

SB

44

(FILE 1)

BILL FILE LOG

BILL # SB 44

- Original bill (with hand corrections)
- Sectional Analysis (1/23)
- Brief summary of bill's intent - per Halford
- * Cross reference - Condo Conversion
- * Cross reference - Banking (lists)
- 2/4 list of changes (handwritten)
- " newspaper articles
- " Connecticut Common Interest Ownership Act - Part 1 and 2
- 2/4 Newsrelease - Nat'l Multi-Housing Council
- 2/4 HCDOA Summary - per
Lincoln Law Commissioners
- 2/4 Vincent Vitale letter to Pat Ricker
- 2/4 Vincent Vitale letter to Sir Hickerson
- 2/4 Sir Hickerson memo to Halford
- 2/4 AHFC letter to Sir Hickerson
- 2/4 Dept of Law letter re. enforcement of
Horizontal Property Regimes Act
- 2/4 RFI/Max letter of endorsement
- 2/6 Letter from Stephen Drieser (2/4)
- 2/14 List from Jim McCallum

BILL CONTACT/ACTION

[illegible]

MEMORANDUM

TO: SENATOR RICK HALFORD

FROM: ELIZABETH J. HICKERSON

SUBJECT: SB 44

DATE: FEBRUARY 1, 1985

The present Horizontal Property Regimes Act does not adequately address the following problems facing common interest ownership property in Alaska.

1. Only condominiums are regulated under the present Act. Planned unit developments (PUDs) and cooperatives are not governed by the Act. These two types of property ownership, particularly PUDs, are being developed and marketed, and often financed by AHFC, without statutory controls. All three types of ownership are governed under SB 44.
2. There are no statutory warranty obligations for builders. Liability is based on the common law. Substantial construction defects have been found in projects developed in Anchorage. According to the Anchorage Building Safety Division numerous construction defects are associated with drainage problems because wet lands have been developed without proper ground preparation. Usually the defect is not discovered until after the units have been sold. SB 44 contains express and implied warranties, and outlines the liability obligations for developers and realtors.
3. There are no regulations for reserve accounts and association dues. Because of this association dues have been "low-balled" and reserve accounts have been inadequate to cover needed repairs. Some associations, at transition, have found that there are no reserves and that the association assumed the developer's debts. This has forced the dues to be increased, which has been financially disastrous for low income purchasers who cannot afford an increase in dues. Foreclosures have resulted.

AHFC, the Real Estate Commission and the Consumer Protection Agency have stated that "low-balled" dues and inadequate reserve accounts are major complaints received from unit owners. Purchasers of common interest

ownership property have stated that their associations were deeply in debt and dues were subsequently increased 100% to 200%, unfortunately this information was not disclosed prior to the sale. SB 44 requires that budget information detailing reserves, dues, projected budgets and assessments, liens, encumbrances, and other financial matter; be included in the public offering statement which must be provided to the purchaser before conveyance of the unit.

4. There are no statutory guidelines governing the transition period from developer control to association control. This has produced numerous problems because the association often is not given necessary documents. SB 44 provides a detailed list of all documents which must be provided at transition, including articles of incorporation, bylaws, financial records, insurance policies, permits, warranties, employment and service contracts and construction plans. All property, funds and units of the unit owners and the association under the developer's control must also be delivered to the association.

5. There are no statutory guidelines governing insurance coverage of the common areas or the individual units. SB 44 specifies insurance obligations of the association and unit owners.

6. Other problems exist which are too numerous to mention. Many of these problems are associated with nondisclosure of vital information, misrepresentation of unit size, and lack of guidelines for association management. SB 44 provides comprehensive guidelines for these and other problems associated with common interest ownership property.

In summary, with a lack of adequate statutory regulations and local building codes and ordinances, Alaska is sending an inviting message to unscrupulous developers in the lower 48. SB 44 provides a balanced regulatory scheme which will aid consumers, developers, managers, financial institutions (including AHFC), realtors and others involved with the housing industry.

Attached are letters more specifically outlining present problems facing common interest ownership properties.

Alaska

HOUSING



FINANCE CORPORATION

February 1, 1985

Ms. Elizabeth J. Hickerson
Senior Advisor
Alaska State Legislature
1024 W. 6th Avenue, Suite #203
Anchorage, AK 99501

Dear Ms. Hickerson:

In response to your January 28, 1985, letter to Denna Cline:

1. AHFC currently finances 7715 loans in condominiums and PUD's, totaling \$614,232,289.
2. Of those 7715, 168 loans are in a delinquent status. This includes REO's and foreclosures. The 168 loans total \$12,745,425.
3. AHFC has encountered "low balled" association budgets. We generally will require bids to be obtained and a more realistic budget drawn up.
4. The problems AHFC encounters are quite varied. The most common problems relate to transfer of ownership from the developer to the association, lack of home owner participation, and collection of delinquent association dues.

Please let us know if you need any additional information.

Sincerely,

A handwritten signature in cursive script that reads "Betty M. Cook". The signature is written in dark ink and is positioned above the typed name.

Betty M. Cook
Mortgage Operations Director

su

REPLY TO
XX

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DEPARTMENT OF LAW
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION SECTION

October 22, 1984

Elizabeth J. Hickerson
Senior Advisor
Senate Advisory Council
Alaska State Legislature
1024 West 6th Ave. Suite 203
Anchorage, Alaska 99501

Dear Liz:

This is in response to a letter to my predecessor Connie Sipe inquiring whether the Consumer Protection Section of the Department of Law has encountered any difficulty enforcing the Horizontal Property Regimes Act or with the lack of regulations under the Act.

First let me share with you the fact that home purchases and home construction problems (which a greater percentage has been condominiums rather than single family homes) are currently the sixth most frequent consumer complaint we receive in this office. This presents a real problem for us because of the unclear status of the law on the jurisdiction and enforcement of the Unfair Trade Practices And Consumer Protection Act in real estate matters. The Supreme Court of Alaska in State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982) held that the sale of real property is not within the regulatory scope of the Consumer Protection Act. Id. 414. State v. First National Bank of Anchorage, arose out of an action the state brought against developers and the bank which financed development of the "Windsong" subdivision for failure to inform buyers of the possibility of flooding of the subdivision. As that case involved the sale of unimproved real property the question is open as to whether or not improved real property is covered by the Consumer Protection Act. As one moves on the continuum from subdivided land to single family homes to condominiums to timeshares it is obvious that more consumer goods and services are included in the purchase of a condominium or timeshare than a lot with no building on it. But the issue of whether the Consumer Protection Act applies in cases of the purchase of a condominium is an issue that has not been yet addressed by our courts. Despite this uncertainty in the law because there really is no other state agency to address consumer complaints about purchases of condominiums, we do take these complaints and attempt to mediate the complaints.

There have been two major areas of condominium complaints that this office has been involved in. These are: (1) the square footage measurement of condominiums and (2) problems with the homeowners monthly association dues. You may want to consider these areas in any review of legislation. In addition to these types of complaints our office has received numerous complaints concerning the quality of construction of the condominium structures. I don't know if that information would be at all relevant to any redrafting of the Horizontal Property Regimes Act but we would certainly be willing to share general information about that type of complaint with you also if you so request.

Square Footage Measurements In Condominiums

There was some misunderstanding in the industry in the past as to the proper method for measuring condominium square footage of each individual unit. The definition of apartment in 34.07.450(1) states: "And the boundaries of an apartment are the interior surfaces of the perimeter walls, floors, ceilings, windows, and doors thereof, and the apartment includes both the portions of the building so described and the air space so encompassed." Based on this definition this office has advised contractors and builders and appraisers that the proper way to measure condominium space is from interior wall to interior wall. (See copy of business advisory enclosed.) By contrast, in a single family dwelling the square footage would be measured from exterior wall to exterior wall.

As far as we are aware most developers, builders, contractors and appraisers are in compliance with the interior square footage measure of condominiums at the present time. Senate Bill 464 introduced last session did not address the proper method for measuring square footage in a condominium. It would be very confusing if the square footage measurements were not uniform. If this provision 34.07.450(1) were eliminated then the same condominium that was 1000 square feet before passage of a new condominium act might suddenly be reported to be over 1000 feet afterward. Therefore, we recommend that the interior boundaries in the condominium be defined as currently in the statute in order to avoid confusion and deception to consumers or purchasers of a condominium.

Homeowner's Monthly Association Dues

34.07.020(11) states:

(The Declaration shall contain)...a provision requiring the adoption of bylaws for the

administration of the property or for other purposes not inconsistent with this chapter which may [emphasis added] include that the property be administered by a board of directors elected from among the apartment owners, or by a manager, or by a managing agent, or otherwise, and the procedures for the adoption and amendments of the bylaws;

When the developer drafts the declaration, s/he is required by AS 34.07.020(11) to adopt by-laws which will provide for the administration of the property. These by-laws "may include" provisions for the management of the property by a board of directors "elected from among the apartment owners." As a matter of regular practice, from the declarations which this office has had the opportunity to review, developers do provide for a board of directors and essentially elect themselves as the initial officers of the association. There is usually stated in the declaration a specified percentage of individual units that must be sold before the association is handed over to those new owners.

In any case, what this translates into is a situation that begs for conflict of interest. These same developers who are going to hire the property managers for their project and work with those managers in determining the amount of monthly association dues, have a clear financial interest in keeping their own costs down, while at the same time insuring the marketability of their units by quoting low monthly dues to prospective buyers.

Ironically, this clear conflict has become more severe in nature with the State's development of the HOF program. Some developers appear to have quickly adapted to the requirements of this program by carefully selecting construction projects that would result in houses and condominiums within the price ceilings that HOF artificially created. Association dues became more important than ever, because potential buyers are now coming from income brackets where an increase of \$20 a month in dues could conceivably make them ineligible for the mortgage loan. Needless to say, builders were motivated to keep association dues low. Even in other states without these loan programs, the evidence suggests that builders have a tendency to "low-ball" their dues' estimates.

It is the experience of this office that having a builder in the dual role of developer and officer of the homeowner's association does not always work for the benefit of

the buyers of the condominium unit. When one builder was asked by an attorney from this office if he understood that he was under a strict fiduciary duty as president of the Board of Directors, a duty separate and apart from his role as vice-president of a construction company, his response was, "No, I had no idea." Even if he had been aware of the dual responsibilities it is not realistic to expect a builder/developer to commit to a higher monthly amount for homeowner's dues, when good business sense dictates otherwise.

34.07.140. Grantee entitled to statement of unpaid assessments.

A grantee is entitled to a statement from the manager or board of directors setting out the amount of the unpaid assessments against the grantor. The grantee is not liable for, nor is the apartment conveyed subject to a lien for any unpaid assessments against the grantor in excess of the amount of the statement.

AS 34.07.140 provides for the grantee's entitlement to a statement of unpaid assessments against the grantor. It is the clear language of this section that the grantee is not liable for any monies owed against the unit in excess of those reflected in that statement. As a matter of regular practice in the condominium industry, developers interpret their own declarations to require that they begin paying association dues at the point that the "homeowners" take over the "association." Generally, there is language in their declarations which requires that the developer will then "pay as any other unit owner." It is important to note here that some of the declarations which this office has reviewed are ambiguous at best in their language on this point.

It is not difficult to imagine newly empowered homeowners who are shocked to find that their "association" is deeply in debt from the moment they "take over." Needless to say, consumers are not regularly shown the statement referred to in AS 34.07.140 before they've made their purchase, if they buy while the builder is still in control. As a consequence, an extremely material fact is withheld from these individuals (particularly important to low-income purchasers), some of whom have said directly to Consumer Protection staff: "Knowing that the association was deeply in debt and that I would be faced with a dues increase of 100% - 200% after moving in, would have persuaded me not to buy in this complex."

34.07.120: Liability of grantee for unpaid common expenses at time of conveyance.

In a voluntary conveyance the grantee [buyer] of an apartment is jointly and severally liable with the grantor [seller] for all unpaid assessments against the latter for his share of the common expenses up to the time of the grantor's conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid or the assessments by the grantee.

AS 34.07.120 establishes that the liability of the buyer and seller for unpaid association dues at the time of conveyance is to be "jointly and severally" construed. This section may have been intended to be further defined in AS 34.07.140 which makes it clear that the buyer is acknowledging liability only for those amounts reflected in the statement to which he is entitled. Some condominium buyers with whom this office has spoken were never shown anything but the theoretical monthly budget upon which the association dues were based. Clearly if it was the legislative intent that these two sections, when read together, would protect buyers from accepting liability for debts not disclosed to them prior to the time of purchase, that protection has failed to materialize.

The solution to these problems must begin from the premise that asking the developer to be both a director of the "homeowner's association" and a corporate manager, responsible for the fiscal health and growth of his/her company is to invite the problems that have been discussed. While there are certainly numerous ways of rewriting this statute the following is one suggestion:

1. Require each recorded declaration to establish an occupancy rate (number of units sold to individual owners) as the point at which the homeowner's association will assume control and responsibility for the common expenses. Nothing about this language will prevent the builder from hiring a property management firm to manage the day-to-day expenses of the project but will clarify that all expenses are the builder's to pay until there is an association in existence (with no room for doubt about when that association comes into being). Dues can still be collected from the individual unit owners who buy before the necessary percentage has been reached, and placed directly into a reserve account to be maintained and protected by the property managers. These funds can then be turned over to the newly elected Board of Directors who can then decide what portion shall

Elizabeth J. Hickerson

October 22, 1984

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remain in reserves and what portion is needed for immediate expenses (i.e., utilities, upkeep of common areas, etc.)

2. The percentage of ownership that must be attained before the association is formed must be high enough (60% to 75%) to insure that:

a. the phases of the project are substantially completed

b. enough units have been sold, and these dues held in reserves, to provide for a financially sound association -- from the day it takes over.

3. Once the "Association" is formed, with all involved in clear agreement as to their rights and responsibilities, the builder pays as any other unit owner on all unsold units.

4. Pursuant to AS 34.07.120 and AS 34.07.140, new owners would be provided this information prior to time of closing but only after the association has been formed. New owners purchasing before there is a homeowner's association would be made aware that while they would still be responsible for monthly dues, those dues would be placed in a reserve account until such time as the association takes over.

You may also wish to contact the Chair of the Real Estate Section of the Alaska Bar Association for comment by the section members. The Alaska Bar Association could tell you the name of the current chair and section members.

Thank you for your request for information from this office. If we can be of further service, please let us know.

Yours very truly,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:

Linda M. O'Bannon
Linda M. O'Bannon
Assistant Attorney General
Chief, Consumer Protection
Section

LHO/ssr
Encl.

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION SECTION

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B U S I N E S S A D V I S O R Y

Norman C. Gorsuch, Attorney General, is issuing the following Business Advisory to all persons involved in the development and sale of condominiums in the State of Alaska.

Investigative work done by the Attorney General's Consumer Protection Section indicates that numerous condo developers, and architects, surveyors, appraisers, attorneys, and advertising agencies hired by developers are unlawfully advertising incorrect square footage claims for condominium units.

In several condominium developments investigated by the attorney general, developers or their agents incorrectly claimed that individual units had a larger square foot area than legally correct according to the Alaska statute on condominiums, which defines in detail how the square foot of each unit is to be measured. It appears that some contractors or developers are operating under a misunderstanding as to what type of measurement is an allowable industry standard, and may be mistakenly applying measurement standards from conventional residential housing, when these methods are not allowed by Alaska law for measuring condominiums.

In the cases investigated by the attorney general, developers had claimed that the square footage of condo units started at the outside of exterior walls, or included areas such as balconies, and other inappropriate areas which are not legally considered part of the square footage of an individual condominium unit. Some consumers complained that the developers' incorrect measurements include exterior and interior common walls added as much as 300 square feet to the condo unit's space, but only on paper. Consumers soon found that this space was not actual square footage which was capable of use by the apartment owner.

Attorney General Gorsuch notes that the Alaska "Horizontal Property Regime Act," is not new, and that its definition of apartment unit, which dictates how a condo unit is to be measured, is a legal obligation which must be followed by all persons who work with condominium developments. Developers should also be aware that this Business Advisory and the relevant statute applies to all declarations filed on condominiums in the

past as well as in the future, since the law has been the same since its passage in 1963.

The correct method for measuring condominium units is derived from AS 34.07.450, which defines a condominium unit or "apartment." According to the statute, the boundaries of an apartment start at the interior surfaces (the paint) of the perimeter walls, windows and doors of the unit. It is clear from this definition that the space enclosed in an exterior wall or an interior "common" corridor wall, is not included in the square footage calculation for an apartment. Two other statutory definitions cover other areas which should not be included in the square footage for the individual unit. Areas such as balconies are more properly labeled "limited common areas," areas held in common ownership by all condo members, but which are limited or designated for use by only a specified unit or units. According to the statute, the main exterior walls, corridor walls, roofs, and so on, are considered to be "common areas," held in ownership by all owners.

The condominium statute requires the developer to record a "Declaration," which must contain, among other information, a square foot designation of the area of each apartment, and a percentage interest in the undivided "common" areas and "limited" common areas.

The Attorney General's Office is issuing this Advisory so that all persons involved with condominium developments will become fully aware of these existing measurement standards. It is the Attorney General's position that misstatements of square footage based on a developer's failure to follow the statutory method of calculation can be a misrepresentation of material fact in the sale of a condominium unit. The Attorney General advises developers and their attorneys that they can also avoid private legal disputes over advertised claims of square footage by following the statutory method.

LAW OFFICES OF VINCENT VITALE

A PROFESSIONAL CORPORATION

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☒ PLEASE REPLY TO THE ABOVE
ADDRESS.

September 11, 1984

☐ PLEASE REPLY TO THE ABOVE
ADDRESS.

Ms. Elizabeth Hickerson
1024 W. 6th Avenue
Suite 203
Anchorage, Alaska 99501

Re: Lack of Sufficient Statutory or Regulatory Guidelines
Under the Horizontal Property Regimes Act

Dear Ms. Hickerson:

As an Alaska attorney since 1977 I have focused my practice on real estate matters. I coauthored the article Caveat Venditor Comes of Age in Alaska - A Plaintiff's Guide to Defective Home Litigation, Alaska - UCLA Law Review, Volume II, Fall 1981, Number 1. I've written numerous articles for the monthly Alaska Real Estate Commission newsletter. I have also lectured to real estate agents at seminars held throughout the state.

My experience with condominiums and Planned Unit Developments evolved out of the years spent representing unhappy home buyers. A condominium or PUD problem is similar to a large defective house.

In the process of representing homeowner associations and association managers I was repeatedly asked to assist in interpreting documents. It became painfully obvious that the association and managers were operating without guidelines. Too often the enabling documents were void of any authority to assist in problem solving. Also, the statutes usually did not assist the association in resolving disputed matters.

Presently I am organizing a local chapter of the Community Association Institute. The purpose of the association is to educate the builder-developer, association manager, public official, owner controlled associations, and lenders, attorneys, accountants, realtors and so forth in understanding the function of an association.

Ms. Elizabeth Hickerson
September 11, 1984
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I believe that an active chapter will enable the condo owner or Board of Directors to understand that a condominium is a corporate neighborhood where everyone agrees to abide by the same set of rules.

I have also been involved in drafting amendments to previously prepared documents. Some of these documents have existed for years but are being reviewed for recertification of AHFC financing or are being reviewed by VA. Much to some condo owner's surprise the documents which the association has been operating under do not comply with Alaska statutes. To allow a unit to be sold immediate changes to the documentation must be made.

Problems created by the present act:

As in most states adopting Horizontal Property Regime Act legislation, the first generation act adopted by Alaska was a developers statute. In short, the act focused on how to dedicate the property, (create the association), protect the lender, handle catastrophic destruction and so forth. The act did not focus on important issues which were not foreseen as problem areas. Some issues ignored by our present act include:

1. Warranty obligations of Builders to association for common areas (generally the entire structure).
2. Obligations of Builder/Developer to provide information to Associations at time of transition.
3. Regulations or statutes covering regular operating problems.
4. Planned Unit Developments (PUDs) and de minimis Planned Unit Developments (dePUDs) are not covered by the statute.
5. There are no guidelines for insurance coverage required for Condominium, PUD's, or dePUDs.

6. Cooperative Housing is not covered by the Act. Cooperative Housing is created by forming a cooperative corporation which owns the building. Each purchaser of space in the building purchases a share in the cooperative corporation. Buyers purchase stock, not real property. This type of housing is often seen near colleges and universities.

7. Commercial condominiums (office and warehouse complex) are not covered by the statute. The often unique problems faced by those associations are simply not addressed.

8. There are no requirements that obligate the developer/builder to educate the Board of Directors of the Association to whom he is turning over management.

9. The statutes do not assist local governments in understanding the process and consequence of community association development.

10. There are no statutory guidelines to aid in the financial management of Community Associations. Budgeting reserves, updating reserve requirements, and investment of reserves, are not discussed and fidelity bonding requirements are ignored.

11. No regulations on community association managers exist. Although these managers may handle several hundred thousand dollars in community association money, they are not licensed, bonded, tested, or subjected to any regulation which might protect the association.

Who pays the price for lack of sufficient statutory/regulatory guidelines?

1. Community Associations do. They are forced to seek legal counsel to interpret the

language of governing documents. This is an unnessecary expense. The option however, is for the Boards to simply guess about the meaning of the confusing language .

2. Property managers do. Managers are consistently asked to practice law by interpreting the governing documents for the association. If they are wrong, they can be liable for the error. Property managers spend an exorbitant amount of time dealing with issues that would not exist if the legislature adopted complete second generation statutes.

3. Developer/Builders do. Needless litigation, arbitration, or disputes are created because there are no rules for the builder/developer to comply with, in selling the units and controlling the association prior to transition.

4. Taxpayers do. Needless and unnecessary litigation costs taxpayers for court time. Also citizens of Alaska are having AHFC funds invested in Community Association developments. These investments should be protected by some statutory guidelines.

5. Lenders do. The more difficulty Associations encounter with developers the more caution lenders show with their involvement with association developments.

6. Realtors do. Realtors often find themselves in the middle of disputes between Builder, developer, property manager, associations, and buyers, due to representation made by the realtor. The realtors also suffer from a lack of statutory or regulatory guidelines to aid them in explaining to new home purchasers what the association is, how it works, and what it is responsible for. Often agents find themselves accused of misrepresenting matters such as warranty obligations.

7. Alaska Housing Finance Corporation does. Too often associations demand that AHFC straighten out developer - association, or association - owner disputes. It takes time for AHFC employees to deal with situations AHFC is not responsible for .

Solution:

There presently exist answers to the problems:

1. The following States either have adopted or are actively considering the Uniform Condominium Act:

Maine, Rhode Island,
Connecticut, Pennsylvania
West Virginia, Virginia
Minnesota, Nebraska,
New Mexico, Oregon
Florida (own version)
California (considering but has
its own version), and
New York (own version)

Under active consideration:

Arizona, Washington,
Colorado, Texas
Missouri, and Tennessee

The legislative acts and research of these states may be of some help.

2. The Uniform Condominium Act, Uniform Planned Community Act, and/or the Uniform Community Interest Act should be adopted for Alaska. These acts and the official comments thereto will answer many of the questions not covered by the present statute.

3. Adoption of a transition statute similar to Florida's statute will further clarify the developer-builder's responsibilities at the time the control of the association is transferred to association members.

4. A builders warranty statute similar to the New Jersey Statute could be implemented. This would clarify the warranty obligation of developers - builders to associations and association members.

5. Insurance requirements should be spelled out for casualty losses, public liability, and fidelity bonding. Some or all of the following insurance should be required by Statute:

- Directors and Officers Insurance
- Casualty Insurance
- Public Liability Insurance
- Earthquake Insurance
- Workman's Compensation if employees
- Fidelity bonding of directors, officers and agents (property managers)
- Reserves in the amount of deductible.

6. Licensing Statutes for association managers should be created. Association managers under contract to collect assessments, pay bills, hire for repairs, etc. are not bonded or licensed by the state yet they handle tens of thousands of dollars of association money. There has been a recent incident of an association manager embezzeling association funds. The associations have no protection for such activity. Anyone can be an association manager. Print a card, purchase an ad, and bid for the contract. The more professional managers believe licensing and bonding will help. The bond should be equivalent to the maximum funds in possession of the manager from all associations in a 30 day period. Licensing should be based upon a test measuring knowledge related to property management.

7. Utilization of guidelines from FNMA, FMHLC, AHFC to create a PUD, deminise PUD, and mobile home park statutes or regulations.

Ms. Elizabeth Hickerson'
September 11, 1984
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Mobile Home Parks

If the legislative intent is to support creation of mobile home developments then the proposed act should include the following:

1. Language which will allow a mobile home to be identified as real property upon the happening of a certain event such as placement of the unit on a cement block foundation and/or removal of wheels and/or axels, etc. If the park is to be a PUD then limits on the lands sold should reflect the needs of mobile home owners. If the park is to be a condominium then a method of selling the airspace should be addressed.
2. Enabling legislation for the mobile home park owners association to require members to remove junk vehicles, trash, etc. Also the association must be allowed architectural controls on storage sheds, Wannigins and so forth. Finally, allowing the association to require maintenance on units and eventual replacement of the units will assure the continued viability of these manufactured housing parks as living space.

Sincerely,

LAW OFFICES OF VINCENT VITALE
A Professional Corporation



WILLIAM L. McNALL
Attorney at Law

WLM:ail

SB 44

BRIEF SYNOPSIS, BILL INDEX, AND SECTIONAL ANALYSIS

SB44

This bill covers common interest communities (such as condominiums, cooperatives and planned communities).

Current law, written 22 years ago, is dated and deals only with condominiums. This bill is an effort to provide guidelines not included in that law, the Horizontal Property Regimes Act, AS 34.07.

The bill is an attempt to allow maximum certainty and flexibility to all developers, lenders and title insurers (see, for example, Art. 2, which provides the developer rights not dealt with in current law, among them phasing projects and reserving rights to future development.)

At the same time, it provides extensive disclosure and consumer protection to owners of condominiums, cooperatives and planned unit developments, including mobile home condominiums (see Art. 4).

Current law does not provide guidelines for the developer, the lender, the title insurer, the real estate agent or the unit owner. This bill is an attempt to fill that void and eliminate the need for litigation arising from confusion and uncertainty about the law:

SENATE BILL 44
UNIFORM COMMON INTEREST OWNERSHIP ACT
COMMON INTEREST OWNERSHIP

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SENATE BILL 44
Sectional Analysis

This bill creates a new chapter to AS 34, entitled Common Interest Ownership Act, and contains comprehensive provisions designed to unify and modernize the law of common interest communities such as condominiums, cooperatives, planned unit developments, and time shares. Presently, only condominiums are regulated by state law under the Horizontal Property Regimes Act, AS 34.07, which was adopted in 1963. Not only is the Horizontal Property Regimes Act dated, it does not effectively address problems such as: creation, alteration and termination of common interest communities; management of the common interest community; protection of purchasers; warranties; unit boundaries; powers and duties of associations; and numerous other important matters which arise out of the creation, marketing and ownership of common interest property.

The Uniform Common Interest Ownership Act (UCIOA) was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws. UCIOA represents the culmination of the Conference's 9 year effort to offer comprehensive legislation to the states which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership. Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership by consolidating the Uniform Condominium Act, Uniform Planned Community Act and the Model Real Estate Cooperative Act.

ARTICLE I. APPLICABILITY

This chapter applies to all common interest communities created in Alaska after the effective date of this act (January 1, 1986). The Alaska Cooperative Corporation Act and the Horizontal Property Regimes Act do not apply to common interest communities created after January 1, 1986. Exclusively nonresidential planned communities are not subject to this chapter, unless they so elect. Exclusively nonresidential condominiums and cooperatives are subject to this act, but purchasers may waive Article IV (Protection of Purchasers) provisions.

Exceptions exist to the general rule of applicability:

1. A common interest community created prior to the adoption of this chapter may elect, under AS 34.08.060, to have the provisions of this chapter apply. Except for preexisting small cooperatives and planned communities which are not subject to development rights, certain provisions under AS 34.08.040, apply automatically to events and circumstances occurring after the effective date of this act, but do not invalidate existing provisions of declarations, bylaws, or plats or plans.

Provisions that automatically apply include: separate titles and taxation, applicability of local ordinances, regulations and building codes, eminent domain, construction and validity of declaration and bylaws, description of units, merger or consolidation, powers of unit

owners' association, tort and contract liability, lien for assessments, association records, resales, effect of violation on rights of action, and definitions.

2. Small cooperatives (no more than 12 units) created after the effective date of this act, are subject only to the provisions regarding local ordinances, regulations and building codes and eminent domain, unless:

future development right are retained or financing through AHFC is utilized, or,

the cooperative's declaration makes the entire chapter applicable.

3. Small (no more than 12 units and not subject to any development rights or AHFC financing) and limited expense liability planned communities (as measured by the size of its common expense assessments) created after the effective date of this act, are subject only to provisions relating to separate titles and taxation, local ordinances, regulation and building codes, and eminent domain, unless the declaration provides that the entire chapter applies.

ARTICLE II. CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES.

Sec. 34.08.090. CREATION OF COMMON INTEREST COMMUNITIES. Creation of common interest communities is accomplished by recording a declaration in each recording district in which a portion of the common interest community is located, and indexing in the grantee's and grantor's index. In cases of cooperatives, the declaration must also convey the real estate to the association. In cases of condominiums, substantial structural construction is also required before the condominium is created.

Sec. 34.08.100. UNIT BOUNDARIES. Except as may be provided in a declaration, unit boundaries for common elements and individual units are defined.

34.08.110. CONSTRUCTION AND VALIDITY OF DECLARATION AND BYLAWS. Construction and validity of the declaration and bylaws are established. All provisions of the declaration and bylaws are severable. In the event of a conflict between the declaration and the bylaws, the declaration prevails, unless the declaration is inconsistent with this chapter. Title to a unit and common elements is not unmarketable or otherwise affected if the declaration insubstantially fails to comply with this chapter.

Sec. 34.08.120. DESCRIPTION OF UNITS. Sufficient legal description of a unit is detailed.

Sec. 34.08.130. CONTENTS OF DECLARATION. The required contents of a declaration are itemized under this section.

Sec. 34.08.140. LEASEHOLD COMMON INTEREST COMMUNITIES. This section sets out provisions and requirements concerning leasehold common interest communities. Leases which may result in terminating the common interest community or reducing its size, must be recorded. Lessors of those leases in condominiums or planned communities must sign the declaration. Required contents of the declaration are itemized. After the declaration for a leasehold condominium or planned community is recorded, the leasehold interest of a unit owner who timely pays rent and complies with relevant covenants may not be terminated. A unit owner's leasehold interest in a condominium or planned community is not affected by failure of any other person to pay rent or fulfill any other covenant.

The acquisition of the leasehold interest of a unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests, unless the leasehold interest of all unit owners subject to that reversion or remainder are acquired. If the number of units in a common interest community are decreased upon expiration or termination of a lease, the allocated interest must be reallocated and confirmed by an amendment to the declaration.

Sec. 34.08.150. ALLOCATION OF ALLOCATED INTERESTS. The required allocation of allocated interests of each unit (common elements, common expenses of the association, and votes in the association) for condominiums, cooperatives and planned communities are outlined and must be included in the declaration. Formulas used to establish or reallocate allocations of interest must be included in the declaration. The allocation of votes may be different depending upon the subject of the vote.

In a condominium, the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void. In a cooperative, any purported conveyance, encumbrance, judicial sale or other voluntary or involuntary transfer of an ownership interest in the association made without the possessory interest in the unit to which that interest is related is void.

Sec. 34.08.160. LIMITED COMMON ELEMENTS. The declaration must specify to which unit or units each limited common element is allocated. An allocation may not be altered without the consent of the affected unit owners. Unless the declaration provides otherwise, a limited common element may be reallocated by an amendment to the declaration, copy to the association and proper recordation. A common element not previously allocated as a limited common element must be allocated according to the declaration. The allocations must be made by amendments to the declaration.

Sec. 34.08.170. PLATS AND PLANS. Plats and plans are a part of the declaration and are required for condominiums and planned communities, but not for cooperative. Items to be included in plats and plans are outlined.

Sec. 34.08.180. EXERCISE OF DEVELOPMENT RIGHTS. This section generally describes the method by which any development rights may be exercised. The development process may continue only within the self-determined constraints originally described by the declarant. Amendments with specific information to the declaration are required to be prepared, executed and recorded. Plats and plans or new certifications must be recorded for condominiums or planned communities.

If the declaration provides that all or a portion of the real estate is subject to a right of withdrawal the following limits apply:

if all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

if any portion is subject to withdrawal, it may not be withdrawn after a unit in that portion has been conveyed to a purchaser.

Sec. 34.08.190. ALTERATIONS OF UNITS. Permissible alterations of the interior of a unit and impermissible alterations of the exterior of a unit and the common elements are detailed under this section. These rules may be varied by the declaration.

Sec. 34.08.200. RELOCATION OF BOUNDARIES BETWEEN ADJOINING UNITS. Subject to the provisions of the declaration and other provisions of law, boundaries between adjoining units may be altered by an amendment to the declaration upon application to the association by the owners of those units. Any reallocation of allocated interests must be specified in the application and determined reasonable by the executive board.

Sec. 34.08.210. SUBDIVISION OF UNITS. Unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided, unless the declaration is amended to permit it.

Sec. 34.08.220. EASEMENT FOR ENCROACHMENTS. If the physical boundaries of any unit or common element encroach on any other unit or common element, an easement exists. The easement does not effect liability that may exist.

Sec. 34.08.230. USE FOR SALES PURPOSES. This section prescribes the circumstances under which portions of the common interest community - either units or common elements - may be used for sales offices, management offices, or models. The declarant must describe the right to maintain such offices in the declaration. This section is subject to the provisions of other state law and to local ordinances.

Sec. 34.08.240. EASEMENT RIGHTS. This section grants to a declarant an easement across the common elements which may be reasonably necessary for the discharging of the declarant's obligations or exercising of special rights, and is subject to any restrictions in the declaration. This section also grants unit owners in a planned community an easement for access, support and enjoyment in the common elements, but these rights may be limited by the declaration.

Sec. 34.08.250. AMENDMENT OF DECLARATION. This section recognizes that the declaration may be amended by various parties at various times in the life of the project. The basic rule is that the declaration, including the plats and plans, may only be amended by a vote of 67% of the unit owners.

The declaration may be amended by a declarant upon exercising any development right or by the association in cases of eminent domain, reallocations following the termination or expiration of a lease, common element reallocated as limited common elements, relocation of boundaries between adjoining units, or subdivision of units. Unit owners may amend a declaration in cases of reallocation of limited common elements, relocation of boundaries between units, subdivision of units, or termination of common interest community.

A declarant is not permitted to use any device, such as powers of attorney executed by purchasers at closing, to circumvent requirements of unanimous consent under subsection (d). Each amendment to the declaration must be properly prepared, executed, recorded, certified and indexed.

Sec. 34.08.260. TERMINATION OF COMMON INTEREST COMMUNITY.

As a general rule, 80% of the votes in the association is required for termination of a project. The declaration may require a larger percentage of the votes and in a nonresidential project a smaller percentage is permitted. A termination agreement is effective only upon recordation, and may provide that all of the common elements and units of the common interest community be sold. Until the sale has been concluded and the proceeds distributed in accordance with this section, the association continues in existence with all powers it had before termination.

Calculations and priorities for creditors which might result upon termination of a common interest community are outlined. This involves competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted and unsecured creditors of the association. Different treatment for these interest is provided depending upon the type of common interest community involved.

Sec. 34.08.270. RIGHTS OF SECURED LENDERS. A lender's security may be dramatically affected by acts of the association. For that reason this section permits the declaration to provide that lenders ratify specified actions of the association. No requirement for approval may operate to:

1. prohibit control over the general administrative affairs of the association;
2. prevent the association or executive board from commencing, intervening in, or settling any litigation or proceeding; or,
3. prevent any insurance trustee or the association from receiving and distributing any insurance proceeds except as provided under

this chapter.

Sec. 34.08.280. MASTER ASSOCIATIONS. It is common in large or multiphased condominiums or planned communities for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller projects. This section details the requirements of a master association. Generally, the powers of a unit owners' association may only be exercised by, or delegated to, a master association if the declaration for the common interest community permits that result. Provisions on notice, voting, quorums, records, meetings and other matters which apply to the unit owner's association would apply to a master association.

Sec. 34.08.290. MERGER OR CONSOLIDATION OF COMMON INTEREST COMMUNITIES. There may be circumstances where common interest communities may wish to merge or consolidate their activities by the creation of a single common interest community; this section provides for that possibility. A merger or consolidation agreement must be prepared, executed, recorded and certified, and must provide for the reallocations of the allocated interests in the new association.

Sec. 34.08.300. ADDITION OF UNSPECIFIED REAL ESTATE. This section was designed to allow developers the ability to add after-acquired parcels of real estate to planned communities. This power is available only if the declarant makes clear in the original declaration that this development right has been reserved. The declarant may impose his/her own time limit on the period during which this development right may be exercised. To foreclose the possibility of an increase in the density of the project beyond that which was originally contemplated, the number of units is limited to the amount specified in the original declaration and the amount of real estate added may not exceed 10% of the real estate originally subjected to the declaration.

ARTICLE III: MANAGEMENT OF THE COMMON INTEREST COMMUNITY.

Sec. 34.08.310. ORGANIZATION OF UNIT OWNERS' ASSOCIATION. A unit owners' association must be organized no later than the date the first unit in the common interest community is conveyed. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the common interest community even during a period of declarant control.

Sec. 34.08.320. POWERS OF UNIT OWNERS' ASSOCIATION. Subject to the provisions of the declaration, the powers of the association are enumerated under this section, and include, the right to: adopt and amend bylaws, rules, regulations, budgets; collect assessments; hire and discharge managing agents, employees, agents, contractor; institute, defends or intervene in litigation; make contracts and incur liabilities; regulate the common elements; acquire, hold, encumber and convey right, title or interest to real estate or personal property; grant easements, leases, licenses and concessions through or over the

common elements; and assign its right to future income. The declaration may extend the powers of the association.

Sec. 34.08.330. EXECUTIVE BOARD MEMBERS AND OFFICERS. Except as provided in the declaration, bylaws, or other provisions of this chapter, the executive board may act in all instances on behalf of the association and are liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. A high standard of duty is imposed on the board members because they are vested with great powers over the property interests of unit owners. The duties and powers of the board members and officers are listed. Highlights include:

- adoption of proposed budgets and presentation to the unit owners for ratification;

- termination of declarant control no later than the earlier of:
 - 60 days after conveyance of 75% of the units,
 - 2 years after all declarants have ceased to offer units for sale, or
 - 2 years after any right to add new units was last exercised.

Sec. 34.08.340. TRANSFER OF ASSOCIATION CONTROL. Before, and not more than 60 days after the unit owners elect a majority of the members of the board, the declarant shall relinquish control of the common interest community and the unit owners shall accept control. At this time the declarant must deliver to the community all property of the unit owners and the common interest community held or controlled by the declarant. A list of items that must be transferred is provided. The records must be reviewed by an independent certified public accountant. Before the transfer an inspection of the common areas and limited common areas must be completed by a certified architect or engineer. The transfer of control to the association shall be based upon the declarant's obligation to complete all repairs and finish all incomplete work within a reasonable time after transfer.

Sec. 34.08.350. TRANSFER OF SPECIAL DECLARANT RIGHTS. This section deals with the manner in which obligations and liabilities imposed upon a declarant by this chapter are transferred to a third party by a transfer of the declarant's interest in a common interest community. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to the declarant's rights, especially persons such as mortgagees. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he/she was in control of the community, while relieving a declarant, who transfers all or part of his/her special declarant rights in a project, of the responsibilities of a successor over whom he/she has no control.

Sec. 34.08.360. TERMINATION OF CONTRACTS AND LEASES OF DECLARANT. This section deals with a common problem in the development of common interest community projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf

of the association, long-term contracts and leases with himself/herself or with an affiliated entity. Management and employment contracts, leases of recreational or parking areas or facilities; other contracts or lease between the association and a declarant or an affiliate of a declarant; or any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the existing circumstances may be terminated.

Sec. 34.08.370. BYLAWS. The bylaws of an association must provide: for the number of members of the executive board, and titles of the officers of the association; for the election of the officers of the association; for the qualifications, powers, and duties, terms of office and manner of electing and removing executive board member and officers and filling vacancies; which, if any, of its powers the executive board or officers may delegate; which of its officers may prepare, execute, certify and record amendments to the declaration; for a method of amending the bylaw; and other matters allowable under the declaration.

Sec. 34.08.380. UPKEEP OF COMMON INTEREST COMMUNITY. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Limited common elements are treated as common elements, unless the declaration provides otherwise.

Sec. 34.08.390. MEETINGS. A meeting of the association must be held at least once each year. Other special meetings may be held. Notice of meetings must be given to all unit owners and must state the items on the agenda.

Sec. 34.08.400. QUORUMS. Unless the bylaws provide otherwise, a quorum is present throughout a meeting if persons entitled to cast 20% of the votes for election of the board are present in person or by proxy at the beginning of the meeting. Unless the bylaws specify a larger percentage, a quorum is considered present throughout a meeting of the board if persons entitled to cast 50% of the votes on the board are present at the beginning of the meeting.

Sec. 34.08.410. VOTING AND PROXIES. Votes allocated to a unit may be cast under a proxy duly executed by a unit owner. Other provisions regarding proxies are included. Provisions for lessee voting is included. Votes allocated to a unit owned by the association may not be cast.

Sec. 34.08.420. TORT AND CONTRACT LIABILITY. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. The association or any unit owner has a right of action against the declarant for any losses suffered as a result of an action based upon a tort or breach of contract arising during any period of declarant control.

Sec. 34.08.430. CONVEYANCE OR ENCUMBRANCE OF COMMON ELEMENTS. A condominium or planned community association may sell or encumber

portions of the common elements and a cooperative association may sell part, or encumber all of the cooperative.

Sec. 34.08.440. INSURANCE. The association shall maintain, to the extent reasonably available, property and liability insurance on the common elements. Association insurance on "stacked" units is required.

Sec. 34.08.450. SURPLUS FUNDS. Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of common expenses and reserves must be paid or credited to the unit owners proportionately.

Sec. 34.08.460. ASSESSMENTS FOR COMMON EXPENSES. Assessments must be made at least annually, and based on a budget adopted at least annually by the association. Assessment rules are provided. Any common expense caused by the misconduct of any unit owner may be assessed by the association against that unit exclusively.

Sec. 34.08.470. LIEN FOR ASSESSMENTS. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens enjoy statutory priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. As to first security interest the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the security interests of lenders. If the lender wishes, an escrow for assessments can be required. Other foreclosure provisions are included.

Sec. 34.08.480. OTHER LIENS. Provisions are included for other liens with special procedures and requirements for condominiums, planned communities and cooperatives.

Sec. 34.08.490. ASSOCIATION RECORDS. The association shall keep sufficiently detailed financial records and these must be available for reasonable examination.

Sec. 34.08.500. ASSOCIATION AS TRUSTEE. This section outlines the relationship between third persons dealing with the association.

ARTICLE IV: PROTECTION OF PURCHASERS

Sec. 34.08.510. APPLICABILITY. This section permits waiver or modification of Article IV protections in common interest communities where all units are restricted to nonresidential use. Public offering statements and resale certificates are not required on:

gratuitous disposition of a unit;

disposition pursuant to court order;

disposition by a government or governmental agency;

disposition by foreclosure;

disposition to a dealer;

disposition that may be canceled at any time and for any reason by the purchaser without penalty; or,

disposition of a unit in a planned community if the declaration limits the maximum annual assessment of any unit to \$300 and if the declarant has a good faith belief that the stated maximum will be sufficient to pay the expenses of the association.

Sec. 34.08.520 LIABILITY FOR PUBLIC OFFERING STATEMENT REQUIREMENTS. This section permits declarant to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering statement is liable for his/her own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

Sec. 34.08.530. PUBLIC OFFERING STATEMENTS GENERALLY. This section protects the purchaser by giving him/her an opportunity to understand the nature of the unit which is being purchased. A lengthy list of information must be provided to each purchaser before a contract is signed.

Sec. 34.08.540. COMMON INTEREST COMMUNITIES SUBJECT TO DEVELOPMENT RIGHTS. This section requires disclosure in the public offering statement of the manner in which the declarant's exercise of development rights may affect purchasers who acquire units before those rights have been full exercised. The purpose is to put the purchaser on notice.

Sec. 34.08.550. TIME SHARES. This section requires additional disclosure in the public offering statement for ownership or occupancy of any units in time shares.

Sec. 34.08.560. COMMON INTEREST COMMUNITIES CONTAINING CONVERSION BUILDINGS. In the case of common interest community containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public offering statement. This is because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of common interest community sales.

Sec. 34.08.570. COMMON INTEREST COMMUNITY SECURITIES. The purpose of this section is to permit the declarant to file or deliver, in lieu of a

public offering statement specifically prepared to comply with the provision of this chapter, the prospectus filed with and distributed pursuant to the regulation of the U. S. Securities and Exchange Commission.

Sec. 34.08.580. PURCHASER'S RIGHT TO CANCEL. This section provides a "cooling off" period for purchasers. Purchasers must be given a public offering statement and all amendments prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. Any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must be provided to the purchaser. Unless the purchaser is given the public offering statement more than 15 days before execution of a contract, the purchaser may cancel the contract within 15 days after first receiving it.

Sec. 34.08.590. RESALE OF UNITS. In the case of resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate, a public offering statement need not be provided. However, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulation of the association and a variety of fiscal, insurance and other information concerning the common interest community and the unit must be provided.

Sec. 34.08.600. ESCROW OF DEPOSITS. This section applies to the sale by persons required to furnish public offering statements of residential units and of nonresidential units unless waived. It does not apply to resales of units between private parties.

Sec. 34.08.610. RELEASE OF LIENS. In the case of a sale of a unit where a delivery of a public offering statement is required, a seller, before conveying a unit, shall record or furnish to the purchaser releases of all liens. Exceptions are provided for real estate that a declarant has a right to withdraw from the common interest community.

Sec. 34.08.620. CONVERSION BUILDINGS. This section is an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners. When a declarant decides to convert a building to common interest ownership, 120 days notice of the conversion with a public offering statement must be given to the residential tenants and subtenants. If the building will be converted to residential use, the tenants must also be given a opportunity to purchase their units. The declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to the tenants if the dimensions of their previous apartment have been substantially altered.

Sec. 34.08.630. EXPRESS WARRANTIES OF QUALITY. Expectations of the purchaser created by the particular conduct (facts, promises, rights, models, descriptions, etc.) of the declarant in connection with the inducement of the sale create express warranties of quality. This is based on the principle that once it is established that the declarant has acted to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the

expectation. Statement of mere opinion or commendation of the real estate or its value does not create a warranty.

Sec. 34.08.640. IMPLIED WARRANTIES OF QUALITY. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties are imposed only against declarants and dealers and not against unit owners selling their units to others.

Sec. 34.08.650. EXCLUSION OR MODIFICATION OF IMPLIED WARRANTIES OF QUALITY. Under this section implied warranties of quality may be disclaimed, however, the disclaimer to each defect or failure must be in a signed instrument. This is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain.

Sec. 34.08.660. STATUTE OF LIMITATIONS FOR WARRANTIES. Unless otherwise agreed to in a separate instrument executed by the purchaser, breach of any warranty obligations must be brought within 6 years after the cause of action arises.

Sec. 34.08.670. EFFECT OF VIOLATIONS ON RIGHTS OF ACTION. This section provides a general cause of action or claim for relief for failure to comply with this chapter by either a declarant or any other person subject to the chapter's provisions.

Sec. 34.08.680. LABELING OF PROMOTIONAL MATERIAL. This section requires the labeling of improvements depicted on promotional material to assure that purchasers are not deceived about improvements the declarant intends to make.

Sec. 34.08.690. DECLARANT'S OBLIGATION TO COMPLETE AND RESTORE. Except for improvements labeled "NEED NOT BE BUILT", the declarant must complete all improvements depicted on plans, representations, and promotional materials. The declarant is also liable for prompt repair and restoration of the common interest community following the exercise of any rights reserved or created to exercise a development right, alter units, relocate boundaries, subdivide, use units or common elements for sales purposes or exercise of easement rights.

Sec. 34.08.700. SUBSTANTIAL COMPLETION OF UNITS. The purpose of this section is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

ARTICLE V. GENERAL PROVISIONS.

Sec. 34.08.710. VARIATION BY AGREEMENT. This chapter is generally designed to provide great flexibility in the creation of common interest communities, and therefore this section permits the parties to vary many provisions. In many instances, however, provisions of the chapter may not be varied because of the need to protect purchasers, lenders, and

declarants. This section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the chapter.

Sec. 34.08.720. SEPARATE TITLES AND TAXATION. Unless the declaration otherwise provides, a unit owner's interest in cooperatives is considered personal property. In condominiums or planned communities, each unit and its interest in the common elements constitutes a separate parcel of real estate. Each unit must be separately taxed and assessed. Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant. If there is no unit owner other than a declarant, the real estate comprising the common interest community may be taxed and assessed in any manner provided by law. The classification of the unit and its allocated interests as real property or as personal property is significant for purposes of such matters as tenure, sales, recordation, transfer taxes, property taxes, estate and inheritance taxes, testate and intestate succession, mortgage lending, the perfection, priority and enforcement of liens, and rights of redemption.

Sec. 34.08.730. APPLICABILITY OF LOCAL ORDINANCES, REGULATIONS, AND BUILDING CODES. The purpose of this section is to resolve the relative roles of the state and local communities in regulating the creation of common interest communities. The underlying concept is to make clear that the local government has a legitimate interest in regulating the use of real estate, in accordance with established zoning, building codes and similar practices, and that such practices continue to have equal applicability to common interest communities.

Sec. 34.08.740. EMINENT DOMAIN. The provisions of this chapter is not intended to supplant the usual rules of eminent domain but merely to supplement those rules in addressing the unique problems which eminent domain raises in the context of a common interest community.

Sec. 34.08.750. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW APPLICABLE. This chapter displaces existing law relating to common interest communities and other law only as stated by specific sections and by reasonable implication therefrom. Unless specifically displaced, common law rights are retained.

Sec. 34.08.760. CONSTRUCTION AGAINST IMPLICIT REPEAL.

Sec. 34.08.770. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

Sec. 34.08.780. SEVERABILITY.

Sec. 34.08.790. UNCONSCIONABLE AGREEMENT OR TERM OF CONTRACT. Upon finding that a contract or contract clause was unconscionable at the time the contract was made, a court may refuse to enforce the contract in whole or part.

Sec. 34.08.800. OBLIGATION OF GOOD FAITH. This section sets forth a basic principle running throughout this chapter: in transactions

involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties.

Sec. 34.08.810. REMEDIES TO BE LIBERALLY ADMINISTERED.

Sec. 34.08.820. ADJUSTMENT OF DOLLAR AMOUNTS. Calculation are outlined for adjustment of dollar amounts discussed in other sections.

Sec. 34.08.830. TRANSFER OF A UNIT IN A COOPERATIVE. If a unit in a cooperative is transferred by the unit owner the interest in the unit that is transferred is the right to possession of the unit under a proprietary lease coupled with the allocated interest of the unit. The association's interest in the unit is not affected by the transfer.

Sec. 34.08.990. DEFINITIONS.

Sections 2 and 3 make necessary revisions to other sections of Title 34.

Section 4 repeals the Horizontal Property Regimes Act. This is improper due to the fact that condominiums now in existence were formed under the old act and will continue to be regulated in part under that law. Unless existing declarations are amended to provide regulation under the Common Interest Ownership Act, only future occurrences or actions after the effective date of this chapter are governed by this new chapter.

Section 5 makes this act effect January 1, 1986.

SB

44

(FILE 2)

S U M M A R Y

The Uniform Common Interest
Ownership Act

UNIFORM COMMON INTEREST OWNERSHIP ACT

Between 1977 and 1981, the National Conference of Commissioners on Uniform State Laws (ULC) promulgated three Acts dealing with multiple-ownership forms of real estate. These were the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. Each form of ownership involves a different organization of ownership interests. In condominiums, owners have title to their units and undivided shares in the common elements. A planned community has owners who own their own units, but the common elements are owned by the owners' association. Every owner is a member of the owners' association. In a cooperative, the association owns all the real estate. Cooperative members own shares in the association, and lease their individual units from the association. These are the principal differences between these forms of multiple ownership.

But these forms are greatly similar to each other, as well, and the similarities have greater practical significance than the differences. For all of them, there is an owners' association responsible for the affairs of the community. Every owner belongs, and has voting rights and the opportunity to participate in the governing board. The community, in all cases, assesses the owners for common expenses and maintenance. The association, in all cases, contracts for management and services for the whole project. The documentation for any multiple-ownership project during its life, although some language may vary slightly, is much the same. Any multiple-ownership form requires some kind of creation document or declaration, as an example, and these documents have much the same function, no matter the form. In short, the technical questions of ownership do not create an enormous difference between these forms when it comes down to matters of operation of a project. And the three earlier Acts by the ULC look very much alike.

So why not one Act that includes all forms within its scope? In response in 1982, the ULC has produced the Uniform Common Interest Ownership Act. It encompasses all forms of multiple or "common interest" ownership.

The major obstacle to such an Act is, basically, definitional. The Common Interest Ownership Act uses the new term "common interest community." It means "real estate with respect to which any person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in the declaration. 'Ownership of a unit' does not include holding a leasehold interest of less than [20] years in a unit, including renewal options." The basic determinant of applicability is obligation for assessments. All multiple-ownership arrangements call for assessments.

Then, the sub-forms, such as condominiums, planned communities, and cooperatives, are defined as kinds of common interest communities. So a developer may choose any form for his project, initially, designating that particular form in the declaration.

The Act then treats the subject of common interest communities, comprehensively, as the earlier Acts treated the individual forms, comprehensively. A comprehensive statute deals with the creation, financing, management and termination of these communities. It also provides for consumer protection and regulation. These subjects must be included before any legislation on common interest real estate can be considered comprehensive.

Creation begins with a declaration, which is the fundamental property document describing the common interest project and identifying it. This document is filed in the land records of the locality. The Act deals with a great number of issues relating to creation, such as unit and common element boundaries, allocation of common element interests and voting rights, rights of the developer in the property while sales of units go on, and procedures for amendment of the declaration. Of special interest is the concept of development rights, which permits the developer to reserve the right to add or subtract real estate, and to add units and common elements, in the declaration. This permits the developer to plan phased common interest projects as long as all effects upon owners' interests are described and disclosed at the outset.

This Act also provides for the other end of any common interest project in time. How can such a project be terminated if and when it is desirable and necessary? The answer

is to provide a procedure for termination and some rules to protect owners' specific rights. Actual termination requires the agreement of a substantial number of owners (suggested is 80% of the total number). The agreement must be recorded in the land records. Once the termination is authorized, the association, as trustee, oversees the actual termination of the declaration, the sale, if any, and the distribution of proceeds, if any. Owners receive exactly their share of the total interest, whether that be proceeds or an individual interest in the real estate. Without the termination procedure, there is no assurance that a project can be terminated or that ownership interests will be protected.

This Act, further, deals with the substantial interests of those who finance common interest projects. There are three key things it does. The Act limits any control of the project or the owners' association by lenders that adversely affects owners. It establishes clear priorities for liens or secured interests against the project or individual owners' interests. It allows the developer's lender or lenders to assume declarant rights so that failure of the developer does not, necessarily, mean failure of the project. The Act defines rights and obligations between lenders and others, generally, to keep the project going, once it has been launched.

The management provisions of the Common Interest Ownership Act establish a workable basis for the ongoing community which the project must become. A common interest ownership community is like a small municipality. It must be governed, and it must be governed democratically. The developer must establish the owners' association at least by the time the first sale is made. Every owner becomes a member upon purchase. The governing body is the Executive Board, elected by the owners on a regular basis. The Executive Board has all of the powers essential to governing the community, including the power to make and enforce assessments. Its members are, also, accountable to the owners as fiduciaries, and are held to that higher standard of care.

The developer has a strong interest in the governance of the community, diminished in proportion to the units he sells. He can, therefore, appoint the initial Executive Board and control it until his interest diminishes sufficiently. Under this Act, he relinquishes control by stages - giving up his Executive Board members at given times during the sell-out. He must relinquish total control at a specific

time, either at a given percentage of the sell-out (75% suggested) or within a specific time (2 years suggested), whichever comes first. Then, the developer may not capture the government of the community beyond the span of his own legitimate interests.

Since the developer, also, makes the initial contracts for maintenance and services, this Act, in addition, permits the association to repudiate his contracts after control passes to the owners. Developers and contractors are put on notice that burdensome, sweetheart contracts will not survive, if they are attempted.

The Act and the project declaration act as a kind of constitution for the community. For example, the Act establishes liability and allocation of risk for insurance purposes for all communities. These are basic provisions to which any common interest project is subject. The Act also empowers the Association to make its bylaws which function as the statutes of the community. The association governs itself, mostly, through its bylaws. The object of the Act is to make each community as autonomous a self-governing entity as possible. These various documents, coupled with the enabling provisions of this Act, are simply the tools to accomplish this purpose.

Consumer protection is accomplished with four basic controls on the sale from developer to purchaser, but it is important to note that this Act tries to provide stability in all phases of common interest ownership development. That stability is the most important characteristic of any project to any buyer. But the specific provisions to protect buyers fall into readily identifiable categories: disclosure, warranties, escrow of deposits, and rescission rights.

This Act requires an extensive public offering statement which must be delivered to a purchaser of a unit in any common interest project before a sales contract can be concluded. The statement must give the customer all the information essential to an adequate purchase decision. That kind of information includes accurate identification of the developer, information about the significant features of the project, and balance sheets and budgets, as examples. However, drafters of these documents are encouraged to summarize those items that may be summarized, in an effort to keep public offering statements more reasonable in volume and weight.

The public offering statement is linked to the buyer's rescission rights, another important aspect of buyer protection. Every buyer has a 15-day period from the time the public offering statement is delivered, within which any sales contract may be cancelled. This right gives the buyer time to consider the character of the purchase and to review his commitment - a cooling off period for the purchase decision. In addition, these rescission rights are part of the disclosure requirements so that the buyer is made aware of them before they accrue.

Tied, also, to the rescission rights and disclosure is the escrow requirement. Any deposit made in connection with a purchase must be placed in an appropriate escrow account. It is not possible, then, for deposits to be dissipated before buyers close on the purchase of a unit. If the buyer wishes to exercise his or her rescission right, or is faced with the seller's default in any way, deposits are safe.

What remains, then, for consumer protection is a remedy for defects that are the responsibility of the developer. This Act provides both express and implied warranties of sale. The seller is bound by any representation made with respect to quality of the project. In addition, whatever is affirmed expressly, and unless adequately disclaimed, the developer must deliver the unit in at least as good a condition as at the time of contracting. It must also be suitable for the ordinary uses to which such property may be put, and free of defects. For residential property, the developer warrants that the existing use does not violate any applicable law when conveyed to, or possessed by, the buyer. If seller and purchaser specifically agree, implied warranties may be waived. For other than residential property, the seller may use a general disclaimer of warranties. And warranties are subject to a statute of limitations in order to encourage timely litigation or settlement of any claims.

The Common Interest Ownership Act also provides for agency supervision of condominium development. The agency has the power to review disclosure. It has investigative and enforcement powers to protect purchasers. It should be noted, however, that the agency article is offered as an optional addition to this Act. Many states do not want to create new agencies or increase the authority and responsibility of old ones. Fiscal constraints underlie such decisions, for the most part. This Act tries to enhance self-enforcement by purchasers as much as possible. Purchasers

can sue for any violation of the Act and ask for attorney's fees. So, an agency presence is not mandatory, and may be considered as an extra element of protection to be added at a jurisdiction's desire.

It is not possible to describe all aspects of a comprehensive act's provisions. It is important to emphasize the need for comprehensiveness. If these kinds of common interest communities are to survive over time, the law must give to them a definite, discernible character. They must know what they are and what they can do. Only a comprehensive act addressing all of the major issues in a careful and complementary way can do the job fully. This is that Act.

UNIFORM COMMON INTEREST OWNERSHIP ACT

*with some
Changes as appear
in SB 44*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIRST YEAR
IN MONTEREY, CALIFORNIA
JULY 30 - AUGUST 6, 1982



WITH PREFATORY NOTE AND COMMENTS

UNIFORM COMMON INTEREST OWNERSHIP ACT

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The Uniform Common Interest Ownership Act is a consolidation of the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. The advisors who cooperated in the preparation of those Acts were:

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Model Real Estate Cooperative Act

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Copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
 ON UNIFORM STATE LAWS
 645 North Michigan Avenue, Suite 510
 Chicago, Illinois 60611

PREFATORY NOTE

The Uniform Common Interest Ownership Act (UCIOA) was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

The explosive rise in land costs during the 1960s and 1970s, coupled with the desire of many consumers to own housing and recreational amenities which they could not afford except when owned with others, led to an extraordinary development of various forms of shared or "common" ownership of real estate. The three most common forms of common ownership have been condominiums, cooperatives and so-called "planned unit developments", or cluster housing projects. Each of these forms typically includes creation of a mandatory owners association to manage and maintain common amenities, while separate portions of the real estate—units—are occupied for individual use.

Title to the common amenities, or common elements, typically rests in varying entities depending on the form of ownership—they are owned on an undivided interest basis by the unit owners in condominiums, while the association "owns" the common elements in the case of cooperatives and PUDS. Similarly, legal title to the units lies with the unit owners in condominiums and PUDS, but with the association in the case of cooperatives. In all forms, however, the beneficial interest in both the common elements and the units lies with the unit owners, while management of the common elements is performed by the association.

While this common scheme is shared by all 3 forms, the legal consequences flowing from the choice of form differ substantially. Typically, condominiums are a highly regulated form of ownership under statute, often with consumer protection provisions in the statute. Cooperatives and PUDS are significantly less regulated. Moreover, when comparing laws between states, the statutes or common law governing condominiums, cooperatives and planned communities use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of project documents and of financing arrangements in those states. Finally, the varying statutes, and case law creating different "bundles of rights" for purchasers of common interest communities in the various states, make it difficult for the increasingly mobile consumer to become educated in this very complex area.

UCIOA represents the culmination of the Conference's 9-year effort to offer comprehensive legislation to the States which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership.

DEVELOPMENT OF THE ACT

Condominiums

The first Uniform Act in the field was the Uniform Condominium Act (UCA), adopted by the Conference in 1977.

All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and many present state statutes are patterned after that 1958 statute, or after the 1962 Federal Housing Administration model condominium statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have enacted more detailed and comprehensive "second generation" statutes. Many actual or potential problems, however, involving such matters as termination of condominiums, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, had not been satisfactorily addressed by any existing condominium statute. Moreover, the statutes differ widely from state to state. The Uniform Condominium Act was drafted primarily to resolve those various problems.

Planned Communities

The Uniform Planned Community Act (UPCA) was adopted at the 1980 Annual Meeting of the Conference.

While the historical development of condominiums can be traced to early statutory enactments at the state level supported by the conveyancing bar and national lending institutions, planned communities, historically, developed as a zoning concept at the local level. As single family subdivisions were increasingly supplanted in land planning theory by "clustering" to enhance the availability of shared open space, local governments required a zoning mechanism responsive to the implications of this new concept. That device, frequently, was the "planned unit development" or PUD zone, in which cluster housing could be built, at the same or greater density than the land in question would support as single family homes on individual lots. This zoning device typically permitted local zoning authorities wide discretion in reviewing and approving designs for the dwelling units as well as the common facilities.

The growing acceptance of PUD zoning techniques by local governments in turn created new interest in an old form of real estate ownership: the multi-unit residential "planned community" served by common area facilities owned and operated by a homeowners' association. Although such developments are remarkably similar to condominiums, they have operated for years under the common law without the benefit of statutory enablement and, in virtually all states, without the regulatory burdens and consumer protection benefits applicable to condominiums.

The homeowner associations that administer such common law planned communities often perform exactly the same functions as the condominium associations that administer statutory condominium regimes. They derive their powers from a declaration of covenants, conditions and restrictions (CC&R declaration) which is recorded at the beginning of the project and which relies for its enforceability on the state common law governing covenants which "run with the land". Not surprisingly, large portions of such CC&R declarations are indistinguishable from condominium declarations. The only basis on which CC&R regimes are exempted from state and local condominium regulation is that title to the common areas is held in the name of the homeowners' association instead of being divided among the unit owners as tenants in common.

These common-law homeowner association regimes take many forms. They include not only planned residential developments, which follow the classic models described in the Home Association Handbook promulgated in 1962 by the Urban Land Institute and which inspired FHA Form 1400, but also various forms of cooperative ownership based on corporate forms, some real estate, some trust, and operative ownership based on personal property ownership. In addition, many other combinations of real and personal property ownership. In addition, new communities now are being formed which contain multiple layers of community associations having, at different levels, condominium, PUD or master association governance in as many combinations as there are draftsmen and problems to be solved.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act. Ironically, however, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has focused on planned communities, except to the extent that they are swept up in general home warranty statutes, or addressed on an *ad hoc* basis by local zoning officials.

The Conference was also mindful of the increasing and understandable inclination of developers, in the face of changing condominium legislation, to choose these alternative forms of developing multi-owner projects. This avoidance process acknowledged the often superior multi-owner arrangements possible under a homeowner association structure that avoids fractionalizing ownership of the common elements. The process also represents, however, an economic decision by developers to avoid, when possible, additional costs imposed by condominium legislation in the form of disclosure, escrow requirements, or restricted practices. The Conference believed that the states should have available for their consideration a uniform act which reflected the same public policies as are contained in the Uniform Condominium Act. In this way, a state could extend the same public policies reflected in UCA to this very common form of real estate development. This need for parallelism whenever appropriate was a major factor in the drafting of the Act as finally adopted.

The result of this process was a comprehensive Act which closely paralleled UCA, and thus would yield the same consumer protections, regulatory structure, and administrative benefits to unit owners in most multi-owner developments, regardless of how title to the common elements had been treated.

The 1980 UCA Amendments

As a result of the legislative process in the various states considering UCA from 1977 to 1980, and after review of UCA by the Drafting Committee on UPCA, a substantial number of amendments to the 1977 UCA were proposed to the Conference.

Many of these amendments were adopted at the 1980 annual meeting of the Conference, and were included in the current version of UCA. Most of those amendments were of a minor, non-substantial nature; they were intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which resulted in more significant changes, either on particular matters of substance, or in the use of terms throughout the Act which simplified the structure and readability of the Act. A summary of the more significant amendments may be obtained from the Headquarters Office of the NCCUSL, Suite 510, 645 North Michigan Avenue, Chicago, Illinois 60611.

A second category of changes resulted from a decision of the Conference at its 1978 annual meeting that the Condominium and Planned Community Acts should contain identical provisions wherever possible, in order to facilitate the future consolidation of the two Acts. This required a large number of textual changes with no substantive effect.

Real Estate Cooperatives

One year after adoption of UPCA and the UCA amendments, the Model Real Estate Cooperative Act (MIRECA) was adopted at the 1981 Annual Meeting of the Conference. It closely tracked its two predecessor Acts, since consolidation of the three Acts was anticipated by the Conference. Accordingly, MIRECA, like the other Acts, was designed principally to insure that, to the extent practicable and consistent with the differences inherent in the various forms of ownership, consumers, developers and lenders would be able to identify a coherent and consistent pattern of rights and obligations applicable to all "common interest" developments, whether organized as condominiums, planned communities or cooperatives.

That Act contains comprehensive provisions designed to provide a unified and modern law applicable to the co-operative form of ownership of real estate. The Act has no applicability to the many cooperatives formed for such purposes as commodity marketing or consumer services. Moreover, while principally applicable to the ownership of residential real estate, a common form of ownership in many jurisdictions, the Act contemplates that, in appropriate cases, it may but need not be used for industrial or commercial real estate as well.

COMMON INTEREST OWNERSHIP

Real estate cooperatives are a very common form of apartment ownership in several jurisdictions; in other states, however, they are virtually unknown, save in areas where they have been created pursuant to a variety of low income housing programs sponsored by the United States Department of Housing and Urban Development. Although cooperatives are similar in a number of ways to condominiums and other forms of multiply owned real estate regimes, they have operated for years under the corporate law without the benefit of specific statutory enablement, and in virtually all states, without the regulatory burdens and consumer protection benefits available to condominiums.

As with planned communities, the associations that administer such cooperatives often perform exactly the same functions as condominiums. They typically derive their powers from a declaration of covenants, conditions and restrictions or some familiar form of instrument, be it in an offering plan, bylaws of the corporation, or a proprietary lease between the corporation which holds title to the property, and the tenants of that corporation who in fact hold the beneficial interest in the corporation and the property which it owns. Commonly, but by no means uniformly, the instruments which create the co-operative form of ownership are not recorded, and the enforceability of the instrument depends principally on the law of landlord and tenant, state corporate trust law, or other law peculiar to the form under which the cooperative was organized. Not surprisingly, large portions of the instruments which create the cooperative are indistinguishable from similar provisions in condominium or planned community declarations, since the instruments are obliged to resolve many of the same issues which arise in those forms of ownership.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters, such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act and the planned community field by the Uniform Planned Community Act. Ironically, however, as in the case of planned communities, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has been focused on cooperatives.

THE UNDERLYING CONCEPT OF UCIOA

Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership simply by consolidating the three prior Acts of the Conference and adding a very few generic definitions. The principal new definition is "common interest community."

Because of the use of consistent definitions and policies in the three Acts preceding UCIOA, consolidation of the three in the merged Act was a relatively simple task. The section numbering system of UCIOA is entirely parallel with the other 3 Acts, and the language of UCIOA tracks, as applicable, with the cognate sections of those 3 Acts. Differences in result between the 3 Acts are preserved where appropriate. At the same time, during the drafting of UCIOA, in a few instances, it became clear that some differences in result were of form rather than legitimate substance. In those cases, the substantive result of one or more of the 3 Acts was changed to reflect a policy generally applicable in all forms.

The result is that a state wishing to consider legislation in the common interest ownership field has a range of choices from which to select. Many states will wish to adopt comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights. In those states, the consolidated Act is a workable and desirable long-term solution. Other states may wish simply to adopt a modern condominium statute to replace an existing but plainly outdated, statutory structure. In those states, UCA alone is the obvious choice. Finally, in states where existing "second" or "third" generation condominium statutes are seen as satisfactory, but a need for additional certainty and structure is desirable for planned communities or cooperatives, the 2 Acts governing those forms of ownership are available. Following adoption of one of the 3 constituent Acts, it would be very feasible, by a few carefully considered amendments, to adopt UCIOA and thereby extend coverage to include all forms of ownership in the field.

COMMON INTEREST OWNERSHIP

UNIFORM COMMON INTEREST OWNERSHIP ACT

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ARTICLE 1

GENERAL PROVISIONS

PART 1

DEFINITIONS AND OTHER GENERAL PROVISIONS

§ 1-101. Short Title

This [Act] may be cited as the Uniform Common Interest Ownership Act.

§ 1-102. Applicability

Applicability of this [Act] is governed by Part II of this Article.

§ 1-103. Definitions

In the declaration and bylaws (Section 3-100), unless specifically provided otherwise or the context otherwise requires, and in this [Act]:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than 20 percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than 20 percent of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the following interests allocated to each unit: (i) in a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association; (ii) in a cooperative, the common expense liability and the ownership interest and votes in the association; and (iii) in a planned community, the common expense liability and votes in the association.

(3) "Association" or "unit owners' association" means the unit owners' association organized under Section 3-101.

(4) "Common elements" means (i) in a condominium or cooperative, all portions of the common interest community other than the units; and (ii) in a planned community, any real estate within a planned community owned or leased by the association, other than a unit.

(5) "Common expenses" means expenditures made by, or financial liabilities of, the association, together with any allocations to reserves.

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to Section 2-107.

(7) "Common interest community" means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. "Ownership of a unit" does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.

(8) "Condominium" means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(9) "Conversion building" means a building that at any time before creation of the common interest community was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

(10) "Cooperative" means a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit.

(11) "Dealer" means a person in the business of selling units for his own account.

(12) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of or (ii) reserves or succeeds to any special declarant right, or (iii) applies for registration of a common interest community under Article 5.

(13) "Declaration" means any instrument, however denominated, that creates a common interest community, including any amendments to those instruments.

(14) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a common interest community; (ii) create units, common elements, or limited common elements within a common interest community; (iii) subdivide units or convert units into common elements; or (iv) withdraw real estate from a common interest community.

(15) "Disposal" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but the term does not include the transfer or release of a security interest.

(16) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

(17) "Identifying number" means a symbol or address that identifies only one unit in a common interest community.

(18) "Leasehold common interest community" means a common interest community in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the common interest community or reduce its size.

(19) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.

(20) "Master association" means an organization described in Section 2-120, whether or not it is also an association described in Section 3-101.

(21) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the common interest community is located.

(22) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity. [In the case of a land trust, however, "person" means the beneficiary of the trust rather than the trust or the trustee.]

(23) "Planned community" means a common interest community that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community.

(24) "Proprietary lease" means an agreement with the association pursuant to which a member is entitled to exclusive possession of a unit in a cooperative.

(25) "Purchaser" means a person, other than a declarant or a dealer, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than 20 years, or (ii) as security for an obligation.

(26) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests that by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(27) "Residential purposes" means use for dwelling or recreational purposes, or both.

(28) "Security interest" means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

(29) "Special declarant rights" means rights reserved for the benefit of a declarant to (i) complete improvements indicated on plats and plans filed with the declaration (Section 2-109) or, in a cooperative, to complete improvements described in the public offering statement pursuant to Section 4-103(a)(2); (ii) exercise any development right (Section 2-110); (iii) maintain sales offices, management offices, signs advertising the common interest community, and models (Section 2-115); (iv) use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community (Section 2-116); (v) make the common interest community subject to a master association (Section 2-120); (vi) merge or consolidate a common interest community with another common interest community of the same form of ownership (Section 2-121); or (vii) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (Section 3-103(d)).

(30) "Time share" means a right to occupy a unit or any of several units during [5] or more separated time periods over a period of at least [5] years, including renewal options, whether or not coupled with an estate or interest in a common interest community or a specified portion thereof.

(31) "Unit" means a physical portion of the common interest community designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 2-105(n)(5). If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily or involuntarily encumbered, or otherwise transferred by a unit owner, the interest in that unit which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit, and the association's interest in that unit is not thereby affected.

(32) "Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the common interest community, but does not include a person having an interest in a unit solely as security for an obligation. In a condominium or planned community, the declarant is the owner of any unit created by the declaration. In a cooperative, the declarant is treated as the owner of any unit to which allocated interests have been allocated (Section 2-107) until that unit has been conveyed to another person.

COMMENT

1. The first clause of this Section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "Affiliate of a declarant" (Section 1-103(1)) is similar to the definition of 12 U.S.C. Section 1730a, which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. Section 78c(a)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. Section 1730a(n)(2)(B), no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

As a result of this definition, the association may, in some instances, be a declarant. Under the definition of "Affiliate of a declarant," it is possible that 20% of the unit owners may "act in concert" to control the activities of the association. While the mere casting of these votes at an association meeting would not normally constitute "concerted action" by those unit owners, other acts by individual unit owners might constitute such concerted action.

The consequences of that result are determined under Section 3-104.

3. Definition (2), "Allocated interests," refers to all of the interests which this Act requires the declaration to allocate to the common interest communities.

"Allocated interests" is defined differently with respect to the 3 forms of Ownership.

First, the important interests, common to all projects, are the proportionate shares of common expense liabilities, and votes in the association, allocated to each unit. In either a cooperative, condominium, or planned community, every unit in the project must have a share of the votes and common expense liabilities.

Second, because the common elements are "owned" by the association in a planned community or cooperative, in contrast to a condominium, there is no common element interest allocated to unit owners in a planned community or cooperative.

Third, in a cooperative, because unit owners have traditionally had an ownership interest in the cooperative corporation, either in the form of stock or a membership certificate, the Act continues to require allocation of an "ownership interest in the association" to each unit.

The common element or ownership interest has limited significance. One situation in which the common element interest allocation would be important, however, is the distribution of insurance proceeds following a loss where an entire condominium project is not required or replaced and insurance proceeds are distributed to unit owners. See Section 3-113(h). See also 2-118(j)(2).

4. Definition (1), "Common elements" is bifurcated. The Act adopts the UCA and MRECA definition with respect to condominiums or cooperatives. However, the Act adopts UPCA's definition with respect to planned communities.

5. Definitions (1) and (31), treating "Common element" and "Unit" as

should be examined in light of Section 2-102, which specifies in detail how the differentiation between units and common elements is to be determined in any given common interest community to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration, as long as the boundaries between units and common elements can be ascertained with reasonable certainty. The common elements include by definition all of the real estate in the condominium or cooperative not designated as part of the units.

6. Definition (7), "Common interest community," is new to this Act. The term creates one comprehensive definition of those interests governed by the Act. This generic definition, derived from the definition of planned community in UPCA, is used through the Act to refer collectively to the 3 particular forms of common interest community: condominiums, cooperatives and planned communities.

Each of these forms in turn, has a separate definition. "Condominium" and "cooperative" are defined precisely as they are in the Acts which apply to those forms. The definition of "planned community", however, is new, and, under UCIOA, becomes a residual concept. Any ownership arrangement which is a common interest community but which does not meet the definition of either a condominium or cooperative, would be a planned community. Thus, there are but three forms of common interest community: (1) condominiums; (2) cooperatives and (3) everything else.

7. Definition (8), "Condominium" makes clear that, unless the real estate title to the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if title to the common elements is in an association in which each unit owner is a member, the project is not a condominium, but a planned community.

8. Definition (9), "Conversion building," is important because of the protection which the Act provides in Section 4-112 for tenants of buildings which are being converted into a common interest community. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the cooperative form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the

former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

9. Definition (10), "Cooperative," makes clear that the Act applies only to cooperatives which constitute common interest communities. The common interest community real estate, moreover, must be owned by the association, which, under Section 3-101, may be organized as a profit or non-profit corporation, trust, trustee, partnership, or depending on the option adopted in a particular state, as an unincorporated association. In requiring, as does Section 3-101, that the association consist exclusively of "unit owners"—defined in MRECA as "proprietary lessees"—the definition tracks the usual requirements of cooperative instruments, which exclude from association membership persons who are not owners or proprietary lessees of the units.

The definition also recognizes the fundamental link between association membership and occupancy rights in providing that unit owners who are the members of the association are entitled to exclusive possession of their units under a proprietary lease—see Definition (24)—by virtue of their ownership interests in the assets of the association.

The ownership interest of a cooperative unit owner is a composite interest, which consists of the owner's ownership interests in the association and his right to occupy a unit pursuant to a proprietary lease. This interest, since it includes the proprietary interest under a lease, may not, as a theoretical matter, exist until a proprietary lease has in fact been executed by the declarant for the units in the cooperative. The definition "unit" resolves this theoretical gap by providing that the declarant is treated as the owner of cooperative interests which have not yet been created.

10. Definition (11), "Dealer," is a newly defined term in UCIOA. It was not used in any of the 3 separate Acts. It replaces, in many sections, the words "person in the business of selling (either) real estate (or) cooperative interests for his own account." Use of the term in UCIOA does not change the substantive results in any of the 3 Acts.

11. Definition (12), "Declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the common interest community, but who are not intended to be charged

with the responsibilities imposed on all declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold common interest communities, ground lessors. (Of course, such a person may become a declarant by subsequently succeeding to a Special declarant right). Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because these units were "previously disposed of" when originally conveyed.

If the association, itself, or in conjunction with another declarant, is offering units for sale to others, and if those units have not previously been sold or otherwise disposed of, then the association itself is a declarant.

Finally, a person who, while in control of the association, chooses not to exercise that control, is still a declarant.

The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the Act.

12. Definition (13), "Declaration," is defined as "any instruments, however denominated, that create a common interest community including any amendments to those instruments". Thus, the term would not only include the traditional condominium declaration with which most practitioners are familiar, or the declaration of covenants, conditions and restrictions (CC&R's) so common in planned unit developments. It would also include, for example, a series of deeds to units with common mutually beneficial restrictions, or to any other instruments which create the relationship which constitutes a common interest community. If those recorded instruments create that relationship, then those documents constitute a declaration and must contain, for new projects, the information required by Section 2-105.

The Declaration of a cooperative does not include the proprietary leases of the individual units, although a sample of such a lease might be attached as an exhibit to the declaration.

Similarly, the definition of "declaration" of any common interest community does not refer to the bylaws of the association or the documents creating the association. Such documents do not "create" the common interest community, but merely regulate its use after creation. The bylaws may, but

need not be, an exhibit to the declaration.

13. Definition (14), "Development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized and regulated in the case of condominiums, in an increasing number of jurisdictions, beginning with Virginia in 1974.

The concept of "development rights" lies at the heart of one of the principal goals of the Act, which is to maximize the flexibility available to a developer seeking to adjust the size and mix of a project to the demands of the marketplace, both before and after creation. The principal constraint on that flexibility is the obligation of disclosure, and its impact on marketing. Thus "development rights" include the rights to:

(a) increase the size or density of a project, either by adding real property to it, or by creating new units, common elements or limited common elements on either the original land or within the original buildings, or on any other land or buildings subsequently added;

(b) change the mix of units, common elements and limited common elements, either by subdividing units, or by converting units into common elements or limited common elements; and

(c) reduce the size of a project by withdrawing real property—whether land, entire buildings, or particular units—from it.

As a matter of simple logic, there are few other things that could be done to a real property regime which are not included within the concept of development rights. This great flexibility, particularly when coupled with the broad definitions of "unit" and "real estate", the power to create leasehold projects, and the right to subordinate unit mortgages to blanket mortgage on either the units or common elements, is an important element in the Act.

For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the common interest community by adding an additional building on Parcel B, containing additional units, as part of the same common interest community. If he reserves the right to do so, i. e., to "add real estate to a common interest community," he has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the common interest community from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will expand into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the common interest community from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the common interest community and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from the common interest community." The portion of the garage which extends into Parcel B may be left in the common interest community (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" has frequently been useful in the case of commercial or mixed use common interest communities, where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the common interest community has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchaser will want to buy the whole floor as a single unit or whether several purchasers will want the floor divided into service units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential common interest communities, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial common interest communities, but may be useful in certain kinds of residential common interest communities as well.

14. Definition (15), "Dispose" or "Disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a

not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "Purchaser," *infra*. However, the term includes more than conveyances and would, for example, cover contracts of sale.

15. Definition (18), "Leasehold common interest community," should be distinguished from land which is leased to a common interest community but not subjected to the common interest community regime. A leasehold common interest community means, by definition, real estate which has been subjected to the common interest community form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the common interest community unit or the real estate underlying the unit would be removed from the common interest community if the lease were not exercised or renewed. On the other hand, real estate may not be subjected to common interest community ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

16. In this Act, in contrast to UPCA, Definition (23), "Planned Community," is a residual concept. That is, any common interest community which fails to fall into the category of a condominium or a cooperative is, by definition, a planned community. The definition also indicates that a planned community may have a condominium or cooperative as a constituent element.

17. Definition (24), "proprietary lease," describes that instrument initially executed by a cooperative association with the purchaser of a unit, granting the right of exclusive occupancy of a unit. The term and its significance is more fully treated in the comments to the definition of "Unit".

18. Definition (25), "Purchaser," includes a person who acquires any interest in a unit, even as a tenant, if the lease including renewal options, entitles him to occupy the premises for more than 20 years. Excluded from the definition, however, are mortgagees, declarants and dealers. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4-102(c)) and the right to rescind (Section 4-108).

19. Definition (20), "Real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(10) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept, and the third dimension is usually important in the condominium and planned community context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards to a point in the center of the planet. In most condominium and planned communities, however, as in so-called "air rights" projects, ownership does not extend "from the center of the earth to the heavens" because units are stacked on top of units or units and common elements are interstratified. In such cases, the upper and lower boundaries must be identified with the same precision as the other boundaries.

20. Definition (28), "Security interest," encompasses any interest in real or personal property which secures payment or performance of an obligation. Thus, for example, regardless of whether or not the units in a cooperative are treated as real or personal property pursuant to Section 1-105(n), a lender's interest in a unit securing the debt is a "security interest." This definition is adapted from Sections 3-102 and 3-103 of the Uniform Land Transactions Act.

21. Definition (29), "Special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a common interest community.

Any person who possesses a special declarant right would be a "declarant," including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights transfers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.

22. Definition (30), "Time share," is based on Section 1-102(14) and (18) of the Model Real Estate Time-Share Act.

23. Definition (31), "Unit," describes a tangible, physical part of the project rather than a right in, or claim to, a tangible physical part of the

property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons, each of whom has the right to occupy the unit for one month does not create 12 new units—there are, rather, 12 owners of the unit. (Under the Section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the vote assigned to that unit.)

Similarly, in a cooperative, the unit remains a physical part of the real estate; its legal title is vested in the association while the right to possession is held by the unit owner under a proprietary lease. The definition, however, makes it clear that the association's interest in the unit is unaffected by transfers of interests in that unit to or by unit owners. The unit owner's interest is a composite interest, which consists of an ownership interest in the association, coupled with the right to occupy a unit pursuant to a lease.

The definition makes clear that in the case of a cooperative, if a unit owned by a unit owner is sold, conveyed, or encumbered or otherwise transferred by the unit owner, the interest in such unit which is affected is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit. In recognizing the relationship between the physical "unit" and the nature of a unit owner's interest in that unit, and by describing that relationship concisely in the definition, the merged Act was able to delete the definition of "cooperative interest" as it was used in MRECA.

24. Definition (32), "Unit owner," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities must be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

The definition makes it clear that a declarant, so long as he owns units in a common interest community, is the unit owner of any unit created by the declaration, and is therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

In the special case of a cooperative, the declarant is treated as the owner of a unit or "potential unit" to which

allocated interests have been allocated, until that unit is conveyed to another.

§ 1-104. Variation by Agreement

Except as expressly provided in this [Act], its provisions may not be varied by agreement, and rights conferred by it may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this [Act] or the declaration.

COMMENT

1. The Act is generally designed to provide great flexibility in the creation of common interest communities and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants. Accordingly, this Section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this Section forbids the use by a declarant of any device to evade the limitation or prohibition of the Act or of the declaration.

3. The second sentence of the section is an important limitation upon the rights of a declarant. Today it is the practice in many jurisdictions, particularly those proscribing expansion of a condominium or planned community by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium or planned community by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters. The Act bars this practice.

4. The following sections permit variation:

Section 1-103. (Definitions). All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.

Section 1-105. (Separate Titles and Taxation). This section permits the declarant of a cooperative to determine whether unit owners' interests are real or personal property.

Section 1-107. (Eminent Domain). The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Article 1, Part II, Sections 1-202, 1-203, 1-205, 1-206, and 1-207, permit a variety of elections to declarants and unit owners with respect to applicability.

Section 2-102. (Unit Boundaries). The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105. (Contents of Declaration). A declarant may add any information he desires to the required content of the declaration.

Section 2-108. (Limited Common Elements). The Act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-109. (Plats and Plans). There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111. (Alterations Within Units). Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-112. (Relocation of Boundaries Between Adjoining Units). Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-113. (Subdivision of Units). If the declaration expressly so permits, a unit may be subdivided into two or more units.

Section 2-115. (Use for Sales Purposes). The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-116. (Easement to Facilitate Exercise of Special Declarant Rights). Subject to the provisions of the declaration, the declarant and unit owners have easements for the purposes described.

Section 2-117. (Amendment of Declaration). The declaration of a non-residential common interest community may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-118. (Termination). The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential common interest community, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

In a cooperative, upon termination, the declaration may specify that association creditors have priority over the rights of unit owners, and their creditors.

Section 2-119. (Rights of Secured Lenders). The declaration may require lender approval of specified actions of unit owners or the association.

Section 2-120. (Master Associations). The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.

Section 2-122. (Addition of Unspecified Real Estate). The declaration of a planned community may grant a declarant the right to add additional real estate to the project without stating the location of that real estate in the original declaration.

Section 3-102. (Powers of the Association). The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.

Section 3-103. (Executive Board Members and Officers). Except as limited by the declaration or bylaws, the Executive Board may act for the association.

Section 3-106. (Bylaws). Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

Section 3-107. (Upkeep of the Common Interest Community). Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.

Section 3-108. (Meetings). The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.

Section 3-109. (Quorums). This section permits statutory quorum requirements to be varied by the bylaws.

Section 3-110. (Voting; Proxies). A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that less than a majority vote on specified matters.

Section 3-112. (Conveyance or Encumbrance of Common Elements). The declaration may vary the percentages of unit owners whose approval is required to convey or encumber common elements.

The declaration may also provide that a conveyance or encumbrance of common elements defeats prior encumbrances on those common elements.

Section 3-113. (Insurance). The declaration may vary the provisions of this section in non-residential common interest communities, and may require additional insurance in any community.

Section 3-114. (Surplus Funds). Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to their common expense liabilities.

Section 3-115. (Assessments for Common Expenses). To the extent provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

Section 3-116. (Lien for Assessments). Unless the declaration provides otherwise, fines, late charges, and other fees are treated as assessments for lien purposes.

Section 3-101. (Applicability; Waiver). All of Article 4 is modifiable or

wavable by agreement in a common interest community restricted to non-residential use.

Section 4-115. (Warranties). Implied warranties of quality may be excluded or modified by agreement.

Section 4-116. (Statute of Limitation on Warranties). The 6-year limitation may be modified by agreement of the parties.

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly

ble, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, see Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. See Section 1-112. This Section derives from Section 1-102(3) of the Uniform Commercial Code.

§ 1-105. Separate Titles and Taxation

(a) In a cooperative, unless the declaration provides that a unit owner's interest in a unit and its allocated interests is real estate for all purposes, that interest is personal property. [That interest is subject to the provisions of [insert reference to state homestead exemptions], even if it is personal property.]

(b) In a condominium or planned community:

(1) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

(2) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved development rights.

(c) Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

(d) If there is no unit owner other than a declarant, the real estate comprising the common interest community may be taxed and assessed in any manner provided by law.

COMMENT

1. Subsection (a) of this Section follows the MRECA provisions. The classification of the unit and its allocated interests as real property or as personal property is significant for purposes of such matters as tenure, sales, recordation, transfer taxes, property taxes, estate and inheritance taxes, testate and intestate succession, mortgage lending, the perfection, priority and enforcement of liens, and rights of redemption.

Subsection (a) resolves an important theoretical and practical issue which pervades the cooperative field: whether a unit owner in a cooperative holds an interest in real or in personal property. Subsection (a) permits the declarant to decide that issue for each cooperative on a project-by-project basis.

The issue arises from the fact that the unit owner's interest in the cooperative typically has elements of both real and personal property. His interest includes both a beneficial interest in the association—either through stock ownership or membership—which is clearly a personal property interest, and a long term "proprietary" or ownership interest under a proprietary lease in an apartment—clearly an interest in real estate.

While this is in many ways a highly theoretical issue, it has many practical consequences. For example, if the

unit owner's interest is a real estate interest, then that interest—aside from the association's interest—may be subject to real property taxes and conveyance taxes; the recording laws would apply to conveyance of those interests; and real estate foreclosure laws would apply to foreclosure of a lien against those interests. Moreover, a security interest in the unit owner's stock or membership certificate would not be effective against the stock without a security instrument being recorded on the land records. In general, none of Article 9 of the Uniform Commercial Code would be applicable to that interest, and all of the conveyancing rules would apply.

On the other hand, if the interest is a personal property interest—the result required by this Section in the absence of a provision in the declaration that the interest is real property—then all of Article 9 of the Uniform Commercial Code would apply to security interests in the unit, the real estate conveyancing rules would not apply, and the interest would be treated for all purposes as personal property.

2. This act, of course, would apply in all respects regardless of the characterization of the unit owner's interests. Thus, for example, recording of the declaration is required, whether or not the owner's interest in a cooperative

interest is real or personal property, because the cooperative itself is the real estate.

3. Whether an institutional lender may lawfully make loans on the unit owner's interest may or may not depend on whether that interest is characterized as real or personal property. That issue is not affected by this Act, however, but by other state law which may permit loans to be made by certain institutional lenders only if secured by an interest in real estate.

4. If a unit owner's interest is a real property interest, recordation of the proprietary lease in the land records is constructive notice of the unit owner's rights. If the unit owner's interest is a personal property interest, recordation of the lease in the land records would be ineffective as constructive notice of that interest, and Article 9 of the Uniform Commercial Code does not provide a mechanism for filing evidence of that ownership interest. It is likely, however, that holders of security interests in units which are personal property would adopt a procedure similar to that followed in Illinois with respect to land trusts, which have been held to be personal property in that state. Under Article 9 of the Uniform Commercial Code and Illinois common law, the secured party files notice of the lien and the lien is thereby perfected for 5 years, when it must be renewed.

5. Subsection (b) integrates the language of UCA and UPCA regarding condominiums and planned communities. A condominium or planned community may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently, for example, with existing rental apartment projects which are converted into either condominiums or planned communities. Subsection (d) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the common interest community is created may be permitted under general state law, which permits or requires separate

rate taxation of individual parcels of real estate. When separate tax assessments become mandatory under this Section, the assessment for each unit must be based on the value of that individual unit, under whatever uniform assessment mechanism prevails in the state or locality. Importantly, no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively, even though, in the context of planned communities, the common elements owned by the association might be subject to taxation as a separately owned parcel of real estate, in the absence of this provision. Any common element subject to development rights, however, must be separately assessed and taxed to the declarant, see Subsection (c), in recognition of the independent economic value that those development rights have. This would be true even if the real estate subject to development rights is a part of the common interest community and lawfully "owned" by the unit owners in common, since the rights are in fact an asset of the declarant.

6. If there is any doubt in a particular state whether a unit occupied as a residential dwelling is entitled to treatment as any other residential single-family detached dwelling under the homestead status, this Section should be modified to ensure that units are similarly treated.

7. Unlike the law of some states, this Section imposes no limitations on the power of a jurisdiction to tax units based on the fair market value of the individual units, rather than on the project as a whole. In most jurisdictions, experience has shown that upon conversion of an apartment building to a common interest form of ownership, the fair market value of the units exceeds the fair market value of that building prior to conversion. Accordingly, a jurisdiction under this Act may impose real estate taxes on common interest community units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.

§ 1-106. Applicability of Local Ordinances, Regulations, and Building Codes

(a) A building code may not impose any requirement upon any structure in a common interest community which it would not impose upon a physically identical development under a different form of ownership.

(b) In condominiums and cooperatives, no zoning, subdivision, or other real estate use law, ordinance, or regulation may prohibit the condominium or cooperative form of ownership or impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership.

(c) Except as provided in subsections (a) and (b), the provisions of this [Act] do not invalidate or modify any provision of any building code, zoning, subdivision, or other real estate use law, ordinance, rule, or regulation governing the use of real estate.

COMMENT

1. The purpose of this section is to resolve the relative roles of the state and local communities in regulating the creation of common interest communities. The underlying concept is to make clear that the municipality has a legitimate interest in regulating the use of real estate, in accordance with long established zoning, building code and similar practices, and that such practices continue to have equal applicability to common interest communities as they do to purely rental projects. With respect to forms of ownership, however, this Act, as a state enactment, preempts the field and accordingly, except as provided in the Act, the municipality may not regulate the form of ownership, as opposed to the use of that real estate.

2. Consistent with the concept described in comment 1, subsections (a) prohibits discriminatory application of building codes against common interest communities by local law making authorities. Thus, if a building code imposes a requirement which cannot be met if property is owned as a common interest community but which would not be violated if all of the property constituting the common interest community were owned by a single owner, this Section makes it unlawful to apply that requirement or restriction to the common interest community. For example, in the case of a high-rise apartment building, if a building code requirement imposing a minimum fire wall rating between apartments would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher fire wall rating between apartments merely because the same building might be owned as a common interest community.

3. While Subsection (a) prevents discrimination against all forms of common interest communities under building codes, Subsection (b) does not prevent local law making authorities from using zoning, subdivision and other real estate regulations to specifically regulate the planned community

form of ownership, in ways different from rental project, or condominiums. This distinction simply recognizes the existing practice in some communities that permits a local zoning board, as a condition of granting a cluster housing zoning permit, to require the right of prior plan approval. However, such regulations may not be used to prescribe the condominium or cooperative form of ownership, or to discriminate against these two types of common interest communities. Accordingly, a community could not prevent a condominium conversion by applying setback requirements between apartments which would not apply if all the apartments were owned by a single owner, or by requiring more parking for condominiums than for rental apartments.

4. Subsection (c) makes clear that, except for the prohibition on discrimination against common interest communities under building codes, and except for the prohibition on the use of zoning, subdivision and other real estate laws, ordinances, or regulations to loan or discriminate against cooperatives and condominiums, the Act has no effect on real estate or personal property laws. For example, a particular parcel of real estate submitted to the common interest community form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the common interest community, but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

§ 1-107. Eminent Domain

(a) If a unit is acquired by eminent domain or part of a unit is acquired by eminent domain leaving the unit owner with a remnant that may not practically or lawfully be used for any purpose permitted by the declaration, the award must include compensation to the unit owner for that unit and its allocated interests, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking, and the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (i) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration and (ii) the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and to the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially-acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(c) If part of the common elements is acquired by eminent domain, the portion of the award attributable to the common elements taken must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.

(d) The court decree must be recorded in every [county] in which any portion of the common interest community is located.

COMMENT

1. The provisions of this statute are not intended to supplant the usual rules of eminent domain but merely to supplement those rules in addressing the unique problems which eminent domain raises in the context of a common interest community. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this Section are properly integrated. For example, Subsection (a) uses the words "the award must include compensation to the unit owner". This language, a change first made in MIRECA, suggests that, under other state law, compensation for other interests may be required in an appropriate case and the section does not limit that result.

2. When a unit is taken or partially taken by eminent domain, this section provides for a recalculation of the allocated interests of all units.

EXAMPLE 1

Suppose that all allocated interests in a 9-unit common interest community were originally allocated to the units

on the basis of size. If eight of the units are all equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is removed from the common interest community by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22 2/3% while each of the small units would have 11 1/6%.

EXAMPLE 2

Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) provides that the allocated interests would automatically shift to 5 1/3% for the partially taken unit, 21 1/3% for the largest unit, and 10 1/6% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large

as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken units' reallocated interests are $5\frac{1}{3}\%$ rather than 5%.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a unit as part of a common interest community or must take the unit and have the unit excluded from the common interest community.

Subsection (a) merely requires that the taking body compensate the unit owner for all of his unit and its allocated interests, whether or not any common elements are acquired. The Act also requires that the allocated interests be automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the allocated interests to the government) is an unanswered question.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interests to be reallocated. Subsection (b) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. The right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

§ 1-108. Supplemental General Principles of Law Applicable

The principles of law and equity, including the law of corporations (and unincorporated associations), the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this [Act] except to the extent inconsistent with this [Act].

EXAMPLE 1

Suppose in a commercial common interest community consisting of four units, each unit consists of a factory and parking lot, and the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit number 1 are equal, and that $\frac{1}{2}$ the parking lot is taken by eminent domain, leaving the factory and $\frac{1}{2}$ the lot intact. Under the formula set out in the statute, unit number one's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

EXAMPLE 2

Suppose that a common interest community contains ten units, each of which is allocated a $\frac{1}{10}$ undivided interest in the association. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the ownership interest of all the units will be reallocated so that the partially-taken unit has a $\frac{1}{20}$ undivided interest in the common elements and the remaining 9 units each has a $\frac{2}{19}$ undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to $\frac{1}{2}$ of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining 9 units each having a 10% undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and the reallocation of interests, votes, and liabilities.

COMMENT

1. This Act displaces existing law relating to common interest communities and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely

an illustration, no listing could be exhaustive.

2. The bracketed language concerning unincorporated associations should be deleted if the enacting state requires incorporation of a unit owners' association. See the parallel language contained in Section 3-101.

§ 1-109. Construction against Implicit Repeal

This [Act] being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

COMMENT

This section derives from Section 1-101 of the Uniform Commercial Code.

§ 1-110. Uniformity of Application and Construction

This [Act] shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

COMMENT

This Act should be construed in accordance with its underlying purpose of making the law uniform with respect to all forms of common interest communities, as well as the purposes stated in the Prefatory Note of simplifying, clarifying, and modernizing the law of common interest communities, promoting the interstate flow of funds to common interest communities, and

protecting consumers, purchasers, and borrowers against common interest community practices which may cause unreasonable risk of loss to them. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

§ 1-111. Severability

If any provision of this [Act] or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provisions or applications, and to this end the provisions of this [Act] are severable.

§ 1-112. Unconscionable Agreement or Term of Contract

(a) The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to:

(1) the commercial setting of the negotiations;

(2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, inability to understand the language of the agreement, or similar factors.

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- (3) the effect and purpose of the contract or clause; and
- (4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the property and the value of that property measured by the price at which similar property was readily obtainable in similar transactions. A disparity between the contract price and the value of the property measured by the price at which similar property was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

COMMENT

This section is similar to Section 2-202 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act. The rationale and comments provided in those sections are equally applicable to this section.

§ 1-113. Obligation of Good Faith

Every contract or duty governed by this [Act] imposes an obligation of good faith in its performance or enforcement.

COMMENT

This section sets forth a basic principle running throughout this Act: in transactions involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards: "honesty in fact", and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(1)(b) and 7-401 of the Uniform Commercial Code.

§ 1-114. Remedies to be Liberally Administered

(a) The remedies provided by this [Act] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this [Act] or by other rule of law.

(b) Any right or obligation declared by this [Act] is enforceable by judicial proceeding.

§ 1-115. Adjustment of Dollar Amounts

(a) From time to time the dollar amounts specified in Sections 1-203 and 4-101(b)(7) must change, as provided in subsections (b) and (c), according to and to the extent of changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers: U. S. City Average, All Items 1967=100, compiled by the Bureau of Labor Statistics, United States Department of Labor, (the "Index"). The Index for December, 1979, which was 230, is the Reference Base Index.

(b) The dollar amounts specified in Sections 1-203 and 4-101(b)(7), and any amount stated in the declaration pursuant to those sections, must change on July 1 of each year if the percentage of change, calculated to the nearest whole percentage point, between the Index at the end of the preceding year and the Reference Base Index is 10 percent or more, but

(i) the portion of the percentage change in the Index in excess of a multiple of 10 percent must be disregarded and the dollar amounts shall change only in multiples of 10 percent of the amounts appearing in this [Act] on the date of enactment;

(ii) the dollar amounts must not change if the amounts required by this section are those currently in effect pursuant to this [Act] as a result of earlier application of this section; and

(iii) in no event may the dollar amounts be reduced below the amounts appearing in this [Act] on the date of enactment.

(c) If the Index is revised after December, 1979, the percentage of change pursuant to this section must be calculated on the basis of the revised Index. If the revision of the Index changes the Reference Base Index, a revised Reference Base Index must be determined by multiplying the Reference Base Index then applicable by the rebasing factor furnished by the Bureau of Labor Statistics. If the Index is superseded, the Index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for consumers.

PART II APPLICABILITY

§ 1-201. Applicability to New Common Interest Communities

Except as provided in Sections 1-202 and 1-203, this [Act] applies to all common interest communities created within this State after the effective date of this [Act]. The provisions of [insert reference to all present statutes expressly applicable to planned communities, condominiums, cooperatives, or horizontal property regimes] do not apply to common interest communities created after the effective date of this [Act].

COMMENT

The question of the extent to which a state statute should apply to particular common interest communities involves 2 major conceptual problems: (1) whether the statute should require or permit different results for common interest communities created before and after the statute takes effect; and (2) whether differences in the forms of ownership, and the history of their development, requires different levels of applicability to those various forms.

Two conflicting policies are posed when considering the applicability of this Act to "old" and "new" common interest communities in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all common interest communities located in a particular state, regardless of whether the common interest community was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different common interest communities, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of common interest communities created under prior law, if any, and because of the requirements placed on declarants and unit owners' associa-

tions by this Act which might increase the costs of new common interest communities, different markets might tend to develop for common interest communities created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically applicable to "old" common interest communities might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this part reflects a desire to maximize the uniform applicability of the Act to all common interest communities in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to preexisting common interest communities.

In carrying out this philosophy with respect to "new projects," the Act applies to all common interest communities "created" within the state after the Act's effective date; at the same time, special limitations on that applicability are provided in the case of certain new cooperatives and planned

§ 1-201 COMMON INTEREST OWNERSHIP

communities in the following sections. This is the effect of the first sentence of the section. The second sentence makes clear that the provisions of old statutes expressly applicable to common interest communities do not apply to common interest communities created after the effective date of this Act.

"Creation" of a common interest community pursuant to this Act occurs upon recording of a declaration pursuant to Section 2-101; however, the definition of "Common Interest Community" in Section 1-103(7) contemplates that *de facto* common interest communities may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a project. Any real estate project which includes individually owned units meeting the definition is therefore subject to the Act if created with-

in the state after the Act's effective date. No intent to subject the project to the Act is required, and an express intention to the contrary would be invalid and ineffective.

The reference in this section to "all present statutes expressly applicable to condominiums or horizontal property regimes" is intended to distinguish between a state's condominium and other enabling statutes and those statutes which apply not only to common interest communities, but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the state's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.

§ 1-202. Same; Exception for Small Cooperatives

If a cooperative contains only units restricted to nonresidential use, or contains no more than 12 units and is not subject to any development rights, it is subject only to Sections 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes) and 1-107 (Eminent Domain) of this [Act] unless the declaration provides that the entire [Act] is applicable.

Comment

Section 1-201 provides generally that the Act applies to all cooperatives "created" within the state after the Act's effective date. Under Section 1-202, however, only 2 sections of this Act automatically apply to a cooperative created after the effective date of this Act if that cooperative contains only 12 units or less and is not subject to development rights. Importantly, Section 1-105, which permits the declarant to determine whether the coop-

erative interests are real or personal property, does not apply unless the declarant elects to have the entire Act apply. Thus, the determination of whether the cooperative interests in a small cooperative created after the effective date of the Act are real or personal property may depend on other state laws. The Act, however, also permits such a cooperative to elect to be subject to the entire Act.

§ 1-203. Same; Exception for Small and Limited Expense Liability Planned Communities

If a planned community:

(1) contains no more than 12 units and is not subject to any development rights; or

(2) provides, in its declaration, that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed \$100, as adjusted pursuant to Section 1-115 (Adjustment of Dollar Amounts),

COMMON INTEREST OWNERSHIP § 1-204

It is subject only to Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes) and 1-107 (Eminent Domain) unless the declaration provides that this entire [Act] is applicable.

COMMENT

Section 1-201 provides generally that the Act applies to all planned communities "created" within the state after the Act's effective date. Section 1-203, however, makes only a few of the Act's sections applicable to either planned communities containing 12 or

fewer units with no development rights or to *de minimis* planned communities—as measured by the size of its common expense assessments—unless the planned community's declaration makes the entire Act applicable.

§ 1-204. Applicability to Pre-existing Common Interest Communities

Except as provided in Section 1-205 (Same; Exception for Small Pre-Existing Cooperatives and Planned Communities), Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 1-107 (Eminent Domain), 2-103 (Construction and Validity of Declaration and Bylaws), 2-104 (Description of Units), 2-121 (Merger or Consolidation of Common Interest Communities), 3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 3-111 (Port and Contract Liability), 3-110 (Idem for Assessments), 3-118 (Association Records), 4-109 (Resales of Units), and 4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and Section 1-103 (Definitions) to the extent necessary in construing any of those sections, apply to all common interest communities created in this State before the effective date of this [Act]; but those sections apply only with respect to events and circumstances occurring after the effective date of this [Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those common interest communities.

COMMENT

1. This section states the general rules of applicability of the Act to common interest communities which were created before the effective date of this Act.

2. The Act adopts a novel three-step approach to common interest communities created before the effective date of the Act. First, certain provisions of the Act described in Section 1-204 automatically apply to "old" common interest communities, but only prospectively, and only in a manner which does not invalidate provisions of declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created common interest communities where not automatically displaced by the Act. Third, under Section 1-205, owners of "old" common interest communities may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by "old" law, as long as the amendment

adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act. In addition, as in the case of "new" projects, special exceptions are provided, in Section 1-205, for "small" projects.

3. Elaboration of the principles described in the last Comment may be helpful.

First, Section 1-201 provides that the enumerated provisions automatically apply to common interest communities created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of common interest communities created under early condominium statutes, or under common law. The second

provisions, as applied to "old" common interest communities, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments.

EXAMPLE 1

Under Section 1-204, Section 4-109 (Resale of Units) automatically applies to "old" common interest communities. Accordingly, unit owners in common interest communities established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

EXAMPLE 2

Under Section 1-204, Section 3-118 (Association Records) automatically applies to "old" common interest communities. As a result, a unit owners' association of an "old" common interest community must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

§ 1-205. Same; Exception for Small Pre-existing Cooperatives and Planned Communities

If a cooperative or planned community created within this State before the effective date of this [Act] contains no more than 12 units and is not subject to any development rights, it is subject only to Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), and 1-107 (Eminent Domain) unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of the provisions of Section 1-206, in which case all the sections enumerated in Section 1-204 apply to that cooperative or planned community.

Second, the prior laws of the state relating to common interest communities are not repealed by this Act because those laws will still apply to previously-created projects, except when displaced. Some states at one point made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.

Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision, as provided in Section 1-206. More specifically, Section 1-206 permits the owners of a pre-existing common interest community to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the project instruments as specified in those instruments and in the pre-existing statute or common law.

EXAMPLE 3

Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-112 does not automatically apply to "old" common interest communities, if the unit owners of a pre-existing community amend their declaration to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

COMMENT

Recognizing that pre-Act cooperative or planned communities of fewer than 12 units ought not to be subject to more rigorous requirements than small cooperatives or planned communities created under the Act, this section provides that only the same sections applicable to small new cooperatives or planned communities will apply to small pre-Act cooperatives and planned communities, unless the declaration of a small pre-Act cooperative

or planned community is amended to take advantage of the amendment provisions of Section 1-206. If such an amendment is made pursuant to Section 1-206, the small pre-Act cooperative or planned community would be subject to all of the provisions applicable to large pre-Act cooperatives and planned communities, and further elections under Section 1-206 would then be possible.

§ 1-206. Same; Amendments to Governing Instruments

(a) In the case of amendments to the declaration, bylaws, or plats and plans of any common interest community created before the effective date of this [Act]:

(1) If the result accomplished by the amendment was permitted by law prior to this [Act], the amendment may be made either in accordance with that law, in which case that law applies to that amendment, or it may be made under this [Act]; and

(2) If the result accomplished by the amendment is permitted by this [Act], and was not permitted by law prior to this [Act], the amendment may be made under this [Act].

(b) An amendment to the declaration, bylaws, or plats and plans authorized by this section to be made under this [Act] must be adopted in conformity with [applicable law] and with the procedures and requirements specified by those instruments. If an amendment grants to any person any rights, powers, or privileges permitted by this [Act], all correlative obligations, liabilities, and restrictions in this [Act] also apply to that person.

COMMENT

EXAMPLE:

Suppose an "old" condominium declaration and "old" state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners' approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67% would be required for subsequent amendments.

3. This section does not address the issue of contract rights of unit purchasers which may be affected by amendments under the new Act. Whether an amendment is effective against unit owners who purchased their units prior to the effective date of the Act and prior, therefore, to the

1. This section tracks closely the provisions of the Uniform Planned Community Act and the Model Real Estate Cooperative Act and provides a straightforward mechanism by which the documents of pre-Act common interest communities may be amended to take advantage of desirable provisions of the Act. See the comment to Section 1-205.

2. In considering the permissible amendments under Section 1-206, it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of a community created under "old" law, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original instruments, and in compliance with the old law.

amendment in question is controlled by the contract and constitutional law of the State.

EXAMPLE:

Assume "old" state law required that 5% of the purchase price of each unit sold by a declarant must be held in escrow until all the common elements in the condominium are completed. Assume further that a declarant created a condominium under "old" law, sold 10 units to purchasers prior to the effective date of the Act, and now is holding 5% of the purchase prices for those 10 units in escrow, since the common elements are not yet completed. Immediately following the effective date of the Act, the declarant amends the declaration pursuant to Section 1-206 to provide that no escrow of any portion of the purchase price is required. The amendment is approved by the requisite votes—all held by declarant—but not by any of the 10 unit owners. On its face, the amendment would appear to comply with the provisions of this Act, since it accomplishes a result—no escrow—which is permitted by this Act and was not permitted by "old" law. Whether that amendment is effective, however, to either permit the declarant to terminate the escrow with respect to the 10 unit owners, or even to terminate the escrow scheme with respect to future unit owners (since the original 10 owners may reasonably have expected that 5% of all purchase prices would be held in escrow) is not addressed by this Act. That determination must be based on the contractual and constitutional rights of the original purchasers.

4. The last sentence of Section 1-206 addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.

EXAMPLE:

Assume that, pursuant to the provisions of "old" condominium law, a declarant may exercise control over the association for only 3 years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to Section 1-206 to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for 2 additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control period.

Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for 2 years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

5. In place of the words "declaration, bylaws, and plats and plans", at the end of this Section, each state should insert the appropriate terminology for those documents under the present state law, e.g. "master deed, rules and regulations", etc.

6. This section does not permit a pre-existing common interest community to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing common interest community may elect to terminate the community under pre-existing law and create a new community which would be subject to all the provisions of this Act.

§ 1-207. Applicability to Nonresidential Planned Communities

This [Act] does not apply to a planned community in which all units are restricted exclusively to nonresidential use unless the declaration provides that

the [Act] does apply to that planned community. This [Act] applies to a planned community containing both units that are restricted exclusively to nonresidential use and other units that are not so restricted, only if the declaration so provides or the real estate comprising the units that may be used for residential purposes would be a planned community in the absence of the units that may not be used for residential purposes.

COMMENT

This section provides a choice for non-residential planned communities to opt out of the Act altogether. "Mixed use" projects, on the other hand, are subject to this Act even in the absence of words to that effect in the declaration.

If the residential portion would, in the absence of the nonresidential portion, constitute of itself a "planned community" within the meaning of this Act.

§ 1-208. Applicability to Out-of-state Common Interest Communities

This [Act] does not apply to common interest communities or units located outside this State, but the public offering statement provisions (Sections 4-102 through 4-105) apply to all contracts for the disposition thereof signed in this State by any party unless exempt under Section 4-101(b) ~~and the agency regulation provisions under Article 5 apply to any offering thereof in this State.~~

COMMENT

This section reflects the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out of state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information regarding common interest communities located in other states but

not in that state. However, where sales contracts are executed wholly outside the enacting state and relate to common interest communities located outside the state, it seems more appropriate for the courts of the jurisdiction(s) in which the common interest community is located and where the transaction occurs to have jurisdiction over the transaction.

ARTICLE 2

CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES

§ 2-101. Creation of Common Interest Communities

(a) A common interest community may be created pursuant to this [Act] only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association. The declaration must be recorded in every [county] in which any portion of the common interest community is located and must be indexed [in the grantee's index] in the name of the common interest community and the association and [in the grantor's index] in the name of each person executing the declaration.

(b) In a condominium, a declaration, or an amendment to a declaration, adding units may not be recorded unless (i) all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent [registered] engineer, surveyor, or architect ~~or (ii) unless the agency has approved the declaration or amendment in the manner prescribed in Section 5-303(b).~~

COMMENT

1. Under subsection (a), a common interest community is created pursuant to this Act only by recording a declaration.

As with any instrument affecting real estate, the declaration must be recorded in every recording district in

which any portion of the common interest community is located and must be indexed in the manner described in subsection (a). Specific indexing rules are suggested in brackets and should be used in those states where this result would not otherwise occur. For example, the declaration community has not been indexed in the grantor's index in the name of the common interest community. Moreover, when multiple persons execute the declaration, the declaration has often been indexed solely in the name of the declarant and not in the name, for example, of lenders and other persons who might have executed the declaration. Because it is important that the names of the association and all persons executing the declaration appear in the index in order to locate all instruments in the land records, that language is not included in brackets.

In the case of a cooperative, there is a second requirement for creation in addition to the recording requirements applicable to all common interest communities discussed above. The declarant must convey the real estate subject to that declaration to the association, since the association (in the form of a corporation, trust or other entity described in Section 3-101) must hold title to that real estate. This requirement may contrast with the current practice in some jurisdictions under which the declarant may retain title to the real estate until proprietary leases for all or most units have been executed. This requirement tracks the language of the Model Real Estate Cooperative Act.

2. In Section 1-103, the Act defines the term "Declaration" as any instruments, however denominated, which create a common interest community, including any amendments to those instruments; "common interest community" in turn is defined as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration. 'Ownership of a unit' does not include 'holding a leasehold interest of less than 20 years in a unit, including renewal options.' It is important to realize that other covenants, conditions, or restrictions applicable to the real estate in the common interest community might be recorded before or after the instruments are recorded which divide the real estate into units and common elements. Until the actual recordation of the document which accomplished that

result, however, the common interest community has not been created.

3. A common interest community has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of a "common interest community" in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with.

4. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate a condominium or planned community. However, if that lien is prior to the declaration itself, the lienholder may exclude that real estate from the condominium or planned community. See Sections 2-118(k) and (l). Moreover, the declarant may wish to obtain agreements from mortgagees or other lienholders that they will give partial releases permitting lien-free conveyance of condominium or planned community units. See Section 4-111(a).

5. Except when development proceeds pursuant to Section 5-103, this Act contemplates that substantial completion must be reached before a unit may be conveyed. See Section 4-120. In the case of a condominium, substantial structural completion is also required before the condominium is created. The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose.

If a condominium were said to consist from the beginning of a certain number of units, even though some of those units had not yet been completed or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete the construction could be enforced against any solvent person. If the insolvent owner of the unbuilt units failed to pay his common expense assessments, for example, the unit owners' association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace. Moreover, votes in the unit owners' association could be assigned to units, and those votes could be cast, even though the units were never built. The Act, therefore, requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial structural and mechanical com-

pletion (or the alternative bonding procedure and other assurances required by Section 5-103) reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

6. In the case of a condominium, Section 2-101(b) requires that "all structural components and mechanical systems of all buildings containing or comprising any units" which will be created by recording a declaration, must be substantially completed in accordance with the plans. The intent of subsection (b) is that if any buildings are depicted on the plats and plans which are required by Section 2-109, and these buildings contain or comprise spaces which become units by virtue of recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the plats and plans recorded pursuant to Section 2-109 depict only the boundaries of the buildings and the units created in those buildings, and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected. See comment 8, below.

The concept of "structural components and mechanical systems" is one commonly understood in the construction field and this comment is not intended as a comprehensive list of those components. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weather tight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would clearly not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting and the like. Similarly, typical examples of "mechanical systems" include the plumbing, heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

7. Section 4-120 requires that, before an individual unit is conveyed, the unit must be "substantially completed,"

"Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A 201, General Conditions of the Contract for Construction (1970 Ed.) at para. 8.1.3, states:

The Date of Substantial Completion of the Work . . . is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work . . . for the use for which it is intended.

This standard is also often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, blocking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

8. Sections 2-101(b) and 4-120 require that completion certificates be recorded, or local certificates of occupancy be issued, as evidence of the fact that the required levels of construction have been met. In the case of "substantial completion," issuance of "a certificate of occupancy authorized by law," as is commonly required by local ordinance or state building codes, will suffice. Once the certificates have been recorded or issued, as the case may be, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the declarant may have failed to complete the required levels of construction; no certificate of completion may have been filed or the architect, surveyor or engineer (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under section 4-117, but would not affect the validity of the purchaser's title to the unit.

9. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units may ultimately be located have been "structurally" completed, the declarant may create a condominium in which he reserves particular development rights (Section 2-105(a)(3)). In such a project, only the completed

units might be treated as units from the outset, and the development rights could be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements, or by subdividing units previously created. The optional units may ever be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more phased condominiums under Section 2-105 in projects which were once in fact built in phases, but under a single non-expandable declaration. Experience in the several states where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this Act. Finally, many lenders and developers are increasingly sensi-

tive to the secondary mortgage market requirements, particularly those of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC). Experience indicates that the pre-sale requirements imposed by FNMA and FHLMC frequently dictate that multi-building projects be structured on a phased or expandable basis.

11. The requirement of completion would be irrelevant in some types of common interest communities, such as campus condominiums or some subdivision planned unit developments where the units might consist of unimproved lots and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this Act would require any residence to be built before the lots could be treated as units.

12. The term "independent" architect, surveyor or engineer in subsection (5) and elsewhere in the Act distinguishes any such professional person who acts as an independent contractor in his relationship to the declarant or lender.

§ 2-102. Unit Boundaries

Except as provided by the declaration:

(1) If walls, floors, or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

(3) Subject to paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

COMMENT

1. It is important for title purposes, for purposes of defining maintenance responsibilities, and for other reasons to have a clear guide as to which parts of a common interest community constitute the units and which parts con-

stitute common elements. This Section fills the gap left when the declaration merely defines unit boundaries in terms of floors, ceilings and perimeter walls, and is particularly useful in the case of cooperatives, in which the recording of plats and plans is not required. See Section 2-105(n)(5).

The provisions of this section may be varied, of course, to the extent that the declarant wishes to modify the details for a particular common interest community.

For example, in a townhouse project structured as a condominium or planned community, it may be desirable that the unit boundaries constitute the exterior surfaces of the roof and exterior walls, with the center line of the party walls constituting the perimeter boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternately, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In these cases it would be inappropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner.

2. The differentiations made clear here, in conjunction with the provisions of Section 3-107, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches, and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of

components—such as stoops and pipes—are resolved by Section 3-107, which imposes liability on a unit owner who causes damage to common elements, or under the broader provisions of Section 3-115(e), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that person. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of the common elements.

3. The differentiation between components constituting common elements and components which are part of the unit is particularly important in light of Section 3-107(n), which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of common elements and each unit owner individually responsible for upkeep of his unit.

4. The differentiation between unit components and common element components may or may not be important for insurance purposes under the Act. While the common elements in a project must always be insured, the units themselves need not be insured by the Association unless the project contains units divided by horizontal boundaries. See Section 3-113(a) and (b). In a "high-rise" configuration, however, Section 3-113(a) contemplates that both will normally be insured by the association (exclusive of improvements and betterments in individual units) and that the cost of such insurance will be a common expense. That common expense may be allocated, however, on the basis of risk if the declaration so requires. See Section 3-115(e)(3).

§ 2-103. Construction and Validity of Declaration and Bylaws

(a) All provisions of the declaration and bylaws are severable.

(b) The rule against perpetuities does not apply to defeat any provision of the declaration, bylaws, rules, or regulations adopted pursuant to Section 3-102(n)(1).

(c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this [Act].

(d) Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this [Act]. Whether a substantial failure impairs marketability is not affected by this [Act].

COMMENT

1. Subsection (b) does not totally invalidate the rule against perpetuities as applied to common interest communities. The language does provide that the rule against perpetuities is ineffective as to documents which govern the common interest community during the entire life of the project, regard-

less how long that should be. With respect to deeds or devices of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

2. In considering the effect of failures to comply with this Act on title matters, subsection (a) refers only to defects in the declaration—which includes the plats and plans in the case of condominiums and planned communities—because the declaration is the instrument which creates and defines the units and common elements. No reference is made to other instruments, such as bylaws, because these instruments have no impact on title, whether or not recorded. However, in all cases of violations of the Act, a failure of the bylaws—or any other instrument—to comply with the Act, would entitle any affected person to appropriate relief under Section 4-117.

3. No special prohibition against racial or other forms of discrimination is included in this Act because the provisions of generally applicable state and federal law apply as much to common interest communities as to other forms of real estate.

4. Some examples may help to clarify what sort of defects in the declaration are to be regarded as "insubstantial" within the meaning of the first sentence of subsection (d).

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by Section 2-107. This would be a substantial defect if the assigned interests were unequal, but if all units were as-

signed identical interests it would be possible to infer that the basis of the allocation was equality—and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a common interest community where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common elements interests unless a different formula were specified pursuant to Section 2-107(c).

Other examples of insubstantial defects that might occur include failure of the declaration to include the word "condominium", "cooperative", or "planned community", as required by Section 2-105(a)(1), or failure of the plats or plans in the case of condominium and planned communities, to comply satisfactorily with the requirement of section 2-109(a) that they be "clear and legible," so long as they can at least be deciphered by persons with proper expertise. Failure to organize the unit owners' association at the time specified in Section 3-101 would not be a defect in the declaration at all, and would not affect the validity or marketability of titles in the common interest community. It would, however, be a violation of this Act, and create a claim for relief under Section 4-117.

5. Each state has case or statutory law dealing with marketability of titles, and the question of whether substantial failures of the declaration to comply with the Act affects marketability of title should be determined by that law and not by this Act.

ault, it will not be necessary under this Act to continue the practice, common in some jurisdictions, of describing in the instrument conveying title to a unit the common element interests, or limit-

ed common elements, that are appurtenant to that unit or make reference to surveys or subsequent amendments to declarations.

§ 2-105. Contents of Declaration

(a) The declaration must contain:

(1) the names of the common interest community and the association and a statement that the common interest community is either a condominium, cooperative, or planned community;

(2) the name of every [county] in which any part of the common interest community is situated;

(3) a legally sufficient description of the real estate included in the common interest community;

(4) a statement of the maximum number of units that the declarant reserves the right to create;

(5) in a condominium or planned community, a description of the boundaries of each unit created by the declaration, including the unit's identifying number or, in a cooperative, a description, which may be by plats or plans, of each unit created by the declaration, including the unit's identifying number, its size or number of rooms, and its location within a building if it is within a building containing more than one unit;

(6) a description of any limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-100(b)(10) and, in a planned community, any real estate that is or must become common elements;

(7) a description of any real estate, except real estate subject to development rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in Section 2-102(2) and (4), together with a statement that ~~they~~ ^{the designated} may be so allocated; ^{real estat}

(8) a description of any development rights (Section 1-103(14)) and other special declarant rights (Section 1-103(29)) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(9) if any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

(10) any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;

(11) an allocation to each unit of the allocated interests in the manner described in Section 2-107;

(12) any restrictions (i) on use, occupancy, and alienation of the units, and (ii) on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation, or casualty loss to the unit or to the common interest community, or on termination of the common interest community;

(13) the [recording data] for recorded easements and licenses appurtenant to or included in the common interest community or to which any portion of the common interest community is or may become subject by virtue of a reservation in the declaration; and

§ 2-104. Description of Units

A description of a unit which sets forth the name of the common interest community, the [recording data] for the declaration, the [county] in which the common interest community is located, and the identifying number of the unit, is a legally sufficient description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws.

COMMENT

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements, so long as the requirements of this section are satisfied, and so long

as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

2. The last sentence makes clear that an instrument which does meet those requirements includes all interests appurtenant to the unit. As a re-

(14) all matters required by Sections 2-100, 2-107, 2-108, 2-109, 2-115, 2-116, and 3-103(d).

(h) The declaration may contain any other matters the declarant considers appropriate.

COMMENT

1. Many statutes and other regulatory schemes in the multi-owner project field do not separate the functions of a recorded declaration and an unrecorded public offering statement or disclosure documents. As a result, many of the developer's representations and assurances concerning his future plans must appear in the declaration as well as the public offering statement, even though they have nothing to do with the legal structure or title of the project. This results in duplicative requirements and unnecessarily complex declarations.

This Act makes a functional distinction between the declaration and the public offering statement. It only requires the declaration to contain those matters which affect the legal structure or title of the common interest community. This includes the reserved powers of the declarant to exercise development rights within the common interest community. A narrative description of those rights, however, and the possible consequences flowing from their exercise, are required to be disclosed only in the public offering statement and not in the declaration.

In the case of condominiums and planned communities, plats and plans are made part of the declaration by Section 2-100, and their content may in part provide some of the information required by this section.

2. This section requires a statement of the name of the association for the common interest community itself, in order that the declaration may be indexed in the name of the association. See Section 2-101.

3. The Act requires that the declaration for a common interest community situated in two or more recording districts be recorded in each of those districts. While the bracketed language refers to the "county" as the recording district in which the declaration is to be recorded, in states where recording is done at the city, town or parish level the bracketed language should be amended accordingly.

Paragraph (a)(4) requires the declarant to state the largest number of units he reserves the right to build. This Act imposes no time limit, measured by an absolute number of years, at the expiration of which the declarant must relinquish control of the as-

sociation. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a 2-year period during which development is not proceeding. See Section 3-103(d). The flexibility afforded by this section may be important to a declarant as he responds to unanticipated future changes in his market.

In theory, a declarant might overstate the maximum number of units in an attempt to artificially extend the period of declarant control, since the time might never come when a declarant had sold 75% of that number of units. As a practical matter, however, as the following example points out, such a practice would not likely achieve long-term control.

EXAMPLE:

A declarant reserves the right to build 100 units, even though zoning would permit only 75 units on the site, and the declarant actually plans on building only 50 units. As a result of the reservation, the declarant would not lose control of the association under the 75% rule stated in Section 3-103(d)(i) even when all 50 units had been built and sold, because that percentage applies to all potential units, not units actually built. See Section 3-103(d)(i).

However, there are practical constraints on the declarant's decision in this matter. Substantial exaggeration of the future density of the development might tend to impede sales of units in that project. Moreover, such a statement might also produce negative governmental reaction to proposals which might require local approval.

Even if the declarant did overstate the number of units to retain control, however, other limitations imposed by Section 3-103(d) will require turnover at an appropriate time. In the example, once the declarant had exercised the right to add the last of the 50 units which he intended to build, the 2 year period imposed by Section 3-103(d)(ii) and (iii) would begin to run and the declarant would lose the right to control the association 2 years from the time the last units were added, even though he had reserved the right to add more units.

5. Paragraph (a)(5) requires that the boundaries of each unit created by the declaration be identified. The words "created by the declaration" emphasize that, in an expandable project, new units may be created in the future by amendments to the declaration. Until those new units are actually added to the project by amending the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

6. Section 2-102 makes it possible in many condominiums or planned communities to satisfy paragraph (a)(5) of this section, by merely providing the identifying number of units and stating that each unit is bounded by its ceiling, floor, and walls. The plats and plans will show where those ceilings, floors and walls are located, and Section 2-102 provides all other details, except to the extent the declaration may make additional or contradictory specifications because of the unique nature of the project.

In the case of many cooperatives, it is possible to satisfy paragraph (a)(5) of this section by merely providing the identifying number of the unit, the size of the unit in square feet or its number of rooms, and its location within a building if it is in a building containing more than one unit. Thus, for example it would be possible to describe a cooperative unit as follows: "Unit Number 213, consisting of 800 square feet, located on the fourth floor of Building A."

7. Paragraph (a)(6) makes clear that the limited common elements described in Section 2-102(2) and (4) need not be described in the declaration. These limited common elements are typically porches, balconies, patios, or other amenities which may be included in a project. Such improvements are treated by the Act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specifically referred to in the declaration. In the case of all common interest communities, except cooperatives, porches, balconies and patios must be shown on the plats

and plans (See Section 2-109(b)(10)), but other limited common elements described in Section 2-102(2) and (4) need not be shown.

8. Paragraph (a)(7) contemplates that the common elements in the project may be allocated as limited common elements at some future time, either by the declarant or the association. For example, a swimming pool might serve an entire project during early phases of development. At the outset that pool might be a common element which all the unit owners may use. At a later time, with more units and additional pools built in subsequent phases, either the declarant or the association might determine that the first pool should become a limited common element reserved for the use only of units in the first phase, while the other pools should be reserved exclusively for units in the subsequent phases. Such a potential allocation should be described in the declaration pursuant to this section. The method of subsequent allocation is discussed in Section 2-108.

9. Paragraph (a)(8) requires that the declaration describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be exercised. The Act imposes no maximum time limit for the exercise of those rights, and contemplates that those rights may be exercised after the period of declarant control terminates.

10. Paragraph (a)(12)(ii) includes certain requirements which were not originally applicable to condominiums and planned communities under UCA and UPCA, respectively. Tracking MITECA, paragraph (a)(12)(ii) requires the declaration to include any information which restricts the amount for which a unit may be sold, or the amount to be received by a unit owner upon sale, condemnation or casualty loss. Such restrictions are increasingly common in the development of "limited equity" common interest communities or common interest communities which are designed to minimize the increased value of the common interest community upon resale in order to preserve housing for a particular income group. The Act in no way restricts the use of such provisions, but does require that explicit provisions concerning such restrictions appear in both the declaration and the Public Offering Statement.

11. Paragraph (a)(14) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as 2-107 on the allocation of allocated interests, will affect all projects. Others, such as 2-100 on leasehold common interest communities, will apply only to particular lands of projects.

12. Subsection (b) contemplates that, in addition to the content re-

quired by subsection (a), other matters may also be included in the declaration if the declarant or lender feel they are appropriate to the particular project. In particular, the draftsman should carefully consider any desired provisions which would vary any of the many sections of the Act where variation is permitted, including such matters as expanding or restricting the association's powers.

2. Subsection (a)(1) provides alternative bracketed language which should be considered by each state based on its practice. In any state where the recording acts do not specify the essential terms which must be included in a memorandum of lease, either this section should be supplemented to specify the essential terms, or the bracketed language relating to such memoranda should be deleted.

3. This section sets out requirements concerning leasehold common interest communities which are not typically contained in the laws of most states. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. This section also contains a number of other consumer protection provisions. However, in contrast to the result under some states' condominium laws, neither the unit owners or the association have a statutory right to renewal of a lease upon termination.

4. In the case of leasehold condominiums and planned communities, the most significant matter of consumer protection in this section is subsection (b), which provides that unit owners who pay their share of the rent of the underlying lease may not be deprived of their enjoyment of the leasehold premises.

Subsection (b) is intended to protect the leasehold condominium or planned community "unit owner" regardless of whether he is a lessee, sublessee, or even further down in a chain of transfer of leasehold interests. See Section 1-103(32). Thus, for example, if the "unit owner" is a sublessee, the term "lessor (or) his successor in interest" includes not only the lessor, but also the lessee.

Subsection (b) further protects the unit owner by assuring that he will not share with his fellow unit owners any collective obligations toward their common lessor. All obligations are instead fractionalized so that no unit owner can be made liable or otherwise penalized for a default by any of his fellows. Thus, a default by the association in payment of the rent due to a lessor, in a case where the lease of common elements ran to the association, would not permit the lessor to terminate continued use of those common elements by those unit owners who then pay their share of the rent.

Subsection (b) does not address the issue of whether a unit owner's tenant

may cure a default by the unit owner under the unit owner's lease so as to prevent termination of the unit owner's lease.

EXAMPLE:

Assume that A leases 100 acres of land to B for 50 years. B, in turn, leases the same 100 acres to C, for the duration of the 50 year term. C creates a condominium on the leasehold land, and thereby becomes the declarant; thereafter, he leases a unit in the condominium to D, together with a lease of this allocated undivided interest in the leasehold underlying the unit, for the duration of the 50 year term. D then leases his unit to E for a term of 5 years.

Both A and B must execute the declaration; see Section 2-106(a). So long as D meets his obligations to C—or any other persons—under the declaration and his sublease, D's interest in the leasehold may not be terminated by either A, B or C; see Section 2-103. For that reason, A and B will likely take appropriate steps to protect their interests in the event that D makes timely payment to C, if called for in the declaration or lease, but C fails to meet his obligations to either A or B. If D fails to make timely payment to C—or to B or A if those persons have so required—then D's interest may be terminated by the person entitled to payment, unless E is entitled to cure. E may cure and thereby prevent default, however, only if other law of the state permits transferees of partial interests to cure defaults of his transferor. Since E is not a unit owner, he is not entitled to rights under this Act.

However, this section does not permit a unit owner in a cooperative to preserve his interest in the cooperative by paying his pro-rata share of the rent in the event the association fails to pay rent due under a ground lease. This distinction flows from the differences in the nature of a cooperative and a condominium or a planned community, and it tracks the distinction made by UCA and UPCA, and MRECA.

5. Subsection (d) considers the problems created when termination of a lease reduces the size of a common interest community. In the event that some units are thereby withdrawn from the common interest community, reallocation of the allocated interests would be required; the section describes how that reallocation would occur.

§ 2-106. Leasehold Common Interest Communities

(a) Any lease the expiration or termination of which may terminate the common interest community or reduce its size [or a memorandum thereof.] must be recorded. Every lessor of those leases in a condominium or planned community shall sign the declaration. The declaration must state:

(1) the [recording data] for the lease [or a statement of where the complete lease may be inspected];

(2) the date on which the lease is scheduled to expire;

(3) a legally sufficient description of the real estate subject to the lease;

(4) any right of the unit owners to redeem the reversion and the manner whereby those rights may be exercised, or a statement that they do not have those rights;

(5) any right of the unit owners to remove any improvements within a reasonable time after the expiration or termination of the lease, or a statement that they do not have those rights; and

(6) any rights of the unit owners to renew the lease and the conditions of any renewal, or a statement that they do not have those rights.

(b) After the declaration for a leasehold condominium or leasehold planned community is recorded, neither the lessor nor the lessor's successor in interest may terminate the leasehold interest of a unit owner who makes timely payment of a unit owner's share of the rent and otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest in a condominium or planned community is not affected by failure of any other person to pay rent or fulfill any other covenant.

(c) Acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.

(d) If the expiration or termination of a lease decreases the number of units in a common interest community, the allocated interests must be reallocated in accordance with Section 1-107(a) as if those units had been taken by eminent domain. Reallocations must be confirmed by an amendment to the declaration prepared, executed, and recorded by the association.

COMMENT

1. Subsection (a) requires that the lessor of any lease in a condominium or planned community which, upon termination, will terminate the condominium or planned community or reduce its size, must sign the declaration. This requirement insures that the lessor has consented to use of his land as a con-

dominium or planned community. Note that such a signature is not required in the case of a lease in a cooperative. This distinction between the types of common interest communities tracks that made by UCA, UPCA and MRECA.

§ 2-107. Allocation of Allocated Interests

(a) The declaration must allocate to each unit:

(i) in a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association (Section 3-115(a)), and a portion of the votes in the association;

(ii) in a cooperative, an ownership interest in the association, a fraction or percentage of the common expenses of the association (Section 3-115(a)), and a portion of the votes in the association; and

(iii) in a planned community, a fraction or percentage of the common expenses of the association (Section 3-115(a)), and a portion of the votes in the association.

(b) The declaration must state the formulas used to establish allocations of interests. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

(c) If units may be added to or withdrawn from the common interest community, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the common interest community after the addition or withdrawal.

(d) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class. If necessary to protect valid interests of the class. A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this [Act] nor may units constitute a class because they are owned by a declarant.

(e) Except for minor variations due to rounding, the sum of the common expense liabilities and, in a condominium, the sum of the undivided interests in the common elements allocated at any time to all the units must each equal one if stated as a fraction or 100 percent if stated as a percentage. In the event of discrepancy between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

(f) In a condominium, the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.

(g) In a cooperative, any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an ownership interest in the association made without the possessory interest in the unit to which that interest is related is void.

COMMENT

1. Subsection (a) treats allocated interests differently in each type of common interest community. The distinctions made in parts (i)-(iii) track those made in the corresponding subsection of UCA, UPCA and MRECA, for condominiums, planned communities, and cooperatives, respectively.

2. Most existing condominium statutes and cooperative documents require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, or ownership interests in cooperatives, votes in the association and common expense liabilities. Following UCA, UPCA, and MRECA, this Act

departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, a common interest community's applicable allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the value of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests (or ownership interests), while equality is used in allocating votes in the association. This section does not require that the

formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant. Otherwise, each of the separate allocations may be on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

3. While the flexibility permitted in allocations is broader than that commonly used today, it is likely that the traditional bases for allocation will continue to be used, and that the allocation for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality, or value of units. Each of these is discussed below.

1. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formula he has chosen.

5. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise project might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in comment 4, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

6. The purpose of subsection (c) is to require a comprehensive scheme for reallocation of allocated interests in a common interest community subject to development rights, and afford some advance disclosure to purchasers of units in the first phase of an expandable common interest community of how

allocated interests will be reallocated if additional units are added.

7. Subsection (d) represents a significant departure from the practice in most states concerning the allocation of votes. The usual rule is that a single allocation of votes is made to each unit, and that allocation applies to all matters on which those votes may be cast. This section recognizes that the increasingly complex nature of some projects requires different allocations on particular questions. Different allocations may be appropriate, for example, in a project where common expense liabilities, or questions concerning rules and regulations, affect different units differently.

EXAMPLE:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners pay a much larger share than their proportion of the total units, the vote of commercial unit owners might be increased so that they exceed the number of votes the residential owners hold. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

8. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use planned community or condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice, and the device described in Comment 7 is not desired. To prevent abuse of class voting by the declarant, subsection (d) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

EXAMPLE:

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting only the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103.)

10. The last clause of subsection (d) prohibits a practice common in planned communities, where units owned by declarant constitute a separate class of units for voting and other

purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. The Act provides other, more balanced, devices for those circumstances which such classes were legitimately intended to address, principally declarant control of the association. See Section 3-103(d).

§ 2-108. Limited Common Elements

(a) Except for the limited common elements described in Section 2-102(2) and (4), the declaration must specify to which unit or units each limited common element is allocated. An allocation may not be altered without the consent of the unit owners whose units are affected.

(b) Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by the unit owners between or among whose units the reallocation is made. The persons executing the amendment shall provide a copy thereof to the association, which shall record it. The amendment must be recorded in the names of the parties and the common interest community.

(c) A common element not previously allocated as a limited common element may be so allocated only pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7). The allocations must be made by amendments to the declaration.

COMMENT

1. Like all other common elements, limited common elements are owned by the association. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed against all the units. See Sections 3-107(a) and 3-115(c)(1). This might include the costs of repainting all shutters or balconies, for example, which are limited common elements pursuant to Section 2-102(4). Accordingly, there may be occasions where, to meet the expectations of owners and to have costs borne directly by those who benefit from those amenities, the declaration might provide that the costs will be borne, not by all unit owners as part of their common expense assessments, but only by the owners to which the limited common elements are assigned.

2. The use of common elements which are not "limited" within the

meaning of this Act may nevertheless be restricted by the unit owners' association pursuant to the powers set forth in Section 3-102(a)(6) and (10), unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage, deed of trust, or security interest may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

4. See also Comments 7 and 8 to Section 2-105.

§ 2-109. Plats and Plans

(a) Plats and plans are a part of the declaration, and are required for all common interest communities except cooperatives. Separate plats and plans are not required by this [Act] if all the information required by this section is contained in either a plat or plan. Each plat and plan must be clear and legible and contain a certification that the plat or plan contains all information required by this section.

(b) Each plat must show:

(1) the name and a survey or general schematic map of the entire common interest community;

(2) the location and dimensions of all real estate not subject to development rights, or subject only to the development right to withdraw, and the location and dimensions of all existing improvements within that real estate;

(3) a legally sufficient description of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) the extent of any encroachments by or upon any portion of the common interest community;

(5) to the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the common interest community;

(6) the location and dimensions of any vertical unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(7) the location with reference to an established datum of any horizontal unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(8) a legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) the distance between non-contiguous parcels of real estate comprising the common interest community;

decks (10) the location and dimensions of limited common elements, including porches, balconies and patios, other than parking spaces and the other limited common elements described in Sections 2-102(2) and (4);

(11) in the case of real estate not subject to development rights, all other matters customarily shown on land surveys.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the common interest community. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) To the extent not shown or projected on the plats, plans of the units must show or project:

(1) the location and dimensions of the vertical boundaries of each unit, and that unit's identifying number;

(2) any horizontal unit boundaries, with reference to an established datum, and that unit's identifying number; and

(3) any units in which the declarant has reserved the right to create additional units or common elements (Section 2-110(c)), identified appropriately.

(e) Unless the declaration provides otherwise, the horizontal boundaries of part of a unit located outside a building have the same elevation as the horizontal boundaries of the inside part and need not be depicted on the plats and plans.

(f) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (d), or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(g) Any certification of a plat or plan required by this section or Section 2-101(b) must be made by an independent [registered] surveyor, architect, or engineer.

COMMENT

1. This section makes clear that plats and plans are a part of the declaration and are required for condominiums and planned communities, but not for cooperatives. That distinction tracks that made by UCA, UPCA, and MIRECA.

2. The terms "plat" or "plan" have been given a variety of meanings by custom and usage in the various jurisdictions. Under this Act, it is important to recognize that a "plat" need not mean a "survey" of the entire real estate constituting a project at the time the initial plat is recorded, although through amendments to the plat as development proceeds, it ultimately becomes a survey of the entire project.

As to "plan," the Act does not use that term to mean the actual building plans used for construction of the project. Instead, the required content of the plans in this Act is described in subsection (d). Essentially, the plans constitute a boundary survey of each unit. Typically, the walls will be the vertical ("up and down" or "perimeter") boundaries, and the floors and ceilings will be the horizontal boundaries. Importantly, these boundaries need not be physically measured, but may instead be projected from the plat or from actual building construction plans. Thus, the plans under this Act are not conceived to be "as built" plans.

3. Subsection (c) permits, but does not require, the plats to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may

control) makes the improvement pursuant to Section 3-102(n)(7). Of course, as to existing unit owners, the improvements which may be made by the declarant and the areas within which they may be made, are limited by his contract with those unit owners. Since this is true, the Declarant may not violate that contract directly—by undertaking improvements for which he reserved no rights—or indirectly by making improvements through the association which he controls or by seeking to amend the declaration in violation of the contract. Moreover, under Section 2-117(d), no amendment to the declaration may create or increase special declarant rights without the unanimous consent of the unit owners.

Within land subject to development rights construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, see Section 4-110(a).

4. As noted in the Comments to Section 2-101, a condominium or planned community unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of Section 2-109 relating to plans (but not plats) would be inapplicable.

5. In detailing the required contents of the plats, two different types of legal description are contemplated. First, in subsection (b)(1), the plat must show at least a general schematic map of the entire project. While this may be by survey, the Act recognizes that a survey may be unduly expensive or impractical in a large project, and accordingly permits a general schematic map of the entire project at the commencement of development. With respect to those portions of the proj-

ect, however, where no future development may take place, the flexibility of a general schematic map is not permitted by the statute. As development ceases in particular phases, subsection (b)(2) contemplates that the locations and dimensions of that real estate will be identified. As this process continues, all of the real estate originally shown in a general schematic map will have been surveyed, and the location and dimensions of that real estate identified, at the expiration of development rights. In addition, subsection (2) contemplates that existing improvements must be shown within real estate where no further development will take place. This does not include take place. This does not include the units which may be within each building, but it does include the external physical dimensions of the buildings themselves. The nature of "existing improvements" required to be surveyed under subsection (2) should be determined by local practices in the particular state.

6. Subsection (f) describes the amendments to the plats and plans

which must be made as development rights are exercised. This section requires that the plats and plans be amended at each stage of development to reflect actual progress to date. If an original schematic map was recorded as permitted by subsection (b)(1), the survey required by (b)(2) would also constitute the amendments required by subsection (f).

7. The terms "horizontal" and "vertical" are now commonly understood to refer, respectively, to "upper and lower" and "lateral or perimeter." Thus, Section 2-102 contemplates that the perimeter walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this Act.

9. Sections 4-118 and 4-119 state the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT," as required by subsection (b)(3).

§ 2-110. Exercise of Development Rights

(a) To exercise any development right reserved under Section 2-105(a)(8), the declarant shall prepare, execute, and record an amendment to the declaration (Section 2-117) and in a condominium or planned community comply with Section 2-109. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created, and, except in the case of subdivision or conversion of units described in subsection (b), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by Section 2-108 (Limited Common Elements).

(b) Development rights may be reserved within any real estate added to the common interest community if the amendment adding that real estate includes all matters required by Section 2-105 or 2-106, as the case may be, and, in a condominium or planned community, the plats and plans include all matters required by Section 2-109. This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to Section 2-105(a)(8).

(c) Whenever a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both:

(1) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain (Section 1-107); and

(2) If the declarant subdivides the unit into two or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(d) If the declaration provides, pursuant to Section 2-105(n)(8), that all or a portion of the real estate is subject to a right of withdrawal:

(1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(2) If any portion is subject to withdrawal, it may not be withdrawn after a unit in that portion has been conveyed to a purchaser.

COMMENT

1. This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the common interest community, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only within the self-determined constraints originally described by the declarant.

2. The reservation and exercise of development rights is typically closely coordinated with financing for the project. As a result, lender review and control of that process is common, and the financing documents reflect the proposed development process.

A typical construction loan mortgage on a portion of a phased condominium or planned community might provide that as soon as that portion of land is added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land and on any buildings containing units built on that land before it was added converts into a mortgage on all of the units located within that portion, together in the case of a condominium, with their respective common element interests. In the case of a condominium, the common element interest of those units will, of course, extend to the common elements in other sections of the condominium. Therefore, conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interest, as a result of the requirements of Sections 2-107(f) and 2-110(a).

3. A lender who holds a mortgage lien on one portion of a condominium or planned community may not cause that portion to be withdrawn from the condominium or planned community unless the portion constitutes withdrawable real estate in which there is no unit owner other than the declarant. Even then, except in the case of foreclosure, the amendment effectuating the withdrawal must be executed by the declarant.

Therefore, a lender may wish to require that an amendment withdrawing the portion on which he has a mortgage be executed by the declarant and placed in escrow at the time the loan is made in order to protect against a recalcitrant borrower. Alternatively, a lender after foreclosure under Section 2-118 (k) may require an amendment from the association. Also a lender could itself execute the amendment if the lender buys in at a foreclosure sale or takes a deed in lieu of foreclosure and elects to become a declarant under Section 3-104(e) or (a).

4. As indicated in the Comments to Section 1-100, the withdrawal of real estate from a common interest community may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider." In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the common interest community.

5. Subsection (c) deals with special problems surrounding allocated inter-

ests when the declarant subdivides or converts units which were originally created in the declaration into additional units, common elements or both. This development right permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand.

For example, a declarant of a 5-story office building common interest community may have purchasers committed at the time of the filing of the common interest community declaration but a lack of purchasers for the upper 2 floors. In such a circumstance, the declarant could designate the upper 2 floors as a unit, reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide his 2-floor unit into 2 or more units. He may also wish to reserve a portion of the divided floor as a corridor which

will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

Alternatively, the declarant may ultimately decide that the entire 2 floors should be turned over to the unit owners' association not as a unit but as common elements to be used perhaps as a cafeteria serving the balance of the building, or for retail space to be rented by the association. In that case, should he choose to make the entire 2 floors common elements, the provisions of paragraph (c)(1) would apply.

The declarant may state in his declaration any conditions or limitations on the time limits reserved for the exercise of development rights which would cause that development right to lapse before the time established in the declaration. It would, of course, be possible for a declarant to voluntarily relinquish those rights prior to the time that they automatically lapsed, and an instrument recorded by the declarant would be effective to cause that lapse, subject, of course, to any constraints imposed on voluntary relinquishment by the declarant's lender.

and is complete according to applicable codes and in a workmanlike manner.

§ 2-111. Alterations of Units

Subject to the provisions of the declaration and other provisions of law, a unit owner:

(1) may make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common interest community;

(2) may not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the common interest community, without permission of the association;

(3) after acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common interest community. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries.

COMMENT

1. This section deals with permissible alterations of the interior of a unit, and impermissible alterations of the exterior of a unit and the common elements, in ways which reflect common practice. The stated rules, of course, may be varied by the declaration where desired.

2. Subsection (3) deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not im-

paired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2).

3. In considering permissible alteration of the interior of a unit, an example may be useful. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be impaired. Moreover, no trespass would be committed because each unit owner, as a part or beneficial owner of the common elements, has a right to utilize them subject only to such restrictions as may be created by the Act, the declaration, bylaws, and the unit owners' association pursuant to Section 3-102.

4. Removal of a partition or the creation of an opening between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate units within the meaning of Section 1-105 and would continue to be treated separately for the purposes of this Act.

5. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed upon the primary residence of a unit owner, it may be appropriate in the case of timeshare or other common interest communities.

§ 2-112. Relocation of Boundaries between Adjoining Units

(a) Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated by an amendment to the declaration upon application to the association by the owners of those units. If the owners of the adjoining units have specified a relocation between their units of their allocated interests, the application must state the proposed reallocations. Unless the executive board determines, within 30 days, that the reallocations are unreasonable, the association shall prepare an amendment that identifies the units involved and states the reallocations. The amendment must be executed by those unit owners, contain words of conveyance between them, and, on recordation, be indexed in the name of the grantor and the grantee, and [in the grantee's index] in the name of the association.

(b) The association (i) in a condominium or planned community shall prepare and record plats or plans necessary to show the altered boundaries between adjoining units, and their dimensions and identifying numbers, and (ii) in a cooperative shall prepare and record amendments to the declaration, including any plans, necessary to show or describe the altered boundaries between adjoining units, and their dimensions and identifying numbers.

COMMENT

1. This section changes the effect of most current declarations, under which the boundaries between units may not be altered without unanimous or nearly unanimous consent of the unit owners. As the section makes clear, this result may be varied by restrictions in the declaration.

2. This section contemplates that upon relocation of the unit boundaries, no reallocation of allocated interests will occur if none is specified in the application. If a reallocation is specified but the executive board deems it

unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's findings as unreasonable.

3. The distinctions made by this section as to information required in the amendment, track the distinctions found in the corresponding UCA, IPCA and MRECA provisions, for condominiums, planned communities and cooperatives, respectively.

§ 2-113. Subdivision of Units

(a) If the declaration expressly so permits, a unit may be subdivided into 2 or more units. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit, the association shall prepare, execute, and record an amendment to the declaration, including in a condominium or planned community the plats and plans, subdividing that unit.

(b) The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.

COMMENT

1. This section provides for subdivision of units by unit owners, thereby creating more and smaller units than were originally created. The underlying policy of this section is that the original development plan of the project must be followed, and the expectations of unit owners realized. Accordingly, unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided into 2 or more units unless the declaration is amended to permit it. A subdivision itself is accomplished by an amendment to the declaration.

2. At the same time, situations will often occur where future subdivision is

appropriate, and this section permits the declaration to provide for it.

3. An analogous concept in the context of development rights is subdivision of units by a declarant.

4. If a unit owned only by the declarant—as opposed to the same unit if owned by another person—may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into 2 or more units or common elements, within the meaning of the definition of development rights. It is therefore governed by Section 2-110 and not by this section.

[ALTERNATIVE A]

§ 2-114. Easement for Encroachments

To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]

[ALTERNATIVE B]

§ 2-114. Monuments as Boundaries

The existing physical boundaries of a unit or the physical boundaries of a unit reconstructed in substantial accordance with the description contained in the original declaration are its legal boundaries, rather than the boundaries derived from the description contained in the original declaration, regardless of vertical or lateral movement of the building or minor variance between those boundaries and the boundaries derived from the description contained in the original declaration. This section does not relieve a unit owner of liability in case of his willful misconduct or relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]

COMMENT

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various states have adopted one approach or the other. Both theories recognize the fact that the actual physical boundaries may differ somewhat from what is shown on the plats and plans, and the practical effect of both is the same.

The easement approach of Alternative A creates easements for whatever discrepancies may arise, while the "monuments as boundaries" approach of Alternative B would make the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent settling or shifting.

§ 2-115. Use for Sales Purposes

A declarant may maintain sales offices, management offices, and models in units or on common elements in the common interest community only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. In a cooperative or condominium, any sales office, management office, or model not designated a unit by the declaration is a common element. If a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the common interest community in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the common interest community. This section is subject to the provisions of other state law and to local ordinances.

COMMENT

1. This section prescribes the circumstances under which portions of the common interest community—either units or common elements—may be used for sales offices, management offices, or models. The basic requirement is that the declarant must describe his rights to maintain such offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element uses might include a sales booth in the lobby of a building, or a trailer or temporary building located outside the buildings on the grounds of the property.

2. In addition, this section contains a permissive provision permitting advertising on the common elements. The declarant may choose to limit his rights in terms of the size, location, or other matters affecting the advertising. The Act, however, imposes no limitations. At the same time, the last sentence of the section recognizes that state or local zoning or other laws may limit advertising, both in terms of size and content of the advertising, or the use of the units or common elements for such purposes. This section makes it clear that local law would apply in those cases.

§ 2-116. Easement Rights

(a) Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging the declarant's obligations or exercising special declarant rights, whether arising under this [Act] or reserved in the declaration.

(b) In a planned community, subject to the provisions of Sections 2-102(a)(6) and 2-112, the unit owners have an easement (i) in the common elements for purposes of access to their units and (ii) to use the common elements and all real estate that must become common elements (Section 2-105(a)(6)) for all other purposes.

COMMENT

1. This section grants to declarant an easement across the common elements, subject to any self-imposed restrictions on that easement contained in the declaration. At the same time, the easement is not an easement for all purposes and under all circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant's rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant's construction equipment to pass and repose over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the "reasonably necessary"

test contained in this section to consider limitations on the declarant's easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.

2. The declarant is also required to repair and restore any portion of the common interest community used for the easement granted under this section. See Section 2-119(b).

3. This section also grants unit owners in a planned community an easement for access, support, and enjoyment in the common elements because unit owners hold a beneficial, but no fee, interest in the common elements. These rights may be limited by the declaration.

§ 2-117. Amendment of Declaration

(a) Except in cases of amendments that may be executed by a declarant under Section 2-109(f) or 2-110, or by the association under Section 2-107, 2-106(d), 2-108(e), 2-112(a), or 2-113, or by certain unit owners under Section 2-108(b), 2-112(a), 2-113(b), or 2-118(d), and except as limited by subsection (d), the declaration, including any plats and plans, may be amended only by vote or agreement of unit owners of units to which at least 67 percent of the votes in the association are allocated, or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to non-residential use.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration must be recorded in every [county] in which any portion of the common interest community is located and is effective only upon recordation. An amendment, except an amendment pursuant to Section 2-112(a), must be indexed [in the grantor's index] in the name of the common interest community and the association and [in the grantor's index] in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this [Act], no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this [Act] to be recorded by the association must be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

COMMENT

1. This section recognizes that the declaration, as the perpetual governing instrument for the common interest community, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential common interest community, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) lists the other instances where the declaration may be amended

by the declarant alone without association approval, or by the association acting through its board.

2. Section 1-101 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyinging if title to real property is to be affected.

3. Subsection (c) describes the mechanisms by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

§ 2-118. Termination of Common Interest Community

(a) Except in the case of a taking of all the units by eminent domain (Section 1-107) or in the case of foreclosure against an entire cooperative of a security interest that has priority over the declaration, a common interest community may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses.

(b) An agreement to terminate must be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof must be recorded in every [county] in which a portion of the common interest community is situated and is effective only upon recordation.

(c) In the case of a condominium or planned community containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all of the common elements and units of the common interest community must be sold following termination. If, pursuant to the agreement, any real estate in the common interest community is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(d) In the case of a condominium or planned community containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but it may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or all the unit owners consent to the sale.

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in a common interest community, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and

appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and then holders as their interests may appear, in accordance with subsections (h), (i), and (j). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of that occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this [Act] or the declaration.

(f) In a condominium or planned community, if the real estate constituting the common interest community is not to be sold following termination, title to the common elements and, in a common interest community containing only units having horizontal boundaries described in the declaration, title to all the real estate in the common interest community, vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (j), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit.

(g) Following termination of the common interest community, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear.

(h) Following termination of a condominium or planned community, creditors of the association holding liens on the units, which were [recorded] [docketed] [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] before termination, may enforce those liens in the same manner as any lien holder. All other creditors of the association are to be treated as if they had perfected liens on the units immediately before termination.

(i) In a cooperative, the declaration may provide that all creditors of the association have priority over any interests of unit owners and creditors of unit owners. In that event, following termination, creditors of the association holding liens on the cooperative which were [recorded] [docketed] [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] before termination may enforce their liens in the same manner as any lien holder, and any other creditor of the association is to be treated as if he had perfected a lien against the cooperative immediately before termination. Unless the declaration provides that all creditors of the association have that priority:

(1) the lien of each creditor of the association which was perfected against the association before termination becomes, upon termination, a lien against each unit owner's interest in the unit as of the date the lien was perfected;

(2) any other creditor of the association is to be treated upon termination as if the creditor had perfected a lien against each unit owner's interest immediately before termination;

(3) the amount of the lien of an association's creditor described in paragraphs (1) and (2) against each of the unit owners' interest must be proportionate to the ratio which each unit's common expense liability bears to the common expense liability of all of the units;

(4) the lien of each creditor of each unit owner which was perfected before termination continues as a lien against that unit owner's unit as of the date the lien was perfected; and

(5) the assets of the association must be distributed to all unit owners and all lien holders as their interests may appear in the order described

above. Creditors of the association are not entitled to payment from any unit owner in excess of the amount of the creditor's lien against that unit owner's interest.

(j) The respective interests of unit owners referred to in subsections (c), (f), (g), (h), and (i) are as follows:

(1) Except as provided in paragraph (2), the respective interests of unit owners are the fair market values of their units, allocated interests, and any limited common elements immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers must be distributed to the unit owners and becomes final unless disapproved within 30 days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and its allocated interests by the total fair market values of all the units and their allocated interests.

(2) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests of all unit owners are: (i) in a condominium, their respective common element interests immediately before the termination, (ii) in a cooperative, their respective ownership interests immediately before the termination, and (iii) in a planned community, their respective common expense liabilities immediately before the termination.

(k) In a condominium or planned community, except as provided in subsection (h), foreclosure or enforcement of a lien or encumbrance against the entire common interest community does not terminate, of itself, the common interest community, and foreclosure or enforcement of a lien or encumbrance against a portion of the common interest community, other than withdrawable real estate, does not withdraw that portion from the common interest community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not withdraw, of itself, that real estate from the common interest community, but the person taking title thereto may require from the association, upon request, an amendment excluding the real estate from the common interest community.

(l) In a condominium or planned community, if a lien or encumbrance against a portion of the real estate comprising the common interest community has priority over the declaration and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, upon foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the common interest community.

COMMENT

1. This section integrates the corresponding UCA, UPCA, and MRECA provisions governing termination of condominiums, planned communities and cooperatives, respectively. This section continues the distinctions made by UCA, UPCA, and MRECA for each type of common interest community. Each such distinction is discussed in the Comments to this section, below.

2. Historically, there were instances, particularly during the 1930's where cooperatives were terminated, often as a result of foreclosure following the association's failure to pay debt service. Those terminations created enormously complex problems for the coop-

eratives concerned. While few planned communities or condominiums have yet been terminated under present law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes.

For all common interest communities, this Act seeks to deal comprehensively with the problems created by both voluntary and involuntary termination. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common

elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real estate; the circumstance under which sale of units may be imposed on dissenting owners; the powers held by the board of directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire common interest community with respect to the validity of the project; and other matters.

3. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter in a project of any size, and recognizing as well that a vote of the stockholders of a corporation under state corporate law may not adequately protect the interests of the minority, subsection (a) states a general rule that 80% of the votes in the association are required for termination of a project. The declaration may require a larger percentage of the votes and in a non-residential project, it may also permit a smaller percentage. Pursuant to Section 2-119 (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, require the consent of a percentage of the lenders before the project may be terminated.

4. As a result of subsection (a) unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the common interest community despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made. However, in such a case, other unit owners may have rights against the declarant under other law of the state, including the law of equity and contract.

5. Subsection (b) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real estate is

being accomplished by the agreement, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. The agreement becomes effective only when it is recorded.

6. Subsections (c) and (d) deal with the question of when all the real estate in a planned community or condominium, or the common elements, may be sold without unanimous consent of the unit owners. The sections reach a different result based on the physical configuration of the project.

Subsection (c) states that if a planned community or condominium contains only units having horizontal boundaries—a typical high rise building—the unit owners may be required to sell their units upon termination despite objection. Under subsection (d), however, if the project contains any units which do not have horizontal boundaries then the termination agreement may not force dissenting unit owners to sell their units unless the declaration as originally recorded provides otherwise. The reason for the rule stated in subsection (d) is that owners of units not having horizontal boundaries—single family homes, for example—may wish to terminate the common interest community regime and sell the real estate which they supported with their common charges, but continue to own the homes which they occupy.

Obviously, if all the unit owners consent to the sale of the units, sale of the entire development would be possible.

7. Subsection (e) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on the unit owner approval. This subsection also makes clear that, upon termination, title to the real estate shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this subsection makes clear that, until the association delivers title to the property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real estate regime will not be impaired.

8. Subsection (f) contemplates the possibility that a planned community or condominium might be terminated but the real estate not sold.

Subsections (b) and (g), the parallel provisions to Section 2-117(b) and (d) of MIECA, contemplate the same possibility in the case of cooperatives. Termination without sale is not likely to be the usual case, but might occur if the unit owners plan conversion to another form of common interest community, for example, conversion from a cooperative to a condominium. In the case of a cooperative, title to the real estate upon termination would remain in the name of the association as trustee for the unit owners; see subsection (g). In a condominium or planned community, title to the common elements following termination vests in the unit owners as tenants in common if that real estate is not to be sold, see subsection (f), but until a sale occurs vests in the association if the real estate is to be sold; see subsection (e). In the case of a condominium or planned community which contains only units with horizontal boundaries, these title rules also apply to all the units. (See subsection (f)). In the remaining case, i.e., the case where there are some units with horizontal boundaries and some without horizontal boundaries, the Act provides, in subsection (f), that unit owners become tenants in common of the common elements, but continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in both a high rise building and in single story structures, the unit owners in the high rise building will hold individual title to their unit upon termination, and either the declaration or the termination agreement should address the needs for encumbrances of support and access for the high rise units over the real estate which all the unit owners will own as tenants in common. Undoubtedly, the unit owners will immediately reconstitute themselves as some form of common interest community.

Since, after termination of a cooperative title to the real estate remains in the association, it could record a new declaration corresponding to the new form of common interest community adopted, convey the units to the former unit holders, and then itself continue as the new common interest community's association.

9. Subsections (g), (h) and (i) deal with the very complex calculations and priorities which might result upon ter-

mination of a common interest community. These questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted and unsecured creditors of the association.

Those subsections accord different treatment to these issues, depending upon the type of common interest community involved. The separate approaches continue the distinctive treatment which condominiums, planned communities and cooperatives have received under UCA, UPCA and MIECA, respectively. Each approach will be discussed and demonstrated in the comments below.

Termination of Condominiums and Planned Communities

10. Subsection (h) establishes general rules with respect to competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the Act, based on application of an assumed state lien priority rule of "first in time, first in right." In those instances, particularly involving mechanics' liens, where state law often establishes priorities at variance with that rule, that result is also indicated.

EXAMPLE 1:

HYPOTHETICAL FOR EXAMPLES 1A-1H: A planned community consists of 5 detached single family homes on 5 individually owned lots, together with a 6th lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned by the association.

The declaration provides that the Act applies to this development (which would otherwise be exempt as a "small" planned community under Section 1-203). The documents also provide that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent

of first mortgage holders before the unit owners may vote to terminate.

The 5 units were originally sold at equal prices of \$50,000. Common expenses in the project are \$100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the planned community which were senior to the declaration, and the common elements were deeded to the association free of all liens.

A shopping center developer has offered \$380,000 for the purchase of the entire planned community. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The ap-

praisal required by Section 2-118(j) shows that the units are still of equal value.

EXAMPLE 1A:

At the time of termination, the 5 units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of \$50,000.

Unit 2: The owner's first mortgage had an unpaid balance of \$10,000.

Unit 3: The owner's first mortgage had an unpaid balance of \$25,000.

Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total \$20,000.

Under the Act (Section 2-118(g)), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for unit owners and holders of liens on the units as their interests may appear." In these circumstances, the interests of each party in the total value of \$400,000 would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Owners	30,000	40,000	55,000	80,000	80,000

EXAMPLE 1B:

The facts stated in Example 1A remain true. However, at termination, Unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due Owners	28,000	40,000	55,000	80,000	80,000

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that 6 months of the unpaid assessments prime the first mortgage pursuant to Section 3-116(b). Thus, if the sales proceeds had been only \$50,000 per unit, rather than \$80,000, the results with respect to Unit 1 would have been as follows:

Sales Proceeds	\$50,000
6-Month Assessment Due Association	600
Balance	\$49,400
Paid to 1st Mortgage Holder	\$49,400
Loss to 1st Mortgage Lender	(1000)
Loss to Association	(200)

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first 6 months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of 6 months' common expense assessments, as they often do for real property taxes.

EXAMPLE 1C:

The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on Lot 6. The association contracts with XYZ Pool Company to build the pool for \$100,000. XYZ does not take a security interest in the common elements, as it might have done under

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Due Owners	8,800	20,000	35,000	60,000	60,000

EXAMPLE 1D:

All facts stated in Example 1C remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire planned community would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were

Section 3-112; and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and properly perfects its judgment pursuant to Section 3-111 (Tort and Contract Liability). As provided in Section 3-111, liens resulting from judgments against the association are governed by Section 3-117. At the time of termination, XYZ has not been paid, and its claim amounts to \$100,000.

Section 3-117(a) provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a \$20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to \$280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

EXAMPLE 1E:

The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a \$50,000 uninsured judgment is entered against the owner of Unit 4, resulting from his personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Due Owners	8,800	20,000	35,000	10,000	60,000

EXAMPLE 1F:

The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against Unit 4 is perfected, the child secures a judgment against the

association for \$100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Tort Lien	8,800	20,000	20,000	10,000	20,000
Due Owners	-0-	-0-	15,000	-0-	40,000

Note that the child's lien realizes only \$78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unpaid claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which in the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for \$20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at \$20,000, even though he could have

reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

EXAMPLE 1G:

The facts stated in Example 1F remain true. After the Unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P Paving Company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P \$50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not,

however, grant the mechanics' lien priority over any liens perfected before work began. P Paving sues on its

lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
XYZ Pool Lien Personal	20,000	20,000	20,000	20,000	20,000
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	10,000
Tort Lien	-0-	10,000	20,000	-0-	20,000
Due Owners	-0-	-0-	5,000	-0-	30,000

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units are not liable for the balance.

In the example, the common expense lien arises before the P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) 0 months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Common Expense Lien First	000	-0-	-0-	-0-	-0-
Mortgage Liens Common	50,000	40,000	25,000	-0-	-0-
Expense Lien XYZ Pool Lien Personal	000	-0-	-0-	-0-	-0-
Lien, Unit 4	20,000	20,000	20,000	20,000	-0-
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	-0-
Tort Lien	-0-	10,000	20,000	-0-	-0-
Due Owners	-0-	-0-	5,000	-0-	80,000

All the results stated above would be the same as to a condominium.

EXAMPLE 2:

The facts stated in example 1G remain true. Assume, however, that, at the outset, Unit 5 was twice as large

EXAMPLE III:

The facts stated in example 1G remain true. Assume Unit 5, before termination, paid its pro rata share of both the P Paving lien and the tort lien. This reduces the P Paving lien to \$10,000, and the tort lien to \$80,000. Under Section 3-117, this entitles Unit 5 to a partial release of both claims, and neither P Paving nor the child has a further claim against Unit 5. The interests of the parties are as follows:

as the others, sold for \$100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In these circumstances, the results on sale are as follows:

UNIT #	1	2	3	4	5
Sale Proceeds Common	60,000	60,000	60,000	60,000	133,332
Expense Lien First	000	-0-	-0-	-0-	-0-
Mortgage Lien Common	50,000	40,000	25,000	-0-	-0-
Expense Lien XYZ Pool Lien Personal	000	-0-	-0-	-0-	-0-
Lien, Unit 4	15,400	10,000	10,000	10,000	33,333
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	13,333	-0-	20,000
Tort Lien	-0-	1,007	10,000	-0-	33,333
Due Owners	-0-	-0-	-0-	-0-	50,000

Note that all the liens are allocated in accordance with each unit's common expense liability, since no special provision was made for allocating the costs of the pool, the paving or the tort claim. Unit 5 probably did not contemplate the size of its exposure; nevertheless, fewer dollars were available to creditors upon termination than in Example 1G.

EXAMPLE 3:

The facts stated in Example 1G remain true, including the fact that Unit

5 was originally sold at the same price (\$50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, Unit 5 is now worth \$75,000. Three other units have remained at \$50,000, while Unit 1 was neglected, and is now worth only \$40,000. Common expense liabilities never changed. In this example, the total value of the units is now \$265,000. Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1:	(15.09433%)	\$ 60,377
Unit 2:	(18.86793%)	\$ 75,472
Unit 3:	(18.86793%)	\$ 75,472
Unit 4:	(18.86793%)	\$ 75,472
Unit 5:	(28.30188%)	\$113,207
	100.00000%	\$265,000

UNIT #	1	2	3	4	5
Sales Proceeds Common	60,377	75,472	75,472	75,472	113,207
Expense Lien First	000	-0-	-0-	-0-	-0-
Mortgage Lien Common	50,000	40,000	25,000	-0-	-0-
Expense Lien XYZ Pool Lien Personal	000	-0-	-0-	-0-	-0-
Lien, Unit 4	9,177	20,000	20,000	20,000	20,000
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	10,000	5,472	10,000
Tort Lien	-0-	5,472	20,000	-0-	20,000
Due Owners	-0-	-0-	472	-0-	63,207

In this example, the equal distribution of common expense liability coupled with the "fair value" distribution of sales proceeds create the greatest losses for the creditors of the association.

11. Subsection (j)(2) is an exception to the "fair market value" rule. It provides that, if appraisal of any condominium unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available,

which is the common element interest allocated to each unit.

12. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium or planned community, but, if a mortgagee or other lienholder for any other party requires units with a sufficient number of votes, that party can cause the condominium or planned

community to be terminated pursuant to subsection (n) of this section.

13. A mortgage or deed of trust on a unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to subsection (f).

Termination of Cooperatives

14. Subsection (i) deals with the very complex calculations and priorities which might result upon termination of a cooperative, in light of the possibility that the association itself might have its own secured creditors, while unit owners and their creditors would seek to enforce their own claims against the proceeds of sale. The Act recognizes, in considering this issue, that there are two competing interests to be resolved. On the one hand, cooperative developers and lenders have traditionally financed cooperatives through loans to the cooperative association secured by one or more blanket mortgages on the cooperative's real estate. Any uniform proposal to reduce the priorities of some or all such mortgages in favor of creditors secured only by interests in some of the units would have a negative effect on that traditional form of financing.

At the same time, it has become increasingly evident that the frequent inability of unit owners to readily recall their units may be traced in part to the reluctance of spot lenders to place mortgages on individual units which may always be subordinate to the claims of the association's secured creditors, even when those associations creditors obtain their security interest at a date later than the date of the spot loan. As a result, the Conference was urged to draft the Act in a manner which would enhance the financing of individual units.

This section became the focal point for much of that debate. In resolving it, the Act takes a middle approach, by providing the declarant an election among priority systems.

Subsection (i) permits the declarant to include in the declaration a provision that all the association's creditors, upon termination, will have priority over all the interests of unit owners and their creditors. If the declaration does so provide, the association's creditors would enforce their liens in their normal priority, while unsecured creditors of the association would be treated

as if they had perfected their liens immediately prior to termination. Only when all of the association's creditors had been satisfied would the unit owners and their creditors be entitled to participate in the proceeds of sale. Such a result, while significantly different from the result flowing under UCA or UPCA, is a recognition of the fundamental differences between the financing of condominiums and cooperatives. Such a provision would likely maximize the ability of the cooperative to secure initial and subsequent blanket financing, while tending to discourage spot loans for units. Alternatively, Subsection (i) contemplates that the declarant may wish to enhance the financeability of units while insuring that the initial blanket financing of a cooperative will not be jeopardized. Accordingly, it provides that, in the absence of a provision in the declaration which grants senior priority to the association's creditors, the liens of all creditors with an interest in the cooperative's property would be fractionalized upon termination, and would constitute a lien against each unit proportionate to that unit's common expense liability. No lien would lie against the cooperative's real estate as a whole, but a senior blanket mortgage, for example, would constitute a first lien against every unit in proportion to the common expense liabilities of the various units.

15. In the case of fractionalized liens, a particularly complex series of creditors' rights questions arise upon termination. Those questions involve competing claims of holders of first security interests on individual units, the secured and unsecured creditors of individual unit owners, as well as blanket mortgagees and judgment creditors of the association. The second part of subsection (i) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those claims. In considering this problem, in the analogous context of condominiums and planned communities, which mandate fractionalized liens upon termination, comment 10 above includes examples of how these competing claims might be resolved. If all creditors of the association have priority over all creditors of unit owners, of course, the examples set out in comment 10 have to be adjusted appropriately.

Other Provisions

16. Subsection (j) describes the method by which the interests of pro-

prietary lessors are to be calculated, and adopts an appraisal procedure for allocation of the sales proceeds in all three forms of ownership.

It departs significantly from the usual result under most condominium acts. Under those acts the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollar actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed or to the time the termination is approved, so that unit owners may understand the likely financial consequences of the termination. If an initial appraisal made pursuant to subsection (i) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

17. With respect to the association's role as trustee under subsection (g), see Section 3-119.

18. "Foreclosure" in subsection (k) includes deeds in lieu of foreclosure.

and "liens" includes tax and other liens on real estate which may be converted or withdrawn from the project.

19. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the common interest community which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a common interest community which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

20. Subsection (f) recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium or planned community declaration was recorded. Recordation of the declaration should not constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium or planned community documents. For that reason, this section permits the nonconsenting prior lienholder upon foreclosure to exclude the real estate subject to his lien from the condominium or planned community.

§ 2-119. Rights of Secured Lenders

The declaration may require that all or a specified number or percentage of the lenders who hold security interests encumbering the units approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board, or (ii) prevent the association or the executive board from commencing, intervening in, or settling any litigation or proceeding, or (iii) prevent any insurance trustee or the association from receiving and distributing any insurance proceeds except pursuant to Section 3-113.

COMMENT

1. In a number of instances, particularly sale or encumbrances of common elements, or termination of a planned community, a lender's security may be dramatically affected by acts of the as-

sociation. For that reason this section permits the declaration to provide that lender ratification of specified actions of the association is a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would order appointment of a receiver for an association. While this would be possible in a court proceeding, the Act prohibits private contractual granting of such a power.

4. Since it may well be that the association might find itself involved in litigation which would be adverse to

the interests of the lender or the declarant, it is inappropriate for a secured party to be able to control the course of litigation in the absence of the consent of the other parties. In an appropriate case, of course, where the lenders' interests are affected, a lender might seek to intervene as a party.

5. Section 3-113 specifies the distribution of insurance proceeds. In particular, it prevents distribution of those proceeds to lenders until the intended purpose of the insurance has been met. For that reason, under this section the declaration may not provide the lender a right to receive insurance proceeds in any manner except the manner provided in Section 3-113.

6. In addition to the provisions of the declaration, the provisions of individual deeds to units may require that unit owner to secure his lender's consent before taking particular actions.

(2) All members of the executive boards of all common interest communities subject to the master association may elect all members of the master association's executive board.

(3) All unit owners of each common interest community subject to the master association may elect specified members of the master association's executive board.

(4) All members of the executive board of each common interest community subject to the master association may elect specified members of the master association's executive board.

COMMENT

1. This section adopts the approach uniformly adopted by UCA, UPCA and MRECA.

2. It is common in large or multi-phased condominiums or planned communities, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller projects. While it is expected that this phenomenon will be less necessary under this Act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue.

3. Subsection (a) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association if the declaration for the common interest community permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several common interest communities may amend their declarations in similar fashion to provide for this power. Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

4. Subsection (b) limits the ability of a master association to exercise the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more common interest communities. In those cases where it is not so acting, however, the only powers of the unit owners' association which the master asso-

ciation may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of Section 3-102 that all of the powers described in that section may be exercised unless limited by the declaration.

5. Subsection (c) clarifies the liability of the members of the executive board of a unit owners' association when the common interest community for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (c) makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (a), that liability lies with the members of the master association.

6. Subsection (d) addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (d) provide certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the common interest community subject to the master board. For that reason, the rights of notice, voting, and other rights enumerated in the Act are available only to the persons who actually elect the board.

7. Subsection (e) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at large election is reasonable. For that rea-

§ 2-120. Master Associations

(a) If the declaration provides that any of the powers described in Section 3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation ~~for an unincorporated association~~ that exercises those or other powers on behalf of one or more common interest communities or for the benefit of the unit owners of one or more common interest communities, all provisions of this [Act] applicable to unit owners' associations apply to any such corporation ~~for an unincorporated association~~, except as modified by this section.

(b) Unless it is acting in the capacity of an association described in Section 3-101, a master association may exercise the powers set forth in Section 3-102(a)(2) only to the extent expressly permitted in the declaration of common interest communities which are part of the master association or expressly described in the delegations of power from those common interest communities to the master association.

(c) If the declaration of any common interest community provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(d) The rights and responsibilities of unit owners with respect to the unit owners' association set forth in Sections 3-103, 3-108, 3-109, 3-110, and 3-112 apply in the conduct of the affairs of a master association only to persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this [Act].

(e) Even if a master association is also an association described in Section 3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each common interest community the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

(1) All unit owners of all common interest communities subject to the master association may elect all members of the master association's executive board.

son, subsection (c) provides that, after the period of declarant control has terminated, there may be 4 ways of electing the master association board. Those four ways are: (1) at-large election of the master board among all the common interest communities subject to the master association, (2) at-large election of the master board only among the members of the executive boards of all common interest communities subject to the master association, (3) each common interest community might have designated positions on the

master board, and those spaces could be filled by an at-large election among all the members of each common interest community, or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each common interest community. It would only be in the case of an at-large election of the master board among all common interest communities that subsection (d) would have no relevance.

§ 2-121. Merger or Consolidation of Common Interest Communities

(a) Any 2 or more common interest communities of the same form of ownership, by agreement of the unit owners as provided in subsection (b), may be merged or consolidated into a single common interest community. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant common interest community is the legal successor, for all purposes, of all of the pre-existing common interest communities, and the operations and activities of all associations of the pre-existing common interest communities are merged or consolidated into a single association that holds all powers, rights, obligations, assets, and liabilities of all pre-existing associations.

(b) An agreement of 2 or more common interest communities to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded, and certified by the president of the association of each of the pre-existing common interest communities following approval by owners of units to which are allocated the percentage of votes in each common interest community required to terminate that common interest community. The agreement must be recorded in every [county] in which a portion of the common interest community is located and is not effective until recorded.

(c) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant common interest community either (i) by stating the reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall allocated interests of the new common interest community which are allocated to all of the units comprising each of the pre-existing common interest communities, and providing that the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing common interest community must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing common interest community.

COMMENT

1. There may be circumstances where common interest communities may wish to merge or consolidate their activities by the creation of a single common interest community; this section provides for that possibility.

Subsection (a) makes it clear that a merger or consolidation may occur by the same vote of the unit owners nec-

essary to terminate the common interest community. If 2 or more common interest communities are merged or consolidated, the resulting common interest community is for all purposes the legal successor of the pre-existing common interest community, with a single association for all purposes. In the event common interest communities

did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to Section 2-120.

2. Under subsection (b), the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (c) does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (c) may be included. The important point that subsection (c) makes is that the reallocation of the allocated interests must be carefully stated.

Subsection (c) states 2 alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of allocated interests to each unit, or by stating the formulas by which those interests may be allocated to each unit in all of the pre-existing common interest communities. Alternatively, the merger or consolidation agreement may state the percentage of overall allocated interests allocated to "all of the units comprising each of the pre-existing common interest communities." The agreement might then also provide that the position of the percentage allocated to each unit from among the shares allocated to each common interest community will be equal to the percentage of allocated interests allocated to that unit by the declaration of the pre-existing common interest community. An example of how this alternative formulation would operate may be useful.

EXAMPLE:

Assume that 2 adjoining planned communities wish to merge their activities into one planned community. Assume that the first planned community consists of 10 one-bedroom units, with an annual budget of \$10,000. Assume further that each of the units, being identical, has an equal common expense liability of 10% and one vote per unit.

The second planned community consists of 40 units, with 20 2-bedroom units and 20 3-bedroom units. The budget of the second planned community consists of \$70,000 per year. Each of the 2-bedroom units has been allocated a 2% common expense liability, while each of the 3-bedroom units has been allocated a 3% common expense liability. Finally, each of the units in the second planned community also has an equal vote.

There is no provision in the Act which mandates a particular allocation among planned communities 1 and 2 as to either common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii), to state "the percentage of overall common expense liabilities and votes in the new association" as follows: as to common expense liabilities, they might allocate 12.5% of the common expense liabilities in the merged project to planned community 1, and 87.5% thereof to planned community 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing planned community must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing planned community" as required by subsection (c), each unit in planned community 1 would then have allocated to it 1.25% of the common expense liabilities in the new planned community. It happens that 1.25% of the common expenses of a merged planned community which has a budget of \$80,000 equals \$1,000.

Under the same rationale, if each of the 2-bedroom units in the second planned community, to which were formerly allocated 2% of the common expense liabilities, now has allocated 2% of the 87.5% allocated to the second planned community, each of those units would then have allocated to it 1.75% of the common expense liabilities of the new planned community. 1.75% of \$80,000 is \$1,400. Similarly, each of the 3-bedroom units would then have allocated to it 2.625% of the common expense liabilities in the merged planned community. That percentage of the common expense liabilities of \$80,000 would yield an annual cost of \$2,100, the same cost as previously obtained in planned community 2.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both planned communities, this would have the effect of giving 20% of the votes to planned community 1, even though planned community 1 had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the ex-

petations of the unit owners in both planned communities. Alternatively, planned community 1 might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second planned community, then each

of the unit owners in planned community 2 would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to paragraphs (c) (i) rather than (c) (ii).

The same result would be reached in a merger of planned communities or cooperatives.

§ 2-122. Addition of Unspecified Real Estate

In a planned community, if the right is originally reserved in the declaration, the declarant in addition to any other development right, may amend the declaration at any time during as many years as are specified in the declaration for adding additional real estate to the planned community without describing the location of that real estate in the original declaration; but, the amount of real estate added to the planned community pursuant to this section may not exceed 10 percent of the real estate described in Section 2-105(a)(3) and the declarant may not in any event increase the number of units in the planned community beyond the number stated in the original declaration pursuant to Section 2-105(a)(5).

COMMENT

In assembling land for large "new town" planned communities, developers have from time to time been unable to secure small parcels of real estate within the outer boundaries of the development at the time the original covenants for the development were recorded. Subsequently, however, for a variety of reasons, those parcels may become available and would logically form a part of the overall development. As a matter of policy, there is no reason to prohibit the amendment of the declaration to permit the addition of that land to the development, so long as that addition does not substantially increase the potential common expenses of the unit owners, nor the density of the project as originally projected by the declarant in his public offering statement.

This section was designed to address this relatively unusual problem. It permits the declarant to add those ut-

ter-required parcels of real estate to the development. This power is available only if the declarant makes clear in his original declaration that this development right has been reserved. The section also requires the declarant to impose his own time limit on the period during which this development right may be exercised. To foreclose the possibility of an increase in the density of the project beyond that which was originally contemplated, the section also prohibits the declarant from increasing the number of units in the planned community beyond the number originally stated in the declaration. Finally, to impose a reasonable limitation on the amount of new land that may be added, the amount of real estate added to the planned community pursuant to this section may not exceed 10% of the real estate originally subjected to the declaration.

or seek injunctive relief for violation of its declaration, bylaws or rules

ARTICLE 3

MANAGEMENT OF THE COMMON INTEREST COMMUNITY

§ 3-101. Organization of Unit Owners' Association

A unit owners' association must be organized no later than the date the first unit in the common interest community is conveyed. The membership of the association at all times consists exclusively of all unit owners or, following termination of the common interest community, of all former unit owners entitled to distributions of proceeds under Section 2-118 or their heirs, successors, or assigns. The association must be organized as a profit or nonprofit corporation, trust, [or] partnership [, or as an unincorporated association].

COMMENT

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the common interest community even during a period of declarant control reserved pursuant to Section 3-103(d).

2. The bracketed language preserves the flexibility existing in practically all states today to organize the association of a condominium, cooperative or

planned community as a profit or nonprofit corporation, trust or partnership. Most associations are either corporations or unincorporated associations, but occasionally developers or their lawyers have found trust or partnership forms valuable. Although at least one state (Georgia) requires the organization of a condominium association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

§ 3-102. Powers of Unit Owners' Association

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association [, even if unincorporated,] may:

- (1) adopt and amend bylaws and rules and regulations;
- (2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;
- (3) hire and discharge managing agents and other employees, agents, and independent contractors;
- (4) institute, defend, or intervene in litigation or administrative proceedings in its own name or behalf of itself or 2 or more unit owners on matters affecting the common interest community;
- (5) make contracts and incur liabilities;
- (6) regulate the use, maintenance, repair, replacement, and modification of common elements;
- (7) cause additional improvements to be made as a part of the common elements;
- (8) acquire, hold, encumber, and convey in its own name any right, title, or interest in real estate or personal property, but (i) common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to Section 3-112 and (ii) part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to Section 3-112;
- (9) grant easements, leases, licenses, and concessions through or over the common elements;

(10) impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in Sections 2-102(2) and (4), and for services provided to unit owners;

(11) impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules, and regulations of the association;

(12) impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments;

(13) provide for the indemnification of its officers and executive board and maintain directors' and officers' liability insurance;

(14) assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;

(15) exercise any other powers conferred by the declaration or bylaws;

(16) exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and

(17) exercise any other powers necessary and proper for the governance and operation of the association.

(b) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

COMMENT

1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-100.

3. This Act makes clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that a condominium association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph (8) refers to the power granted by Section 3-112, upon a vote of the requisite number of unit owners, to sell or encumber common elements in a condominium or planned community or to sell part or encumber all or part of a cooperative without a termination of the common interest community. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners.

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the common interest community. These powers are intended to be in addition to any rights which the association may have under other law.

6. Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration—for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources

such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

7. If the association is incorporated, it may, pursuant to paragraph (16),

exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (16), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-109.

§ 3-103. Executive Board Members and Officers

(a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this Act, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board are required to exercise ~~all powers conferred by the declaration, the care required of fiduciaries of the unit owners and all powers conferred by the unit owners, ordinary and reasonable care.~~

(b) The executive board may not act on behalf of the association to amend the declaration (Section 2-117), to terminate the common interest community (Section 2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (Section 3-103(f)), but the executive board may fill vacancies in its membership for the unexpired portion of any term.

(c) Within 30 days after adoption of any proposed budget for the common interest community, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. Unless at that meeting a majority of all unit owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners must be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) 60 days after conveyance of 75 percent of the units that may be created to unit owners other than a declarant; (ii) 2 years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) 2 years after any right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event the declarant may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(e) Not later than 60 days after conveyance of 25 percent of the units that may be created to unit owners other than a declarant, at least one member and not less than 25 percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than 60 days after conveyance of 50 percent of the units that may be created to unit

owners other than a declarant, not less than [33 1/3] percent of the members of the executive board must be elected by unit owners other than the declarant.

(f) Except as otherwise provided in Section 2-120(e), not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least 3 members, at least a majority of whom must be unit owners. The executive board shall elect the officers. The executive board members and officers shall take office upon election.

(g) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant.

COMMENT

1. Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board.

2. The provisions of paragraph (c) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect.

3. Subsections (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

4. Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

5. Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

(b) Upon transfer of any special declarant right, the liability of a transferor or declarant is as follows:

(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this [Act]. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.

(2) If a successor to any special declarant right is an affiliate of a declarant (Section 1-103(1)), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the common interest community.

(3) If a transferor retains any special declarant rights, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this [Act] or by the declaration relating to the retained special declarant rights and arising after the transfer.

(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant or real estate in a common interest community subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that property held by that declarant, or only to any rights reserved in the declaration pursuant to Section 2-115 and held by that declarant to maintain models, sales offices, and signs. The judgment or instrument conveying title must provide for transfer of only the special declarant rights requested.

(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of all interests in a common interest community owned by a declarant:

(1) the declarant ceases to have any special declarant rights, and

(2) the period of declarant control (Section 3-103(d)) terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

(e) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:

(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by this [Act] or by the declaration.

(2) A successor to any special declarant right, other than a successor described in paragraphs (3) or (4) or a successor who is an affiliate of a declarant, is subject to the obligations and liabilities imposed by this [Act] or the declaration:

(i) on a declarant which relate to the successor's exercise or non-exercise of special declarant rights; or

(ii) on his transferor, other than:

(A) misrepresentations by any previous declarant;

(B) warranty obligations on improvements made by any previous declarant, or made before the common interest community was created;

(C) breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or

§ 3-104. Transfer of Special Declarant Rights

(a) A special declarant right (Section 1-103(20)) created or reserved under this [Act] may be transferred only by an instrument evidencing the transfer recorded in every [county] in which any portion of the common interest community is located. The instrument is not effective unless executed by the transferee.

following
further
notice
under AS
34.08.390

(D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (Section 2-115), may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement [.] and any liability arising as a result thereof [and obligations under Art. 10-5].

(4) A successor to all special declarant rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the executive board in accordance with Section 3-103(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, the successor declarant is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under Section 3-103(d).

(f) Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this [Act] or the declaration.

COMMENT

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a common interest community. There are two parts to the problem. First, what obligations and liabilities to unit owners (both existing and future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the community, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor

over whom he has no control. Similarly, the section absolves a non-affiliated transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (e.g., a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a project to a successor without a concomitant trans-

fer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

A declarant may wish to transfer special declarant rights as a part of his transfer to another person of units already constructed in a cooperative. If the declaration has specified that units are personal property, the transfer of the units themselves will be personal property transfers not subject to the real estate recording act. However, under subsection (a), if special declarant rights are to be transferred, that transfer must be evidenced by an instrument recorded in every county in which the cooperative lies. The intent of that provision is that the recording be in the land records and identify the real estate involved so that a title examination relating to the land in the cooperative would reveal the transfer of the special declarant right.

In a common interest community, a mortgage recorded prior to the recordation of the declaration would have priority over any rights of declarants or unit owners arising under the declaration. However, under Section 2-118(k) and (l), foreclosure of such a mortgage does not automatically terminate the effectiveness of a condominium or planned community declaration; the declaration becomes ineffective as to the land covered by the prior mortgage only if the purchaser at the foreclosure sale records an instrument excluding the real estate from the condominium or planned community. If the purchaser on the foreclosure of the prior mortgage elects to have the real estate remain in the condominium or planned community, it becomes a successor declarant subject to the general rules of this section, including those applicable to persons who acquire special declarant rights by virtue of foreclosure sales (subsection c).

However, under the Act, foreclosure of a mortgage which is prior to a cooperative declaration automatically removes the real estate from the cooperative since there is nothing in the Act which would change the ordinary rule that the foreclosure of a mortgage which is prior to any restrictive covenants or easements results in a transfer free of those "junior interests." (See Section 2-118(k) and (l)).

Therefore, in the absence of some contractual arrangement between the mortgagee and the association under which the buyer at the foreclosure sale has a right to reconvey the property

to the association, the purchaser at the foreclosure sale could not succeed to any development rights of the declarant since the property would be removed from the cooperative by the foreclosure sale itself. However, there is nothing in the act which would preclude the developer from having the association contractually obligate itself to retake title to foreclosed property on specified terms. If the underlying mortgage is of the entire cooperative property, there would probably be no advantage in such an arrangement since the foreclosing mortgagee with the entire project could set up his own cooperative association and undertake new marketing efforts without regard to the obligations and liabilities of the prior cooperative association. If, on the other hand, the mortgage is on only a portion of the cooperative project there may be distinct advantage in giving the purchaser at the foreclosure sale the power to reconvey the property to the association and having the purchaser become owner of the units which would exist or could be created in the property. In such a case, the position of the mortgagee would be essentially the same as that of a declarant who acquires the special declarant right to add additional land to the cooperative.

If the developer, while in control of the cooperative association, has had the cooperative association grant a mortgage in its real estate and has subordinated the declaration to the mortgage, the situation is the same as that just described: on foreclosure, that real estate would no longer be a part of the cooperative. Again, in the ordinary case no special declarant rights could pass to the purchaser at the foreclosure sale since he would not have any real estate in the cooperative. If, however, the association is obligated to accept a reconveyance of the real estate which has been foreclosed the purchaser at the foreclosure sale would have special declarant rights as just described.

If the declarant in a cooperative has given a mortgage or security interest in his own special declarant rights or in his unsold units, purchasers at the foreclosure sale would acquire rights as to property still in the cooperative and would therefore be able to succeed to the declarant's special declarant rights.

4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing and future) for all obligations and liabilities, including

warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in Section 1-103(1)), the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b) and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (c). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor by foreclosure or conveyance in lieu of foreclosure) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which relate to the rights he holds. Such a transferee also is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (c)(2)(ii). For example, because of the exclusions in (c)(2)(ii), a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however, to complete improvements which the developer is obligated to complete under Section 4-110.

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (c) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (i.e., persons whose sole interest in the project is the protection of debt security) in three ways. First, subsection

(c) provides that, in the case of a foreclosure of a security interest or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of all units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights then, under subsection (d), those special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described, or by a conveyance in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (c), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who holds special declarant rights solely for transfer is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, paragraph (3) of subsection (c) provides that a successor who has only the right to maintain model units, sales offices, and signs does not there-

by become subject to any obligations or liabilities as a declarant, except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act.

Under Section 2-110, a declarant may reserve the right to create additional units in portions of a common interest community which were originally designated as common elements, even though, in a condominium, rights

of unit owners have otherwise attached to the common elements, and even though, in a planned community or cooperative, the common elements have been conveyed to the association. The declarant, upon creation, becomes the owner of any units created. The right to create the units is an interest in land which may be sold or in which a security interest may be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d), the purchaser may limit his liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (c)(4) or may buy the rights under paragraph (e).

§ 3-105. Termination of Contracts and Leases of Declarant

If entered into before the executive board elected by the unit owners pursuant to Section 3-103(f) takes office, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office upon not less than [90] days' notice to the other party. This section does not apply to: (i) any lease the termination of which would terminate the common interest community or reduce its size, unless the real estate subject to that lease was included in the common interest community for the purpose of avoiding the right of the association to terminate a lease under this section, or (ii) a proprietary lease.

COMMENT

1. This section deals with a common problem in the development of condominium, planned community and cooperative projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem in two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the common interest community and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his

business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (i.e., any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party, or any contract or lease previously entered into by the declarant which is not bona fide or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses the usual leasehold common interest community situation where the underlying real estate is subject to a long-term ground lease. Because termination of the ground lease would terminate the community, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the common interest community was to prevent termination of the lease, the lease may nevertheless be terminated.

§ 3-106. Bylaws

(a) The bylaws of the association must provide

(1) the number of members of the executive board and the titles of the officers of the association;

(2) election by the executive board of a president, treasurer, secretary, and any other officers of the association the bylaws specify;

(3) the qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;

(4) which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;

(5) which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and

(6) a method for amending the bylaws.

(b) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

COMMENT

1. Because the Act does not require the recording of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the common interest community. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The requirement, set forth in subsection (a)(5), that the bylaws designate which of the officers of the association has the responsibility to pre-

pare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain), Section 2-106 (expiration of certain leases), Section 2-112 (Relocation of Boundaries Between Adjoining Units), and Section 2-113 (subdivision or conversion of units). Section 2-117(c) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

§ 3-107. Upkeep of Common Interest Community

(a) Except to the extent provided by the declaration, subsection (b), or Section 3-113(h), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

(b) In addition to the liability that a declarant as a unit owner has under this [Act], the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the common interest community is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.

(c) In a planned community, if all development rights have expired with respect to any real estate, the declarant remains liable for all expenses of that real estate unless, upon expiration, the declaration provides that the real estate becomes common elements or units.

COMMENT

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. See Section 1-103(10). As a result, under subsection (a), unless the declaration provides that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and re-

placement for such limited common elements is assessed against all the units in the common interest community, unless the declaration provides for such expenses to be paid only by the units benefited. See Comment 1 to Section 2-108.

2. Under Section 2-110, a declarant may reserve the right to create units in portions of the common interest community originally designated as common elements. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate even though, in the case of a planned community or cooperative, it has been conveyed to the association. As to real estate taxes, see Section 1-105(e).

§ 3-108. Meetings

A meeting of the association must be held at least once each year. Special meetings of the association may be called by the president, a majority of the executive board, or by unit owners having 20 percent, ~~as may be determined and specified in the bylaws of the association.~~ Not less than [10] nor more than [60] days in advance of any meeting, the secretary or oth

sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove an officer or member of the executive board.

§ 3-109. Quorums

(a) Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast [20] percent of the votes that may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast [50] percent of the votes on that board are present at the beginning of the meeting.

COMMENT

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort common interest communities where many owners may reside elsewhere, often at considerable distances, for most of the year.

§ 3-110. Voting; Proxies

(a) If only one of several owners of a unit is present at a meeting of the association, that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is no majority agreement if any one of the owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

(b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.

(c) If the declaration requires that votes on specified matters affecting the common interest community be cast by lessees rather than unit owners of leased units: (i) the provisions of subsections (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners. Unit owners must also be given notice, in the manner provided in Section 3-108, of all meetings at which lessees are entitled to vote.

(d) No votes allocated to a unit owned by the association may be cast.

COMMENT

Subsection (c) addresses an increasingly important matter in the governance of common interest communities: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give les-

sees, other than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the common interest community.

§ 3-111. Tort and Contract Liability

Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the common interest community which that declarant has the responsibility to maintain. Otherwise, an action alleging a wrong done by the association must be brought against the association and not against any unit owner. If the wrong occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner for (i) all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) all costs that the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from maintaining an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by Section 3-117 (Other Liens).

COMMENT

1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subse-

ction (a) provides that the association or any unit owner has a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. If a suit based on a claim which accrued during the period of developer control is brought against the association after control of the association has passed from the developer, reason-

able notice to, and grant of an opportunity to the developer to defend, are conditions to developer liability. If, however, suit is brought against the association while the developer is still

in control, obviously the developer cannot later resist a suit by the association for reimbursement on the grounds of failure to notify.

§ 3-112. Conveyance or Encumbrance of Common Elements

(a) In a condominium or planned community, portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but all owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses. Proceeds of the sale are an asset of the association.

(b) Part of a cooperative may be conveyed and all or part of a cooperative may be subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but, if fewer than all of the units or limited common elements are to be conveyed or subjected to a security interest, then all unit owners of those units, or the units to which those limited common elements are allocated, must agree in order to convey those units or limited common elements or subject them to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association. Any purported conveyance or other voluntary transfer of an entire cooperative, unless made pursuant to Section 2-118, is void.

(c) An agreement to convey common elements in a condominium or planned community, or to subject them to a security interest, or in a cooperative, an agreement to convey any part of a cooperative or subject it to a security interest, must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every [county] in which a portion of the common interest community is situated, and is effective only upon recordation.

(d) The association, on behalf of the unit owners, may contract to convey an interest in a common interest community pursuant to subsection (a), but the contract is not enforceable against the association until approved pursuant to subsections (a), (b), and (c). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(e) Unless made pursuant to this section, any purported conveyance, encumbrance, judicial sale, or other voluntary transfer of common elements or of any other part of a cooperative is void.

(f) A conveyance or encumbrance of common elements or of a cooperative pursuant to this section does not deprive any unit of its rights of access and support.

(g) Unless the declaration otherwise provides, a conveyance or encumbrance of common elements pursuant to this section does not affect the priority or validity of pre-existing encumbrances.

(h) In a cooperative, the association may acquire, hold, encumber, or convey a proprietary lease without complying with this section.

Comment

1. Subsection (a) provides that a condominium or planned community association may sell or encumber portions of the common elements and subsection (b) provides that a cooperative association may sell part, or encumber all, of the cooperative. The difference in treatment of condominiums and planned communities, on the one hand, and cooperatives, on the other, arises out of the fact that in a cooperative title to the entire cooperative is in the association. Also, historically, cooperative associations have had greater control over the regime real estate, including the units, than has been the case in condominiums or planned communities.

The power given by subsections (a) and (b) can be exercised only on agreement of unit owners holding 80% of the votes in the association (80% is the percentage required for termination of a common interest community under Section 2-118). This power may be exercised during the period of declarant control, but, in order to be effective, 80% of non-declarant unit owners must approve the action. The ability, without termination, to sell common elements in a condominium or planned community or to sell part of a cooperative gives common interest communities desirable flexibility. For example, the unit owners, some years after the initial creation of the common interest community may decide to convey away a portion of the open

space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber real estate in the common interest community gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

2. Subsection (c) requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite majority of the unit owners. The agreement then must be recorded in the land records. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full power to execute a deed or mortgage. Under subsection (d) it is contemplated that the association will execute the actual instrument of conveyance. Under subsection (f), a conveyance or encumbrance under this section may not deprive a unit owner of rights of access and support.

§ 3-113. Insurance

(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

(1) property insurance on the common elements and, in a planned community, also on property that must become common elements, insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion building, against fire and extended coverage perils. The total amount of insurance after application of any deductibles must be not less than 100 percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations, and other items normally excluded from property policies; and

(2) liability insurance, including medical payments insurance, in an amount determined by the executive board but not less than any amount specified in the declaration, covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in

connection with the use, ownership, or maintenance of the common elements and, in cooperatives, also of all units.

(b) In the case of a building that is part of a cooperative or that contains units having horizontal boundaries described in the declaration, the insurance maintained under subsection (a)(1), to the extent reasonably available, must include the units, but need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsections (a) and (b) is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it considers appropriate to protect the association or the unit owners.

(d) Insurance policies carried pursuant to subsections (a) and (b) must provide that:

(1) each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association;

(2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household;

(3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and

(4) if, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.

(e) Any loss covered by the property policy under subsections (a)(1) and (b) must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any holder of a security interest. The insurance trustee or the association shall hold any insurance proceeds in trust for the association, unit owners, and lien holders as their interests may appear. Subject to the provisions of subsection (b), the proceeds must be disbursed first for the repair or restoration of the damaged property, and the association, unit owners, and lien holders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the common interest community is terminated.

(f) An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.

(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner or holder of a security interest. The insurer issuing the policy may not cancel or refuse to renew it until 30 days after notice of the proposed cancellation or non-renewal has been mailed to the association, each unit owner and each holder of a security interest to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

(h) Any portion of the common interest community for which insurance is required under this section which is damaged or destroyed must be repaired or replaced promptly by the association unless (i) the common interest community is terminated, in which case Section 2-102 applies (ii) repair or replacement would be illegal under any state or local statute or ordinance governing health or safety, or (iii) 80 percent of the unit owners, including every owner of a unit or assigned limited common element that will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire common interest community is not repaired or replaced, (i) the insurance proceeds attributable to

the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the common interest community, and (ii) except to the extent that other persons will be distributees (Section 2-105(a)(2)(ii)), (A) the insurance proceeds attributable to units and limited common elements that are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lien holders, as their interests may appear, and (B) the remainder of the proceeds must be distributed to all the unit owners or lien holders, as their interests may appear, as follows: (1) in a condominium, in proportion to the common element interests of all the units and (2) in a cooperative or planned community, in proportion to the common expense liabilities of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations.

(i) The provisions of this section may be varied or waived in the case of a common interest community all of whose units are restricted to non-residential use.

COMMENT

1. Subsections (a) and (b) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

2. Subsection (b) represents a significant departure from the present law as to condominiums and planned communities in virtually all states by requiring that the association obtain and maintain property insurance on both the common elements and the units within buildings with "stacked" units. See Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

The Act does not mandate association insurance on condominium or planned community units in town house or other arrangements in which there are no stacked units. However, if the

developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units.

In a cooperative, the association must carry insurance on all units since legal title to all units is in the association.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Section 1-103(4) and (3) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, and if ceilings, walls, or floors are boundaries, the provisions of Section 2-102 apply.

Section 2-102 provides that, if the declaration is silent, all nonloadbearing and nonstructural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited

ited common element (see definition in Section 1-103(19)), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

Under 2-102, all spaces, interior partitions, electrical, plumbing and mechanical systems, and all other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit.

Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of a stacked unit, the item is insured by the association. (Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If improvements or betterments are made to a unit by a unit owner, they will typically be covered under the owner's insurance policy, even if the unit itself is generally covered by the association's policy, since most policies exclude "improvements or betterments made by the owner", and the Act does not mandate improvements and betterments coverage. The subject is a complex one, and careful attention should be paid to it by the association's insurance advisor.

4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many common interest community documents require insurance in an amount equal to 100% of the replacement cost of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (a) (2) covers only the liability of the association, and unit

owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit.

7. Clause (i) of the third sentence of subsection (b) would operate as follows: (1) if the common interest community consists of campsites, restoration after fire damage might consist of merely resodding the area damaged; (2) if the common interest community consists of separate garden type buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the common interest community consists of a single high-rise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the common interest community" would be damaged and unrepaired.

8. The scheme of this section, as set forth in subsection (b), is that any damage or destruction to any portion of the common interest community must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the common interest community or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (c) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the common interest community that may be required.

If units or limited common elements are not rebuilt, insurance proceeds are to be distributed to lienholders or owners of units unless the declaration provides that such payments are to go to some other person.

§ 3-114. Surplus Funds

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves must be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

COMMENT

Surplus funds of the association are generally used first for the prepayment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (e.g., the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

§ 3-115. Assessments for Common Expenses

(a) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After an assessment has been made by the association, assessments must be made at least annually, based on a budget adopted at least annually by the association.

(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to Section 2-107(a) and (b). Any past due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding 12 percent per year.

(c) To the extent required by the declaration:

(1) any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides;

(2) any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and

(3) the costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.

(d) Assessments to pay a judgment against the association (Section 3-117(a)) may be made only against the units in the common interest community at the time the judgment was entered, in proportion to their common expense liabilities.

(e) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.

(f) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due must be recalculated in accordance with the reallocated common expense liabilities.

COMMENT

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of project development, to pay all of the expenses of the common interest community himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in

the project and wishes to avoid billing the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the common interest community, is unwilling to make payments for replacement reserves or for other expenses which he expects

if such an assessment can be determined, if not the

will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (e), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a common interest community after a judgment has been entered against the association, the new units are not as-

sessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a common interest community by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision of units).

§ 3-113. Lien for Assessments

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and curtesy, or other exemption].]

(c) If the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code].

(4) In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

(k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms, must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, of the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record 7 weeks before the date specified in the notice as the date of any public sale or 7 weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until 5 weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the debtor is liable for any deficiency in a foreclosure sale. under AS 9.45.170.

(3) The proceeds of a foreclosure sale must be applied in the following order:

- (i) the reasonable expenses of sale;
- (ii) the reasonable expenses of securing possession before sale; holding, maintaining, and preparing the unit for sale, including pay-

ment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by agreement between the association and the unit owner, reasonable attorney's fees and other legal expenses incurred by the association;

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record; and

(v) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by him after a foreclosure of the association's lien by power of sale and that he was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of non-payment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

COMMENT

1. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recording of the declaration, thus imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit.

If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)(ii) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

2. Units may be part of two common interest communities. For example, a large real estate development

may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

3. Subsection (f) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in Subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the state as to eviction of tenants.

If the unit owner's interest is real estate, subsection (j)(2) then offers

the state two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the state can choose the 2d alternative: power of sale under subsection (k) of this section.

Subsection (k), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time consuming, and inefficiency producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owner's interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 2-105, the unit owner's interest in a cooperative will be real property or personal property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various states as a permissible method of foreclosure in that housing area without serious challenge.

In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the state rather than setting out a special faster method of foreclosure in the statute.

§ 3-117. Other Liens

(a) In a condominium or planned community:

(1) Except as provided in paragraph (2), a judgment for money against the association [if recorded] [if docketed] [if [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment]], is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the units in the common interest community at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(2) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(3) Whether perfected before or after the creation of the common interest community, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the common interest community), becomes effective against two or more units, the unit owner of an affected unit may pay to the lien holder the amount of the lien attributable to his unit, and the lien holder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(4) A judgment against the association must be indexed in the name of the common interest community and the association and, when so indexed, is notice of the lien against the units.

(b) In a cooperative:

(1) If the association receives notice of an impending foreclosure on all or any portion of the association's real estate, the association shall promptly transmit a copy of that notice to each unit owner of a unit located within the real estate to be foreclosed. Failure of the association to transmit the notice does not affect the validity of the foreclosure.

(2) Whether or not a unit owner's unit is subject to the claims of the association's creditors, no other property of a unit owner is subject to those claims.

COMMENT

1. This section deals with the effect on unit owners of judgments against the association. The issue is not free from difficulty. Presently, in most states, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against the property of the association. On the other hand, if the association is organized as an unincorporated association, under the law of most states each unit owner would have joint and several liability on the judgment. This Act strikes a balance between the two extremes.

2. In condominiums and planned communities, the Act makes the judgment lien a direct lien against each individual unit, but allows the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment based on that unit's relative common expense liability. The judgment would also create a lien against any property owned by the association. In cooperatives, title to the units is in the cooperative so that it is not necessary for the Act to provide that a judgment against the association creates a lien against units. The Act does provide, however, that no property of a cooperative unit owner other than the unit is subject to the claims

of association creditors. The result is that the relationship between creditors of the association and unit owners is similar in all three forms of ownership.

There are, however, significant differences between cooperatives and condominiums or planned communities as to the position of unit owners as against association creditors. In one respect cooperative unit owners have greater liability than condominium or planned community unit owners and in another respect they have lesser liability.

They have greater liability in that, in a cooperative, if a judgment lien has priority over a unit owner's interest in a unit, the lien against the unit is not limited to the unit's common expense liability percentage. In contrast, in a condominium or planned community, the lien against a unit is only for the unit owner's share of the common expense liability. For example, suppose a four unit planned community in which there is a judgment against the association for \$50,000. Further suppose that each of the units has a value of \$100,000 and that there are outstanding mortgages as follows:

	Unit A	Unit B	Unit C	Unit D
Value	\$100,000	\$100,000	\$100,000	\$100,000
Mortgage	50,000	10,000	90,000	75,000
Equity	50,000	10,000	10,000	25,000

In a condominium or planned community, the judgment lien attaches to each unit in proportion to that unit's liability for common expense liability. If, in the above example, the common expense liability is equal, the lien would attach to each unit for \$12,500. Therefore, the association judgment creditor could reach the full equity of Unit owners B and C in their units, but could reach only \$12,500 of the interest of Unit owners A and D. Since the association cannot assess A and D for any additional amounts of the judgment, if B and C allow their interest to be foreclosed and foreclosure produces only \$20,000, the association judgment creditor will collect only \$15,000 of its \$50,000 judgment. That is less than it would collect if all unit owners' interests in units were fully liable, but more than it would collect if only association assets were subject to attachment. (The judgment creditor may, however, satisfy his judgment in full by reaching the income stream of the association by appropriate creditor process.)

In a cooperative, on the other hand, the association creditor can reach the entire interest of any of the unit owners in their units and will have its judgment satisfied in full.

The liability of cooperative unit owners to association judgment creditors is less than that of unit owners in condominiums and planned communities in that there is no statutory provision giving the judgment creditor a direct lien against units. Since, in a cooperative, title to the units is in the cooperative, a judgment creditor of the association will have a lien on the units, but under ordinary recording and pri-

ority rules, that lien will be subordinate to unit owner interests in units if those interests were recorded prior to the attachment of the judgment lien. Therefore, in a cooperative, there is a possibility that the judgment lienor will have no rights as against the interests of the unit owners. However, the declaration may provide that association creditors have priority over the interests of cooperative unit owners, and, if it does so, such a provision is effective (See Section 2-118), and even in the absence of Section 2-118 would be effective, as a general subordination of unit owner interests to creditors of the association. (The Act in Section 2-118 requires that all creditors of the association be treated in the same way as to priority against unit owners so that the declaration cannot provide, for example, that only contract creditors have priority over unit owners or, for another example, that only regulated financial institution debt has priority. However, the unit owners might subordinate their interest to the rights of individual creditors of the association by giving that individual creditor a subordination agreement.)

However, upon termination of the cooperative, liens against the cooperative which did not have priority over the cooperative interests do become proportional fractional liens against each individual cooperative interest (see Section 2-118(f) and the comments thereto).

3. The provisions of Section 2-117 applicable to condominiums and planned communities were adopted after substantial consideration by the committee and the National Conference and achieve what the drafters believe

Is appropriate unit owner liability for association debts. The somewhat different treatment given cooperatives arises out of the different history of cooperatives and out of the different tradition as to financing of cooperatives. The rules just stated in effect continue the existing law as to the relationship between cooperative unit owners (today commonly called proprietary lessees) and association creditors. The provisions also take account of a common way of financing cooperatives: In the typical cooperative, the cooperative association will take title to the real estate and will assume or take subject to existing mortgages on the real estate, or if there are no existing mortgages, will borrow a significant portion of the purchase price of the cooperative real estate and secure that price by a mortgage on the real estate. Thereafter, when individual units are conveyed (leased) to individual unit owners, the unit owner's interest will be subject to the prior recorded underlying mortgage. The unit owner also will commonly borrow money on the security of his lease interest to pay the purchase price of the unit owner's interest. Unless a subordination agreement has been taken from the unit owner or subordination of unit owner interest to subsequent association creditors is provided for in the declaration, the unit purchase financing lender who lends on the security of the unit owner's interest can assess his risk on the assumption that he will never be subject to a greater proportion of the underlying debt than he is at the time the loan is originally made. If there is a subordination agreement, the unit financing lender knows that his security interest is subject to being entirely defeated by subsequent transactions between the association and its creditors. In the cooperative context, that system has worked reasonably well, and many people with substantial experience with housing cooperatives wished to continue that system in the Model Real Estate Cooperative Act and in the Uniform Common Interest Ownership Act.

In the case of condominiums and planned communities, while the condominium or planned community judgment creditor has a direct lien against the units, the lien against a particular unit is limited to that unit's common interest percentage liability, and based on ordinary priority rules, the association judgment creditor's lien will be junior to any prior perfected liens or security interests in the unit owner's

unit. Since the priority between association judgment creditors and holders of security interests or liens against individual units in condominiums or planned communities will be determined according to ordinary priority rules, as is the case of cooperatives in the absence of subordination agreements, the result as between association judgment creditors and holders of security interest or liens on individual units is essentially the same under all three acts. However, as pointed out above, as against the unit owner himself, the cooperative association lien creditor who has priority over a unit owner's interest will have greater rights than does the association judgment creditor in the case of condominiums and planned communities.

It should be noted that, while the judgment lien runs directly against unit owners in condominiums and planned communities, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated condominium or planned community association only is liable for a judgment, it will, of course, have no assets to satisfy the judgment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnished by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That additional assessment would be in precisely the amount for which this Act gives a direct lien against the individual unit owners. Further, if an association which is without sufficient assets to satisfy a judgment refuses to make assessments from which the creditor can have his claim satisfied, it is very likely that a court, in a supplemental proceeding on the judgment, would direct the association to make the necessary assessments against the unit owners. Unpaid assessments made by the association constitute liens against units just as do judgments.

Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay his

proportionate share will end up with a lien against his unit.

The differences, therefore, between the lien system established by Section 3-117 for condominiums and planned communities and the system which would be applicable if ordinary corporation rules were applied are these:

(1) The unit owner can discharge his unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on his unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

(2) The judgment creditor through his ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment. Procuring an assessment through pressure on individual unit owners may be quicker and cheaper for the judgment creditor than using supplemental proceedings and having a judge order that the board of directors make the necessary assessment.

5. In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units or common elements the unit owners as tenants-in-common or otherwise, the National Conference of Commissioners on Uniform State Laws believes that that result is inappropriate, and that the unit in the condominium or planned community itself should be viewed as equity property of

the association capable of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy the condominium or planned community association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well-being of society. The condominium or planned community association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of his home or for torts caused by his failure to adequately maintain the premises should not be able to entirely avoid that liability through the device of organizing with other homeowners into a condominium or planned community association. On the other hand, it is perhaps not fair to a unit owner in a condominium or planned community regime to have all of his assets at risk based on the contracts of the association over which he has little control and as to which he has only a fractional interest or benefit.

It should be noted that, except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left in a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.

§ 3-118. Association Records

The association shall keep financial records sufficiently detailed to enable the association to comply with Section 4-109. All financial and other records must be made reasonably available for examination by any unit owner and his authorized agents.

§ 3-119. Association as Trustee

With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper ex-

ercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

ARTICLE 4

PROTECTION OF PURCHASERS

§ 4-101. Applicability; Waiver

(a) This Article applies to all units subject to this [Act], except as provided in subsection (b) or as modified or waived by agreement of purchasers of units in a common interest community in which all units are restricted to non-residential use.

(b) Neither a public offering statement nor a resale certificate need be prepared or delivered in the case of:

- (1) a gratuitous disposition of a unit;
- (2) a disposition pursuant to court order;
- (3) a disposition by a government or governmental agency;
- (4) a disposition by foreclosure or deed in lieu of foreclosure;
- (5) a disposition to a dealer;
- (6) a disposition that may be canceled at any time and for any reason by the purchaser without penalty; or
- (7) a disposition of a unit in a planned community in which the declaration limits the maximum annual assessment of any unit to not more than \$300, as adjusted pursuant to Section 1-115 (Adjustment of Dollar Amounts) if:

(i) the declarant has a reasonable and good faith belief that the maximum stated assessment will be sufficient to pay the expenses of the planned community;

(ii) the declaration cannot be amended to increase the assessment during the period of declarant control without the consent of all unit owners; and

(iii) the planned community is not subject to any development rights.

COMMENT

1. In the case of commercial and industrial common interest communities, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection

imposed by Article 4 may be substantial. Accordingly, subsection (a) permits waiver or modification of Article 4 protections in common interest communities where all units are restricted to non-residential use. However, except for certain waivers of implied warranties of quality (see Section 4-115) and certain exemptions from public offering statement and resale certificate requirements (see subsection (b)), no express waiver of the protections of this Article with respect to the purchasers of residential units is

permitted by this subsection. Accordingly, by operation of Section 1-104, the rights provided by this Article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use common interest communities, waiver or modification of rights conferred by this Article is restricted to purchasers in wholly non-residential common interest communities.

2. There are many single family subdivision or townhouse-type common interest communities in which the commonly owned and maintained facilities are relatively inconsequential and the assessment for maintenance of the

common areas trivial. For example, the only common facility may be a road, a playground, or an open area. In such cases, the cost of the public offering statement required by this article is not justified any more than it would be justified in the sale of any residence in a subdivision or townhouse development. Therefore, (b)(7) provides that no public offering statement is necessary if the planned community declaration limits the maximum annual assessment of any unit to \$300.00 (adjusted for inflation) and if the declarant has a good faith belief that the stated maximum will be sufficient to pay the expenses of the association.

§ 4-102. Liability for Public Offering Statement Requirements

(a) Except as provided in subsection (b), a declarant, before offering any interest in a unit to the public, shall prepare a public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105, and 4-106.

(b) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant (Section 3-104) or to a dealer who intends to offer units in the common interest community. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).

(c) Any declarant or dealer who offers a unit to a purchaser shall deliver a public offering statement in the manner prescribed in subsection 4-108(a). The person who prepared all or a part of the public offering statement is liable under Sections 4-108 and [1] 4-117 [1, 5-105, and 5-106] for any false or misleading statement set forth therein or for any omission of a material fact therefrom with respect to that portion of the public offering statement which he prepared. If a declarant did not prepare any part of a public offering statement that he delivers, he is not liable for any false or misleading statement set forth therein or for any omission of a material fact therefrom unless he had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission.

(d) If a unit is part of a common interest community and is part of any other real estate regime in connection with the sale of which the delivery of a public offering statement is required under the laws of this State, a single public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105, and 4-106 as those requirements relate to each regime in which the unit is located, and to any other requirements imposed under the laws of this State, may be prepared and delivered in lieu of providing 2 or more public offering statements.

COMMENT

This section permits declarants to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering state-

ment is liable for his own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

§ 4-103. Public Offering Statement; General Provisions

(a) Except as provided in subsection (b), a public offering statement must contain or fully and accurately disclose:

(1) the name and principal address of the declarant and of the common interest community, and a statement that the common interest community is either a condominium, cooperative, or planned community;

(2) a general description of the common interest community, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings, and amenities that the declarant anticipates including in the common interest community;

(3) the number of units in the common interest community;

(4) copies and a brief narrative description of the significant features of the declaration, other than any plats and plans, and any other recorded covenants, conditions, restrictions, and reservations affecting the common interest community; the bylaws, and any rules or regulations of the association; copies of any contracts and leases to be signed by purchasers at closing, and a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under Section 3-105;

(5) any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for (one) year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include, without limitation:

(i) a statement of the amount, ~~or a statement that there is no amount, included in the budget as a reserve for repairs and replacement~~ *incl the estimated cost of repair or replacement cost & the estimated useful life of the asset to be rep or replaced.*

(ii) a statement of any other reserves;

(iii) the projected common expense assessment by category of expenditures for the association; and

(iv) the projected monthly common expense assessment for each type of unit;

(6) any services not reflected in the budget that the declarant provides, or expenses that he pays and which he expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;

(7) any initial or special fee due from the purchaser at closing, together with a description of the purpose and method of calculating the fee;

(8) a description of any liens, defects, or encumbrances on or affecting the title to the common interest community;

(9) a description of any financing offered or arranged by the declarant;

(10) the terms and significant limitations of any warranties provided by the declarant, including statutory warranties and limitations on the enforcement thereof or on damages;

(11) a statement that:

(i) within 15 days after receipt of a public offering statement a purchaser, before conveyance, may cancel any contract for purchase of a unit from a declarant,

(ii) if a declarant fails to provide a public offering statement to a purchaser before conveying a unit, that purchaser may recover from the declarant (10) percent of the sales price of the unit plus (10) percent of the share, proportionate to his common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community, and

(iii) if a purchaser receives the public offering statement more than 15 days before signing a contract, he cannot cancel the contract;

(12) a statement of any unsatisfied judgments or pending suits against the association, and the status of any pending suits material to the common interest community of which a declarant has actual knowledge;

(13) a statement that any deposit made in connection with the purchase of a unit will be held in an escrow account until closing and will be returned to the purchaser if the purchaser cancels the contract pursuant to Section 4-108, together with the name and address of the escrow agent;

(14) any restraints on alienation of any portion of the common interest community and any restrictions: (i) on use, occupancy, and alienation of the units, and (ii) on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation, or casualty loss to the unit or to the common interest community, or on termination of the common interest community;

(15) a description of the insurance coverage provided for the benefit of unit owners;

(16) any current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the common interest community;

(17) the extent to which financial arrangements have been provided for completion of all improvements that the declarant is obligated to build pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore);

(18) a brief narrative description of any zoning and other land use requirements affecting the common interest community;

(19) all unusual and material circumstances, features, and characteristics of the common interest community and the units; and

(20) in a cooperative, (i) whether the unit owners will be entitled, for federal, state, and local income tax purposes, to a pass-through of deductions for payments made by the association for real estate taxes and interest paid the holder of a security interest encumbering the cooperative, and (ii) a statement as to the effect on every unit owner if the association fails to pay real estate taxes or payments due the holder of a security interest encumbering the cooperative.

(b) If a common interest community composed of not more than 12 units is not subject to any development rights and no power is reserved to a declarant to make the common interest community part of a larger common interest community, group of common interest communities, or other real estate, a public offering statement may but need not include the information otherwise required by paragraphs (9), (10), (15), (16), (17), (18), and (19) of subsection (a) and the narrative descriptions of documents required by subsection (a)(4).

(c) A declarant promptly shall amend the public offering statement to report any material change in the information required by this section.

COMMENT

1. The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he

is purchasing. Such a result is difficult to achieve, however, in the case of the common interest community purchaser because of the complex nature of the bundle of rights and obligations

Assumptions concerning the calculation of the amount of reserves, certified by architect or engineer

which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement appears in Section 4-102(e), and Section 4-108 provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the Act.

2. Paragraph (a)(2) requires a general description of the common interest community and, to the extent possible, the declarant's schedule for commencement and completion of construction for all building amenities that will comprise portions of the common interest community.

Under Section 4-110 the declarant is obligated to complete all improvements shown on a site plan or other graphic representation in the public offering statement or other promotional materials unless they are labeled "NEED NOT BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with those requirements.

3. Paragraph (4) requires the public offering statement to include copies of the declaration, bylaws, and any rules and regulations of the common interest community, as well as copies of any contracts or leases to be executed by the purchaser. In addition, the paragraph requires the public offering statement to include a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities, and other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expires, as provided in Section 3-105. This latter requirement is intended to encourage the preparation of brief summaries of all common interest community documents in laymen's terms, i.e., the "brief narrative description" should be more than a simple explanation of what a declaration (or other document) is, but less than an extended legal analysis duplicating the contents of the documents themselves. The summary requirement is intended to alleviate

the common problem of public offering statements being drafted in lawyers' terms and being no more comprehensible to laymen than the documents themselves.

4. The disclosure requirement of paragraph (8) is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period. In such a circumstance, the declarant commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping, or other services) will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to each) in paragraph (8), the Act seeks to minimize "lowballing." In order to comply fully with the provisions of paragraph (5), the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the common interest community during that budget year. This requirement as well operates to negate the effects of any attempted "lowballing."

5. Paragraph (9) requires disclosure of any financing "offered" by the declarant. The paragraph contemplates that a declarant disclose any arrangements for financing that may have been made, including arrangements with any unaffiliated lender to provide mortgages to qualified purchasers.

6. Under paragraph (10), the declarant is required to disclose the terms of all warranties provided by the declarant (including the statutory warranties set forth in Section 4-111) and to describe any significant limitations on such warranties, the enforcement thereof, or damages which may be collectible as a result of a breach thereof. This latter requirement would necessitate a description by the declarant of any exclusions or modifications of statutory warranties undertaken pursuant to Section 4-115. The statute of limitations for warranties set forth in Section 4-110, together with any separate written agreement (as required by Section 4-116) providing for reduction of the period of such statute of limitations, must also be disclosed.

7. Paragraph (11) requires that the declarant disclose the existence of any

right of first refusal or other restrictions on the uses for which or classes of persons to whom units may be sold. It also requires disclosure of any provisions limiting the amount for which units may be sold or on the part of the sales price which may be retained by the selling unit owner. In some existing housing cooperatives for low income families the unit owner is required to sell at no more than a fixed sum; sometimes the amount which the unit owner paid; sometimes that plus a fixed appreciation. In addition to that practice, the section contemplates other possible limitations on the owner's right to receive sales proceeds such as a provision under which the developer shares in any appreciation in value.

8. Under paragraph (10), the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the common interest community. Such fees or charges might include swimming pool fees, golf course fees, or required membership fees in a recreation association. Such fees also represent a substantial addition to the periodic assessments.

9. The "financial arrangements" required to be disclosed pursuant to paragraph (17) may vary substantially from one development to another. It is the intent of the paragraph to give purchasers as much information as possible with which to assess the declarant's ability to carry out his obligations to complete the improvements. For example, if a declarant has a commitment from a bank to provide construction financing for a swimming pool when 50% of the units in the common interest community are completed, that fact should be disclosed to potential purchasers.

10. In addition to the information required to be disclosed by paragraphs (1) through (18), paragraph (10) requires that the declarant disclose all other "unusual and material circumstances, features, and characteristics"

of the common interest community and all units therein. This requires only information which is both "unusual and material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the common interest community, e.g., the fact that buildings have a roof, walls, doors, and windows. Similarly, the provision does not require the disclosure of "unusual" information about the common interest community which is not also "material," e.g., the fact that a common interest community is the first development of its type in a particular locality. Information which would normally be required to be disclosed pursuant to paragraph (19) might include, to the extent that they are unusual and material, environmental conditions affecting the use or enjoyment of the common interest community, features of the location of the common interest community, e.g., near the end of an airport runway or a planned rendering plant, and the like.

11. The cost of preparing a public offering statement can be substantial and may, particularly in the case of small common interest communities, represent a significant portion of the cost of a unit. For that reason, subsection (b) permits a declarant to exclude from a public offering statement certain information in the case of a small common interest community (i.e., less than 12 units) which is not subject to development rights and which is not potentially part of a larger common interest community or group of common interest communities. Essentially, subsection (b) permits a declarant to exclude from a public offering statement those materials which, as a practical matter, require extended preparation effort by an attorney or engineer in addition of the normal effort which must be exerted to provide the declaration, bylaws, plats and plans, or other documents required by the Act.

§ 4-104. Same; Common Interest Communities Subject to Development Rights

If the declaration provides that a common interest community is subject to any development rights, the public offering statement must disclose, in addition to the information required by Section 4-103:

(1) the maximum number of units, and the maximum number of units per acre, that may be created;

(2) a statement of how many or what percentage of the units that may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

(3) If any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas, and the maximum percentage of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

(4) a brief narrative description of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;

(5) a statement of the maximum extent to which each unit's allocated interests may be changed by the exercise of any development right described in paragraph (3);

(6) a statement of the extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the common interest community will be compatible with existing buildings and improvements in the common interest community in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;

(7) general descriptions of all other improvements that may be made and limited common elements that may be created within any part of the common interest community pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(8) a statement of any limitations as to the locations of any building or other improvement that may be made within any part of the common interest community pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(9) a statement that any limited common elements created pursuant to any development right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the common interest community, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

(10) a statement that the proportion of limited common elements to units created pursuant to any development right reserved by the declarant will be approximately equal to the proportion existing within other parts of the common interest community, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

(11) a statement that all restrictions in the declaration affecting use, occupancy, and alienation of units will apply to any units created pursuant to any development right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

(12) a statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

COMMENT

This section requires disclosure in public offering statement of the use in which the declarant's exercise of development rights may affect persons who acquire units before rights have been fully exercised. The purpose is to put the purchaser

on notice of the extent to which the exercise of those rights may alter, sometimes quite dramatically, both the physical and the legal aspects of the project. For example, the prospective purchaser may be contemplating the acquisition of a particular unit because

it enjoys a view of open, undeveloped land over which the declarant has, however, reserved development rights. It may be that the boundary of the parcel as to which development rights have been reserved actually coincides with, or runs quite close to, the outer wall of the unit in question. The dis-

closure or statements made pursuant to paragraphs (8) and (12) of this section will indicate to the prospective purchaser the extent (if any) to which he can rely on the declarant not to do anything which would radically alter the view from the unit.

§ 4-105. Same; Time Shares

If the declaration provides that ownership or occupancy of any units, is or may be in time shares, the public offering statement shall disclose, in addition to the information required by Section 4-103:

(1) the number and identity of units in which time shares may be created;

(2) the total number of time shares that may be created;

(3) the minimum duration of any time shares that may be created; and

(4) the extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in Section 3-110.

COMMENT

1. Time sharing has become increasingly important in recent years, particularly with respect to resort common interest communities. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing.

2. Virtually all existing state statutes dealing with condominiums, planned communities or cooperatives are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this Act, however, does not

imply that other law regulating time sharing is affected in any way in a state merely because that state enacts this Act.

The Uniform Law Commissioners' Model Real Estate Time Share Act specifies more extensive disclosures for time-share properties. A "time-share property" may include part or all of the common interest community, and Section 4-109 of the Model Act governs conflicts between this Act and time-share legislation.

§ 4-106. Same; Common Interest Communities Containing Conversion Buildings

(a) The public offering statement of a common interest community containing any conversion building must contain, in addition to the information required by Section 4-103:

(1) a statement by the declarant, based on a report prepared by an independent (registered) architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;

(2) a statement by the declarant of the expected useful life of each item reported on in paragraph (1) or a statement that no representations are made in that regard; and

(3) a list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations.

(b) This section applies only to buildings containing units that may be occupied for residential use.

COMMENT

1. In the case of a common interest community containing or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of common interest community sales.

2. Paragraph (a)(1) requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the conversion building. Such information is as useful to declarant as to the purchaser since, under the implied warranty provisions of Section 4-114, a declarant impliedly warrants all improvements made by any person to the building "before creation of the common interest community" unless such improvements are specifically excluded from the implied warranty of quality pursuant to Section 4-115(h).

3. See Comment 3 to Section 2-101 concerning the meaning of "structural components" as used in paragraph

(a)(1). Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3), the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the planned community) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the reasons set forth in the Comment to Section 4-101(a), this section does not apply to units which are restricted exclusively to non-residential use.

§ 4-107. Same; Common Interest Community Securities

If an interest in a common interest community is currently registered with the Securities and Exchange Commission of the United States, a declarant satisfies all requirements relating to the preparation of a public offering statement of this [Act] if he delivers to the purchaser ~~and files with the agency~~ a copy of the public offering statement filed with the Securities and Exchange Commission. [An interest in a common interest community is not a security under the provisions of [insert appropriate state securities regulation statutes].]

COMMENT

1. Some common interest communities will be regarded as "investment contracts" or other "securities" under federal law because they exhibit certain investment features such as mandatory rental pools. See SEC Securities Act Release No. 5317 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this Act, the prospectus filed with and distributed

pursuant to the regulations of the United States Securities and Exchange Commission. Absent this provision, prospective purchasers of common interest communities classified by the SEC as "securities" would have to be given two public offering statements, one prepared pursuant to this Act and the other prepared pursuant to the Securities Act of 1933. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of ci-

ther public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to adopt the agency provisions of Article 5 of the Act. The second sentence

should also be inserted by states opting to incorporate Article 5 of the Act to avoid duplicative regulation of common interest communities by the agency administering the State's securities regulation statutes.

§ 4-108. Purchaser's Right to Cancel

(a) A person required to deliver a public offering statement pursuant to Section 4-102(c) shall provide a purchaser with a copy of the public offering statement and all amendments thereto before conveyance of the unit, and not later than the date of any contract of sale. Unless a purchaser is given the public offering statement more than 15 days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, may cancel the contract within 15 days after first receiving the public offering statement.

(b) If a purchaser elects to cancel a contract pursuant to subsection (a), he may do so by hand delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly.

(c) If a person required to deliver a public offering statement pursuant to Section 4-102(c) fails to provide a purchaser to whom a unit is conveyed with that public offering statement and all amendments thereto as required by subsection (a), the purchaser, in addition to any rights to damages or other relief, is entitled to receive from that person an amount equal to (10) percent of the sale price of the unit, plus (10) percent of the share, proportionate to his common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community.

COMMENT

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) requires that each purchaser be provided with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as

"non-binding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) that a purchaser be provided with subsequent amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the common interest community which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be

permitted to judge for himself the materiality of any change in the nature of the common interest community.

5. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a), the purchaser would, as a matter of right, be able to extend the date of closing for 15 days from the time the public offering statement is provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a), the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to

cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible that under the common law in some states reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under Section 4-117 to collect punitive damages and attorney's fees in connection with his action against the declarant.

and the status of any pending suits in which the association is a defendant;

(9) a statement describing any insurance coverage provided for the benefit of unit owners;

(10) a statement as to whether the executive board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned thereto violate any provision of the declaration;

(11) a statement as to whether the executive board has knowledge of any violations of the health or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the common interest community;

(12) a statement of the remaining term of any leasehold estate affecting the common interest community and the provisions governing any extension or renewal thereof;

(13) a statement of any restrictions in the declaration affecting the amount that may be received by a unit owner upon sale, condemnation, casualty loss to the unit or the common interest community, or termination of the common interest community; and

(14) in a cooperative, an accountant's statement, if any was prepared, as to the deductibility for federal income tax purposes by the unit owner of real estate taxes and interest paid by the association.

(b) The association, within 10 days after a request by a unit owner, shall furnish a certificate containing the information necessary to enable the unit owner to comply with this section. A unit owner providing a certificate pursuant to subsection (a) is not liable to the purchaser for any erroneous information provided by the association and included in the certificate.

(c) A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the purchase contract is voidable by the purchaser until the certificate has been provided and for 15 days thereafter or until conveyance, whichever first occurs.

§ 4-109. Resale of Units

(a) Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser before execution of any contract for sale of a unit, or otherwise before conveyance, a copy of the declaration (other than any plats and plans), the bylaws, the rules or regulations of the association, and a certificate containing:

(1) a statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit;

(2) a statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling unit owner;

(3) a statement of any other fees payable by unit owners;

(4) a statement of any capital expenditures anticipated by the association for the current and 2 next succeeding fiscal years;

(5) a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any specified projects;

(6) the most recent regularly prepared balance sheet and income and expense statement, if any, of the association;

(7) the current operating budget of the association;

(8) a statement of any unsatisfied judgments against the association

COMMENT

1. In the case of the resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate for his own account, a public offering statement need not be provided. See Section 4-102(c). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular unit. Accordingly, each unit owner not required to furnish a public offering statement under Section 4-102(c) and not exempt under Section 4-101(b) is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the common interest community and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has

an obligation to provide the information to the unit owner within 10 days after a request for such information. Under Section 3-102(a)(12), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to Section 4-117.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

In excess of \$3,000 approved by the exec bd

§ 4-110. Escrow of Deposits

Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to Section 4-102(c) must be placed in escrow and held either in this State or in the state where the unit is located in an account designated solely for that purpose by [a licensed title insurance company] [an attorney] [a licensed real estate broker] [an independent bonded escrow company or] an institution whose accounts are insured by a governmental agency or instrumentality until (i) delivered to the declarant at closing; (ii) delivered to the declarant because of the purchaser's default under a contract to purchase the unit; or (iii) refunded to the purchaser.

COMMENT

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of Section 4-101. It does not apply, however, to leases of units between private parties.

2. This section provides declarant a number of choices as to the appropriate escrow agent. Whether the escrow agent must deposit the funds in an insured institutional depository, or in a particular type of account, depends on state law or the agreement of the parties. To minimize record keeping, of course, the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted. The account may be held either in the state where the unit is located, or in the enacting state, in recognition that buyers are often from outside the state where the unit is located.

3. The escrow requirements of this section apply in connection with any deposit made by a purchaser, whether such deposit is made pursuant to a

binding contract or pursuant to a non-binding reservation agreement (with respect to which no public offering statement is required under Section 4-101(b)(8)).

4. In some states current practice permits escrows to be held by certain title insurance or escrow companies, attorneys, or real estate brokers. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

5. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller, or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

6. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this Act does not include bonding as an alternative to the required escrow of deposits.

§ 4-111. Release of Liens

(a) In the case of a sale of a unit where delivery of a public offering statement is required pursuant to Section 4-102(c), a seller

(1) before conveying a unit, shall record or furnish to the purchaser releases of all liens, except liens on real estate that a declarant has the right to withdraw from the common interest community, that the purchaser does not expressly agree to take subject to or assume and that encumber;

(b) in a condominium, that unit and its common element interest, and

(c) in a cooperative or planned community, that unit and any limited common elements assigned thereto, or

(2) shall provide a surety bond or substitute collateral for or insurance against the lien as provided for liens on real estate in [insert appropriate references to general state law or Sections 5-211 and 5-212 of the State Uniform Simplification of Land Transfers Act].

(b) Before conveying real estate to the association, the declarant shall have that real estate released from: (1) all liens the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and (2) all other liens on that real estate unless the public offering statement describes certain real estate that may be conveyed subject to liens in specified amounts.

COMMENT

1. The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. It deals with the unusual case in which a unit has been assigned a limited common element (for example, a parking space) on real estate which the developer has the right to withdraw from the common interest community. In that case, the limited common element can be assigned to the unit without release of liens or assumption of them by the unit owner. Theoretically, a developer might partially avoid the lien release requirement of subsection (a) by placing part of the limited common element improvements such as a parking garage on withdrawable real estate. By doing so, it could separately mortgage that part of the limited common elements without being obligated to discharge the mortgage or secure partial releases when individual units to which the limited common elements are assigned are sold.

If a mortgage or other lien created by or arising against the developer attaches to withdrawable real estate after the declaration has been recorded, a lapse of the developer's right to withdraw the real estate would also terminate the rights of the lienors, since the lien would attach only to the developer's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse

without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the planned community declaration was recorded, lapse of the right to withdraw would not affect the lienor's rights and it could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing limited common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

2. Subsection (b) will most commonly apply in the case of a planned community, where all of the common elements, whatever they may be in a particular project, must be owned by the association, see section 1-103(4), or in a cooperative, where section 2-101 requires that all the real estate comprising the cooperative must be conveyed to the association at the time the cooperative is created. The section would also apply, however, in the event other real estate, such as units or other real property not subject to the declaration, is conveyed to the association.

*Section on Security Bonds
Substitution of Collateral
Release of Lien*

§ 4-112. Conversion Buildings

(a) A declarant of a common interest community containing conversion buildings, and any dealer who intends to offer units in such a common interest community, shall give each of the residential tenants and any residential subtenant in possession of a portion of a conversion building notice of the

conversion and provide those persons with the public offering statement no later than 120 days before the tenants and any subtenant in possession are required to vacate. The notice must set forth generally the rights of tenants and subtenants under this section and must be hand delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than 120 days' notice, except by reason of nonpayment of rent, waste, or conduct that disturbs other tenants' peaceful enjoyment of the premises, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession.

(b) For 60 days after delivery or mailing of the notice described in subsection (a), the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases that unit. If a tenant fails to purchase the unit during that 60-day period, the offeror may not offer to dispose of an interest in that unit during the following 180 days at a price or on terms more favorable to the offeror than the price or terms offered to the tenant. This subsection does not apply to any unit in a conversion building if that unit will be restricted exclusively to non-residential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

(c) If a seller, in violation of subsection (b), conveys a unit to a purchaser for value who has no knowledge of the violation, the recordation of the deed conveying the unit or, in a cooperative, the conveyance of the unit, extinguishes any right a tenant may have under subsection (b) to purchase that unit. If the deed states that the seller has complied with subsection (b), but the conveyance does not affect the right of a tenant to recover damages from the seller for a violation of subsection (b).

(d) If a notice of conversion specifies a date by which a unit or proposed unit must be vacated and otherwise complies with the provisions of [insert appropriate state summary process statute], the notice also constitutes a notice to vacate specified by that statute.

(e) Nothing in this section permits termination of a lease by a declarant in violation of its terms.

COMMENT

1. One of the most controversial issues in the field of common interest community development relates to conversion of rental buildings to a common interest community. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to common interest community ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curbing the problem of declining urban tax bases. Proponents also point out that

the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization. This section, which seeks to balance these competing interests, is based principally on similar provisions set forth in the condominium statutes of Virginia and the District of Columbia.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (b) provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter

sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to tenants if the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single planned community unit, compliance with the requirements of subsection (b) would be impossible.

3. Jurisdictions with rent control statutes should consider whether

amendments to this section are necessary to conform to the procedures or substantive requirements set out in the rent control laws or whether modifications to the rent control laws may be required as a result of the enactment of this section.

4. Except for the restrictions on permissible exceptions stated in subsection (a), this Act does not change the law of summary process in a state. As a result, if a tenant refuses to vacate the premises following the 120-day notice, the usual provisions of the state's summary process statutes would apply, while any defenses available to a tenant would also be available.

§ 4-113. Express Warranties of Quality

(a) Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows:

(1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the common interest community that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the common interest community, creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(2) any model or description of the physical characteristics of the common interest community, including plans and specifications of or for improvements, creates an express warranty that the common interest community will conform to the model or description;

(3) any description of the quantity or extent of the real estate comprising the common interest community, including plats or surveys, creates an express warranty that the common interest community will conform to the description, subject to customary tolerances; and

(4) a provision that a purchaser may put a unit only to a specified use is an express warranty that the specified use is lawful.

(b) Neither formal words, such as "warranty" or "guarantee", nor a specific intention to make a warranty, are necessary to create an express warranty of quality, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

(c) Any conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers.

COMMENT

1. This section, together with Sections 4-114, 4-115, and 4-116, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, that is, with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expect-

tations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

3. Subsection (b) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (a) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning common interest community property during the bar-

gaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representations need be shown in order to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Subsection (a)(1) provides that representations as to improvements and facilities not located in the common interest community may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts, etc., will be constructed in the future and that unit owners will have the right to utilize such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the planned community." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if they are not completed. Such liability is distinct from the declarant's obligations, under Section 4-119, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under subsection (a)(1), a contract provision permitting the purchaser to use a common interest community unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under section 4-115.

4-114. Implied Warranties of Quality

(a) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear excepted.

(b) A declarant and any dealer impliedly warrants that a unit and the common elements in the common interest community are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him, or made by any person before the creation of the common interest community, will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

(c) In addition, a declarant and any dealer warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of

6. The precise time when representations set forth in subsection (a) are made is not material. The sole question is whether the language or other representations of the declarant are fairly to be regarded as part of the contract between the parties.

7. Subsection (b) makes clear that it is not necessary to the existence of a warranty that the declarant have intended to assume a warranty obligation. On the other hand, mere statements of opinion or commendations by the declarant do not necessarily create warranties. Whether a particular statement purports to be merely opinion or commendation is basically a question of whether the purchaser could reasonably rely upon the statement as a meaningful representation or promise with respect to the planned community. That determination depends, in turn, not merely upon the words used but also upon the relative characteristics and skills of the parties. Thus, a representation by a declarant to a novice purchaser that a particular planned community unit is in "good condition" may be more than mere opinion or commendation, while the same statement by a novice seller to a professional buyer would likely be only opinion or commendation, and thus not a warranty.

8. The provision of subsection (c) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate his warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

(d) Warranties imposed by this section may be excluded or modified as specified in Section 4-115.

(e) For purposes of this section, improvements made or contracted for by an affiliate of a declarant (Section 1-103(1)) are made or contracted for by the declarant.

(f) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

COMMENT

1. This section, which is based upon Section 2-309 of UETA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of " *caveat emptor* "). In recent years, that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930's, more and more courts have completely or partially abolished the *caveat emptor* rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under subsection (b), are imposed only against declarants and dealers and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability. However, under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential common interest communities. If, for example, a commercial unit is sold for commercial use and is not suitable for the ordinary uses of common interest community units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the common interest community.

4. The warranty of suitability and of quality of construction arises only against a declarant and dealers. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties made by him. However, if a non-professional seller fails to disclose defects of which

he is aware, he may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-professional seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the common interest community is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the units or common elements unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (c) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (c), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for any violation of housing codes or other laws which renders any existing use of the unit or common elements unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arm's length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (f) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and Section 3-101(b)(1) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by him, even after he transfers all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor

declarant is an affiliate of the original declarant, it is clear, under both Sections 3-101(b)(2) and 3-111(f), that the original declarant remains liable for warranties of quality or improvements made by his successor even after the declarant himself ceases to have any special declarant rights.

8. As to the liabilities of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to Section 3-101(e)(1), for warranties or improvements made by his predecessor. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improve-

ments made or contracted for by him, and is not liable for warranties which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. See Section 3-101(e)(2). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of UETA. The same result is also reached under UETA in the case of a successor who, under UETA Section 3-309(b), would be a dealer since under that subsection the seller is liable only for warranties for improvements made or contracted for by him.

§ 4-115. Exclusion or Modification of Implied Warranties of Quality

(a) Except as limited by subsection (b) with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

(1) may be excluded or modified by agreement of the parties; and

(2) are excluded by expression of disclaimer, such as "as is," "with all faults," or other language that in common understanding calls the purchaser's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any dealer may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

COMMENT

1. This section parallels Section 2-311(b) and (c) of UETA.

2. Under this section, implied warranties of quality may be disclaimed. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability. Although the section imposes no requirement that a disclaimer be in writing, except in the case of residential units, an oral disclaimer might be ineffective under the law of parole and extrinsic evidence.

3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to effectively notify the purchaser of the nature of the disclaimer.

4. Under subsection (b), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a

declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion common interest community might, consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials

comprising or supporting the roof, and all components of the air conditioning system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. How-

ever, under the Act, the implied warranty that a new unit will be suitable for ordinary uses (i.e., habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

§ 4-116. Statute of Limitations for Warranties

(a) A judicial proceeding for breach of any obligation arising under Section 4-113 or 4-114 must be commenced within 6 years after the [claim for relief] [cause of action] accrues, but the parties may agree to reduce the period of limitation to not less than 2 years. With respect to a unit that may be occupied for residential use, an agreement to reduce the period of limitation must be evidenced by a separate instrument executed by the purchaser.

(b) Subject to subsection (c), a [claim for relief] [cause of action] for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(1) as to a unit, at the time the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or at the time of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(2) as to each common element, at the time the common element is completed or, if later, as to (i) a common element that may be added to the common interest community or portion thereof, at the time the first unit therein is conveyed to a bona fide purchaser, or (ii) a common element within any other portion of the common interest community, at the time the first unit is conveyed to a bona fide purchaser.

(c) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the common interest community, the [claim for relief] [cause of action] accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

COMMENT

1. Under subsection (a), the parties may agree that the statute of limitations be reduced to as little as 2 years. However, such a contract provision (which, in the case of residential units, must be reflected in a separate written instrument executed by the purchaser) could, like other contract provisions, be subject to attack on grounds of unconscionability in particular cases.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of a warranty of quality would normally arise when the purchaser to whom it is first made enters into possession. Suit on such a war-

ranty would thus have to be brought within 6 years thereafter. Even an inability to discover the breach would not delay the running of the statute of limitations in this regard.

3. Real estate sales frequently include warranties that certain components (e.g., furnaces, hot water heaters, air conditioning systems, and roofs) will last for a particular period of time. In the case of such warranties, the statute of limitations would not start running until the breach is discovered, or, if not discovered before the end of the warranty term, until the end of the term.

§ 4-117 Effect of Violations on Rights of Action; Attorney's Fees

If a declarant or any other person subject to this [Act] fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. Punitive damages may be awarded for a willful failure to comply with this [Act]. The court, in an appropriate case, may award reasonable attorney's fees.

COMMENT

This section provides a general cause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3-103(d), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally

available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section specifically permits punitive damages to be awarded in the case of willful failure to comply with the Act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

§ 4-118. Labeling of Promotional Material

No promotional material may be displayed or delivered to prospective purchasers which describes or portrays an improvement that is not in existence unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified either as "MUST BE BUILT" or as "NEED NOT BE BUILT."

COMMENT

This section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with re-

spect to improvements the declarant indicates he intends to make in a common interest community.

§ 4-119. Declarant's Obligation to Complete and Restore

(a) Except for improvements labeled "NEED NOT BE BUILT," the declarant shall complete all improvements depicted on any site plan or other graphic representation, including any plats or plans prepared pursuant to Section 2-109, whether or not that site plan or other graphic representation is contained in the public offering statement or in any promotional material distributed by or for the declarant.

(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the common interest community, of any portion of the common interest community affected by the exercise of rights reserved pursuant to or created by Section 2-110, 2-111, 2-112, 2-113, 2-115, or 2-116.

COMMENT

1. The duty imposed by subsection (a) is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under Section 3-101.

2. Section 4-119(b) requires the declarant to repair and restore the common interest community following the exercise of any rights reserved or created to exercise a development right (Section 2-110), to alter units (Section 2-112), relocate the boundaries between adjoining units (Section 2-112),

subdivide units (Section 2-113), use units or common elements for sales purposes (Section 2-115), or exercise of easement rights (Section 2-116.) Plainly, this obligation on the declarant exists only if the declarant, in his capacity as a unit owner, exercises these rights. If any right to, for example, alter units, is exercised by another unit owner, that unit owner and not the declarant, would be responsible for the consequences of those acts.

§ 4-120. Substantial Completion of Units

In the case of a sale of a unit in which delivery of a public offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed, until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an independent [registered] architect, surveyor or engineer, or by issuance of a certificate of occupancy authorized by law.

COMMENT

The purpose of this section, complemented by Section 4-110, is to assure that the declarant is not able to obtain

use of the purchaser's money until the purchaser is able to get a completed unit.

[OPTIONAL]

ARTICLE 5

ADMINISTRATION AND REGISTRATION OF COMMON INTEREST COMMUNITIES

§ 5-101. Administrative Agency

As used in this [Act], "agency" means [insert appropriate administrative agency], which is an agency within the meaning of [insert appropriate reference to state administrative procedure act]. [Insert any related provisions on creation, selection, and remuneration of personnel, budget, annual reports, fees, and other administrative provisions appropriate to the particular state.]

COMMENT

1. Each state should insert in lieu of the bracketed language in the first sentence that agency, whether it be the Real Estate Commission, the Attorney General's Office, or any other existing or new agency, which the state deems appropriate for regulation of common interest communities.

2. The 1961 Revised Model State Administrative Procedure Act (the "Model Act") had been adopted in 20 states and the District of Columbia by 1981. The appropriate reference in

those states in the definition of "Agency" would be the statute adopting Section 1(1) of the Model Act. In those states which have not adopted the Model Act, reference to a similar statute should be made to insure that the procedures of the agency regulating planned communities are undertaken in accordance with the principles of procedural due process which underlie the Model Act. In those states which do not have an administrative procedure act, appropriate administrative proce-

dures should be included, either in this section or elsewhere in this article, to provide for hearings, appellate review, regulations, and other administrative matters.

3. As indicated, Article 5 was not designed to solve all procedural matters which are appropriate for an agency. Rather, the Act relies on the cross reference to a state administrative procedure act. Even in such

states, however, it may be appropriate to include other provisions, either in Section 5-101 or elsewhere in this article, which are necessary under state practice to insure the proper functioning of a state agency. This might include budget authority, salary levels, civil service requirements, and the like. This may be particularly important when a new state agency is created.

§ 5-102. Registration Required

A declarant may not offer or dispose of a unit intended for residential use unless the common interest community and the unit are registered with the agency, but a common interest community consisting of no more than 12 units and which is not subject to development rights is exempt from the requirements of this section and Section 5-103(a).

COMMENT

1. Registration of a common interest community is only required in the case of a common interest community or unit intended for residential use. Commercial and industrial common interest communities, accordingly, are exempt from registration under this Act. Also exempt from the requirement of registration is a small common interest community containing 12 or fewer units, so long as the common interest community is not subject to development rights. However, the small common interest community and the industrial or commercial common in-

terest community are still subject to scrutiny by the agency under its general powers, despite the fact that registration is not required.

2. If Article 5 were adopted in a particular state, a declarant could not offer or dispose of a residential unit unless that unit were registered with the agency. However, he could offer and dispose of the unit after registration was approved but before the common interest community was created, subject to the requirements of Sections 2-101 and 5-103.

§ 5-103. Application for Registration; Approval of Uncompleted Units

(a) An application for registration must contain the information and be accompanied by any reasonable fees required by the agency's [rules] [regulations]. A declarant promptly shall file amendments to report any actual or expected material change in any document or information contained in the application.

(b) If a declarant files with the agency a declaration or proposed declaration, or an amendment or proposed amendment to a declaration, creating units that he proposes to convey before they are substantially completed in the manner required by Section 4-120 and, in a condominium, by Section 2-101(b), the declarant shall also file with the agency:

(1) a verified statement showing all costs involved in completing the buildings containing those units;

(2) a verified estimate of the time of completion of construction of the buildings containing those units;

(3) satisfactory evidence of sufficient funds to cover all costs to complete the buildings containing those units;

(4) a copy of the executed construction contract and any other contracts for the completion of the buildings containing those units;

(5) a 100 percent payment and performance bond covering the entire cost of construction of the buildings containing those units;

(6) plans for the units which, in the case of a condominium or planned community, shall conform to the requirements of Section 2-109(c);

(7) if purchasers' funds are to be utilized for the construction of the common interest community, an executed copy of the escrow agreement with an escrow company or financial institution authorized to do business within the state which provides that:

(i) disbursements of purchasers' funds may be made from time to time to pay for construction of the common interest community, architectural, engineering, finance, and legal fees, and other costs for the completion of the common interest community in proportion to the value of the work completed by the contractor as certified by an independent [registered] architect or engineer, on bills submitted and approved by the lender of construction funds or the escrow agent;

(ii) disbursement of the balance of purchasers' funds remaining after completion of the common interest community must be made only when the escrow agent or lender receives satisfactory evidence that (A) the period for filing mechanic's and materialman's liens has expired, (B) the right to claim those liens has been waived, or (C) adequate provision has been made for satisfaction of any claimed mechanic's or materialman's lien; and

(iii) any other restriction relative to the retention and disbursement of purchasers' funds required by the agency; and

(8) any other materials or information the agency may require by its [rules] [regulations].

(c) The agency may not register the units described in the declaration or the amendment unless the agency determines, on the basis of the material submitted by the declarant and any other information available to the agency, that there is a reasonable basis to expect that the units to be conveyed will be completed by the declarant following conveyance.

COMMENT

1. Subsection (a) is a general provision empowering the agency by regulation to develop requirements for information to be submitted to the agency, and for the imposition of reasonable fees by the agency. Such rules or regulations, under the Model Act, could be adopted only after providing notice to interested persons and an opportunity to be heard. See Section 3 of the Model Act. The article encourages, but does not require, development of uniform regulations between states adopting Article 5. See Section 2-107(e).

2. Under Section 2-101(h) a condominium declaration may not be recorded until all structural and mechanical systems for units which will be created by the recording are substantially completed. While there is no similar requirement for planned communities and cooperatives, Section 4-120, which is applicable to all types of common interest communities, prohibits conveyance of units before they are substantially completed.

In addition, under Section 4-110, any deposit made in connection with the purchase or reservation of a unit must

be held in escrow until closing. The combined effect of Sections 2-101(h), 4-120 and 4-110 is to insure that any funds of a purchaser are held in escrow until his unit is substantially completed and the purchaser has title.

Subsection (b) is a departure from the requirements of Sections 2-103(b) and 4-120. The need for consumer protection suggests that substantial completion of a residential unit should be a prerequisite for conveying the unit to a purchaser in the absence of an agency to control and review planned community projects. Under subsection (b), however, a declarant may file a declaration or proposed declaration, or an amendment to a declaration, for the purpose of creating a common interest community in which the units are not substantially completed. Subsection (b) contemplates that the agency might nevertheless register the units described in the declaration or amendment, if the agency were satisfied that the units would be completed. Registration would then permit the declarant to offer to sell and convey the uncompleted units.

In addition, paragraph (7) of Section 103(b) contemplates that purchases of funds might be used, despite the language of Section 4-110 for construction of the planned community, if funds are imposed, however, to insure that disbursements are made in accordance with the value of work completed and approved by an escrow agent.

Note that the common elements in common interest community under

the Act need not be completed at the time of the sale, even in the absence of an agency. Completion of common elements, however, is governed by Section 4-119 (Obligation to Complete and Restore).

3. The agency, by regulation, should determine the parties whom the payment and performance bond required under paragraph (b)(5), indemnifies.

-104. Receipt of Application; Order of Registration

(a) The agency shall acknowledge receipt of an application for registration within [5] business days after receiving it. Within [90] days after receiving application, the agency shall determine whether:

(1) the application and the proposed public offering statement satisfy the requirements of this [Act] and the agency's [rules] [regulations];

(2) the declaration and bylaws comply with this [Act]; and

(3) it is likely that the improvements the declarant has undertaken to make can be completed as represented.

(b) If the agency makes a favorable determination, it shall issue promptly an order registering the common interest community. Otherwise, unless the declarant has consented in writing to a delay, the agency shall issue promptly an order rejecting registration.

COMMENT

This section provides reasonable time for agency review of an application for registration, and describes standards by which the application should be measured. The agency is directed to review the documents provided to the purchaser, and is given a great deal of discretion in mandating form and content of the public offering statement; see Section 5-110.

The agency is also charged with reviewing those common element improvements which a declarant has agreed to make, and which would be listed under Section 4-118 as "MUST BUILD," to determine whether the declarant has the financial capacity to build them.

In the event the agency were to issue an order rejecting registration under subsection (b), an important issue concerning judicial review of that order may arise in some states.

The order would appear to be a denial of an application for a license, as defined in Section 1(3) of the Model Act; it would be a "contestable," however, within the meaning

of Section 1(2) of the Model Act, only if "an opportunity for hearing" is provided. No right to a hearing, or right of appeal, is provided in the Act.

The order rejecting registration thus might not be appealable under Section 15 of the Model Act, because judicial review is provided under Section 15 only for "contested cases." While that section does not limit utilization of, or the scope of judicial review available under, other means of review, some courts have held that, in the absence of specific statutory authority to hear an appeal from an administrative decision, courts have no jurisdiction to entertain such an appeal. See, e.g., *Rybinaki v. State Employees' Retirement Comm.*, 173 Conn. 402 (1977).

Accordingly, the law of each state should be carefully reviewed. In cases where the state administrative procedure act provides for appeals from decisions on licensing matters made by state agencies regardless of the availability of a hearing, no amendment would be required.

§ 5-105. Cease and Desist Orders

If the agency determines, after notice and hearing, that any person has disseminated or caused to be disseminated orally or in writing any false or misleading promotional materials in connection with a common interest community or that any person has otherwise violated any provision of this [Act] or the agency's [rules] [regulations] or orders, the agency may issue an order to cease and desist from that conduct, to comply with the provisions of this [Act] and the agency's [rules] [regulations] and orders, or to take affirmative action to correct conditions resulting from that conduct or failure to comply.

§ 5-106. Revocation of Registration

(a) The agency, after notice and hearing, may issue an order revoking the registration of a common interest community upon determination that a declarant or any officer or principal of a declarant has:

(1) failed to comply with a cease and desist order issued by the agency affecting that common interest community;

(2) concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of units in that common interest community;

(3) failed to perform any stipulation or agreement made to induce the agency to issue an order relating to that common interest community;

(4) misrepresented or failed to disclose a material fact in the application for registration; or

(5) failed to meet any of the conditions described in Sections 5-103 and 5-104 necessary to qualify for registration.

(b) A declarant may not convey, cause to be conveyed, or contract for the conveyance of any interest in a unit while an order revoking the registration of the common interest community is in effect, without the consent of the agency.

(c) In appropriate cases the agency, in its discretion, may issue a cease and desist order in lieu of an order of revocation.

COMMENT

1. This section permits the agency, after notice and hearing, to revoke a prior registration of a common interest community. Under Section 15 of the Model Act, the revocation would not be effective until the last day for seeking review of the agency order. While the filing of the appeal would not stay the

agency's decision, the agency or reviewing court could grant a stay of the revocation. Naturally, this result may vary in a particular state.

2. A declarant is prohibited from disposing of any interest in a unit when registration has been revoked, without consent of the agency.

§ 5-107. General Powers and Duties of Agency

(a) The agency may adopt, amend, and repeal [rules] [regulations] and issue orders consistent with and in furtherance of the objectives of this [Act], but the agency may not intervene in the internal activities of an association except to the extent necessary to prevent or cure violations of this [Act]. The agency may prescribe forms and procedures for submitting information to the agency.

(b) If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of this [Act] or any of the agency's rules or orders, the agency without prior administrative proceedings may maintain an action in the [appropriate court] to enjoin that act or practice or for other appropriate relief. The agency is not required to post a bond or prove that no adequate remedy at law exists.

The agency may intervene in any action involving the powers or responsibilities of a declarant in connection with any common interest community for which an application for registration is on file.

(d) The agency may accept grants in aid from any governmental source and may contract with agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this [Act].

(e) The agency may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the agency's duties.

(f) In issuing any cease and desist order or order rejecting or revoking registration of a common interest community, the agency shall state the basis for the adverse determination and the underlying facts.

(g) The agency, in its sound discretion, may require bonding, escrow of portions of sales proceeds, or other safeguards it may prescribe by its [rules] [regulations] to guarantee completion of all improvements which a declarant is obligated to complete pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore).

COMMENT

1. Under subsection (a), the agency is empowered to adopt regulations and issue orders in furtherance of the objectives of this Act. Those objectives are the same as the underlying purposes of the Act. The agency, however, is prohibited from intervening in the internal activities of the association except to the extent necessary to prevent or cure violations of this Act. The principal purpose of the agency is to regulate the behavior of the declarant, not the behavior of individual unit owners. If, however, the declarant is misusing the association by virtue of his power to control its activities, and thereby violating the Act, the agency may act to prevent the violation.

2. Subsection (g) empowers the agency to require bonding, escrow, or other safeguards to guarantee completion of improvements labeled "MUST BE BUILT" (Section 4-118).

A substantive requirement for bonding is not included under Article 4 for all common interest communities, in all circumstances. While some states

have adopted bonding and escrow requirements for completion of the common elements in condominiums (see, e.g., Section 47-71d, Conn. Gen. Stat.), the available economic evidence indicates that a universal bonding requirement would increase the cost of units, and that the cost of such provisions may not always be justified. The principal concern for consumer protection in this regard has been resolved in the Act by requiring substantial completion of all units prior to conveyance (Section 4-120) and by requiring labeling of common elements as either "MUST BE BUILT" or "NEED NOT BE BUILT."

At the same time, particularly in the case of common interest communities registered under Section 5-103(b), there may be individual cases where the agency, in its discretion, may find escrowing or bonding to be in the public interest. For that reason, this power is included only as a permissible power for the agency under Article 5.

§ 5-108. Investigative Powers of Agency

(a) The agency may institute public or private investigation within or outside this State to determine whether any representation in any document or information filed with the agency is false or misleading or whether any person has engaged, is engaging, or is about to engage in any unlawful act or practice.

(b) In the course of any investigation or hearing, the agency may subpoena witnesses and documents, administer oaths and affirmations, and address evidence. If a person fails to comply with a subpoena or to answer questions

propounded during the investigation or hearing, the agency may apply to the [appropriate court] for a contempt order or injunctive or other appropriate relief to secure compliance.

COMMENT

The powers enumerated in Sections 5-107 and 5-108 are specifically granted to the agency because of judicial determinations in various states that, in the absence of such statutory powers, agencies have no authority to act.

§ 5-109. Annual Report and Amendments

(a) A declarant, within 30 days after the anniversary date of the order of registration, annually shall file a report to bring up to date the material contained in the application for registration and the public offering statement. This provision does not relieve the declarant of the obligation to file amendments pursuant to subsection (b).

(b) A declarant promptly shall file amendments to the public offering statement with the agency.

(c) If an annual report reveals that a declarant owns or controls units representing less than [25] percent of the voting power in the association and that a declarant has no power to increase the number of units in the common interest community, or to cause a merger or confederation of the common interest community with other common interest communities, the agency shall issue an order relieving the declarant of any further obligation to file annual reports. Thereafter, so long as the declarant is offering any units for sale, the agency has jurisdiction over the declarant's activities, but has no other authority to regulate the common interest community.

COMMENT

1. This section requires annual reports from a declarant to the agency in order to keep the information filed with the agency current. This requirement parallels the declarant's obligation to provide a current public offering statement to unit owners. See Section 4-103(c).

2. Under subsection (c), if the period of declarant control has passed, the declarant is relieved of the obligation

to continue to file an annual report. However, the obligation to continue to provide public offering statements is imposed on a declarant under Section 4-103(c) so long as he is offering any unit for sale. The agency would thus continue to have jurisdiction over the declarant's activities, but would have no other authority to regulate the common interest community.

§ 5-110. Agency Regulation of Public Offering Statement

(a) The agency at any time may require a declarant to alter or supplement the form or substance of a public offering statement to assure adequate and accurate disclosure to prospective purchasers.

(b) The public offering statement may not be used for any promotional purpose before registration and afterwards only if it is used in its entirety. No person may advertise or represent that the agency has approved or recommended the common interest community, the disclosure statement, or any of the documents contained in the application for registration.

(c) In the case of a common interest community situated wholly outside this State, an application for registration or proposed public offering statement filed with the agency which has been approved by an agency in the state where the common interest community is located and substantially complies with the requirements of this [Act] may not be rejected by the agency on the grounds of non-compliance with any different or additional requirements imposed by this [Act] or by the agency's [rules] [regulations]. However, the agency may require additional documents or information in particular cases to assure adequate and accurate disclosure to prospective purchasers.

COMMENT

1. Subsection (c) attempts to facilitate interstate sales of units by requiring the agency in the enacting state to accept an agency-approved public offering statement from the state where the common interest community is located. This avoids the need for a different public offering statement in several states for the same project. If no agency exists in the state where the common interest community is located, however, a public offering statement must be prepared and approved before offering an out-of-state unit in an enacting state.

2. Because of the bracketed language contained in Section 1-208, which should be inserted in the Act if Article 5 is enacted, a foreign common interest community must only be registered under this Article in an enacting

state if a declarant is "offering" units in that common interest community in the enacting state. Thus, general advertising which did not meet the definition of "offering" could be circulated in the enacting state without registration. If an "offering" is once made, however, then all of Article 5 applies to the foreign common interest community. Any "disposition" of a foreign residential common interest community in an enacting state, of course, would require delivery of a public offering statement even in the absence of an agency; see Section 1-208. If an agency exists in the enacting state, any disposition in that state would be illegal if the common interest community were not registered in the enacting state; see Section 1-208.

THE CONNECTICUT COMMON INTEREST OWNERSHIP ACT: WHAT CONNECTICUT REAL ESTATE ATTORNEYS NEED TO KNOW

By William R. Breetz, Jr., Esq. ¹

PART I

On July 8, 1983, Governor William O'Neill signed Public Act 83-474, An Act Concerning A Common Interest-Ownership Act. The bill had been unanimously approved in both houses of the General Assembly. Its effective date is January 1, 1984, except for the conversion provisions, which became effective when the bill was signed.

In 71 pages and 96 sections, the Common Interest Ownership Act (the "Act") supplants the Connecticut Condominium Act of 1976, now codified as Chapter 825 of the General Statutes. The Act also applies the statutory framework of condominiums to cooperatives, all so-called "PUDs" or cluster housing projects, and to every other form of "common interest community". It applies to all new projects, and several sections apply retroactively to all pre-existing condominiums, cooperatives and PUDs. Finally, the Act entirely redrafts current Connecticut statutes granting special status to conversion tenants, although most of the substantive results remain the same under both old and new law.

The Act is based almost entirely on the Uniform Common Interest Ownership Act, ("UCIOA") promulgated by the National Conference of Commissioners on Uniform State Laws in August, 1982. ² Connecticut is the first State in the country to adopt UCIOA. This sweeping and very comprehensive legislation represents the most fundamental change in the law of common interest communities ever adopted in Connecticut.

The purposes of this article are to generally describe the basic concepts that underlie the Common Interest Ownership Act, to identify the projects to which the Act is applicable, and, in very summary fashion, to highlight a few of the Act's major provisions. In a subsequent installment, we will consider in more detail other major provisions of the Act, including conversions, warranty provisions, disclosure, resale certificates, association lien priorities, association financing and ways in which the document drafter can simplify documentation.

THE BASIC CONCEPTS

A. Basic Structure of the Act.

The Uniform Common Interest Ownership Act contains four articles, or major subdivisions. Article I

contains General Provisions, including definitions and sections governing applicability of the Act. The broad concepts which distinguish the Act are first found in these definitions.

Article 2 describes the manner of creation, alteration and termination of common interest communities, including technical provisions with respect to the establishment and legal requirements of a project. Much of the tremendous flexibility of the Act, from the developer's perspective, may be found here.

Article 3, entitled "Management of the Common Interest Community", generally describes the organization and powers of the unit owners association, the method of control of the association, and transfer of development rights. It deals generally with the activities of the association both during and after the period of declarant control. It also contains important provisions on insurance, liens for assessments, and a variety of other matters. Article 3 works many fundamental changes in the powers of the association and the conduct of its affairs.

Article 4 contains the principal sections designed for the protection of purchasers, including the disclosure requirements of the Act, broad warranty provisions, and a variety of other matters. Importantly, this article changes the "bundle of rights" afforded condominium buyers by Chapter 825, and extends those rights to cooperative and planned community purchasers.

In the format of the Act as passed, the provisions of Article 1 are contained in Sections 1 through 20, with the provisions on applicability contained in Section 15 through 20. Article 2 is contained in Sections 21 through 43 of the Act; Article 3 is contained in Sections 44 through 62 of the Act; and Article 4 is contained in Sections 63 through 82 of the Act. The conversion provisions of the Act, which amend entirely existing Connecticut conversion statutes, are contained in Sections 83 through 95. Finally, Section 96 describes the effective dates of the Act.

Attached as an appendix to this article is a table of contents of the Act, with a cross reference table to the parallel sections of UCIOA. Reference to the parallel sections of UCIOA will be helpful to practitioners in a number of ways, even though a series of minor amendments were made in adapting UCIOA to the unique experience of Connecticut in the field, and to suggestions of those influential in the Act's adoption in Connecticut. ³

B. What is a Common Interest Community?

A "common interest community" is defined in §3 (7) of the Act.

It means

"real property described in a declaration with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for (1) real property taxes on, (2) insurance premiums on, (3) maintenance of, or (4) improvement of, any other real property other than that unit described in the declaration.

"Ownership of a Unit" includes holding a leasehold interest of 20 years or more in a unit, including renewal options".

This generic definition is used throughout the Act to refer to three particular forms of common interest communities: condominiums, cooperatives and planned communities. Each of those forms is a separately defined term. ⁴

The definition of "common interest community" encompasses every form of ownership in which any recorded instruments create a contractual relationship between the owner of a "unit", his fellow unit owners, and their association in which a unit owner must pay common charges to support either the common property which is a part of the common interest community or units other than the unit subject to the charges.

Note that the definition of "planned community", set out in Footnote 4, is a residual concept; any ownership arrangement which meets the definition of "common interest community", but does not meet the definition of either a condominium or cooperative, would be a planned community. The concept of a planned community encompasses most known forms of planned unit developments, cluster housing, shared facility projects, homes association, and the like. Thus, there are but three forms of common interest community: (1) condominiums; (2) cooperatives and (3) everything else.

C. Other Important Concepts

In addition to the generic concept of a "common interest community" and the residual concept of "planned community", the Act introduces a number of newly defined terms which are likely to become part of the lexicon of the practitioner in the field. Among the most important are "development rights", "special declarant rights", "allocated interests", "declarant", "declaration", and "unit".

1. "Development rights", defined in §3(14), means

any right or combination of rights reserved by a declarant in the declaration to (A) add real property to a common interest community; (B) create units, common elements, or limited common elements within a common interest community; (C) subdivide units or convert units into common

elements; or (D) withdraw real property from a common interest community.

The concept of "development rights" lies at the heart of one of the principal goals of the Act, which is to maximize the flexibility available to a developer seeking to adjust the size and mix of a project to the demands of the marketplace, both before and after creation. The principal constraint on that flexibility is the obligation of disclosure, and its impact on marketing. Thus "development rights" include the rights to:

(a) increase the size or density of a project either by adding real property to it, or by creating new units, common elements or limited common elements on either the original land or within the original buildings, or on any other land or buildings subsequently added;

(b) change the mix of units, common elements and limited common elements, either by subdividing units, or by converting units into common elements or limited common elements; and

(c) reduce the size of a project by withdrawing real property — whether land, entire buildings, or particular units — from it.

As a matter of simple logic, there are few other things that could be done to a real property regime which are not included within the concept of development rights. This great flexibility, particularly when coupled with the broad definitions of "unit" and "real estate", the power to create leasehold projects, and the right to subordinate unit mortgages to blanket mortgages on either the units, common elements, or both, is the principal attraction of the Act to the development community. Developers also like the fact that the Act, while requiring the developer to impose a limit on the time within which these rights must be exercised, abolishes the current statutory time limits imposed by Chapter 825 on the exercise of development rights. Thus, it would be possible — although not likely — for a declarant to reserve the right to expand a planned community for a period of, for example, 50 years.

2. "Special Declarant Rights." Development rights are different than "special declarant rights" which are defined in §3(29) of the Act. While lengthy, the special declarant rights are the control rights which a declarant typically reserves during the marketing phase to control the association, use easements, complete improvements and complete marketing efforts. The definition resolves a number of issues which have concerned developers by setting objective criteria for the exercise of those rights.

Unlike development rights, the Act imposes time limits, similar to current law, which will cut off the declarant's right to control the association, regardless of the time frame imposed by the declaration. Other special declarant rights, however, are not limited in that way.

3. "Allocated Interests" are defined in §3 (2) of the Act. Basically, "allocated interests" are the interests which are assigned to each unit in any form of common interest community. The important ones, common to all projects, are the proportionate share of common expense liabilities, and votes in the association, allocated to each unit. Whether a cooperative, condominium, or planned community, every unit in the project must have a share of the votes and common expense liabilities.

In addition, condominiums and cooperatives have unique allocated interests. Condominiums are distinguished from other forms of ownership because of the undivided interest in the common elements which is vested in each unit owner. That distinction is maintained in the Act and, in order to meet the definition of a condominium, an undivided interest in the common elements must continue to be allocated to each unit.

For cooperatives, the distinguishing feature is that the association owns all the real estate comprising the project, including the real estate comprising each unit. Each unit owner, however, has an "ownership interest" in that association. This "ownership interest" must, under the Act, continue to be allocated to each unit in order to define that project as a cooperative.

With very rare exceptions, the unique allocated interests of condominiums and cooperatives have no functional value; it is the votes and common expense liabilities which will be the principal factors on which potential unit owners should focus.

Consistent with the concept of flexibility in the Act, but very different from current condominium law, the allocated interests are not tied to each other, but may be assigned on totally different, even arbitrary, bases. Thus, for example, voting could be equal among all units, or based on whole numbers, while common expense liabilities could be based on relative size of units. Moreover, particular common expenses could be based on usage, with others based on size, or equality. This flexibility, again, is typical of the Act. Allocation of interests is generally discussed in §27 of the Act; §58 considers special problems associated with assessments for common expenses.

4. "Declarant" is defined in the Act in §3(12) as

any person or group of persons acting in concert who (A) as part of a common promotional plan, offers to dispose of his interest in a unit not previously disposed of or (B) reserves or succeeds to any special declarant right.

Importantly, the Act identifies a declarant as a person offering to convey his own interest, thus excluding brokers from the definition. Alternatively, "declarant" includes any person who "reserve or succeeds" to special declarant rights, which include the right to exercise development rights. Because the definition is so sweeping, a variety of special provisions are included in the Act to insure that some successors to special declarant rights, particularly lenders, are insulated from the

otherwise significant impact of that status, including its liabilities; see, e.g., Section 47 of the Act, concerning transfer of special declarant rights.

5. "Declaration". The definition of "declaration" in §3(13) is necessarily circular. It is defined as "any instruments, however denominated, that create a common interest community, including any amendments to those instruments". Thus, the term would apply not only to the traditional condominium declaration with which most practitioners are familiar, or the declaration of covenants, conditions and restrictions (CC&R's) so common in planned unit developments it would also include for example a series of deeds to units with common mutually beneficial restrictions, or to any other instruments which create the relationship which constitutes a common interest community. If those recorded instruments create that relationship, then those documents constitute a declaration and must contain, for new projects, the information required by Act §25, et seq.

6. "Unit". A "Unit" under Act §3(31) includes "a physical portion of a common interest community designated for separate ownership or occupancy" "Unit" thus becomes a very flexible concept, enabling a declarant to characterize anything as a unit which he intends to separately sell.⁶ Comments to the Act points out that a unit may be a parcel of real estate filled with air or water; thus, the definition enables marinas, air rights projects, campsites and other forms to be more readily developed as common interest communities, in marked contrast to the often complex mechanisms inventive practitioners have used to avoid the constraints of the present Connecticut condominium statute. Compare, for example, the description of the first Connecticut marina condominium in Stone, "Where Do I Dock My Boat?", Chicago Title "Perspectives" No. 3, Fall, 1982, at page 1.

APPLICABILITY

A. What Projects are affected by the Act?

The applicability of the Act is broad and sweeping. It is fair to say that every common interest community in Connecticut, and some outside the state, will be affected by this Act, regardless of the particular form of ownership or the date on which the declaration for that project was recorded. Most importantly, the Act will reach every pre-Act condominium, cooperative or cluster housing development in Connecticut, although the extent of the Act's impact depends on a variety of factors.

B. What Factors Affect Applicability?

Basically, the level of applicability of the Act to any individual project will depend on one or more of the following factors:

1. The date of creation, that is, the date the declaration is or was recorded. In the text that follows, a project whose declaration was recorded before January 1, 1984 is known as an "old" or "pre-act" project, while a project whose declaration is recorded on or after January 1, 1984 is a "new" project.

2. Size of the Project. A project which contains 12 units or less is exempt from certain provisions of the Act, even if it is a "new" project. "Old" projects of 12 or fewer units are also treated differently from other pre-Act projects. From time to time, the text refers to "large" and "small" project rules.

3. Permitted Uses. Nonresidential projects are exempt from all but 3 sections of the Act, unless the declaration expressly provides otherwise.

4. Existence of Development Rights. "Development rights" are the rights which a developer may reserve in the declaration to expand or contract the project or convert common elements within the project to units or limited common elements. The concept was described more fully above. The absence of development rights, in combination with a "small" project, affects the applicability of certain provisions of the Act.

5. Forms of Ownership and Common Expense Restrictions in the Declaration. Certain limitations apply either to "de minimus" planned communities, or to limited equity cooperatives.

6. New Construction or Conversion. The Article 5 rules — sections 83 through 95 — apply to conversion projects, and apply whether or not other provisions of the Act are applicable.

7. Location in or out of the State. A project located outside Connecticut is subject, in limited circumstances, to the disclosure provisions of the Act.

8. Individual Transfers. Particular transactions are exempt from the disclosure requirements of the Act.

C. The Factors at Work: Applicability "In a Nutshell".

1. Out of State Projects. In considering applicability, the easiest distinction to be made is between "in state" and "out of state" projects. Applicability to out of state projects is described in §20 of the Act.

The basic rule is that if a project is located outside Connecticut, only the public offering statement ("POS") provisions of the Act, contained in Section 63 through 82, apply to that project. Moreover, they apply to the out of state project only if: (a) the project is "offered" in Connecticut, see Act §3(12); and (b) either the buyer or seller signs the contract in this State; and (c) no other exemption from the POS requirements exists. See the exemptions described in §63 of the Act.

The underlying public policy is clear. If an out of state seller is actively offering units for sale in this state, and is actively asking buyers to sign contracts in this state, then the State has a legitimate interest in insuring that the level of disclosure offered to its re-

sidents should be the same, regardless of where the project is located. Thus, the disclosure requirements would apply to such an out-of-state offer. The out-of-state offeror has ample protection; it may make clear that it does not offer units in this state, or it may refuse to accept contracts signed in this state, or it may do both. When both circumstances exist, however, the project has sufficient contacts with the State to justify applicability of the disclosure provisions.

Except for disclosure, the Act has no applicability to a project located outside this state, and the substantive laws of the foreign jurisdiction would apply. In contrast, "in state" projects are subject to the substantive provisions of the Act, although in several different degrees.

2. "New" and "old" projects. The most substantial distinction to be made with respect to applicability is for "new" projects, that is, projects whose declarations are recorded on or after January 1, 1984.

The basic rule for new projects is that the entire Act applies; see §15 of the Act. There are, however, 3 significant limitations to that rule.

(a) Commercial Projects. If all units in a common interest community are restricted to nonresidential use as, for example, in a medical office condominium, then only Sections 5, 6 and 7 of the Act apply to that project unless the declarant elects to have the entire act apply. See §6(a)(1). The impact of those 3 sections, which apply collectively in several instances, is described in the footnote.⁵

Even if the entire Act applies to a commercial project, many provisions of the Act may be varied by agreement. In addition, much of the regulatory burden imposed on common interest communities — for example, in the area of disclosure — would not apply to commercial projects, even if the declarant elected to have the entire Act apply. See §63(b)(5).

(b) "Small" Project Exception. If a new project contains 12 units or less and is "simple" — that is, no development rights are reserved — then the structural requirements of the Act apply to such a project, but no POS need be prepared and no resale certificates are required in those projects at any time. See §16(c). The resale certificate requirements of the Act, contained in §71, are described below at footnote 7. This changes the current rule for condominium disclosure under Chapter 825, where a POS is required regardless of size. The policy underlying this distinction is to minimize the cost of disclosure, which can significantly affect the price of units in a small project.

(c) "De minimus" Planned Communities. A "de minimus" planned community is described in terms of limitations in the declaration with respect to common expense liabilities. See §16(a)(2) of the Act.

Basically, if the declaration for a planned community provides that the annual common expense liability of each unit in the project may not exceed \$100 then, again, only sections 5, 6 and 7 apply to that project

unless the declaration provides that the entire Act applies. In calculating that \$100 figure, the developer may exclude "optional use fees" and "insurance premiums paid by the association". Moreover, the \$100 figure is subject to adjustment under Section 14 of the Act, as the Consumer Price Index Increases. It is likely that, in July of 1984 (which would be the first time that the adjustment figures would be applied) the dollar limitation in §16(a) (2) will increase to between \$120 and \$130.

In addition, if the declaration for a "simple" planned community limits maximum annual common expense assessments to \$300 — including all charges — and meets certain other requirements, then it is subject to all substantive provisions of the Act, but no public offering statements or resale certificates are required. See §63(b)(7).

As a practical matter, very few projects currently have limitations in the project documents which place a cap on the amount of common charges which an association may assess. Such a limitation imposes a potential burden on the financial viability of an association and should, as a policy matter, be avoided except in those circumstances where a minimal charge is plainly warranted. For some projects, however, particularly subdivision projects or other single family home developments where the association does not maintain substantial reserves, does not perform maintenance on the units, and has only very modest recreational facilities or perhaps private roads, a limitation of the magnitude permitted by the Act may be reasonable. In those circumstances, the limited applicability of the Act will simply serve to insure that problems of taxation and eminent domain, which apply to all common interest communities, are resolved.

A drafter choosing to take advantage of the possible \$100 exemption would, of course, be obliged to fall back on the common law in attempting to resolve many of the thorny issues that exist in the field. The Act contemplates, however, that private contractual arrangements may be available to solve those issues, and the parties should not be obliged to work within the strictures of the Act where the economic impact of the "common interest" aspects of the community is so minor.

(d) A Word on Conversions. Note that the conversion provisions of Article 5 apply to every common interest community, whether new or old, even if part of the project might otherwise be exempt from the Act. See §16(b).

3. Applicability to "Pre-Act" Projects. Perhaps the most controversial provisions, and certainly the provisions immediately reaching the greater number of units in the state, are those affecting "old" or "pre-act" projects.

The rules for pre-act projects are somewhat more complex than the rules applicable to new projects. The basic rules are that (1) "the law of the project" — that is, the statutory or common law under which the pro-

ject was created — continues to apply to a pre-act project; (2) some provisions of the new statute, however, automatically apply to all old projects although the extent of applicability depends on whether a pre-act project contains 12 units or less; and (3) old projects, whether large or small, have a variety of "opt-in" elections which permit existing owners to take advantage of additional provisions of the new Act which they may find desirable.

It is useful, in dealing with pre-act projects, to describe them as "small pre-act" projects and "large pre-act" projects.

(a) Small Pre-Act Projects. See Section 18. If a pre-act project (1) is a cooperative or planned community, but not a condominium, (2) has 12 or fewer units; and (3) is not subject to development rights, then only sections 5, 6 and 7 apply to that project. Note that there is no exemption for small pre-act condominiums. Any pre-Act condominium was created since 1963 either under the original Connecticut Unit Ownership Act or under the Condominium Act of 1976; thus, its documents already comply, in one fashion or other, with the rather stringent requirements of those statutes. Therefore, all condominiums, of whatever size, are treated in the same manner as large pre-act projects.

Small pre-act projects may elect broader treatment under the new Act. Acting in accordance with §18 of the Act, the unit owners of a small pre-Act project may elect, in conformity with the law applicable to their project and with the amendment procedures of their old declaration, to be treated in accordance with §19 of the Act. Such an election would have the effect of treating such projects as if they were larger projects. It would thus make a number of additional sections automatically applicable, and would provide additional "opt-in" rights, as described in §19.

(b) Large Pre-Act Projects, and all Pre-Act Condominiums. See Section 17. Essentially, §17 requires that 12 enumerated sections of the Act, and the definitions as necessary, shall automatically apply to large pre-act projects and to all pre-act condominiums. ⁷

Importantly, these automatically applicable sections apply only prospectively, that is to "events and circumstances occurring after January 1, 1984". Moreover, the sections do not invalidate existing provisions of documents for those pre-act projects.

Many of these sections will work substantial changes in the activities of existing associations. In addition to Sections 5, 6 and 7 which have been described earlier, the automatically applicable sections enhance the powers of the association, resolve significant issues of tort and contract liability, grant priority of the association's lien over first mortgages, impose an obligation on the association to retain records and to provide resale certificates, clarify the rights of action given unit owners

and the association, and include provisions for attorneys' fees. Attorneys representing pre-act associations should carefully examine the automatically applicable sections to determine what impact they will have on their clients.

(c) The Opt-in Provisions. Section 19 of the Act provides that any pre-act project subject to that section — that is, any large pre-act cooperative or planned community, any pre-act condominium, and any electing small pre-act cooperative or planned community — may amend its declaration and bylaws to accomplish any result permitted by the Act. The kinds of amendments contemplated by this Section are many; the section is designed to make the much broader flexibility of the Act available to an old project to, for example, enhance its borrowing capacity, permit a restructuring of the bylaws, enlarge the activities of the association, or a variety of other changes. Importantly, any such amendment must be accomplished in conformity with the law of the project — that is, the law under which it was created — as well as the procedures set forth in the current documents of the project. Thus, while the Act permits the declaration to be amended, for example, by 67% of the unit owners, a declaration for an existing project which required a 90% vote to amend could only be amended with that 90% unit owners' consent. Moreover, to prevent abuse, the section provides that if any new rights, powers or privileges are granted to any person, then any correlative obligations, liabilities and restrictions in the Act also apply to that person. Accordingly, an amendment under this section would automatically pick up the entire bundle of rights and responsibilities applicable to any particular transaction, regardless of any attempt in the amendment to limit that result.

(To be Continued in Fall Issue)

FOOTNOTES

1 Mr. Breetz is a principal in the Hartford law firm of Reid and Riege, P.C., and is the Chairman of the Connecticut Law Revision Commission. As a reporter for the National Conference of Commissioners on Uniform State Laws, he was the principal draftsman of the Uniform Common Interest Ownership Act and its constituent Acts, including the Uniform Condominium Act, the Uniform Planned Community Act and the Model Real Estate Cooperative Act. The amendments to UCIOA, and were prepared under the auspices of the Law Revision Commission, which recommended its adoption in Connecticut.

2 It may be helpful to understand the background and development of the Uniform Common Interest Ownership Act.

Recognizing the need for a comprehensive statute responsive to the explosive growth and variety of condominium development in this country since the first state condominium statute was enacted in 1963, the National Conference of Commissioners on Uniform State Laws undertook to draft the Uniform Condominium Act in the Fall of 1975. UCA was completed and adopted by the Conference in 1977. It has since been adopted in eight states, including Maine, Minnesota, Missouri, Nebraska, New Mexico, Pennsylvania, Rhode Island and West Virginia.

As an outgrowth of UCA, the Conference promulgated the Uniform Planned Community Act in 1980. UPCA was designed to apply to all forms of common interest ownership, other than cooperatives and condominiums. In 1980, the Conference also adopted substantial amendments to the 1977 version of the Condominium Act, so that UCA and UPCA were identical, except in those areas where differences in the nature of the ownership forms warranted special treatment.

In 1981, the Conference promulgated the Model Real Estate Cooperative Act, applying the principals of the UCA and UPCA to cooperatives.

All three acts used the identical section numbering systems, with four mandatory articles and an optional article 5 on administration. This enabled the Conference, in 1982, to merge the three acts into a single statutory vehicle, the Uniform Common Interest Ownership Act, which applies to all 3 forms of common ownership. The merged Act is barely 10 pages longer than any of its single constituent parts.

Reference to the parallel section of these Uniform Acts may be helpful to practitioners since each of the uniform acts, including the merged Act, is accompanied by a set of detailed comments describing the impact of the statute and the relationship of one section to another. Copies of the individual Acts, with their comments, appear in West's Uniform Laws Annotated. They may also be obtained by letter to Ms. Alicia Pond, Executive Secretary, Uniform Laws Conference, 645 North Michigan Avenue, Suite 510, Chicago, Illinois 60601.

3 While The Connecticut Act is based almost entirely upon the Uniform Common Interest Ownership Act, our Judiciary Committee chose to delete the reference to a "uniform" act because of minor differences between the Uniform Act and the Connecticut version. Notwithstanding those minor variations, it is hoped that the codified version of the Common Interest Ownership Act in Connecticut will reflect the section titles and numbering system of the Uniform Act, as was done with the Uniform Commercial Code. This will permit ready reference to the uniform acts, with their comments, and to statutes and case law in other states which have adopted any of these uniform acts. Such a system would also enable other states to more easily relate their consideration of the uniform acts to Connecticut's enactment. At the date of this writing, no final determination had been made by the Legislative Commissioner's Office with respect to the form of codification.

4 A "condominium" is defined in Act §3 (8).

"Condominium" means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real property is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

A "cooperative" is defined in Act §3 (10).

"Cooperative" means a common interest community in which the real property is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit.

A "planned community" is defined in Act §3 (23).

"Planned community" means a common interest com-

munity that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community.

5 Section 5 is entitled "separate titles and taxation". The present rule in §47-79 C.G.S. is that condominium units must be separately taxed and assessed and no separate tax bill may be assessed on the common elements. Section 5 continues that result. Most significantly, the same rule is applied to planned communities; cooperative units, however, will not be separately taxed. This will change the practice under which municipalities tax the value of individual PUD units, and also levy a separate tax on the common property, since it is a separate parcel owned by the association, even though the common property has no economic value apart from the units. If the common property remains subject to development rights, however, it must be separately taxed and assessed, and the declarant alone is liable for those taxes.

Section 6 is a direct prohibition on local regulations of conversions, reflecting the same public policy of §47a-23c., C.G.S.

Section 7 contains a variety of provisions dealing with the unique aspects of eminent domain in the common ownership context. It supplements, and does not supplant, general state statutes dealing with the subject.

6 The definition of "unit" includes a concise separate provision to describe what it is that a unit owner "owns" in a cooperative. It is designed to carefully distinguish between the unit owner's possessory interest in the unit coupled with his ownership interest in the association, and the fee ownership of the real estate comprising that unit, which is vested in the association. The section provides that a sale, conveyance or encumbrance of a unit owner's interest does not affect the association's interest in that unit.

7 Section 17 provides:

Except as provided in Section 18, (an exception for small pre-act projects) Section 5, 6, 7, 23, 24 and 41, subdivisions (1) to (6), inclusive, and (11) to (16) inclusive, of subsection (a) of section 45, sections 54, 59, 61, 71 and 79, and section 3 to the extent necessary in construing any of those sections, apply to all common interest communities created in this state before the effective date of this act; but those sections apply only with respect to events and circumstances occurring after the effective date of this act and do not invalidate existing provisions of the declaration, bylaws or surveys or plans of those common interest communities.

The impact of Sections 5, 6, 7 is described in Footnote 5.

Section 23 is entitled Construction and Validity of Declaration and Bylaws. Its major impact, other than dealing with severability, conflict and rule against perpetuity problems, is to insulate the title of the units and common elements from claims of unmarketability as a result of an "insubstantial" failure of the declaration to comply with the Act.

Section 24 is entitled Descriptions of Units, and merely validates the use of an abbreviated reference to the unit's identity in deeds and other instruments requiring a legally sufficient description of a unit.

Section 41 is entitled Merger or Consolidation of Communities. Like present §47-88, C.G.S., §41 provides a flexible mechanism for pre-act communities to merge or consolidate with other communities where such an action is viewed as desirable by the unit owners.

Section 45 describes the powers of the association. The powers newly granted to pre-act associations are to (1) adopt and amend bylaws and rules; (2) adopt and amend budgets and collect assessments; (3) hire and fire; (4) institute, intervene in and defend litigation in both a direct and representative capacity "on matters affecting the common interest community"; (5) make contracts and incur liabilities; (6) regulate the use and repair of the common elements; (11) impose charges and interest for delinquent assessments or violation of rules; (12) impose charges for preparing amendments or resale certificates; (13) indemnify directors and officers and provide directors and officers liability insurance; (14) assign its rights to future common expense assessments; (15) exercise other powers confined in the project documents, and (16) exercise all powers exercisable by other "legal entities of the same type as the association" which, under typical Connecticut practice, are the powers of nonstock corporations under Chapter 600 of the General Statutes. A number of these powers plainly exceed the present authority of many current unit owner's associations.

Section 54 is entitled Tort and Contract Liability. Its principal impact is to (i) make the declarant liable for claims against the association occurring during the period of declarant control, (ii) provide procedural devices to assist the association in asserting its claims, and (iii) insulate unit owners from liability.

Section 61 requires the association to keep certain financial records, and to make them available to unit owners.

Section 71 requires every unit owner in a common interest community — except owners in certain small projects — to provide a resale certificate to a purchaser "before execution of any contract for sale . . . or otherwise before conveyance . . ." The association is required to prepare the certificate, which contains a substantial amount of information concerning the project, within 10 days of a request. To enforce the obligation, the purchaser has an unqualified right to cancel a sales contract until 5 days after the certificate is delivered, although actual conveyance cuts off the cancellation right. This new obligation of a seller, and new right of a buyer, is likely to be the subject of substantial discussion in future months.

Section 79 provides a clear right of action to any person for violation of the Act, and empowers the court, "in an appropriate case", to award attorneys fees.

Cross-Reference Table — Public Act 83-474 CONNECTICUT COMMON INTEREST OWNERSHIP ACT

ARTICLE I — General Provisions

PART I

Definitions and Other General Provisions

Public Act Section No.	Uniform Act	Section Title
1	1-101	Short Title
2	1-102	Applicability
3	1-103	Definitions
4	1-104	Variation by Agreement
5	1-105	Separate Titles and Taxation

THE CONNECTICUT COMMON INTEREST OWNERSHIP ACT: WHAT CONNECTICUT REAL ESTATE ATTORNEYS NEED TO KNOW

By

William R. Breetz, Jr., Esq.

Part II

Part I of this Article, which appeared in the last issue of *Perspectives*, reviewed applicability and some other major concepts of P.A. 83-474, the Connecticut Common Interest Ownership Act (the "Act"). The Act becomes effective on January 1, 1984, except for the conversion provisions which became effective July 8, 1983.

This part examines in greater detail the principal issues affecting attorneys who represent buyers and sellers of individual units. Part III to appear in the winter issue of *Perspectives* will examine the impact of the Act on the developer, and on the lender involved in construction loans or in securing secondary market commitments for end loans in common interest communities.

THE LAWYER'S DILEMMA.

Most Connecticut attorneys will first wrestle with the Act when asked by a purchaser to review a Public Offering Statement ("POS") received from a developer, or when representing a unit buyer or seller on resale. This section focuses on the Act from that perspective, and asks "what should I, as buyer's counsel, worry about?" A subordinate but very real issue that buyer's counsel must ask is, "How can I provide adequate representation to a client at a fee which the client is willing to accept?" The economics of this equation do not always work easily, and a concern voiced repeatedly by the drafters of the Act was how the Act would affect buyer's counsel, faced with the obligation to provide a reasoned explanation of a complex transaction at a reasonable price. Although perhaps not readily apparent at first reading, the Act was drafted with a standard in mind of being readily understood, after some effort, by the average attorney. Hopefully this series of articles will facilitate that process.

AN OVERVIEW FROM THE BUYER'S PERSPECTIVE. The individual buyer usually does not have enough leverage to cause a change in the project documents of a common interest community, although this may not be true for lawyers representing multiple buyers, or buyers in small projects. At the same time, knowledgeable counsel often can secure individual concessions in the client's sales contract, particularly during the "cooling off" period.

Counsel's other roles are to explain the implications of the transaction, and to insure that good title is transferred. The POS is helpful in fulfilling the former role. The greatest consumer protection provided by the Act is disclosure, and the POS should provide buyer's counsel the information necessary to evaluate the transaction and advise a client.¹ While the Act provides great flexibility to the developer creating a project, it also requires that each of the development rights to be retained be disclosed in detail. Buyers' counsel needs to understand the implications of some of those development rights, as well as greater flexibility in financing afforded the developer in the Act.

Significant warranties and other consumer protections are provided by the Act. The majority of the provisions benefiting the purchaser are contained in Article 4 of the Act, Sections 63 through 82. Special provisions benefiting purchasers and tenants in conversion projects are contained in Article 5, Sections 83 through 95. The Act also has significant new provisions governing the association's relationship to its individual owner/members. A buyer should be aware of what the association can do for, and to, that buyer.

Finally, a number of conveyancing matters are treated in the Act. These should not affect the buyer's interest, but will affect the lawyer's role of insuring transfer of good title.

DISCLOSURE.

1. Summary of the disclosure provisions of the Act:

- a. The Act generally adopts the same broad disclosure requirements imposed on "declarants" - typically, the developer - by the Connecticut Condominium Act of 1976, Chapter 825;
- b. The Act expands the amount of mandated disclosure in significant ways;
- c. The Act applies this increased level of disclosure to planned communities and cooperatives, where no disclosure was previously required;
- d. This level of disclosure applies to all "new" projects - that is, projects created after January 1, 1984 - unless the project or the particular transaction is exempt from disclosure;

e. With respect to "old" projects - that is, projects created before January 1, 1984 - other forms of disclosure, either the present POS requirements for "old" condominiums or resale certificates under §71 for "old" planned communities or cooperatives, are required of declarants; and

f. A short form of disclosure, the §71 resale certificate, is required of all unit sellers in nearly all projects, both old and new.

2. Applicability and Exemptions. Buyers' counsel should know the disclosure to which his or her client is entitled. Section 63 discusses applicability of the disclosure requirements.

"New" Projects. Disclosure must generally be provided by a declarant of any common interest community created after January 1, 1984. Buyers of units in nonresidential projects may waive disclosure. Limited exemptions from disclosure are granted in §63(b) for particular transactions - that is, a gift, court-ordered disposition, disposition by government, or disposition pursuant to a "nonbinding reservation agreement," which is a reservation which may be canceled by the purchaser at any time without penalty.²

There are only two significant exemptions from disclosure for entire "new" projects: (a) "simple" planned communities with annual assessments limited to \$300 per year; and (b) "simple" common interest communities, including condominiums, containing 12 or fewer units. Both exemptions have significant limitations.³

The collective effect of these limitations will be that relatively few new projects will be free from disclosure under those provisions. Some "old" planned communities which in fact operate below this figure may wish to amend their declarations, under the "opt-in" provisions of the Act, in order to avoid the necessity of resale certificates under §71. Other old projects may find the certificates desirable.

Moreover, although there is no statutory mandate that disclosure be provided in such cases, the experience of many planned community developers under current law is that a POS in some form is a useful marketing device for his real estate broker. For that reason, buyers' counsel may find that disclosure will be provided in some projects which are not mandated to disclose.

"Old" Projects. The POS requirements do not apply to projects created before January 1, 1984. Accordingly, a pre-Act condominium declarant must still provide a POS complying with Chapter 825, while a declarant of either a pre-Act cooperative or planned community is not required to provide any POS. In every case where delivery of a POS is not required, however, §71 requires that every "old" and "new" project unit owner must furnish a variety of documents, including a resale certificate, to a unit purchaser before execution of any contract for sale of a unit, or otherwise before conveyance. For that reason, declarants offering units without

a POS in projects created before January 1, 1984 will be required to comply with the more limited disclosure imposed under §71. This should change the practice of developers of currently existing planned communities which are not yet sold out. Buyer's counsel should look for the §71 certificates because of the cancellation rights and information those certificates provide. See the analysis of resale certificates, *infra*.

3. Liability for Failure to Disclose. Because the Act relies primarily upon disclosure for consumer protection, there are 2 forms of liability imposed on declarants who fail to properly disclose. In the case of a complete failure to disclose, the consequence is described in §71(c):

"If a person required to deliver a POS fails to provide a purchaser with the POS and all amendments thereto as required by subsection (a), the purchaser, in addition to any rights to damages or other relief is entitled to receive an amount equal to 10% of the sale price of the unit plus 10% of the proportionate share of any indebtedness of the association secured by security interests. . . ."

The 10% penalty is designed as an "atomic bomb", requiring no evidence of actual damages or other proof except that the POS or the amendments were not delivered as required by statute.

Sections 64(c) and 79 set out the standard of liability for failure of the POS to adequately disclose:

"The declarant . . . is liable to all persons claiming an interest in the common interest community . . . under Section 79 of this Act for any false or misleading statement set forth therein or for any omission of a material fact therefrom with respect to that portion of the public offering statement which was prepared. If the declarant did not prepare any part of the public offering statement that he delivers he is not liable for any false or misleading statement . . . unless he had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission." (emphasis added).

Section 79 of the Act provides that if a declarant or other person fails to comply with the Act, any person or class of persons adversely affected by the failure has a claim for appropriate relief, including the right of punitive damages for willful failure to comply and, in an appropriate case, reasonable attorneys fees.

From the buyer's perspective, this liability system represents a significant improvement on the old provisions of §47-90a which provided condominium purchasers the right to reconvey a unit, in addition to other (unspecified) remedies, within one year following purchase for failure to disclose under Chapter 825. Section 47-90a will, in a sense, self destruct on January 1, 1985, one year after the last project may be created under Chapter 825.

4. Buyer's Right to Cancel. The 15 day "Cooling Off" period. The Importance of POS Amendments.

In Section 70(a), the Act continues current condo-

minimum law that permits a purchaser, before conveyance, to cancel a sales contract within fifteen (15) days after executing it. The right is absolute, and the buyer is entitled to full return of any deposit. In an ideal world, the buyer's attorney should review the POS during that fifteen (15) day period; unfortunately, counsel often does not have the opportunity to review the POS until a loan commitment has been secured, and the buyer realizes that he may have to pay an attorney's fee in order to close. In some instances, however, the requirement in §65(b) that "a declarant promptly shall amend the POS to report any material changes or information to be required to be included in the POS", coupled with the requirement in §70(c) that those amendments must be provided to a purchaser, may offer additional opportunity for negotiation.

Those sections clearly identify the declarant's obligation to keep the contract purchaser informed of changes in or affecting the project. The requirement that amendments to the POS be provided the purchaser does not extend the 15 day "cooling off" period. Indeed, the delivery of such amendments is required even if the cooling off period has expired. The purpose of the requirement is to insure that unit purchasers are advised of any material changes in the project which may affect their contract under general law. A material change in the project affecting buyer's unit or the project as a whole, of course, would normally constitute a novation and such amendments could be significant in negotiations between buyer and seller. The penalty for failure to promptly provide the amendment would appear to come within the 10% penalty provisions of §70(c), although that result is not completely clear from the text of the Act.

The impact of possible amendments to the POS is often addressed in the declarant's form sales contract, since the possibility of future changes in the project documents after the project is being marketed haunts declarant's counsel. For the same reasons, the relevant clauses in the sales contract should concern buyer's counsel.

The most common amendment problem faced by declarant is that the end lender seeking loan purchase commitments from secondary market mortgage buyers - FNMA, FHCMC and others - may require changes after lender's counsel reviews project documents which may have already reached the sales force. The other common problem is the declarant who changes his mind as to various aspects of the project, or responds to market conditions, after marketing has begun. Some developer's counsel seek to avoid these potential problems by providing, in the sales contract, that the declarant reserves the right to unilaterally change the POS or declaration as he sees fit. A more balanced contract clause would permit document amendments to meet requirements imposed by institutional end lenders or the secondary market. Buyer's counsel should refuse to accept the broader clause, and should insist on the right to cancel a contract containing either clause if any material changes are made.

5. Substantive Disclosure Requirements.

The broadest disclosure standard of the Act is contained in §65(a) (19), which requires that the POS "fully and accurately disclose . . . (19) all unusual and material circumstances, features and characteristics of the common interest community and the units." The balance of §§65 through 68 discusses particular items of disclosure. Thus:

- Section 65 discusses disclosure applicable to all common interest communities.
- Section 66 requires additional disclosure for projects where development rights are reserved.
- Section 67 requires additional disclosure for projects where units are being sold in time shares; and
- Section 68 requires special disclosures for projects which involve conversion of existing buildings.

Disclosure in all Projects. Since §65 requires many disclosures currently required by Chapter 825, this part focuses on the mandated disclosure of §65 only to the extent it changes current condominium law.

As a matter of style, the actual name of a condominium or other common interest community need not include the form of ownership; thus a condominium known as "Happy Acres" need not be called "Happy Acres Condominium" but may simply be called "Happy Acres".

Section 65(a)(2) requires a declarant to disclose, among other things, his schedule of commencement and completion of construction of buildings and amenities, to the extent known. In considering that disclosure, the constraints imposed by a construction lender should be examined. Many phased project developers will face time limits within which commitments for construction financing in subsequent phases is available.

Subsection (a)(3) requires a declarant to disclose the number of units in the common interest community. In an expandable project, the POS should include the number of units to be in Phase 1 when the declaration will be recorded, while, under Section 66, the POS should disclose the number of units that may ever be a part of a planned community. Unlike current condominium law, there is no time limit on the period within which those units may be built, except the declarant's self-imposed limit.

The POS must include a brief narrative description of contracts or leases that may be subject to cancellation by the Association. See §65(a)(4). This includes all agreements with the declarant or a related party, any management or employment agreement, any lease of parking and recreational facilities, as well as any contract or lease which is not "bona fide", or is "unconscionable" or "commercially unreasonable."

Under subsection (5), the POS must include a budget for one year after the first conveyance and thereafter the current budget of the association. This mandates amendments to the POS for budgets in years after the first year. Unlike current law, the budget must include assumptions concerning occupancy and inflation. In a significant departure from current law, there is no

requirement in either a conversion or new condominium or other project, that there be "adequate" or even any reserves for repairs or replacement, but the fact that there are no reserves in the budget must be disclosed. The standard of "adequate" under old law raised a series of difficult problems.

Subsection (6) requires disclosure of a practice known as "low balling." If, as a marketing device, a developer intentionally reduces current common expenses in order to encourage sales, and instead provides those services himself to the project at no fee during the sales period, the anticipated effect of those increased services on future common charges must be disclosed. If a declarant failed to disclose such uncharged services, and they were "material," the declarant might be subject to liability under §79 for the cost of providing those future services.

All fees due from the purchaser at closing must be described in the POS; see §65(7). Under §65(9), the declarant must describe not only the financing which he is offering, but financing which he may have "arranged."

The declarant, under subsection (12), must disclose any unsatisfied judgments or suits pending against the association and any other pending suits "material to the common interest community of which the declarant has actual knowledge," even though the declarant is perhaps not a party to those actions.

Subsection (17) requires the declarant to disclose the extent to which he has arranged financing to complete improvements which he is required by his project documents or promotional materials to complete; §§80 and 81 describe the substantive obligation on declarants; see that discussion, *infra*.

Under subsection (18), the declarant is required to provide a brief narrative description of zoning and other use requirements "affecting" the common interest community. This is a potentially significant matter, particularly as to abutting and which the developer may or may not own or have knowledge of.

Again, §65(d) requires the declarant to promptly amend his POS to report material changes in the information required to be disclosed.

Disclosure of Development Rights. Under Section 66, all the declarant's development rights must be disclosed in detail, together with an indication of the self-imposed period of time within which those rights may be exercised, or will lapse. The subjects about which disclosure must be made are detailed, although the declarant is frequently permitted to state that he "makes no assurances" with respect to a particular issue.

Section 66(12) is a potentially important provision. It requires the declarant to describe the extent to which any assurances which he has made with respect to the exercise of development rights would apply or not apply if those rights were not exercised. For example, assume a declarant reserved the right to add 50 additional acres of land to a condominium, and assured potential purchasers that if he added the land, he would also build a swimming pool and 100 townhouses on that land.

The POS would have to indicate what the consequences might be, in that case, if the declarant chose not to add that land.

Time Shares. Section 67 requires particular disclosure in the case of time shares. Otherwise, the Act generally does not specifically affect time share projects, although the general requirements of §65 would apply.

Conversion Buildings. Section 68 discusses the special information which a POS must contain concerning a conversion building. The material required is somewhat different than that provided for condominiums under current law. For example, the Act eliminates the current requirement that a 3 year budget of past building expenses be provided, since past operating expenses are frequently not available or, when available have often borne little relationship to the experience of the project after conversion. There are other changes which become apparent when this section is compared to present §47-88b(a)(1) through (4). Importantly, the information required by §68 must be provided even in a common interest community which contains no more than 10 units and where no other disclosure is required; see §3(b).

6. The Resale Certificate

Section 71 is an important new device benefitting buyers and their attorneys in both "old" and "new" projects. Section 71 applies automatically to all pre-existing projects, unless exempt. As a result, owners of units in all existing condominiums, planned communities and cooperatives must provide a resale certificate upon resale unless the project is either under 12 units or is a project whose declaration restricts annual assessments to \$300 per year; see footnote⁴, *supra*.

Section 71 requires that the buyer be given a copy of the declaration, bylaws, rules and regulations of the association, and any current POS if any special declarant rights - which include declarant control of the association, as well as all development rights - are still outstanding. The buyer is also entitled to a certificate containing 10 enumerated facts, most of which relate to the financing condition of the project. Two of these - the effect on the project of the exercise of rights of first refusal, and the extent to which monthly common charges have been paid - are required by current law for condominiums, although the deadline now required for delivery is simply prior to conveyance.

The remaining required information includes fees payable by the seller; a statement of the association's projected capital expenditures for 2 years; a statement of any reserves of the association; a statement of any judgments against the association, or pending suits in which the association is the defendant; a statement of insurance coverage; restrictions or limitations on the amount of profit that a unit owner may secure upon sale; and, in a cooperative, an accountant's statement if any has been prepared concerning the deductibility of any portion of common charges under federal income tax.

The Act requires a unit owner to furnish the certificate, but also requires the association to provide the seller information that he needs. The certificate must be furnished before execution of a sales contract, if there is one, and otherwise before conveyance. Subsection (c) provides, however, that a unit owner is not liable to a purchaser for failure or delay in providing the certificate.

While the public policy represented by the mandated resale certificate is important, the enforcement mechanism has created some controversy among real estate brokers. To provide a meaningful sanction for delivery of the certificate, the purchase contract is voidable by the purchaser until the resale certificate has been provided and for 5 days thereafter or until conveyance, whichever first occurs. No reason is required; this is simply an additional "cooling off" period and enforcement mechanism.

Thus, while conveyance cuts off any rights of cancellation, a resale purchaser has the right to cancel his sales contract for 5 days after a resale certificate is delivered. In states which have enacted the Uniform Condominium Act, this provision has apparently not proved to be a problem. A possible solution to the broker's perceived dilemma may be for the broker to secure the required information from the unit owners association when the listing is secured, and provide it to every prospective purchaser.

When representing a resale purchaser, buyers' counsel should be aware of the implications of §71, both as to the information which the client is entitled to receive, and the 5 day "cooling off" cancellation period that it provides.

7. Labeling of Promotional Material.

In addition to the POS, §§80 and 81 of the Act are important constraints on a developer's promotional activity. Section 80 provides that no promotional material may be displayed or delivered to prospective purchasers which describes or portrays an improvement which is not in existence unless that promotional material is conspicuously labeled either "must be built" or "need not be built". Under §81, unless improvements are labeled "need not be built", the declarant must complete all improvements depicted on site plans or other graphic representations. These sections are likely to change the content of promotional materials in significant ways, and thorough counsel would welcome the opportunity to compare the promotional material with the POS.

WARRANTIES

Sections 75 through 78 treat the express and implied warranties provided by a declarant under the Act. Counsel should be aware that the warranties under the Act, combined with existing statutory warranties, form a complex set of warranties that sometimes overlap. Other statutory warranties include the new home warranties under §§47-116 through 120, the 3 year "code compliance" warranty of §46-121, C.G.S., and

the federal Magnuson/Moss Act warranties for tangible personal property, 15 U.S.C. §2301 et seq.

Express Warranties. Section 75 sets out a series of express statutory warranties. No provision of the Act permits waiver of those express warranties, but the warranties are limited to the extent that they must be "relied on by the purchaser." See §75(a). Accordingly, it would be useful for counsel to ask the client whether or not any representations or promises coming within these warranties were made. The fact that a form sales contract prepared by the seller provides that no such promises were made or relied on - a quite typical provision - should not be binding on the buyer if such promises in fact existed and were relied on. See §§11 [unconscionability] and 12 [obligation of good faith] of the Act; see generally, Restatement 2d, Contracts, §§380, 381. This appears to be the law in this state and elsewhere. See the authority cited in the footnote.⁴

Section 75(a)(1) provides that representations made which relate to the unit, use of the unit, or rights appurtenant to the unit or to the common interest community, create an express warranty that the unit, area improvements, and related rights and uses will conform to the representation.

Section 75(a)(2) provides that a model or description of the physical characteristics of the common interest community, including plans and specifications for improvements, create an express warranty that the common interest community will substantially conform to the model or description.

Third, under §75(a)(3), a description of the amount of real property comprising the common interest community creates an express warranty that the common interest community will conform to the description.

Finally, a provision that the purchaser may put a unit only to a specified use, such as a residential use, is a warranty that the use is lawful.

Section 75(c) contains a neat compromise between competing interests, the effect of which is not immediately clear under current Connecticut case law. It provides that a conveyance of the unit transfers to the purchaser all express warranties made by previous sellers, but only to the extent that a similar transfer of warranties occurs upon a conveyance under Chapter 827 of the general statutes. Thus, any rights of resale purchasers to claims against the original declarant must be interpreted in a future judicial decision.

Implied Warranties. Section 76 deals with implied warranties, which are given to a buyer upon purchase unless expressly excluded. Those warranties are as follows:

Under §76(a), a unit must be in at least as good condition at the time of conveyance or delivery of possession as it was at the time the sales contract was signed.

Section 76(b) (concerning construction quality.) Under this section, the declarant warrants that a

unit and the common elements are suitable for their intended use and that the improvements made by the declarant and by any other person prior to creation of the common interest community - an important provision in conversion projects - will be (1) free from defective materials and (2) constructed according to law, in accordance with sound engineering and construction standards, and in a workmanlike manner.

Under §76(c), a declarant warrants to a residential purchaser there an existing use does not violate applicable law at the time of conveyance or occupancy.

Importantly, the warranties on the common elements provided to the purchaser under §76 also extend to the association; see §76(g).

Exclusion of Warranties; Limitation on Warranty Period. Section 7 deals with limitations or exclusions of implied warranties. Most importantly for the residential purchaser, no general disclaimer is effective. A declarant may disclaim liability in an instrument signed by the purchaser "for a specified defect or class of defects", but only if that defect "entered into and became a part of the basis of the bargain." The official Comments to §4-115 of the Act indicate that this requirement of a signed instrument "is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties."

Plainly, buyers' attorney should carefully review the closing package prepared by the seller, including any such waiver document - which must be included in the POS by virtue of §65(a)(4) - and apprise the client both of the rights being waived, and the consequences of waiver. Note that, even if implied warranties under the Act are waived, the warranty under §47-121, C.G.S., which overlaps the Act's warranty, may not be waived.

If the implied warranties are not limited or excluded, an action to enforce them must be brought by a unit owner within 3 years of purchase of a unit or, as to a common element, within 3 years after first use. See §78.

OTHER SIGNIFICANT BUYER ISSUES

1. ESCROW OF DEPOSITS

If a purchaser makes any deposit when buying a unit from a declarant, that entire deposit must be held in escrow; see §72. The declarant himself may not be the escrow agent. The Act does not require payment of interest on an escrow deposit, but the parties may contract for interest. The escrow requirements apply in connection with any deposit made by a purchaser, whether pursuant to a binding sales contract or a nonbinding reservation agreement, and regardless of the characterization of the deposit as some other form of payment. Counsel for buyers therefore should not accept the occasional practice in which a portion of a deposit is characterized as a payment for custom work

in a separate contract, and thereby alleged not to be subject to the provisions of this section. Counsel should also be aware of §75(b), which provides that "any person who procures the wrongful release of any escrow funds . . . with intent to defraud the purchaser, shall be guilty of embezzlement."

While those escrow rules provide important protection for buyers, the Act rejects the current rule of §47-74d(b), C.G.S. requiring an escrow of 5% of sales proceeds until all common elements in a condominium are completed. This significant limitation of cash flow penalizes all developers of major phased projects, despite the fact that very little evidence existed of abuse. In those cases where developer abuse did exist, the 5% escrow was of very minimal help.

2. RELEASE OF LIENS AT CLOSING

Section 73, on release of liens, states a very different rule than that currently existing for condominiums under §57-87(a), C.G.S. First, the section contemplates that there may be underlying liens, either on the unit or on the common elements, which the buyer may assume and thus which need not be released at closing. Thus, the unit need not be released from liens on potentially "withdrawable" land, or from liens "which the purchaser expressly agrees to take subject to or assume". A buyer's willingness to assume a lien, of course, is a matter of contract.

Moreover, the declarant may convey common elements to the association subject to underlying liens in specified amounts. It may be anticipated that this device will be used in some cases as a means to reduce unit purchase prices; this will appear to make the units more competitively priced and, depending on the underwriting used by end lenders, may increase the number of buyers who qualify for a loan in the project, since their incomes may now meet the loan-to-value ratio applied by a lender. Such debt structure may help some buyers acquire housing they otherwise would not qualify for, and may permit declarants to take advantage of favorable blanket mortgages. Thus, buyers in some cases will be aided by this flexibility. The practice should have essentially the same economic impact as land leases used in some Connecticut projects.

There is, of course, a potential dark side to such liens. Debt service on those loans may significantly increase common charges, and the interest paid by the association on its debt is not likely to be tax deductible to the unit owner, in contrast to the classic cooperative result under §216 of the Internal Revenue Code. For marginal buyers, the impact of this debt may burden the family budget, particularly if debt service is structured as a "springing charge" some years in the future. Such charges have been seen in a number of conversion projects where, for example, the manager's apartment has been treated as a unit which the association is required to purchase some years in the future, when the declarant anticipates that all the units will be sold. Accordingly, buyer's attorneys faced with

underlying debt, either on the units or on the common elements, should counsel their clients on the financial implications of those loans, and the unwelcome surprise they may represent.

3. INSURANCE.

Buyer's counsel should be aware of Section 56, which imposes significantly different insurance requirements than the rules presently existing for condominiums. There are, of course, no current rules affecting planned communities and cooperatives, except those imposed by the secondary market.

Section 56 is a lengthy section with many provisions of particular interest to the association. From the buyer's perspective, the importance of the section is that it requires the association to maintain, to the extent reasonably available, casualty insurance of the common elements of not less than 80% of actual cash value. The association also must maintain liability insurance in an amount set by the directors or the declaration covering all risks commonly insured against for death, bodily injury and property damage arising out of or in connection with the use or ownership of the common elements. In a building that contains units having horizontal boundaries - that is, high rise or other buildings where a unit encroaches on the air space of another unit - the association must also maintain casualty insurance on the units in a minimum amount of 80% of actual cash value. That insurance need not include improvements and betterments installed by unit owners. Be aware that even though the Act requires a minimum of 80% actual cash value - in order to avoid co-insurance problems - the current requirements of the secondary market are that the association must carry casualty insurance in an amount equal to 100% of replacement cost, a substantially more expensive product. Obviously, the premiums for this insurance are reflected in the common charges paid by unit owners. The owner, as a result, will not be required to carry any insurance for his own benefit in many projects, other than a contents policy and a personal liability policy. The POS is required to describe the insurance coverage carried for the benefit of unit owners.

4. ANALYZING DEVELOPMENT RIGHTS AND FLEXIBILITY.

The buyer's attorney should be aware of the significantly greater flexibility given a declarant in allocating common expense liabilities, votes and common element interests in projects, as well as creation of development rights. For that reason, he should review and understand the developer's flexibility, to be described in more detail in the next part of this article. A few highlights are given here.

Allocated Interests. In a change from condominium law, votes and common expenses may be allocated on a basis which is different from each other or from common element interests. Common expense liabilities, for example, may be the same as voting rights, or

common expenses may be allocated on the basis of relative size or any other basis, while votes are equal. Moreover, a variety of special allocations of common expenses may be made, and the method by which these expenses are allocated to various units will have a significant impact on an owners' monthly charges. Understanding this, a review of the budget will be very helpful, and the impact of "low balling" should be considered.

Development Rights. Buyer's attorneys should understand the concepts of "convertible land," "convertible units", "additional land" and "withdrawable land." The buyers risk of unanticipated changes in project's quality and lifestyle will be substantially greater where declarants reserve long time periods within which to exercise development rights, and where "no assurances are made" respecting such things as future unit sizes, styles, amenity packages, or even sufficient units to carry front-ended recreational packages.

Changes in Unit Size and Mix. Traditionally, it has been assumed that the number of units in a condominium is fixed by the declaration, and that the boundaries of those units are immutable. Sections 31, 32 and 33 of the Act, however, provide substantial flexibility in these respects, and unit owners and their lawyers ought to be aware of these possibilities.

Section 31 provides that if a person acquires two adjoining units, the owner may remove or alter intervening partitions or "create appurtenances therein" without approval from the association unless the declaration limits that result. Section 32 provides that, subject to the provisions of the declaration, the boundaries between adjoining units may be relocated so that, for example, a bedroom belonging to one unit could be sold to the owner of another unit, changing the bedroom mix. This may be accomplished by agreement of the two adjoining unit owners.

Finally, under §33, if the declaration affirmatively provides for the subdivision of units, a single unit may be subdivided into two or more units, or units and common elements, or only common elements. This is likely to be a commonly used device by declarants in larger buildings, where entire floors are declared as units subject to subsequent partition. In reviewing declarant's development rights, a buyer's attorney would want to pay attention to the number of units which may be created as a result of subdivision, and whether that space might become common elements to be supported by common charges.

Exercising Development Rights. The Act resolves a number of issues which have plagued both developers' and association counsel over many years. Section 35 makes clear that the declarant may maintain sales offices, management offices and models in the units, but only if the declaration permits them. It also provides that the declarant may maintain signs on the common elements. Section 36 provides that the declarant has an easement through the common elements necessary

for exercising whatever rights he may have reserved in the Act.

Having a picture in mind of how development rights may be exercised over time and realizing the great extent of the developers flexibility will permit buyer's counsel to analyze a project in general terms much more quickly than the layman. Since the Act presumes a free market will control the possible excesses of the development community, and since the POS is designed to facilitate an understanding of reserved development rights, the attorney may increasingly become the only "outside expert" available to advise the unwary buyer. The task is a formidable one.

5. DECLARANT'S LIABILITY.

Buyer's counsel should be aware that the declarant and any association directors appointed by him are fiduciaries of unit owners under the Act, so long as they control the association; see §46(a)(1). As such, they have substantial liability to unit owners for expenses that they may cause or force upon the association during the period of declarant control.

Buyer's counsel will also want to be aware of Section 54 of the Act, which provides that only the declarant is liable for his torts in connection with any part of the common interest community which he has the responsibility to maintain. Additionally, a unit owner is insulated from any claims arising from wrongs done by the association; if that wrong occurred during the period of declarant control, the declarant alone, and not the association, is liable for losses not covered by insurance. Declarant is also liable for all costs that the association incurs as a result of breach of contract or other wrongful act or omission. Any statute of limitations affecting the association's right of action against the declarant is tolled until after the period of declarant control terminates, and a unit owner is not precluded from maintaining an action under this section because he is a unit owner or because he is a member of the association. The association may bring an action against the declarant, or any other person, as representative of all the unit owners; see §45(a)(4).

6. LIENS RESULTING FROM JUDGMENTS AGAINST THE ASSOCIATION.

Section 60 has a potentially significant impact on unit owners. Basically, the section provides that a money judgment against the association, if recorded, is not a lien on the common elements but is a lien against all the units in the common interest community at the time the judgment was rendered. Section 60 represents a significant, and somewhat controversial, policy respecting the best means of enforcing money judgment against associations. The section is designed to enhance the ability of associations to secure services from creditors, and recognizes that the units rather than the common elements are usually the economic basis of the project. If a money judgment is rendered against the association, it may not be recorded for at least thirty (30) days, and the association is required under

subsection (c) to promptly send notice of the judgment to each unit owner. This is intended to insure that the unit owners will be aware of the lien about to be created on their units. If liens on units are created as a result of the judgment, subsection (b) permits a unit owner to secure a release of that lien by paying his pro rata share of the lien, or by posting a bond.

7. ASSOCIATION'S LIEN FOR COMMON CHARGES.

Buyer's counsel should be aware of the increased power which the association has to enforce its lien for common charges, fines and other charges against unit owners. These rights are generally described in §§59 and 60. In summary, the association has a statutory lien for its common charges, and no further record notice of the lien need be made by the association. To the extent of six months common charges, the association also has a "super lien" which is senior even to first mortgages on the unit which become effective after the effective date of the Act.

8. SPECIAL PROVISIONS APPLICABLE TO CONVERSION BUILDINGS.

The Act attempts to clarify the special rules in Connecticut for the protection of conversion tenants. They are important both for tenants who want to buy, and tenants who wish to continue renting. For the investor buying an occupied conversion unit, these rules potentially spell the difference between a profitable and a poor investment.

Section 84 defines several terms, including "conversion notice", "converted unit", "conversion tenant", and "transition period", being a period of time beginning on the date a tenant's apartment becomes a "converted unit" and ending 180 days after the tenant receives a conversion notice, or, if later, at the expiration of his lease.

Conversion tenants have the following rights, subject to certain qualifications which should be reviewed:

1. Under Section 85, tenants must be given at least 180 days notice prior to the time the tenant will be asked to vacate his unit.

2. Under Section 86, after receipt of a conversion notice a tenant has a 60 day exclusive right to purchase the unit that the tenant occupies.

3. Under Section 87, after the tenant receives a conversion notice, he may terminate any existing lease on 30 days notice, regardless how long the lease may have to run.

4. Under Section 88, some conversion tenants are entitled to a relocation payment equal to the greater of 2 months rent or \$1,000, whichever is greater. Relocation payments are payable only if a tenant's "household income" is less than \$21,000 if the tenant is unmarried, or \$25,000 if married. A technical question, unanswered by the Act, is what constitutes a "household", if 2 or more unrelated persons or groups of persons are living in an apart-

ment, with or without a lease, at the time it becomes a converted unit. Whatever the Legislature intended, it is entirely possible, and common in many cultures, that several "households" may occupy a single apartment.

5. During a tenant's transition period, every conversion tenant may be evicted only for "good cause". "Good cause" includes refusal to pay a fair and equitable rent increase.

6. After his or her transition period ends, a conversion tenant may be evicted for any reason, including expiration of a lease, unless that tenant is also a "protected tenant". A "protected tenant" is any tenant living in a building or complex containing 7 or more units who is either over 62 years old, blind or physically disabled or whose spouse, sibling, parent or grandparent living with that tenant meets those criteria. There is no income limitation.

7. A protected conversion tenant may never be evicted, except for "good cause", prior to January 1, 1988. We may expect that the Legislature will be asked to eliminate the 1988 deadline.

8. Under Section 90, a conversion tenant's rent may not be increased during his or her transition period for any reason. After the transition period ends, a conversion tenant's rent, whether or not protected, may be increased only to the extent the increase is "fair and equitable", based on the same criteria considered by fair rent commissions. At least 60 days notice of any proposed rent increase must be given to a conversion tenant.

These rules obviously offer significant insulation for existing tenants from the consequences of conversion; Conversely, they may significantly affect the market value of an apartment building, particularly one occupied by a predominantly elderly group of tenants. This insulation does not presently extend to tenants in units who first rent after the unit is either converted, or who rent units in a newly constructed building subjected to a declaration before the tenant occupies. It is likely, however, that legislation will be introduced in the 1984 Legislature seeking to reverse that result. This would extend the so-called "subjective rent control" of fair rent commissions to all new apartment and condominium construction in Connecticut, posing substantial issues of public policy.

MISCELLANEOUS CONVEYANCING ISSUES.

The Act imposes a variety of changes which do not particularly affect the buyer's interest, but may affect the practice of lawyers representing buyers and sellers of units in common interest communities.

1. **Description of Unit Boundaries.** Current condominium practice is to include an extended description, in the declaration, of what portions of the building are part of the unit and which portions are part of the common elements. In an attempt to obviate the need for this extended description, §22 of the Act permits the declarant to simply designate the "walls, floors and

ceilings" as the boundaries of the unit. The declarant is not obliged to use that description, but if he does, §22 describes what the consequences of such a description are. As a result, in a normal high rise building, "walls, floors and ceilings" may be the only boundary descriptions contained in the declaration and that should serve the need of most owners.

2. Legal Descriptions of Units; Limited Common Elements.

Section 24 is a concise statement of all that must be said with respect to the unit in order to constitute a legally sufficient description. Henceforth, if: (1) the name of the common interest community; (2) the recording data for the original declaration; (3) the town in which the community is located; and (4) the identifying number of the unit, are stated in a deed or mortgage, that is a legally sufficient description of the unit and all rights, obligations and interests appurtenant to that unit, including its limited common elements. Thus, it would be legally sufficient to deliver a warranty deed to "Unit 6 in Happy Acres, Hartford, Connecticut, the declaration of which is recorded in Volume 2000, Page 192 of the Hartford Land Records." Caveat: if a buyer indicates that there are limited common elements appurtenant to the unit he wants to buy - parking spaces, patios, balconies, storage areas, sheds, garages, etc. - counsel should insure that the declaration has clearly achieved the intended result, and that the client understands whether he, or the association, must pay to maintain them.

3. **Title Searching.** Section 37 describes the method by which amendments to the declaration are made and the manner in which they are recorded. Because the Act changes the current method by which certain amendments to the declaration are made and indexed, an attorney searching the title of a unit in a common interest community created after January 1, 1984 should be aware of the provisions of §37.

Section 37 provides that an amendment to the declaration "shall be indexed in the grantee's index in the name of the common interest community and the association and in the grantor's index in the name of the parties executing the amendment." Often, the association will be the grantor. The one exception is contained in Section 32(a) of the Act with respect to amendments concerning a boundary between adjoining units. In cases of boundary amendments, the amendment must be indexed in the name of the grantor and the grantee, as well as in the name of the association. The declaration itself must be indexed in the grantee's index in the name of the common interest community and the association and in the grantor's index in the name of each person executing the declaration. See §21. Thus, a lawyer interested in obtaining a clear record of all amendments to the declaration affecting a particular unit would run the name of the common interest community in the grantee's index, run the name of the association in both the grantees' index and the grantors' index, and run the seller's title in the usual fashion.

FOOTNOTES

¹ The limitations of space do not permit an extended discussion of what might be done to create a clearing house in Connecticut of summaries of project documents. The fact is that at various times in the development of a project, documents are reviewed in detail, and it would be a relatively simple process for lenders or title companies to require written summaries to be prepared by reviewing counsel of all projects in excess of, say, 20 units. A cooperative effort by lenders and title companies across the state to compile such summaries in a standard format and in a central location would provide a great service, at reasonable cost, to buyers, attorneys, brokers, property managers and spot lenders.

² While no POS is required under the Act before a buyer signs a nonbinding reservation agreement, see §63(b)(5), this has not been the case under current condominium law. See §47-74f(a), C.G.S.

³ With respect to a planned community project, §63(d)(7) provides that disclosure is not required in a planned community "in which the declaration limits the maximum annual assessment of any unit to not more than \$300", as adjusted for the Consumer Price Index. To enjoy this exemption, however, (1) the declarant must have a reasonable and good faith belief that the assessment will be sufficient to pay the assessment to the project; (2) the declaration may not be amended to increase the assessment during the period of declarant control without 100% unit owner consent; and (3) the planned community may not be subject to any development rights, such as expandability.

Under §16(c), if a common interest community contains no more than twelve units and is not subject to development rights, no POS or resale certificate is required. This changes the result in condominiums under current law, where disclosure is required for all condominiums regardless of size. This continues the present result in small cooperatives and planned communities, however, since no disclosure is required in any such project. The public policy inherent in this exemption reflects the fact that disclosure in a simple under-13 unit project may cost more than the benefits conferred.

⁴ Cases such as *Ursini v. Goldman*, 118 Conn. 554, 173 A. 789 (1934), and *Corona v. Esposito*, 230 A.2d 624 (Conn. 1966), hold that a party to a written contract is not bound by its terms if something was said or done to mislead the party. In *Corona*, the purchaser of an automobile under a contract which stated that buyer took "as is" was permitted to rescind because contrary oral representations were made before the contract was signed. A misrepresentation of a material fact, even if not intentionally made, is sufficient to permit rescission of a written contract. See *State v. Hartford Acc. and Inden Co.*, 138 Conn. 334, 341 (1951). Cancellation of a contract for the purchase of real estate is no different. See, e.g., *Sinder v. Sinder*, 171 A.2d 248 (Maryland 1961).

SB

44

(FILE 3):

CORR. REC'D



OFFICE OF THE MAYOR

POUCH 6-650

ANCHORAGE, ALASKA 99502

TONY KNOWLES
Mayor

April 11, 1985

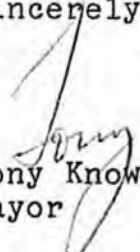
Sen. Patrick M. Rodey
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Member ^{Pat} of our Delegation:

I am writing you to urge your support for passage of a new Uniform Common Ownership Interest Act this session. We have long needed a better definition and clarification of the rights and responsibilities of both developers and individual property owners. The existing Horizontal Property Regimes Act does not sufficiently address the situation. The continued growth and the changes in our housing stock, particularly the increase in multi-family units, makes enactment of an improved law even more important.

A great deal of work has been done this session to refine the proposed Uniform Common Ownership Interest Act, and I would appreciate your support for the legislation.

Sincerely,


Tony Knowles
Mayor

ALASKA MORTGAGE BANKERS ASSOCIATION

P.O. BOX 4-2691/ANCHORAGE, ALASKA 99503

April 4, 1985

Senator Pat Rodey
Senate Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator:

The Alaska Mortgage Bankers Association is an organization which represents 29 financial institutions composed of four national banks, five state banks, four credit unions, two savings and loan associations, 13 mortgage companies and one savings bank, collectively employing in excess of 6,000 people in the state of Alaska.

Thank you for the opportunity to comment on the Judiciary Substitute for Senate Bill 44, the Uniform Common Interest Ownership Act.

The Alaska Mortgage Bankers Association has reviewed the bill, and while it appears to offer some improvements over current statutes, it is an extensive piece of legislation which should be thoroughly reviewed in order to ascertain its full impact.

Following are some specific comments:

Section 34.08.030: This section proposes to exempt small and limited expense common interest communities from most of the bill's requirements; however, since these communities would not be exempt if they are "...subject to financing from the Alaska Housing Finance Corporation...", in reality there will be few, if any, communities eligible for exemption.

Section 34.08.330 (e): This section requires addition of unit owners, other than the declarant, to the Executive Board upon conveyance of 25 percent and 50 percent of the units to individual unit owners. While the concept of individual unit owners' representation on the Executive Board has merit, compliance with this requirement would probably result in a new requirement of the lenders by AHFC which would be difficult to monitor since typically the long term loans on individual units close at many different lending institutions.

(f) This section requires a minimum of three members on Executive Boards. There are a few Associations comprised of only 2 units.

Section 34.08.340: This section requires inspection of the common and limited common areas by a certified architect or engineer. This type of inspection is typically performed by a fee appraiser who provides a list of unfinished items. If the items cannot be completed due to weather or other adverse conditions, it is normal for a cash escrow to be established to assure completion.

It should be noted that throughout the bill, performance of certain items is required by persons other than those who typically perform these functions.

Section 34.08.350, Transfer of Special Declarant Rights is of particular concern to construction lenders. The concept appears to be that a lender obtaining title through process of foreclosure, deed in lieu of foreclosure, sale under Bankruptcy Act, etc. is protected from additional liability or obligation as a Declarant if the lender declares "...in a recorded instrument an intention to hold the rights solely for transfer to another person...". In reality, a lender often must assume completion and maintenance of the project in order to hold sales transactions together, maintain a good relationship with existing owners and avoid potentially expensive litigation. By the time a construction lender must take over property through foreclosure, deed in lieu, etc., the project usually has a poor image in the community which would only be worsened by putting the project on hold pending sale by the lender to another person. The ultimate result of this bill could be to place the lender in a position of increased liability.

Section 34.08.470, Lien for Assessments: This section would give a maximum of 6 months' Association dues priority lien rights over a first mortgage. The Alaska Mortgage Bankers Association has requested a policy statement from the Federal National Mortgage Association (FNMA) regarding this item. Paul Vergets, Counsel for FNMA in Los Angeles, has stated verbally that if this section became law, FNMA may require 1) all Association dues be collected on a monthly basis (some Associations currently collect annually), 2) Association dues be included in the Mortgage Payment. Item 2 would greatly increase the responsibilities and paperwork of mortgage servicers. Although FNMA may not own many loans in the majority of Alaska Common Interest Communities, it does own some loans in many of the projects, and the impact of such a requirement could be extensive. As support for our request for thorough review of this bill prior to passage, we would bring your attention to a law which passed in Utah in 1983 which gave Associations priority lien rights. Once the impact of the law was discovered (inability to sell the loans on the secondary market, which quickly affected condominium values), the law was rescinded in special legislation. It is our understanding the wording of the Utah law was different than Senate Bill 44; however, it does point out the problems which can occur when legislation is enacted precipitously.

Section 34.08.520 through 34.08.590: These sections relate to requirements for information to be furnished to purchasers of units. The requirements are burdensome, at times with unworkable time frames, and appear to add substantial liability to Executive Boards, developers and lenders.

Section 34.08.530 (11) This section, allowing a buyer 15 days after receipt of the public offering statement in which to cancel a contract for purchase of a unit, could prove costly to a developer. Units will be held off the market during the waiting period, with uncertainty as to the sale, or if not held off the market, may result in litigation if "sold" to more than one purchaser. In most instances, purchasers who, shortly after signing a contract, decide they do not wish to pursue the transaction, receive their Earnest Money back from the seller. This requirement will result in additional carrying costs to the seller which will ultimately be passed through to buyers in higher sales prices.

(17) requires disclosure of financial arrangements on additional phases. While lending institutions may anticipate financing all phases of a project it is not typical to commit to additional lending prior to completion and marketing of the current phase.

Section 34.08.700: This section requires substantial completion be "...evidenced by a recorded certificate of substantial completion executed by an independent registered architect, surveyor or engineer, or by issuance of a certificate of occupancy...". Certificates of Occupancy are not available in many areas of Alaska. Requirement of a certificate by a registered architect, surveyor or engineer again adds to the cost, both direct costs and those due to delay. Final inspection are typically performed by fee appraisers; requirement of performance by other entities appears to set up another layer of paperwork, delay and expense.

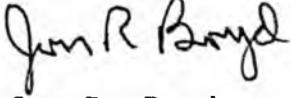
We have mentioned problems which are immediately apparent. There are many other areas of concern which have not been addressed, as we do not understand their full impact at this time. The bill would require increased policing on the part of lenders by secondary market investors; realistically, this will result in higher fees to developers and therefore, higher costs to homebuyers.

The Section Analysis is brief and, in our opinion, misleading, in that it glosses over the actual impact of the bill on developers, lenders, Executive Boards and the secondary market.

Finally, enforcement of this bills' provisions will be by litigation, which will benefit few outside the legal community.

The Alaska Mortgage Bankers Association is ready and willing to work with the legislature and/or legislative staff on this bill, but we urge you to fully consider the impact and delay passage until all sections can be thoroughly reviewed.

Sincerely,

A handwritten signature in cursive script, reading "Jon R. Boyd".

Jon R. Boyd
Director
Alaska Mortgage Bankers Association

attachment: Membership list, Alaska Mortgage Bankers Assoc.

:su

DELIVER TO: JFOM *****

ORIGINAL *****

SENT: 04/03/85 TIME: 16:39 *****

FROM: DAVID JENSEN *****

SUBJECT: FOM *****

PRINT DATE: 04/03/85 TIME: 16:40 *****

TO: SENATORS FAIKS, HALFORD, RODEY

REPRESENTATIVE UEHLING

FROM: WILEY BROOKS

1200 I STREET

ANCHORAGE, ALASKA 99501 (H)277-2484

SUBJ: SB44

I BELIEVE IT IS EXTREMELY IMPORTANT THAT SB 44 BE ENACTED THIS SESSION. IT IT'S A GOOD BILL FOR DEVELOPERS, LENDERS, MANAGERS AND MOST IMPORTANTLY COMMUNITY ASSOCIATION UNIT OWNERS. I URGE THAT YOU DO ALL WITHIN YOUR MEANS TO INSURE THIS BILL BECOMES LAW SOON. SIGNED, WILEY BROOKS - PRESIDENT ELECT, ALASKA CHAPTER OF R.E. MANAGEMENT.

EOH

STATE OF ALASKA

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

DIVISION OF BANKING, SECURITIES & CORPORATIONS

BILL SHEFFIELD, GOVERNOR

POUCH D
JUNEAU, ALASKA 99811

Banking & Securities (907) 465-2521
Corporations Section (907) 465-2530

ANCHORAGE

Corporation Information (907) 563-2163

April 4, 1985

Honorable Patrick Rodey
Chairman
Senate Judiciary Committee
Pouch V
Juneau, Alaska 99811

Dear Senator Rodey:

Re: Senate Bill 44
"An Act relating to the Uniform
Common Interest Ownership Act"

I would like to address my comments to proposed AS 34.08.570 on page 66, line 6, of the bill.

That section provides that if an interest in a common interest community is currently registered with the United States Securities and Exchange Commission (SEC), the declarant may rely on the public offering statement authorized by the SEC rather than using a public offering statement as provided for by Section 530.

This is a good provision. It will do away with a requirement to provide two similar offering statements and the SEC offering statement will in most cases provide more information than is mandated by Section 530. Purchasers, in addition, will have recourse under the Federal Securities Acts.

As Administrator of the Alaska Securities Act, AS 45.55, I do suggest that the sentence on page 66, lines 12 and 13, "An interest in a common interest community is not a security under AS 45.55," be amended to read, "An interest in a common interest community is not subject to the registration requirements of AS 45.55."

SEC Securities Act Release No. 5347, a copy of which is enclosed as Exhibit 1, describes situations in which real estate programs can and should be construed to be securities subject to the Federal Securities Acts. This can occur when a rental pool or management for profit is involved. State courts, although not bound to do so, frequently look to federal court decisions to determine whether the securities law of its state should apply to a particular real estate investment program.

COPY

There are certain types of real estate programs which should be subject to the Alaska Securities Act although not necessarily to the registration requirements of the act if Senate Bill No. 44 is passed. If a real estate program is a security (most are not), the Alaska Securities Act would not come into play unless there were violations of the fraud provisions, AS 45.55.010. In addition, purchasers would be able to look to AS 45.55.220(a)(2) for recovery. Regulation would not be duplicative because the offeror would still prepare only one public offering statement as provided for in Section 530 of Senate Bill 44.

Where purchasers are buying a condominium in order to provide for themselves a primary residence a security is not involved. Judge Pegues recently followed this rationale in Gertsch et al. v. Perez et al., 3 Blue Sky Law Reporter (CCH) ¶172,121 at 70,840 (1984). This case involves the Mobile Haven Mobile Home Park. Judge Pegues followed the U.S. Supreme Court case of United Housing Foundation, Inc. v. Forman, 421 U.S. 837,858 (1975) in holding that although shares of "stock" were issued to show ownership a security was not involved because people were buying housing, a necessity of life. A copy of Judge Pegues' decision is enclosed as Exhibit 2.

Brigantine Bay, Exhibit 3, is an example of a real estate security program. The Alaska Department of Law, Consumer Protection Section, investigated abuses in that program and when it filed a complaint alleged among other things violations of the Alaska Securities Act.

Enclosed as Exhibit 4 is a letter of this division dated July 23, 1982 in the matter of International Investments Cooperative Housing Corporation in which the division took the position that the program as proposed would constitute a security. Beginning on page 4 of that letter note that the sponsor proposed to form a cooperative housing project and to sell shares not just to those who intended to use an apartment as a primary residence, but to nonresidents who would purchase shares of the cooperative for investment purposes. I believe investment purchasers of such a program should have the protection of the Alaska Securities Act.

Should my suggestion not be acceptable, a less desirable change to lines 12 and 13, page 66, could read, "An interest in a common interest community is not a security under AS 45.55 if the real property is located in this state."

An Alaska resident who purchases property in this State is in a better position to examine the property and, if necessary, bring some type of action under Senate Bill No. 44 than if the property is located out-of-state. There have been particular problems with time share sales, particularly in the vacation oriented areas.

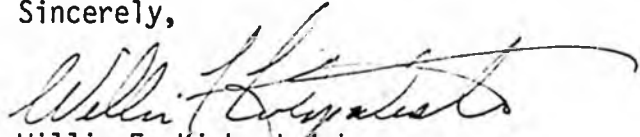
Honorable Patrick Rodey

-3-

April 4, 1985

If you have any questions or if I can furnish additional materials,
please feel free to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Willis F. Kirkpatrick", with a stylized, sweeping flourish extending from the end of the name.

Willis F. Kirkpatrick
Administrator of Securities

WFK/wfs2039W
4485b
Enclosures

cc: Loren H. Lounsbury, Commissioner (0800)
Jeff Bush, Assistant Attorney General
Department of Law (0300)

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION SECTION

February 28, 1985

BILL SHEFFIELD, GOVERNOR

XX REPLY TO

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1st NATIONAL CENTER
100 CUSHMAN SUITE 400
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S S FULLER BLDG
4th & HARRIS, SUITE 214
POUCH K
JUNEAU, ALASKA 99811
PHONE (907) 465-3592

STATE COURTHOUSE, ROOM 26
P.O. BOX 671
VALDEZ, ALASKA 99686
PHONE (907) 835-2462

The Honorable Pat Rodey
The Honorable Jan Faiks, and
The Honorable Rick Halford
Alaska State Legislature
Pouch V
Mail Stop 3100
Juneau, Alaska 99811

Re: SB 44 and HB 138

Dear Senators:

Since the Senate Judiciary hearing on February 26, 1985, on SB 44 I have had an opportunity to review SB 44 and the Uniform Common Interest Ownership Act, including the comments of the National Conference of Commissioners on Uniform State Laws, and to determine its possible interplay with HB 138 which proposes regulation of timeshares in our state for the first time. Upon close review of both bills it appears that both types of legislation could be passed by the legislature without conflict. In the comments to the Uniform Interest Common Ownership Act section 4-105, the commissioners noted:

1. Time sharing has become increasingly important in recent years, particularly with respect to resort common interest communities. In recognition of this fact, this section requires the disclosure of certain information with respect to timesharing.

2. Virtually all existing states statutes dealing with condominiums, planned communities or cooperatives are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of timesharing in this Act, however, does not imply that other law regulating timesharing is affected in any way in a state merely because that state enacts this Act.

The Uniform Law Commissioners' Model Real Estate Time-share Act specifies more extensive disclosures for time-share properties. A

"timeshare property" may include part or all of the common interest community, and section 1-109 of the Model Act governs conflicts between this Act and time-share legislation. [Emphasis added]

Section 4-105 of the Uniform Common Interest Ownership Act is identical to SB 44 § AS 34.08.550 TIMESHARES (beginning on page 64 at line 29), except that SB 44 adds additional provisions for disclosures in timeshare sales in subparagraph (5), (6) and (7).

In sum SB 44 (or the Uniform Common Interest Ownership Act) does not preclude the passage of specific timeshare legislation.

There should, however, be an amendment to HB 138 or any proposed timeshare legislation which would be similar to the Uniform Law Commissioners' Model Real Estate Timeshare Act section 1-109 "Conflicts with Other Statutes" which would provide:

In the event of any conflict between this Act and the Horizontal Property Regimes Act, AS 34.07.010 - 34.07.460 [and the Uniform Common Interest Act, AS 34.08.010 - 34.08.995, if SB 44 passes], the provisions of this Act prevail, but this Act does not invalidate or otherwise affect rights or obligations vested under those statutes before the effective date of this Act, or the manner of their exercise or enforcement.

Thus, we would propose an amendment to HB 138 as follows:

Sec. 45.50.656 CONFLICTS WITH OTHER STATUTES. In the event of any conflict between the Act and the Horizontal Property Regimes Act, AS 34.07.010 - 34.07.460, the provisions of this Act prevail, but this Act does not invalidate or otherwise affect

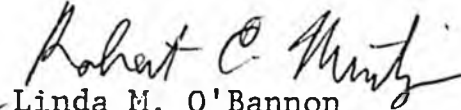
Honorable Rodey, Faiks, and Halford

February 28, 1985
Page 3

rights or obligations vested under those statutes
before the effective date of this Act, or the
manner of their exercise or enforcement.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: 
for Linda M. O'Bannon
Assistant Attorney General
Chief, Consumer Protection
Section

LMO/ssr

cc: Norman Gorsuch
Elizabeth Hickerson
Senate Advisory Council
1024 West 6th Av., Suite 203
Anchorage, Alaska 99501



Official Business

Alaska State Legislature

December 3, 1984

Pouch V
State Capitol
Juneau, Alaska 99811

Senator Pat Rodey
Alaska State Legislature
2335 Lord Baranof
Anchorage, Alaska 99503

Dear Senator Rodey:

With the opening of the next legislative session soon upon us, we wanted to share with you legislation we are considering introducing which may be of considerable interest to you. As you know, the condominium industry is growing by leaps and bounds throughout Alaska. With this growth, the Legislature has realized the existing Horizontal Property Regimes Act is severely limited in its applicability to common interest ownership.

As we're sure you realize, this situation is not peculiar to only Alaska. In response to the growing need nation-wide, the National Conference of Commissioners on Uniform State Laws developed the "Uniform Common Interest Ownership Act (UCIOA)". Professionals from every aspect of the industry were involved in the development of this model legislation -- from title insurance companies, architects, mortgage associations, the National Association of Home Builders, engineers, federal agencies, attorneys to realtors. It is this model legislation on which we propose to base our discussion of Alaska's version of UCIOA. The legislation is basically designed to provide consumers, developers and lenders with a consistent pattern of rights and obligations which will apply to all "common interest" developments -- whether they be condominiums, planned communities or cooperatives.

Because the legislation will touch in some way many of your constituents involved in the industry, we wanted to apprise you of this area of legislative effort. We are also interested in learning your reaction to the proposed bill and will be glad to provide you with a copy of UCIOA as well as the first draft as soon as it is available. In addition, a work session will be held on Friday, December 14th from 10 a.m. to noon at the Legislative Information Office first floor conference room (1024 West Sixth Avenue). If you're interested in a copy of the legislation and/or will be able to attend the meeting, please give Jan Faiks' office a call at 274-6611.

It's a comprehensive piece of needed legislation and the cooperation of all involved will be necessary to make certain the needs of everyone are satisfactorily addressed. We hope we will be able to count on your input.

Sincerely,


Jan Faiks
Senator


Rick Halford
Senator

BAILY AND MASON
LAWYERS

A PROFESSIONAL CORPORATION
1130 WEST SIXTH AVENUE, SUITE 100
ANCHORAGE, ALASKA 99501
TELEPHONE (907) 276-4331

MARK E. ASHBURN
DOUGLAS B. BAILY
LEWIS F. GORDON
JULIAN L. MASON III
DONALD W. McCLINTOCK III

March 1, 1985

Ms. Dea Turner
Executive Officer
Alaska Association of Realtors
1818 W. Northern Lights Blvd.
Suite 104
Anchorage, Alaska 99503

Re: Definition of "Dealer" in
Senate Bill No. 44

Dear Dea:

This firm has been asked to render an opinion on the meaning on the term "dealer" as defined in Senate Bill No. 44 (Alaska's proposed version of the Uniform Common Interest Ownership Act) at proposed §34.08.990(11). That definition provides:

(11) "dealer" means a person engaged in the business of selling units who is not an owner of a common interest community or of a unit within a common interest community.

This definition differs from that provided in the model Uniform Common Interest Ownership Act at §1-103:

(11) "Dealer" means a person in the business of selling units for his own account.

The definition provided in Senate Bill No. 44 clearly subjects real estate agents and brokers to the obligations of "dealers" found in Senate Bill No. 44, which obligations are in turn derived from the model act. For example, a declarant may transfer responsibility for preparation of all or a part of the statement to a dealer who intends to offer units in a common interest community. §34.08.520(b). A

Ms. Dea Turner
Page 2
March 1, 1985

declarant or dealer who offers a unit to a purchaser is required to deliver a public offering statement to each purchaser. §34.08.520(c) and 580. Both a declarant and a dealer warrant to a purchaser of a unit that may be used for residential use that a contemplated continuing use does not violate applicable law at the earlier time of conveyance or delivery. Senate Bill No. 44 at §34.08.640(c).

While these same duties are imposed on "dealers" in the model act, the definition of "dealer" is less clear. The undefined phrase "for his own account" causes the interpretation problem. The commentary to the model act's definition of "dealer" indicates that it is a newly defined term, not used in any of the three predecessor acts, the Uniform Condominium Act, the Uniform Planned Community Act, or the Model Real Estate Cooperative Act.

It appears that the only state that has adopted the Uniform Common Interest Ownership Act at this time is Connecticut. The Connecticut version of the act, Public Act No. 83-474, provides the following definition of a "dealer":

(11) "Dealer" means a person who owns either six or more units, or 50% or more of all the units, in a common interest community.

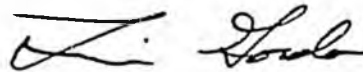
It is clear under the Connecticut act that a dealer refers to one with a significant ownership interest in a common interest community. The Connecticut act retains the model act definition of a "declarant." Thus, under the Connecticut act, a real estate agent or broker is not subject to the same requirements that an Alaskan agent or broker would be subject to under Senate Bill No. 44. In other words, it appears that the only state that has enacted the Uniform

Ms. Dea Turner
Page 3
March 1, 1985

Common Interest Ownership Act imposes "dealer duties" only on owners of a significant interest in a common interest community, and not on real estate agents and brokers. This contrasts with Senate Bill No. 44, which imposes duties on non-owner sellers, i.e., agents and brokers.

Very truly yours,

BAILY & MASON

A handwritten signature in dark ink, appearing to read "L. F. Gordon", written in a cursive style.

Lewis F. Gordon

LFG:dt

Municipality of Anchorage



P.O. BOX 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4960

TONY KNOWLES,
MAYOR

INTERGOVERNMENTAL AFFAIRS
February 21, 1985

Hon. Pat Rodey
Pouch V
Juneau, Alaska 99811

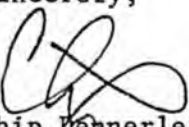
Dear Sen ^{Pat}Rodey:

Thanks for your February 19 letter regarding UCIOA.

I've notified the Judiciary Committee that I'll be in Juneau on February 26 and will plan to testify on the subject, although I understand there's a conflict at 2:00 when Justice Rabinowitz will give his State of the Judiciary address. I've given them the Municipality's Juneau number (586-2401) so a message can be left for me.

I hope to see you around town next week.

Sincerely,


Chip Bennerlein



NATIONAL MULTI HOUSING COUNCIL

Suite 306 • 1150 Seventeenth Street N W • Washington, D.C. 20036 • (202) 659-3381

February 4, 1985

Senator Pat Rodey
Pouch V
State Capitol
Juneau, Alaska 99811

Dear Senator Rodey,

Thank you for contacting me regarding Senate Bill 44, the Uniform Common Interest Ownership Act (UCIOA) which is now pending before your committee.

I appreciate your invitation to testify before your committee on February 5th regarding The National Multi Housing Council's support of UCIOA. Unfortunately, I have several important meetings which I must attend here in Washington on that date or else I would have been delighted to tell you why NMHC members support UCIOA's enactment and why we have recommended several strengthening amendments. For your information I have enclosed a press release setting forth NMHC's position on this important issue.

You indicated in your letter that there will be future opportunities for public testimony. I would appreciate you keeping me informed as to those dates and I will try to arrange my schedule so that I could appear at one of these future hearings.

Again, thank you for contacting NMHC regarding UCIOA and good luck in your efforts to get it enacted in Alaska. If I can be of any further assistance in this worthy effort, please do not hesitate to let me know.

Looking forward to working with you I remain,

Yours truly,

Stephen D. Driesler
Executive Vice President

cc: Senator Rick Halford
Senator Jan Faiks



NEWS RELEASE

National Multi Housing Council • Suite 306 • 1150 Seventeenth Street, N.W. • Washington, D.C. 20036 • (202) 659-3381

FOR IMMEDIATE RELEASE

Contact: Stephen Driesler
(202) 659-3381

NATIONAL MULTI HOUSING COUNCIL BEGINS NATIONWIDE DRIVE FOR UNIFORM CONDO CONVERSION LAW

WASHINGTON, February 14, 1984 -- Inaugurating its campaign for nationwide adoption of the Uniform Common Interest Ownership Act (UCIOA), the National Multi Housing Council (NMHC) is urging governors in all fifty states to pass a sweeping legislative package designed to give existing tenants greater protection during the conversion of their apartments into condominiums.

In letters to governors, the Council stressed the need for uniform laws which are fair for apartment tenants, condominium purchasers and developers.

This action follows the unprecedented decision by the National Multi Housing Council Board of Directors to endorse the Uniform Common Interest Ownership Act and to offer stronger protections to elderly and handicapped tenants, and families with children in school.

"Twenty years ago, when condominiums were new in America, developers sought -- and received -- legislation enabling their creation. From that time, the condominium concept radically altered something as fundamental as housing," wrote Robert Sheridan, NMHC co-chairman.

"Along with this radical departure from single family ownership of detached homes came problems of public acceptance and adjustments, especially for apartment tenants being relocated. Attempting to alleviate these initial problems, a second generation of condominium legislation ensued; much of it heavily favored the displaced apartment dwellers, tenant action committees and opponents of condominium conversion who, all too frequently, lost sight of facts amid the wrenching experiences of charges and countercharges," the letter said.

"Tough restrictions of condominium conversions are well intentioned but, we believe, they are an over-reaction," Geoffrey Stack, NMHC Secretary, further elaborated. "The results have often been disastrous to communities, rather than helpful. Benefits of condominiums have either been ignored or underplayed in conversion debates.

"Sometimes, we, in the industry, contributed to this unproductive environment by bristling at any hint of regulation. In the early days, the business community saw regulation as a noxious proposition. Now, 20 years later, the housing industry has matured and the National Multi Housing Council is piloting a national effort toward passage of the UCIOA and NMHC amendments," Stack said.

The letter emphasized that, "Members of the NMHC recognize they must take the lead in improving the condominium conversion process and encourage states to enact the UCIOA. The industry has the knowledge, the ability and certainly the incentive to take the lead in reducing the anxiety which condominium conversion may cause some tenants.

"The UCIOA and Council amendments strive for uniformity, not at the expense of compassion -- but also not unrealistically or unfairly to developers who have invested heavily in making the American dream a reality, and not unjustly to consumers who are seeking to opportunity for home ownership," Sheridan wrote.

* ATTACHED: A fact sheet prepared by the National Multi Housing Council answering specific questions about the Uniform Common Interest Ownership Act and Council amendments.

Q. WHAT ARE THE MAJOR PROVISIONS OF THE UCIOA?

A. Major UCIOA provisions dealing with many tenant/buyer/developer problem areas are:

- * A 120-day notice of conversion to tenants;
- * 60-day tenant right of first refusal to purchase their units;
- * No public offering of the tenant's unit on more favorable terms than those offered to the tenant for 180 days;
- * An engineer's or architect's inspection report on the condition of structural and mechanical systems;
- * List of outstanding building code violations, if any, and the cost to rectify;
- * Disclosure of current building income/expense statements; and
- * Projected condominium association budget, including any reserves for major repairs and renovation.

Q. WHAT ARE THE PRINCIPLE COMMUNITY BENEFITS OF CONVERSIONS?

A. The following benefits of converting an apartment building to a condominium have often been ignored in the conversion debate:

- * Condominium conversions expand the supply of affordable homes;
- * Conversions prevent the possibility of decay and abandonment of rental housing;
- * Condominium conversions help stabilize and often improve neighborhoods;
- * Owning a condominium is often the only way to own a home in some highly desirable neighborhoods;
- * Recycling of outmoded industrial and commercial buildings to condominium homes can create viable new uses and neighborhoods;
- * Condominium homes, especially converted units, fit today's new and changing lifestyles and household size patterns;
- * Conversions are the primary form of entry-level housing for home buyers;
- * Conversions usually involve renovation and rehabilitation and so stimulate construction employment and the local economy;
- * Condominium associations are a new and vital type of neighborhood group; and
- * Conversions have a significant, positive fiscal impact on a community, especially on the local property tax base.

Q. WHAT ARE COMMON PROBLEMS CREATED BY CONDOMINIUM CONVERSIONS WHICH THE UCIOA AND NMHC AMENDMENTS HELP ALLEVIATE?

A. Problems created by conversions need not be "solved" by indirect methods, such as moratoria, price restrictions, windfall taxes or rent control. The following considerations are recognized by the industry; the UCIOA and NMHC amendments address them:

- * Not every tenant wants to buy a condominium;
- * Some tenants might like to own a condominium, but not the unit they currently rent;
- * Some tenants simply cannot afford the down payment or the monthly cost of owning their units;
- * Tenants who buy may pay more per month to own than to rent;
- * Some tenants who do not buy pay more rent after they move;
- * Some non-purchasing tenants must move to other neighborhoods,
- * Elderly and handicapped tenants may be least able to buy and most affected economically and emotionally if they cannot; and
- * Converted buildings are sometimes old and often have not been totally renovated prior to conversion.

Q. WHO MAY I CONTACT FOR MORE INFORMATION ABOUT THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE NATIONAL MULTI HOUSING COUNCIL AMENDMENTS, THEIR EFFECT ON MY STATE AND HOW THEY WILL CREATE AN ATMOSPHERE OF CO-OPERATION AMONG CONDOMINIUM DEVELOPERS, OWNERS, MANAGERS AND PROSPECTIVE BUYERS AND NON-BUYING APARTMENT DWELLERS?

A. The National Multi Housing Council, 1150 17th Street, N.W., Suite 306, Washington, D.C. 20036, (202) 659-3381, eagerly awaits your inquiries about the UCIOA and the Council's stronger amendments. It has taken the unprecedented step of endorsing and pushing for passage of both the act and amendments. Call or write the Council and more information and a comprehensive review of the condominium conversion climate in the United States will be provided.

Q. WHAT HAS BEEN THE EFFECT OF SOME OF THE LATEST RESTRICTIONS TO CONDOMINIUM CONVERSIONS?

A. While most constructive second generation legislation was enacted at the state level, many new anti-conversion laws are primarily local legislative efforts aimed at meeting the particular demands and fears of local tenant groups. They are fundamentally different in their variety, purposes and provisions. Some of them, explicitly or covertly, intend to end condo conversions completely. The effect of some new restrictions has been to increase the cost of condominium conversions so substantially that the relative price advantage the consumer has in buying a converted unit disappears.

Q. WHAT ARE MAJOR SHORT AND LONG TERM EFFECTS OF RESTRICTIVE CONDOMINIUM LEGISLATION?

A. Overly restrictive condominium legislation sends signals to developers who could play a part in making both rental and ownership units more available. It says:

- * There is no incentive to build new rental apartments, because developers cannot plan on a conversion at a later time. Developers increasingly cannot build and operate rental projects profitably without some form of government assistance or subsidy -- unless they can recoup their investment at a later date by converting apartments to multifamily housing units.
- * Thousands of rental units would, annually, become tax delinquent or abandoned as owners simply gave up in the face of escalating operating costs and lagging rents. Restrictive legislation may well doom apartment buildings in older neighborhoods -- units which could otherwise be recycled and bring about a turnaround in a residential area. Instead, the neighborhood could become locked into a continuous decline, becoming extremely difficult to upgrade and rehabilitate. This would be particularly harmful to younger workers in larger cities -- such as New York, Boston, Atlanta, Chicago and Washington, D.C. -- which act as regional magnets for urban, job seekers; older buildings converted to condominiums have provided these workers with home ownership in close-in locations at more affordable prices.
- * It says "go slow" on any capital improvements because owners of existing buildings fear their opportunities for return on that additional investment might be negligible -- if there is any opportunity for return at all. The real losers are people living in units, the neighborhood and community.

Q. WHAT IS THE REAL PROBLEM FOR CONVERSION OPPONENTS?

A. When pressed to express their real concern, advocates of tough restrictions on condominium conversions usually admit their first priority is to preserve an adequate supply of rental housing. Their method is to slow or halt the rate of conversions. Conversions, in their opinion, worsen an already serious rental housing shortage. Reputable studies have shown this is not true.

Q. IS THERE A RENTAL HOUSING SHORTAGE CAUSED BY CONDOMINIUM CONVERSIONS?

A. There is no significant shortage of rental housing, according to the U.S. Department of Housing and Urban Development. A 1980 HUD condominium survey concluded that 366,000 rental units, or approximately 1.31 percent of all occupied rental housing units United States, had been converted between 1970 and 1979. Based on the HUD conclusion that every 100 converted units results in a net loss of five rental apartments, then only slightly more than 18,000 rental units in the entire country were "lost" to conversions during the 1970s. That is a tiny fraction of the 26.5 million rental units in this country. If conversions were permanently halted -- an extreme "remedy" of this so-called rental housing shortage -- we might conclude that approximately 1,800 more rental units per year would be available nationwide.

LAW OFFICES OF VINCENT VITALE

A PROFESSIONAL CORPORATION

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VINCENT VITALE *
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DAVID E. GEORGE
KATHLEEN A. WEEKS
EDWARD L. MINER

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EAGLE RIVER, ALASKA 99577-2889
(907) 694-8050

☐ PLEASE REPLY TO THE ABOVE
ADDRESS.

☐ PLEASE REPLY TO THE ABOVE
ADDRESS.

January 31, 1985

The Honorable Senator Pat Rodey
Chairman, Judiciary Committee
Pouch B
Juneau, Alaska 99811

Re: Senate Bill 44, Common Interest Ownership Act

Dear Senator Rodey:

The following review is designed to point out a few of the important differences between the existing act (A.S. 34.07.) and Senate Bill 44. As you are aware the existing act covers only condominiums and does not cover planned unit developments, leasehold planned communities, planned communities, timeshare communities, or cooperatives.

<u>Specific Area of Concern</u>	<u>AS.34.07.</u>	<u>SB 44</u>
1. Association Insurance needs.	Generally addressed by AS 34.07.400	Detailed insurance requirements contained in AS 34.08.440

Insurance needs of the associations should be clearly spelled out to avoid confusion on the part of developers and association boards and assure adequate coverage. The new statute requires insurance to be at 100% of the replacement value, for example.

2. Transition Problems	Not addressed	Detailed requirements contained in AS 34.08.340

There must be a specific statute which identifies those items or acts which must be completed as part of turning the control of the project over to the owners. This new section accomplishes that purpose. Owners, directors, managers and developers benefit by having the requirements clearly established.

Specific Area of Concern

AS.34.07.

SB 44

The declarant is required to provide the board with all financial records, amendments to declarations or bylaws, warranties from suppliers and subcontractors and so forth. Plans for the building and underground utilities must be provided. The Associations and the unit owners will benefit by having such information. A punch list of common area repairs must be made thus eliminating disputes over common area repairs. This will tend to reduce unnecessary litigation.

3. Developer reservation of rights.	Not addressed	Addressed in detail AS.34.08.180

Developers must be able to phase projects. Purchasers should know what the developer must build and what the developer may build to avoid misleading representations. By avoiding innocent misrepresentation the developer, realtor and homebuyer will benefit. Unnecessary litigation can be avoided.

4. Association Budget for Reserves	Not addressed	Addressed in detail As 34.08.____

The method of computing reserves should be clearly understood by developer and owners. In this manner "low balling" of budgets can be limited. Proper budgeting for reserves will avoid unexpected special assessments or large increases in the monthly assessments Homebuyers will be assured of having a monthly assessment within their projected household budget.

5. Maintenance of Units	Not addressed	Addressed in

Developer, managers, and boards often dispute whether an item within a unit is the association's responsibility, or the unit owner's responsibility. The new definition will help avoid these disputes. The new unit boundary definition allows clear

Specific Area of Concern

AS.34.07.

SB 44

distinction to be drawn between owner responsibility and association responsibility. Owners will know that they are responsible for certain maintenance items and can plan accordingly. Arguments about such maintenance items should be limited.

6. Transfer of reserves rights by declarant	Not addressed	AS 34.08.350 allows declarant to transfer rights reserved by declarant to third parties, generally build- ers or other de- velopers.

This section allows the developer to transfer specific declarant rights to another developer. In this manner a project can proceed even though the initial developer may choose not to do further work.

7. Termination of Contracts entered into by developer	Not addressed	AS 34.08.360 allows the asso- ciation to term- inate contracts entered into by declarant and avoids unfair contracts

This section avoids situations where a developer may have entered into a contract on behalf of the association on terms that are unfavorable. The association has the right to cancel. This avoids the situation where snow removal is being done by the developer's wife's company at exorbitant rates.

<u>Specific Area of Concern</u>	<u>AS.34.07.</u>	<u>SB 44</u>
8. Assessments for Common Expenses	AS.34.07.380 and .450(7)	AS 34.08.460 more clearly spells out assessment re- quirements.

What is, or is not a common expense, is sometimes a problem. In the case of a P.U.D. there is no statutory definition to aid the association. This section solves those problems.

9. Borrowing by Associa- tion	Not addressed	AS 34.08.320(a) (14) specifically allows asso- ciations to assign future in- come

Associations presently have no ability to borrow funds by assigning future income. As potential borrowers the association needs to have statutory authority to assign future income to secure borrowing for repairs.

10. Disclosure to Purchasers	Not addressed	AS 34.08.530 sets forth speci- fic information which must be contained in the Public Offering Statement clearly spelled out in AS 34.08.460

Numerous complaints by unit owners involve nondisclosure of future plans by the developer. The Public Offering statement

Specific Area of Concern

AS.34.07.

SB 44

tells potential purchasers and realtors exactly what the project entails and should reduce misleading information being given to buyers. AS 34.08.680 requires the declarant to mark promotional literature with "must be built" or "need not be built" to avoid confusion. Buyers will have available information which will advise them of the developers intentions and plans. Such information will substantially reduce complaints by purchasers.

11. Liability for Assess- ments for Common Expenses	Addressed but confusing	Clearly spelled out in AS 34.08 .460

Developers often believe they do not have the same liability as unit owners to pay for common expense assessments. This statute clearly sets forth those responsibilities.

12. Access to Records	AS.34.07.290 allows access to financial expen- diture records	AS 34.08.490 allows access to all records

Some developers and managers refuse to allow associations to have access to corporate records prior to transition. This statute clearly sets forth the unit owners right to access all records.

13. Resale Disclosure	Not addressed	AS 34.08.590

Many complaints have involved nondisclosure of material facts by unit owners upon resale. The problem can be substantially resolved by requiring the unit owner to give the required information to a purchaser. To do this the associations will be required to keep all the records current. Unit owners, buyers realtors and managers will benefit from up to date informaton.

<u>Specific Area of Conern</u>	<u>AS.34.07.</u>	<u>SB 44</u>
14. Express Warranties of Quality	Not addressed	AS 34.08.630 sets forth how express warranties are created and what they are.

Numerous difficulties are involved in warranty disputes.
These statutes clearly set forth what a warranty is.

15. Implied Warranties	Not addressed	AS 34.08.640 sets forth implied warranties. AS 34.08.650 discusses how warranties can be modified or excluded. AS 34.08.660 establishes a statute of limi- tations for implied warran- ties.

Under present Alaska law an implied warranty goes on
until the court decides the time period is too long. This sta-
tute sets up specific implied warranty periods and avoids much
confusion that exists in the area of implied warranty liability.

16. Organization of Unit Owners	Not addressed	Requires asso- ciation cor- porations to be formed no later than the date of first conveyance of unit.

Senator Pat Rodey
January 31, 1985
Page -7-

Numerous disputes involve situations where the association was not created until time of transition. Thus owners were paying assessments to a nonexistent association prior to transition. This section requires the declarant to have the association in place prior to the conveyance of the first unit so the unit purchaser will be a member of an existing association.

There are numerous other differences between the present act and Senate Bill 44. The purpose of this summary is to highlight specific areas that have caused difficulties in the past and reflect the fact that these areas are covered in Senate Bill 44.

Sincerely yours,

LAW OFFICES OF VINCENT VITALE
A Professional Corporation

By:

William L. McNall
WILLIAM L. McNALL

WLM:ail

FOR IMMEDIATE RELEASE

Contact: Stephen Driesler
202/659-3381

NATIONAL MULTI HOUSING COUNCIL ANNOUNCES UNPRECEDENTED
ENDORSEMENT OF CONDOMINIUM CONVERSION LAW

Washington, D.C., January 12, 1984 -- In a landmark decision, the National Multi Housing Council (NMHC) Board of Directors endorsed the Uniform Common Interest Ownership Act (UCIOA). The Council also took the further unprecedented step to recommend strengthening the UCIOA by expanding certain protections for tenants living in apartments slated for conversion to condominiums.

The board announced its intention to press state legislatures to enact the UCIOA along with the NMHC strengthening amendments.

"The variety and degree of complexity of condominium conversion laws across the country range from those establishing minimum information disclosures to outright moratoria. Many of these restrictions are based on fear, not facts. The result has curtailed social and physical enhancement of neighborhoods and inner cities, denied basic housing to prospective homeowners and ultimately added costs to the consumer," Robert Sheridan, NMHC co-chairman said. Sheridan is chief executive officer of Robert Sheridan and Partners, a major national condominium development firm headquartered in Chicago.

"The UCIOA and the proposed NMHC amendments strive for uniformity, not at the expense of compassion, but also not unrealistically or unfairly to developers who have invested heavily in making the American dream a reality," Sheridan pointed out.

"As condominium conversion activity has heightened in recent years, members of the National Multi Housing Council have become increasingly aware of, and sympathetic to, problems created for some tenants. It is our experience that the elderly, handicapped and families with school-aged children undergo the greatest stress and inconvenience if they choose not to buy a converted unit," Sheridan said.

"For these reasons, the Council recommends the UCIOA be broadened to guarantee greater protection for the elderly and handicapped. This includes extending to one year the relocation period with relocation expenses paid for by the developer, and allowing for termination of existing leases without penalty.

For families with school-aged children, NMHC suggests additional flexibility to allow them to remain in their unit until the end of the school year," explained Geoffrey Stack, president of Regis Homes, Inc. and secretary of NMHC. Stack is a leading condominium developer from Newport Beach, California.

"The decision to endorse the UCIOA and the proposal of strengthening amendments is a bold move for any housing association, because of the industry's tendency to resist regulation. Now, 20 years after the first condominium laws, the industry has matured; it has the knowledge, the ability -- and certainly the incentive -- to take the lead in reducing the anxiety which condominium conversion may cause for some tenants," said Sheridan.

"The Council believes the industry must take the lead in encouraging states to enact the UCIOA. The industry can -- and must -- rectify the oversights which couldn't be foreseen during the infancy of condominium conversion in America," Stack added.



**Above
the
Crowd!®**

January 31, 1985

✓ Senator Rick Halford
Senator Jan Faiks
Senator Arliss Sturgulewski;

RECEIVED FEB 04 1985

Re: Senate Bill No. 44
Relating to the Uniform Common Interest Ownership Act

Dear Senators;

We strongly endorse and urge your support of the above mentioned bill. We are particularly interested in the section relating to implied warranties of quality, as we believe this will help to alleviate many of the problems purchasers and sellers are faced with upon contracting for sale of a condominium unit.

Further we would encourage you to consider a similar home warranty bill for single family homes. The need here is as great as the other if not greater.

RE/MAX OF EAGLE RIVER

REALTORS

cc: Senator Tim Kelly
Senator Robert Zigler
Senator Jay Kertulla

Representative Randy Phillips
Representative Sam Cotten
Representative Ben Gruesndorf
Representative Don Clocksin
Representative Mike M. Miller
Representative Rick Uehling
Representative Pat Porchot

John Blaker
Gary Dandrell
Henry McWann
David Brach
Mark Spanner
Virginia Kippel
Thomas
Patricia J. Arguine
Charlotte Schost
Greg
Joe L. M...
Monica Mann
Maureen S. Clayton
James A. Porte
Patricia Nicolayser

RE/MAX eagle river
post office box 772849
eagle river, alaska 99577
(907) 694-4200

Sheridan concluded "It is highly desirable, for reasons of uniformity and fairness, that UCIOA and NMHC amendments apply to all condominium conversions, once enacted." Therefore, the NMHC also recommends the UCIOA be modified to clearly state that adoption of the Act would override any local ordinances or regulations which would be in conflict with the provision of the UCIOA. This is necessary to secure uniformity which is one of the main purposes of the Act.

The four NMHC suggested amendments to the UCIOA which would provide even greater protections for the elderly, handicapped and families with school-aged children, are specifically:

- o Allow elderly and handicapped tenants to remain in their units for one year after receiving an offer to buy or until the expiration of the existing lease, whichever is greater, with no additional increase in rent.
- o Provide relocation assistance equal to two months rent to elderly and handicapped tenants who vacate their units within 12 calendar months after receiving the notice of conversion.
- o Permit elderly and handicapped tenants to, without penalty, terminate an existing lease after giving 30 days' notice.
- o Allow families with minor, school-aged children to remain in their units until the present school year is finished, even if all other applicable expiration dates have passed.

These amendments are designed to strengthen UCIOA provisions which already deal with most of the tenant/buyer/developer problem areas. The major condominium conversion provisions of the UCIOA are:

- o A 120-day notice of conversion to tenants;
- o 60-day tenant right of first refusal to purchase their unit;
- o No public offering of the tenant's unit on more favorable terms than those offered to the tenant, for 180 days;
- o An engineer's or architect's inspection report on condition of structural and mechanical systems;
- o List of outstanding building code violations, if any, and cost to rectify;
- o Disclosure of current building income/expense statements; and
- o Projected condominium association budget, including any reserves for major repairs or renovation.

-30-

A national non-profit trade association, the National Multi Housing Council represents builders, condominium and apartment developers, owners and managers involved in all phases of multifamily housing. The organization serves as a clearinghouse for information on multifamily housing issues and offers legislative representation at the federal, state and local government levels to foster policies that would encourage the development of rental apartments and condominiums to meet America's growing needs now and for the future.

Governor

First residential PUD approved by commission

By JIM SPRINGER

MAT-SU—A proposal to build 14 condominium units on 7.3 acres at Big Lake became the first residential planned unit development (PUD) ever to be approved by the Borough Planning Commission.

The commission approved an application by Steven Rudd, under the 1981 PUD ordinance, to put seven duplex condominiums on his property in Lake Park Subdivision on the shore of Big Lake. The precedent-setting action came after a lengthy presentation by Rudd's consultant, and from others who criticized the plan.

One man testified that the land on which the development was proposed for was too wet to safely contain seepage from the 14 units.

"The reason it hasn't been developed in the past is that it's very wet," said

Ralph Hansen. He said the ground was floating, matted vegetation that sprung underfoot.

Three others, including Assemblyman Vern Ungerecht, testified that the ground was swampy and that septic drainage would be a problem.

But the Planning Commission, leaving the septic drainage question for the Department of Environmental Conservation to rule on, took the Planning Department's recommendation, including several stipulations, and gave it the go ahead.

Among those stipulations was that Rudd document or acquire right-of-way on an abutting road, and upgrade the road to collector standards to provide access from the PUD to South Big Lake Drive.

The planned unit development ordinance provides an alternative to

the standard subdivision procedure for developers who comply with its provisions. It allows higher density development than the subdivision ordinance if mitigating measures such as buffers and open space are provided for, and numerous other special requirements are met.

On the heels of the residential PUD action, the Planning Commission opened hearings on a proposed commercial and industrial PUD ordinance that would be a counterpart to the residential version. Like the residential PUD ordinance, the commercial and industrial ordinance would give developers an alternative to the subdivision ordinance that they now operate under.

The hearing on that ordinance will be continued at the next Planning Commission meeting, scheduled for Dec. 26.

MEA budget \$38 million

By JIM BRUGGERS

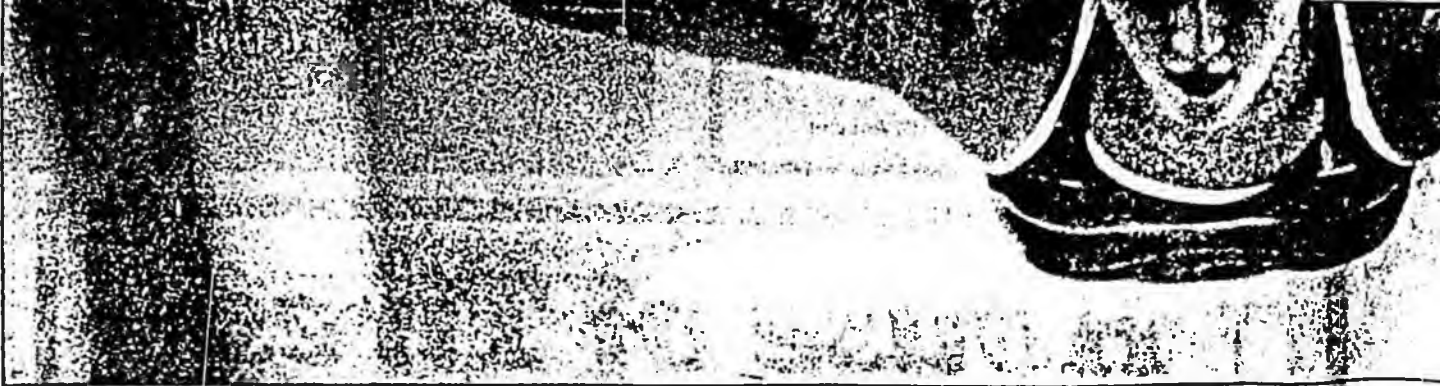
PALMER—Matanuska Electric Association has drafted a tentative 1985 budget of nearly \$38

more than half of MEA's proposed budget.

Wages, salaries and benefits for about 218 employees—up 28 from

ways. For example:

•In 1974, MEA had 1,150 miles of transmission lines. By the end of 1985, more than 2,359



NEW CHALLENGES—A former diver for the Palmer High School swimming team, Tammy Bospflug is now trying

Lake Lucille condos bring crowd to City Hall

By ED BENDER

WASILLA—After a lengthy and sometimes emotional discussion of a proposal to build up to 70 condominiums on Lake Lucille, the City Council Monday night tabled a motion to change a land use ordinance allowing the project, and will seek additional public response.

About 100 people packed the City Council Chambers to air concerns about the development by local builder Stan Morris of 65-70 condominiums on a seven-acre tract of land on the lake's southeast shore. The land is currently owned by Council Member Pat Carter, who abstained from voting on the issue.

People opposed to the project said that such dense development will do irreparable damage

to the lake, increase traffic on an already poor road, increase taxes for area residents and set a dangerous precedent for developers.

Those favoring a change in the land use ordinance, which now limits the area around the lake to single-family dwellings, said condominiums are an effective, responsible use of the land.

Another public hearing on the proposed ordinance change was scheduled for the next regular council meeting at 7:30 p.m. Monday, Feb. 11.

In all, 13 lake-area residents opposed allowing the ordinance change, which if approved would then allow Morris to present his plans to the Planning Commission for review before receiving a land use permit.

Six people spoke in favor of the change.

Explaining his project to the audience and council, Morris said, "We have gone to a great deal of trouble to avoid negative aspects."

The condominiums will be a ranch and townhouse style with cedar siding, he said, and the area around will be landscaped to create a park-like environment. The dwellings will sell for between \$80,000 and \$140,000—about \$100 per foot.

The homes will cover 22 percent of the seven acres and have a 70-foot buffer of trees next to the lake. To protect the lake, the project will, when possible, be hooked to city utilities, such as sewer and water systems, he said.

In addition, Morris said he is (Continued on Back Page)

Reed resigns council

By ED BENDER

WASILLA—Following through on a promise made before the recent mayoral election, Council Member Ruth Reed on Monday resigned her seat on the City Council, to reduce the number of council members to six.

Reed's action comes in the wake of the election of local businessman Charlie Bumpus as mayor of this city.

The council certified the election results at Monday's meeting. Final tallies show Bumpus receiving 367 votes, and DeCamp 334.

Bumpus will be officially sworn into office at 7:30 p.m. Feb. 4 at City Hall.

Reed promised to resign several weeks ago when the council discussed electing a new mayor, and the state statute requiring a first-class city have a six-member council.

Two council members, Pat Hjellen and Ken DeCamp, had stated their intentions to run for mayor. If Hjellen or DeCamp had been elected mayor, then the seven-member, second-class city council would have been reduced to six members.

But if someone outside the council were elected, the council would consist of seven members. To resolve the possible conflict, Reed said she would resign.

Local businessman Charlie Bumpus defeated incumbent Mayor Ken DeCamp in the runoff election last week.

"It worked out just fine," said Reed, who supported DeCamp in the election. "I said I would leave, it makes me real happy to resign now."

"I can be much more effective outside the council."



NEW MAYOR
Council certified
to 334 votes. De
p.m. Monday at

Request for new Palmer-Wasilla H

Back page

Condos

(Continued from Front Page)

more than willing to help with the yearly project of oiling the dirt and gravel road currently passing the site, and will help pay paving costs if necessary.

"We are going to time this project so it coincides with city facilities," he said.

The housing is designed and priced for young professionals, he said, likening the units to Porsches or Corvettes, which an owner gives great care.

"We are not looking for recreational buyers here," he said. "We are looking for permanent Wasilla residents."

Voicing the most vehement opposition to ordinance change were Rod and Colleen Cottle,

who live near the project site, and who spent two afternoons discussing the project with area residents.

"If we are willing to stand around and let a lot of California fast-talkers do this, then we deserve what we get," said Rod, who also said he was a long-time friend of Pat and May Carter. "Right now, I feel I'm talking against the California fast-movers."

Rod read a letter from a resident of Lake Wasilla, where townhouses were built. Those townhouses, the letter stated, contributed to a higher crime rate and disruption of a sedate lifestyle.

Rod also read from a study of a proposed park on the south shore. That study states, he said, that the lake is very sensitive to changes.

"I am not willing to sit back and say (development) is inevitable," he said.

"Rod and I want to live on the lake for the rest of our lives," Colleen said. "We do not want to go through a traffic jam to get home."

After explaining that he had held onto the land until he found a project he felt was worthy, Pat Carter said: "I am going to sell the land. Whoever gets it next is not going to be as considerate as I have been the last 40 years"

Palmer needs new, n city hall, consultants

By JIM BRUGGERS

PALMER—Confirming what some city officials said last fall, a consulting firm reported last week that the Palmer City Hall here is old, cramped and in need of replacement.

The architectural firm of Maynard and Parich has recommended that the council build a new city hall instead of two other alternatives: renovating the Matanuska Electric Association Building or the present city hall.

The report was commissioned by council members last fall, following a proposal to buy the Matanuska Electric

Association headquarters downtown Palmer. The proposal drew sharp criticism from numerous residents who said they believed the council was rushing into the issue without enough knowledge.

In a presentation Tuesday to council members, architect Michael Schryber said that the cost of either of the two buildings would be nearly the same as constructing a new facility, but a renovated final product would not be as good.

In looking at cost comparisons between the alternatives, Schwartz said the

Hurley's legislative pay cut bill draws little

By JIM SPRINGER

Although a petition calling for the repeal of the 1983 legislative pay raise bill had 26,000 signatories statewide, only seven citizens took part in a teleconferenced House committee hearing on a bill to accomplish the repeal.

One thousand petition

Committee (HB 48) was authored by Hurley. It would compensate legislators at a rate of \$21,084 per year instead of \$46,800, which was the rate the Legislature set in 1983. It would also reestablish a daily, per diem allowance, for the days legislators spend in Juneau during the session. In passing the pay raise bill, the

former compensation rate.

It is so far the only legislation introduced by Hurley this session.

"I was disappointed about the lack of turnout here in the session since I thought we had given enough notice and since so many people have signed the petition," Hurley said.

interested in," said the freshman representative.

She said one reason for the poor turnout may have been because the hearing was held on a rainy Saturday.

Opponents of her bill, two of whom spoke in the teleconference, say the higher pay rate is important to attract high-caliber legislators who may not

where it was before. Your income of 20,000 per year in session you had per year. Most people take a leave of absence or work when they are home—they aren't just full-time legislators. Most keep up their businesses while they are in session," she said.

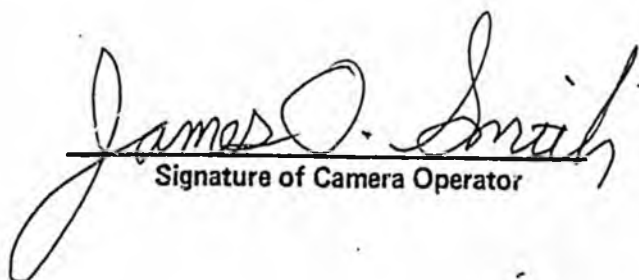
"I'm an advocate of citizens' Legislature."

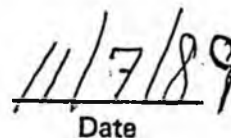


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Signature of Camera Operator


Date

SB

44

(FILE 4):

TESTIMONY /
TELECONFERENCES

SPONSOR: Senate Judiciary

T/C DATE/DAY: Tues., 2/26

leg non-leg / pub hear work ses inv hear
Work Session and Public Hearing

TIME: Alaska 1:30 - 4:30 pm

SUBJECT: SB 44 Uniform Common Interest Ownership Act

MAILING ADDRESS: _____

DATE TAKEN/BY Barbara, 2/15

PHONE 274-1426

CONTACT: Liz Hickerson

JUNEAU ROOM _____

SITES PARTICIPATING:

North Slope

Anaktuvuk Pass
* Barrow
Kaktovik
Point Hope
Wainwright

Interior

* Delta Junction
* Fairbanks
Fort Yukon
Galena
* Glennallen

Nana

Ambler
* Kotzebue
Noorvik
Selawik

Bristol Bay

Aleutians

* Bethel
* Dillingham
St. Paul
Sand Point
Unalaska
Togiak
Toksook Bay
Naknek
Newhalen

South Central

* Anchorage
Cordova
+ Homer
* Kenai (Soi)
* Kodiak
* Mat-Su
+ Seward
* Valdez

Norton Sound

Gambell
Hooper Bay
* Nome
Savoonga
Shishmaref
Unalakleet

Southeast

+ Haines
Hoonah
* Juneau
* Ketchikan
* Petersburg
* Sitka
Wrangell
Yakutat

ALL ALASKA

ALL LIO's

ALL LIO's, OTHER SITES WELCOME
WITH PRIOR NOTIFICATION

Chairing Site/person Jnu*/Sen. Rodey

Special Offnet

Don Buck in Connecticut

Location/Phone # _____

203-275-8200

SIGNATURE OF SPONSOR/CONTACT PERSON DATE

[] This teleconference is an advertized public hearing
required to meet the public hearing laws.

-----TELECONFERENCE OFFICE USE ONLY-----

Mode: 2-Wire _____ 4-Wire _____ split 4-Wire _____

Publicity: _____

Special Instructions: _____

_____ Local calls/list attached

_____ Media/P.S.A. attached

Can Expect: _____

3rd # Billing: _____

_____ Lengthly Back-up

_____ Bill Summary

_____ Participants List

Comments from Buck:

1. and 2. A legislative call:

Luck says sec 760 in SB 44 modifies existing statute so it takes the place of the old law referred to here.

10.20 referred to here is for non-profit corporations.

He says if you want to increase the number required for quorum, OK.

Butr he believes it is best to keep it low because people could be out fishing, hunting, etc. (or in time shares, not there)...

3. OK. She's right. Dick Bradley made a mistake.

4. Buck said he cruldn't respond, but Bill McNall will if it comes up at this session. Says there is no problem because is talking about judicial foreclosure and the other is non-judicial.

5. She's correct.

Summary of Testimony before the Senate Judiciary Committee
14th Legislature, First Session, State of Alaska
Teleconference, February 26, 1985

My name is Mary Puksta. I am have been employed as a paralegal with the law firm of Hoge and Lekisch in Anchorage for seven years. I am also a condominium homeowner, officer and member of the board of directors for my condominium association for the past two years.

In my review of the original bill and the Committee Substitute for Senate Bill 44, I have noted some possible conflicts within the new bill with current statutes.

1. Page 41, CSSB 44(Jud), 34.08.400 Quorums, paragraph (a), line 13.

The reference to the quorum of the association being 20% may be in conflict with AS 10.20.076 Quorum of Shareholders, wherein is stated

"Unless otherwise provided in the articles of incorporation or the bylaws, members holding one-tenth of the votes entitled to be cast, represented in person or by proxy..."

2. Page 42, CSSB 44(Jud), 34.08.410 Voting and Proxies, paragraph (b), line 7-8.

The reference to the time limit of the proxy terminating after one year may be in conflict with AS 10.20.071(b) Voting, wherein is stated,

"No proxy is valid after eleven months from the date of its execution, unless otherwise provided in the proxy."

3. Page 48 CSSB 44(Jud), 34.08.440 Insurance, paragraph (h), line 24.

The reference to AS 34.08.860(a) should be changed to read AS 34.08.740. There was no 34.08.860 that I could see and 34.08.740 refers to eminent domain.

4. Page 53 CSSB 44(Jud), 34.08.470 Lien for Assessment, paragraph (k)(2), line 14-15.

The reference to the debtor being liable for any deficiency in a foreclosure sale may be in conflict with AS 34.20.100. Deficiency Judgment Prohibited.

5. Page 87 CSSB 44(Jud), 34.08.990 Definitions, paragraph (26)(A), line 21.

Is the reference to 20 years supposed to be 40 years as in (22) above?

SENATE JUDICIARY COMMITTEE

Please sign in as a witness or an observer.
Your address and phone number must be
included in the designated blocks.

Written testimony submitted to the committee should be given to Ann Plunkett, the Committee Secretary, and it will be distributed for you.

Hearing Date: 2-5-85

• **Legislation Under Consideration:**

SB44

[illegible]


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* DELIVER TO: LTCJ
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* ORIGINAL
* SENT: 02/05/85 TIME: 13:48
* FROM: TCANC
* SUBJECT: SENATE JUDIC. SB44
* PRINT DATE: 02/05/85 TIME: 13:48
*
*****

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IN ANCHORAGE

PARTICIPANT LIST #1

TO TESTIFY:

-0-

TO OBSERVE

1. GIL LULAY\MARSTON PROPERTIES
2. WAYNE MUNDY\AK. HOUSING FINANCE
3. MARY M. FUKSKA
4. BOB ARWEZON\AK. ASSO. OF REALTORS
5. JILL CARSON\AK. ASSO. OF REALTORS
6. DEANA CLINE
7. LUCILLE SHEI\NBA
8. BETTY COOK
9. ED BEU
10. HAL BANCOFF--
11. ANNE PICARD
12. ELSIE HANSEN
13. FAT HARRIS
14. JIM MAGOWAN\AREC
15. LYNN BURNS\AK ASSO. OF REALTORS

PARTICIPANT LIST #2

TO TESTIFY:-0-

TO OBSERVE:

1. RHODIANN KARELLA\AK. ASSO. OF REALTORS

ANCH. BD. OF

 *
 * DELIVER TO: LTCJ
 *
 *
 * ORIGINAL
 * SENT: 02/05/85 TIME: 13:42
 * FROM: CHARLOTTE CREMER
 * SUBJECT: TC OBSERVERS
 * PRINT DATE: 02/05/85 TIME: 13:44
 *

TC MESSAGE NO ONE
 OBSERVERS FROM MAT SU
 SEN JUD LEG WORK SESSION RE SB 44

LOUISE HUNTER BOX 874754 WASILLA 99687 376-8384
 BOB SIMMONS. AAR BOX 872989 WASILLA 99687 376-8711

EOM*****

HELLO JUNEAU TC.

OUR THIRD OBSERVER FOR THE SEN BILL 44 JUD LEG WORK SESSION
 TC: RICK WIKE BOX 870385 WASILLA 99687 376-3976
 EOM*****

* DELIVER TO: TCJNU

* ORIGINAL

* SENT: 02/05/85 TIME: 16:33

* FROM: TCANC

* SUBJECT: SEN. JUDICIARY SB44

* PRINT DATE: 02/05/85 TIME: 16:33

*** FINAL T/C STATS ***

DATE: _____ FEB. 5, 1985 _____
SITE: _____ ANCHORAGE _____
SPONSOR: _____ SEN. JUDICIARY _____
SUBJECT: _____ SB 44 RELATING TO THE UNIFORM _____
LOCAL MODERATOR: _____ JEANMARIE SMITH _____

***** OBSERVED: *****

NAME/REPRESENTING	ADDRESS	PHONE
GIL LULAY\MARSTON PROP.	4105 TURNAGAIN ANCH	99503 248-1717
WAYNE MUNDY\AHFC		276-5599
MARY M. PUKSKA	437 'E' ST. STE. 500	276-1726
GIL LULAY\MARSTON PROP	4105 TURNAGAIN ANCH.	99503 248-1 17
BOB ARWEZON\AK. ASSO. OF REALTORS		276-0655 OR 2090
JILL M. CARSON AK. ASSO. OF REALTORS		522-1030
DEANA CLINE	235 E 8TH ANCH.	276-5599
LUCILLE SHEI	NBA-POUCH 7-025 ANCH.	275-2860
BETTY COOK	235 E 8TH	276-5599
ED BEU	P.O. BOX 102072	333-2200
HAL BANCOFF	207 E NORTHERN LIGHTS	276-1333
ANNE PICARD	235 E 8TH	276-5599
ELSIE HANSEN	235 E 8TH	276-5599
FAT HARRIS	235 E 8 TH	276-5599
JIM MAGOMAN\AREC	3601 'C' ST. ANCH.	563-2169
LYNN BURNS\AOR	3301 DENALI #201 ANCH.	522-1030
RHODIANN KARELLA\AOR & ANCH. BD OF REAL.		522-1030

TESTIFIED

NAME/REPRESENTING	ADDRESS	PHONE

NONE FOR THIS CONFERENCE

TESTIFIED: _____ -0- _____
OBSERVED: _____ 16 _____
TOTAL: _____ 16 _____

TIME START: _____ 1:30 _____
TIME END: _____ 3:15 _____

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 * DELIVER TO: TCJNU *
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 * ORIGINAL *
 * SENT: 02/05/85 TIME: 16:38 *
 * FROM: TCMAT *
 * SUBJECT: SEN. JUDICIARY/SB44 *
 * PRINT DATE: 02/05/85 TIME: 16:38 *
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*** FINAL T/C STATS ***

DATE: _____ FEB. 5 _____
 SITE: _____ MAT-SU LID _____
 SPONSOR: _____ SEN. JUDICIARY _____
 SUBJECT: _____ SB 44 _____
 LOCAL MODERATOR: CHARLOTTE CREMER _____

 TESTIFIED:
 NAME/REPRESENTING ADDRESS PHONE

 OBSERVED:
 NAME/REPRESENTING ADDRESS PHONE

1. LOUISE HUNTER, BOX 874764, WASILLA 99687, 376-8384
2. BOB SIMMONS /AAR/BOX 872489, WASILLA 99687, 376-8711
3. RICK WIKE, BOX 870385, WASILLA 99687, 376-3976

TESTIFIED: ---0--- TIME START: _____
 OBSERVED: ---3--- TIME END: _____
 TOTAL: ---3---

SENATE JUDICIARY COMMITTEE MEETING
Invitational Work Session
SB 44, Uniform Common Interest Act
February 5, 1984

Meeting called to order by Senator Rodey.
Attendance at meeting: Senator Faiks, Senator Halford,
Senator Kelly, Senator Ziegler. Senator Rodey, Chair.

Senator Rodey: We will be taking up Senate Bill 44. The Committee has discussed the bill. Many of the people here are quite familiar with the bill. The bill has been discussed in Committee and we discussed it totally. We have, fortunately, several people with us today. Perhaps the first thing to do is to call Mr. Don Buck, to take the witness chair.

Senator Faiks: Mr. Chairman, because of a conflict in the Senate Finance, I am going to have to leave the committee right now, but I promise to be in on the next one.

Senator Rodey: I know that you have to take care of our money. What little we have left. Thank you Senator. Mr. Buck you have the floor, sir.

(012)

Don Buck: May I suggest perhaps that Mr. McNall could join us and we could have an interchange.

Senator Rodey: Good suggestion. Mr. McNall would you please. I would like to point out to the committee that Mr. McNall is an Anchorage attorney who has considerable experience with this area of law, such as it is in the Alaska Statutes. Mr. Buck is a very well known attorney nationally in this field and heads the Bar Association Committee in this area. Identify both yourselves for the record.

(021)

Don Buck: My name is Gurdon Buck. I'm with the law firm of Robinson & Cole in Hartford, Connecticut. I'm a lawyer. I'm also a Realtor. As a background, I've also been a developer. I'm also presently the vice-chairman of the Committee on Condominiums, Cooperatives and Home-owners Associations of the American Bar Association. I'm a Trustee of Community Associations Institute and professionally I write documents for common interest communities in Connecticut and undertake the representation of developers, although I do have municipalities and

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associations as clients in the common interest community field.

Bill McNall: My name is Bill McNall. I'm attorney that does a lot of association work. I work with some brokers, some developers. I'm president of the Alaska Chapter of Community Association Institute.

Rodey: Mr. Buck could you give us kind of a brief statement of why you're familiar with the Alaska law and give the committee, as well as the other group that is here, your idea why it is important that we adopt this piece of legislation.

Mr. Buck: Certainly, this is a barely modified version of the Common Interest Ownership Act which was passed in 1982, by the National Conference of Commissioners on Uniform State Laws. UCIOA, as it is called, is a combined act combining the provisions of the Uniform Condominium Act (originally passed in 1977, and modified in 1980), the Uniform Planned Community Act passed by the Commissioners in 1980, and the Model Real Estate Cooperative Act passed in 1981. They pushed them all together in 1982 as a single act which covers condominiums, cooperatives and any common interest community which is not a condominium or cooperative, which is called a planned community under the act.

The purpose of the bill is to supplant the Alaska Horizontal Properties Act as to condominiums declared effective after the Act, which is January 1, 1986. It also applies the same statutory framework of condominiums to cooperatives and planned unit developments or cluster housing, and every other form of common interest community. The central provision of the Act is the definition of common interest community. In short, it is a community whereby the ownership of a unit mandates the payment of maintenance assessments for property other than a unit. A unit is defined as a parcel or physical division of land. It could be: a lot, it could be a marina slip, it could be a stable, it could be an apartment, a building, a house, or a shop. It could be almost any form of real estate that can be divided and set aside for individual ownership or occupancy. It also applies in approximately a dozen sections, pursuant to its section 40, to pre-existing common interest communities whether they were formed under the Horizontal Properties Act, or formed under the Common Law such as the planned unit developments, or formed under one form or another under corporation law such as cooperatives.

The Act is based almost entirely on the Uniform Common Interest Ownership Act which was developed through the

National Conference of Commissioners of Uniform State Laws, promoted by the National Institution of Real Estate. It's consumer interest, title interest folks, association people to provide a uniform and balanced statute to represent all interests and provide for free interstate commerce, and uniform mortgage and sales instruments, and to solve the myriad of problems that have arisen since FHA originally promulgated its model statute for apartment ownership in 1962, which was adopted by Alaska in 1963. It was last revised by FHA in 1965 and basically what has happened since that period of time is the states have been monkeying around with their statutes in all different directions. The Uniform Law Commissioners felt that it was important that there be a uniform law throughout the United States.

They started the Uniform Condominium Act, but realized that the same problems were arising in cooperatives and arising in planned unit developments and a Uniform Condominium Act alone does not solve the problems in these other forms of ownership. So the Commissioners decided to merge the three acts which had been designed to merge in 1982. The structure of the Act is relatively simple. It begins at the beginning and ends at the end and then stops. The Alaska bill is similar but shifts some of the definitions to the end, which is in course with the statutory practice, so it goes back to the beginning again. One of the great advantages of the act is that you can find things in it. There is an order to it, and going through in a general overview you can begin finding where solutions to problems occur by knowing approximately how the act is arranged.

The first Article, which is the applicability article, provides for applications and exemptions of various communities. It divides communities into classes: new communities which are created or declared after the effective date of the Act, in which the entire act applies; small or limited expense communities, which are of such a small nature that the imposition of the Act would be cumbersome; 12 units or less, or where their annual assessments is \$100 or less per unit (adjusted by the CPI which tends to be \$140 this year); and old communities which were declared before the effective date of the Act, in which, as I explained, certain provisions of the Act apply to them but only with respect to acts and occurrences happening after its effective date and only provided that the initial documents of the project are not contrary to the statutes.

In respect to old communities, the statute is overridden by the documents because of the contract

clause of the constitution. In respect to new communities, the statute overrides the document if they are otherwise contrary. It applies to nonresidential communities with a very limited aspect, unless the developer opts to take advantage of all the various provisions of the act, and there is a very large number of those provisions which are very useful. It applies to out-of-state communities with respect to offers or sales made within the state and in which case then a public offering statement is required.

(101)

Article II, is the beginning: creation, alteration, and termination of the community. This is basically the developers'/draftsmen's article. It has a whole tool box of useful provisions that can be used by a draftsman in creating an act to follow the desires of an individual developer or project which is being contemplated. It allows the developer to flex the condominium in a wide range of varying ways, to create units in common elements, to add land, to withdraw land, to subdivide units into sub-units such as in office buildings. These particular flexing powers allow a developer to sensitively respond to the market. Not to commit him or herself to a particular format or formula, and discover that the market does not like a walk-up two bedroom flat and be stuck with 15 of them. The concept of flexing units, I think the most useful concepts of the act, has been done in varying ways or mucked up in other various ways by developers using common law covenants, and couldn't be done under the old act. In addition, there are some substantial lender protection provisions put into the Act, under Section 270, which provide for things that lenders have been wanting for a long time, the right to participate in major association decisions.

(120)

Article III is management provision. We have now created a community and now we are going to operate it. Management, Sections 300 through 500, include the powers of the association, giving broad and flexible rights to the association to enforce and develop the activities of the common interest community. It includes some interesting new powers: the right to collect fines and late charges; the right to sue and be sued; which is an interesting problem in some of the common interest communities as whether they can sue on behalf of the owners. It gives some very interesting and powerful remedies in collection. Probably one of the most useful remedies that are in the Act is the so called superlien, giving the association the right to collect up to six months of regularly budgeted assessments that accrued prior to commencement of

collection ahead of first mortgages on the property. This gives a very, very substantial financial viability to the association, high levels of credit, and the ability to obtain funds quickly and easily for the operations of the association. It provides protection of the board of directors from liability, however, imposes upon the developer fiduciary responsibilities during the period of development control.

It has a detailed provision on the transfer of the association control, which was not in the uniform act but a version of it was in the Connecticut act, and this particular provision is adopted from the Florida provisions. It has a detail of the transfer of special declarant rights. That's the developers' rights to undertake a project and allows a construction lender to be assigned these development rights, but not use them, and therefore not be subject to liability and then throw them out, as they say, after the successor developer comes along and gives the successor developer the liabilities and not expose the lenders. It gives some interesting provisions on corporate duties, including assignment of assessment of income, a new source of credit for associations. As parking lots are beginning to fail and roofs need to be reroofed, and major structural components are needed, the ability of the association to borrow money on the assignments assessment income is necessary and gives them this source of credit. It has a detailed provision on insurance, which is a mess that has needed clarification since the first act was promulgated. There is a relatively simplistic approach, that is, the association is obligated to insure what is it obligated to repair.

There are two kinds of classes of associations: those with horizontal boundaries, have ceilings and floors, in which case, all buildings and improvements, including the areas within the units, kitchen cabinets and the like, have to be insured. Those without horizontal boundaries, that is, with no boundary that interferes between the center of the earth and the heaven. I'm thinking in that case as a house lot, in which case the insurance only has to be on the common elements and optionally the association can choose to insure all the buildings.

(156)

Article IV, after we have the management completed, is the protection of the purchasers, Section 510 and following. It provides for two kinds of consumer protection of great substance and works it through disclosure, that would be it licensing and registration that would be due. You have a heavy disclosure provision on the developer by the preparation and

presentation of a public offering statement. If it is a simple straight forward, one building condominium, there are 20 questions that have to be answered, like the quiz show. If it is a complex project, where there is going to be an addition of units, or an addition of land, or development rights are reserved undertaking a change of the project, there are a dozen more questions that have to be answered to predict the developer's actions. If the project is time share, there are four questions that are added to the public offering statement that have to be answered with respect to time share activities and plans. If it is a conversion building, there are three questions that must be answered having to do with the physical characteristics of the common interest community at the time it is offered for sale.

The second area where consumer protection is put in a major area, is in resales. A seller of common interest community unit must obtain from his or her association a resale certificate and disclosure package. It consists of 14 questions having to do with the financing, the financial viability, lawsuits and matters having to do with the operation of the condominium. Three of which are really optional, that is, if there is a municipal project or limited equity project under the co-ops, and it has to include a declaration, the bylaws and rules and regulations.

(181)

Article V, which is an extract actually of Article I of the Uniform Act, contains general provisions, and includes one of the most important provisions, the definitions. The definitions are very carefully spelled out and as I explained, one of the most important definitions is the definition of the common interest community. That's probably where we should start with what a common interest community is and what a unit is.

To give you an outline and the scope of the Act, I have a few examples of what I would consider the outlying frontiers of the area. This act can cover and provide solutions to problems. One of the areas would be older people in an apartment who wish to stabilize their housing costs. Apartments could be bought as investments by relatives using gifts as downpayment and can undertake some advantageous estate planning. Groups of investors are interested in commercial property, but they have different equity interests. This has become quite prominent in the medical field where some of the doctors are retiring, some of them wish to remain as investors and some wish to remaining as owner occupants. There may be owner-occupancy.

There may be industrial revenue bond financing. There may be tax exempt financing. There may be investment without occupancy. There may be various corporate estate and limited partnership requirements indicating each of the sections of the given property. It would be useful if it was divided into separate ownership with financing capability. The Act permits that and permits a wide variety of flexibility in doing that.

Presently doing that is the city of New Haven. Providing an office building, a city hall, a parking garage, a shopping center, and an underground highway, each having separate ownership, separate financing and they are tied together under common ownership activity. It looks like, if it is done right, they are going to get a free city hall. State bond money is paying for the highway, so it had to have separate ownership. The state highway department actually owns it, while the parking garage is owned by the parking authority. The office building is owned by a private investment developer with a combination of Urban Development Acceptance Corporation (UDAC) and certain kinds of industrial revenue financing. And, of course, city hall is owned by the city using general obligation bond financing. We had to title them all separately. We had to relate it and they had a series of common elements just to hold these things in the air. It was done through using the Common Interest Ownership Act as a method of financing this.

Industrial high technology parks are now in a situation where they require architectural controls. They incorporate common utilities, private slopes and open space, life style amenities and matters of that nature. Industrial people or high technology people will not run and move in where these controls exist. Under common interest communities the Act permits a reasoned method of combining the common facilities.

Student housing, apartments in the vicinities of universities, are built by private investors and sold to parents who then give the children the rent. They have the depreciation shelter, reallocation income to children that can be a good investment. These are occurring all over the country.

Municipal and local government protection. Where municipal (indiscernible) amenities such as fragile wet lands and eco-systems, protections of drainage systems, detention basin and stream encroachment zones, historic facades, and central sewer systems. All require common maintenance, common control, and financially viable associations. This Act gives financially viable association so that the municipality can be assured of the continued maintenance of these amenities at the

expense of the particular properties that are creating the burden.

(226)

Marina condominiums. Interesting issue. They are not an apartment, because they are not in a closed space within a building as the old act required. They are a slip. They are actually a portion of reparation rights. A very interesting metaphysical concept which is a unit with common maintenance. The consumer would purchase the uplands as tenants in common or as a condominium. The slips would become units. Consumers would purchase these in order to get stability of and assurances of a slip, particularly where they are restricted. Although, in many cases, there seems to be little chance of equity growth, the values are going up and obviously because there is more value of the increments of the marinas, then there is value from a cash flow basis, and so we are forming a number of those. They all can be mixed. Presently, in some 24 projects I did last year, over half of them had mixed uses: professional units, marina units, commercial units, mixed in with residential. The common interest act permits this and allows the documents to be developed.

That's some of the things. It is not just an apartment act. It's an act that has a great deal of excitement. It's a bold venture and I certainly commend it to your favorable consideration. I think at this time I would like to consider it on a section-by-section basis and I'll turn it over to Bill.

(244)

Bill McNall: Thank you, Mr. Chairman. After hearing everything that can be done with the new act, I'm embarrassed to say that under the old act, I have clients that come to talk with me about the problems they have in their associations, and because an association may be a PUD, for example, I can't give them any help. PUDs simply are not covered by our statutes. Our statutes only apply to condominiums in the traditional sense and there is no case law in our state. There are no regulations, so I am afraid that if the association I'm trying to deal with is a PUD I simply have no place to go for information.

I would also like to point out that most of our current statute has literally no help for associations that are having managerial problems in the day-to-day problem solving that the board of directors and association managers have to face. Among these issues sometimes you find that the association was never properly formed by the developer. The units have been sold. The

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declaration requires automatic membership in those units. The corporation process has never occurred. The association has gone on, and now the unit owners are taking over and trying to find out what's happened to the money. They are trying to find out what their rights are. They are trying to figure out why it is they are not members of an association. The statutes simply do not speak to those type of problems. All these problems have been addressed in the new act and more. I have numerous examples that I can share with you and should probably do so as we go through specific portions of the bill.

I am in favor of the new act because it simply gives me some tremendous flexibility to help the associations that I'm working with, either after the fact or trying to solve problems that the association itself has. Where if I'm representing realtors, who I think have some substantial protections under this act, I can assist them, or for that matter, developers, in avoiding problems that I know will come up at a later point in time. Last but not least, I would like to point out that I think the new act is a substantial help to the Alaska Housing Finance Corporation who is asked to look at projects that are not covered by any statutory guidelines, and are asked to assist in the development of those projects without appropriate statutory guidelines. I simply don't know how AHFC is going to be able to do that without getting into the regulation drafting process. I think that this new act will also help substantially at that level. Thank you.

(281)

Senator Rodey: Just a reminder to other members of the Committee that we are on Teleconference. A number of our constituents in Anchorage and Mat-Su Valley are listening and if we could use our microphones when we talk it would be very helpful. There are a number of proposed amendments to the bill. Have you had a chance to review them?

Buck: Yes.

Rodey: We have talked previously about the Act and got a very good overview of the act. And perhaps it would be appropriate at this time, because it is a uniform act, to talk about some of the changes that make it a nonuniform act, at least in that sense.

Buck: There were a number of changes. I can't pull them all out from the uniform act. Generally, we've made some comparisons from the act. There're some other changes, however, the act itself is still substantially uniform with respect to interstate commerce, forms and

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activities. The proposed changes, perhaps we could do them when we go on a section by section bases, or we could suggest that they be introduced and described in whole. Taking them out of context does tend to make it a little difficult to deal with.

Senator Halford: Mr. Chairman, there is one set of changes that was in our packet and we also have another set of changes that are somewhat related to drafting in the second handout. I don't know whether we should maybe go through section by section, but I think that they know where those changes apply. If they could point them out to us as they go through that section then we could request that the substitute to include all the changes.

Rodey: Senator Kelly.

Senator Kelly: I'm under the impression that the first pages of changes are incorporated in the second pages of changes. Is that correct? The second set of changes contains all the changes we're looking at?

Buck: I have one set of changes, that is correct.

Halford: Yes. The second set of changes includes the first set of changes. We can go through the sectional analysis with the changes and the bill at the same time. I think we're all familiar with the changes.

Rodey: Perhaps the best way to do that is to start out at the beginning, as you say, and go through the end.

Buck: What Bill and I sort of agreed to do was go through the sections and he will come up with specific Alaska examples to which these would apply. I'll discuss the relationship of the uniform act and perhaps some of the drafting reasons for coming up with this particular provision.

The first section which is Section 34.08.010, General Applicability, is a uniform provision and it indicates essentially that the act is applicable to all common interests communities after its effective date. The provisions of the existing law do not apply to common interest communities after the effective date of this act. The existing law, pursuant to a change that we are submitting, will not be repealed. It still exists. It is the enabling statute for existing condominiums. Connecticut went through the horrible experience in 1976 of inadvertently repealing the old condominium law at the time they passed the new one, having the new one only effective for condominiums declared after its effective date. Thus leaving 300 projects with no

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enabling statute at all. It was chaos and nine months later the legislature cured it. Therefore, one of the recommended changes to the bill, before you, is that you do not repeal the existing horizontal properties act. You follow the applicability provision as suggested, indicating that the provisions of the existing act do not apply to common interest communities created after its effective date and it still remains on the books.

Rodey: A question on the applicable law regarding those projects which have been created and are functioning.

Buck: The applicability is picked up in section 40. Perhaps we can jump over 20 and 30, because of the applicability of the portions of this act to existing communities. I'll go over that and list, what I call the section 40 sections. Portions of this act apply to existing communities and solve some of the problems which Bill will come to.

With the Chairman's permission, I'll cover 20 and 30 quickly and we can go to 40 which will take some discussion.

Rodey: Please do. You have the broadest possible latitude in explaining this. You are the expert, we're not, and we will be guided by your experience.

Buck: Thank you. Section 20, Applicability of Small Cooperatives, indicates that if the cooperative contains only units restricted to nonresidential use or contains no more than 12 units, and is not subject to any development rights, and not subject to any financing from AHFC, it is only subject to Sections 720, 730, and 740. We're proposing an amendment to add 720 in there. The universal sections which are at the back of the act are very important and at this point we'll skip to them to give you an idea what they are.

They essentially include those particular provisions that should apply to all common interest communities no matter how large they are, how small they are, residential or nonresidential and no matter what their structure is.

There are separate titles and taxation (34.08.720), indicating that each unit, no matter how it is structured, as a condominium unit or a planned community unit is separately taxable. It also provides in cases of a condominium, in a planned community, that there is no separate tax bill for the common elements. This has been a problem. The Community Association Institute feels that throughout the country, where

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people are assessed the full value of a house in a planned unit development, and then the town will tax the common elements which are obviously included in the value of the house. After great arguments, usually in almost every case, the town municipal tax assessor has been persuaded to reduce the assessment on the common elements to an nominal amount because he is picking up the taxes in the house taxes. This settles that problem, clear and simple. It just says that there are no taxes on the common elements.

Cooperatives are treated somewhat differently in the universal section, because obviously there is a single tax bill for the whole cooperative. The unit is not for taxation purposes, considered to be separate. There is a single bill, and in the concept of credit pools, where everybody pools their credit in a cooperative, this is a slight difference between the functions of the cooperative and the condominium. This universal section is on page 76, section 720.

There is another important provision, although with respect to the small portions there is no problem. If a developer has reserved development rights, that is the right to unilaterally change the project by adding units, subtracting units, withdrawing units or subdividing, that portion on which a development right is reserved is separately taxed and assessed against the declarant and the declarant alone is liable. It's part of the the overall structure and it is also part of the reason that the declarant wants to get rid of the development rights as soon as they have used them, that is to create the units, withdraw the land or done whatever they predicted they would do, because they are liable for expenses and taxes on it.

And finally, if there is no unit owner other than the declarant, the estate is taxed as a whole, in the same way it would be taxed no matter if it was another form. So if there is a declaration on the land records, the estate is taxed in the same way. The whole estate is taxed in the same way it would be taxed if it were an apartment building or whatever until there is a unit sold.

Halford: Is that the way they are currently taxed in Anchorage for example?

McNall: The documents that I have seen from the Anchorage Municipality indicate that there is a tax bill generated, and there is in fact a tax assessed. If the association manager is on top of it, he will go down and talk to the Municipality, who will then reduce that to zero.

Halford: So the Municipality has agreed with this position in terms of allocating that tax from the common areas to the individual units.

McNall: Yes. according to the two experiences I have had.

Rodey: We should get a formal statement from the assessor's office and it would behoove us to also contact the other municipalities that would or could levy property on cooperative housing and receive a statement from them.

Halford: We don't necessarily want to know whether they would like to be able to tax both. We want to know what they are doing and what they end up in court able to do under existing law.

Buck: Under the condominium statutes, since the common elements are not owned by anyone except unit owners, there is no separate tax on common elements in condominiums. I have seen tax assessors try to do that too, set a tax for the club house even though it is owned by everybody else. So essentially what we are doing is unifying the treatment of condominiums and planned communities so that there is a tax bill on the unit and there is not on the common elements. The whole concept of unifying these forms of ownerships is evidenced here. In subsection D, of the universal section (34.08.720) indicating as I stated, is a shelf conversion. If no units have been sold it would be taxed as any unitary property.

The applicability of local ordinances, regulations and building codes indicates that a building code cannot impose a requirement on a structure in a common interest community that the building code cannot impose in a physically identical development. Thus if it is an apartment house, it's an apartment house, it's an apartment house, it does not matter whether it is owned by 13 orthodontists from Brooklyn or owned as a condominium or owned as a cooperative or as a planned community. The same code requirements apply across the board. This does not waive the code requirements, but it does in fact, mean that the code will not put additional burdens, such as extra fire walls, merely because of the form of ownership. The idea being unified management, unified control of the project is provided in all forms.

Rodey: Let me get back to my original question which was, the applicability of this act to those condominiums that are presently in existence. Actually the most important thing is the management structure. One that Mr. McNall has had a great deal of experience with.

The question will be asked by constituents of mine and by the real estate community and developers: "How will this effect the management and operation of existing condominium projects and liabilities of all parties involved?"

(478)

Buck: Because by virtue of what I described as the universal sections, these particular provisions, Sections 720, 730 and 740 are one of section 40 sections applying to old condominiums, cooperatives and planned communities, and thus it will settle elements with respect to old projects. It cannot, however, override the decision of an existing document, but with respect to the fact the documents are silent these particular provisions will then apply to the older communities.

Rodey: Essentially then, we are grandfathering in existing condominiums and grandfathering their documents, covenants and maybe bylaws. Everything they have unless they are silent on any particular point. Where they are silent the new law supercedes that silence.

Buck: Yes, the new law would and it does solve problems, because obviously the documentation cannot impose assessment practice on a municipality. In a PUD this will solve the problem because in most cases the documents are silent.

Rodey: I wonder if the State of Alaska can impose assessments upon requirements on municipal documents.

Buck: The State can on the individual documents, but the project can't. That's what we're doing, is saying OK where we have an old project where this is unclear, there can't be a separate tax on the common elements.

Finally, another universal section is the eminent domain provision. The eminent domain provision merely answers a lot of questions that a lot of people have had in condemnations. When you have a partial condemnation of a condominium, say affecting the unit and not affecting a units, or not affecting the units affecting the common elements only, affecting some of the units, some of the common elements. How is the pot wacked up? This particular provision gives that answer. It is essential and those who have gotten involved in partial condemnations of condominiums will find that this is just a can of worms and definitely needs a solution and this bill does a fairly good job.

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(517)

McNall: Mr. Chairman, I have just been contacted by an association that exists out on the Dimond Boulevard widening area, and in fact they are having a partial taking and are trying to figure out right now what is a fair value. The present statute addresses the issues but not to any great extent. There are two halves to it. The association is having some common area property taken, and the individual unit owners are now discovering that their units will be sitting right on the new highway and will be having some losses. All these factors have to be considered in dealing with taking authority. Any clarification we get out of this statute will be of benefit to both the state, local government and the association.

Rodey: Because of the new highways that are being built in Anchorage I suspect it will be. What is your reading of the law in Alaska now with regard to taking. We have a number of near misses, if you will, by the highway department. We have a possible diminishing value because of the proximity of a high speed highway. Are any recoveries being had, or any payments being made in that case now.

McNall: Mr. Eschbacher, an Anchorage attorney, is representing four of the association owners in this particular matter that I was just describing. He indicates to me that he thinks that they've had some substantial diminution in value that they are going to seek redress for. It's my understanding from our existing statute, that you have to live with the statute and you also have to look very closely at the documentation for the association, because some of the draftsmen have different approaches to condemnation than others. I have seen drafting that has more detailed discussion of partial and total takings in the declaration. I've seen some that just mimic what the present statute says.

(556)

Halford. Just another question to Mr. McNall on the applicability of local ordinances in terms of building codes, zoning, subdivision and all the other local regulations. Is that what's happening with regard to condominiums?

McNall: In Anchorage, the building codes are enforced and inspections occur and the projects are being built pursuant to the uniform building codes adopted by Anchorage. The uniform building codes apply in Eagle River, but there are no inspections for example. In the Valley I'm not sure at this point if they have adopted

any uniform codes at all. So as far as this section is concerned, those codes that are enforced in those areas will continue to be enforced and if the old pre-existing association documents are silent this comes in to protect the associations and brings in those sections.

Halford: The question is, are we limiting anything that is currently going on?

McNall: No, I think as a matter of fact, as I understand it, the application by the State, the State electrical inspector, State plumbing inspector you may be able to bring in some additional protections that are not there now.

Halford: From the State level without cost to the developer?

McNall: That's correct.

Buck: I would like to indicate that in Connecticut they have had some interesting problems because of the fact that the condominium unit is a title line. Some building inspectors have said, well it's a title line, therefore, we need a full fire wall in every apartment. Other building inspectors have said, this is a unified ownership and therefore we don't need fire walls in every apartment, we have them every four apartments. This confusion is simply cleared up by the act and indicates that they be uniform.

Halford: Would they be treated as if they were apartments.

Buck: That's right. They would be treated as an apartment building. It does not invalidate or modify any particular provisions of the zoning codes, it just indicates that there is a uniform provision.

Those are the three universal sections, and I think that they do apply. This moves us on to Section 40 which sections 20 and 30 indicate that with respect to small limited common expense communities, only these universal sections apply. The limited expense of common interest communities that we are proposing be changed from "planned" to "common" interest so that they all get treated in a uniform manner, indicates that when you have a small community of this nature that they do not have to go through the formality of the whole public offering statement, documentation, organization of an incorporated association and everything else that is required unless they opt in. Any planned community can opt. We may find by virtue of the lending practice and requirements, that most

communities will because there are substantial advantages of being subject to the act, because of the fact that you don't get as good and clear defined guidelines under the common law. But many cases in a small community, merely because of informality, it is worthwhile not being in it.

A limited expense common interest community came out of the planned community act. There's a large number of PUDs only maintain a detention basin or a single drainage way or a sign at the end of the street. And in those particular cases with the corporate formalities and record keeping and financial reporting would be a burden on these folks. So again the \$100 per year per unit limitation is written into the act. It's modified by the CPI based on a very complex formula and this year it means that it's about \$140 because it comes in \$10 increments.

Kelly: Is that complex formula something that is easy to figure out?

Buck: Yes. It is the same formula that the uniform commissioners use for every CPI adjustment, Uniform Commercial Code, and the others. It is easy to extend. It is written into the act. It is easy to understand although, it takes a little bit of calculation. It is the same provision in every uniform act, Uniform Condominium Act, Planned Community Act that has been passed in other states. It is one of the uniform provisions that the commissioners would like to remain uniform so that everybody will know what's equally exempt in every state. It can be calculated, as I say, it is in \$10 increments and now it uses a 1976 base which is the Virginia act. Thus all the states which are adjusting their provisions are adjusting on the same base.

Section 40 is an important provision. It's probably one of the most important provisions and one that will create most of the trauma if at all, by the passage of the bill. This is the applicability of certain provisions to pre-existing common interest communities. There are 12 sections plus the definitions. A round dozen sections which apply to pre-existing common interest communities. These are provisions which will go ahead and cure a lot of the problems that Bill is coming up with and provide definitions where no definitions have been provided. Give uniformity as to activities within these areas, new powers and all kinds of very useful activities to the associations.

The Section 40 sections are very important. I would like to perhaps suggest doing, as a matter of order,

and depart from beginning at the beginning go through the end and stop routinely and go through the Section 40 sections. Because these are the ones that your existing communities will be subject to, as I said, unless the declaration or documents provide otherwise. These are the ones that they will have to conform to and these will be the ones that will be the most surprised when they discover the existence of the act. No matter how much news we put out a lot of them won't.

Kelly: Surprises should be reserved for Christmas and birthdays.

Buck: I think that we are doing this for New Year's. But, I think that there are some very important provisions

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that validate a lot of sloppy documents, a very, very important provision. I would like to defer to Bill to talk about some of the Alaskan provisions with respect to section 110 and perhaps this particular provision will assist.

McNall: The number of times that I have seen documents drafted back in the early 70's that have maybe eight pages, six pages of which are legal descriptions, one page is a dedication of the property, leaving one page to deal with association management, assessments, and so forth. Gives you an idea that the documents are not very complete. As a result, we have to either go back and try to substantially amend, which is a very expensive process for the associations. When allowing these sections to come into play we simply do not have to go through that drill. They may want to anyway, but they don't have to because most of these statements are written with the statement that says, "if and unless the declaration states otherwise these sections apply", "these definitions apply", "this statutory provision applies". So those will apply where the document is silent, which will help substantially when I have to sit down and try to work with an association and figure out what the answer to a problem is. I'd be willing to bet that of the pre-76 documents that I've seen probably all of them will benefit from this provision.

Buck: There are a number of things in here, one of them is the title insurance provision in 110. This is the bail out title insurance company provision which indicates that the title of the unit common elements is not rendered unmarketable rather or otherwise effected by reason of insubstantial failure of the declaration to comply with the chapter. Where a substantial failure,

of course of marketability, is not effected by this chapter but it does allow title insurance people to sleep a little better. But it was put in at the insistence of the title insurance folks. It covers the rules of against perpetuities, which in some of our more obscure provisions, that only lawyers who took first year property know about, indicate that it not defeat any portion and it makes the sense that the declaration is superior to the bylaws. It's just sort of a useful housekeeping item.

Halford: Run by that title insurance again. It says that basically an unimportant, insignificant violation of something or other does not effect the title of the property.

Buck: That's right, so if there is an insubstantial failure to comply with the act the purchaser can't say "I'm going to walk away because a 't' hasn't been crossed or an 'i' hasn't been dotted." Now the difference between substantial and insubstantial is the difference between reasonable and unreasonable which we leave to the courts. I think it was left ambiguous. It was the kind of thing that you have to look at the facts. And thus this particular provision is an ambiguous provision, but it is the kind of thing that the courts can deal with if they have to.

Rodey: The Alaska courts have been good about dealing with that topic but we haven't had anything major, at least that I am aware of relating to condominium titles. Correct me if I'm wrong, are you familiar with dealing with title documents for condominiums?

McNall: No. The only Alaskan case that deals with condominiums, at all is Carroll vs. Eldorado Estates out of Fairbanks that was dealing with notice requirements in the declaration of bylaws. That also was, by the way, the case that suggested Uniform Condominium Act and the Model Real Estate Cooperative Act for guidance in this area.

Buck: The section 120 is another housekeeping item that basically says that a simple description in the purchase agreement which sets out: the name of the common interest community, the recording information of the declaration, and the district in which it is recorded and identifying number of the unit is all you need to legally describe the unit. You don't have to go into great detail in order to have a legal description.

Section 290 is another universal section, which, is a merger or consolidation section, permits existing and

new common interest communities of the same type. That is condominiums with condominiums, planned communities with planned communities, cooperatives with cooperatives to merge or consolidate their activities under a single association and gives a technique for doing it, providing essentially for a negotiated merger agreement which will take care of most of the problems.

The powers' section, Section 320, subsections 1 through 6 and 11 through 16, add to the powers of the associations. Very important powers, that many of them don't have, including the power to levy fines, late charges, charge fees, charge assessments, bring law suits and undertake some other types of activities that are in question under the condominium act. If a PUD is operating under the corporation laws it may or may not have powers to represent its members or shareholders in actions of common interest. These powers are an excellent and superkind of a provision, and should be in there and applicable to all projects.

McNall: Most of the property management firms in Anchorage right now impose fines and attempt to work with boards to assure collections of unpaid assessments. They have fines, late fees and so forth. As to whether or not these will ever be enforced by our courts, I will leave for the courts to decide because it is not clear from the existing statutes. Most declarations allow it and state that you can impose these, but the statutes are silent on that particular issue.

Buck: There has been some argument since the lien is proportioned to the percentage interest allocated in the documents. A fine is not proportioned to that, and there may not be a statutory lien for a fine, so this cures it. Yes, that kind of a prophylactic activity which I seriously commend for your favorable consideration.

Section 420, the tort and contract liability, has some fairly interesting aspects in it. It does generate a corporate limited liability provisions to protect the association, but does impose some liabilities on the declarant with respect to torts while the declarant is in the control of the association. It's basically an insurance provision, but it does clarify that the declarant does have this particular liability. It will in fact have some significant impact on existing associations with respect to developers, because it provides, for instance, that a statute of limitation is tolled until a period of declarant control terminates. Thus if you are working under a warranty provision or a tort provision, and a declarant is in control, you

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don't lose your right of action merely because the declarant controlled the right to bring the action. There have been some unfortunate cases. I consider them unfortunate even as a developer's representative, where in short statutes (one, two or three years), the right to bring an action simply has disappeared, and the action was against the declarant while the declarant was in control and he didn't sue himself, surprisingly. There is a provision in this tort contract liability provision which I think is going to be very useful in existing associations.

McNall: Often a board will come in after the transition has occurred and the developer said, "You are now in control." They will then raise issues of common area maintenance or common construction problems, only to be told that their one year warranty has lapsed, and they really don't have any rights to sue the developer for any of these types of problems. All the help we can get to clarify those types of issues, including the warranty language, we have contained in the new proposed act will be of benefit.

Rodey: What effect will this have on the liability of developers for existing projects. The law is silent on that now.

Buck: There is a problem with this area. It is the kind of problem that 85 pages of legislation will be needed to be draft, that's the straddle problem, where the statute of limitation is running and then the act passes and then it fails and then controls transfer. We come up with a whole series of permutations and combinations of this which probably will ultimately end up being worked out on a case by case situation. The act only applies with respect to Section 40 sections as to events and occurrences after its effective date. So the termination of the statute of limitations is that an event or a circumstance? I don't know the answer.

Rodey: So for any existing project there is still a murky question of liability?

Buck: There always was, there will be, but after the act gets older and older that question will become more and more put in the past.

Section 470, the lien for assessments, is applied to existing associations and is a very, very powerful remedy, probably one of the more exciting and excellent provisions of the statute. This particular provision indicates that the association has a lien for an assessment to be levied on a unit for common expenses.

It doesn't matter whether the common expenses are proportioned to allocated interest or fines, whether they are payable in installments or not, the lien exists. It's prior to all other liens or encumbrances except mortgages and taxes. With respect to mortgages, it is prior to mortgages up to the amount of six months of regularly budgeted assessments that have come due prior to the institution of an action to enforce the lien.

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This super lien, which gives priority to the association assessments, will provide for quick collections. It will provide for excellent financial credit of the associations. It will allow a wide range of new remedies available to the association to get their association fees in on a timely manner. In Connecticut, it is probably one of the aspects that has most reformed the condominium practice. That is, that collection now occurs following a letter to the bank, and the bank helps by sending the check or bringing the borrower in and making the borrower send a check. That's the end of it. We don't go through the formality of filing a notice of lien on the land records, commencing a foreclosure action, or going to small claims waiting for this to happen, and then have at the end, because many times when these liens aren't paid the borrower is in trouble and we find that the bank forecloses out the whole thing at the end. The attorney's fees, the time, and all the accumulated assessments are lost and laid off on the rest of the unit owners. With many cases they can ill afford it.

McNall: The situation in Anchorage is identical to what has just been described by Mr. Buck. Associations that have, say, ten unit owners who are in arrears, finally lose patience with the promises to pay and bring those in for small claims court. Either I'll file it or the association manager might file it, or some associations can file it themselves. If I do it, of course, it will cost money and this situation can be avoided under the new act. The disadvantage to the association, of course, is if I've gone through the process, and if I get a judgement against that unit owner and can't collect that judgement because the unit owner is unemployed or whatever reason, as long as the bank is receiving its mortgage payment, the banker is not going to be involved in the collection efforts. It is up to the association to attempt to collect. I have numerous examples where we have judgements, attempts to collect the money, and we cannot. The association comes back and says let's attempt to foreclose and attempts to file an action for foreclosure. Judge Johnstone

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refused to let me foreclose on behalf of an association because he didn't think that it was appropriate to foreclose for \$1,700. He gave me a continuing judgement against the unit owner, which to this day, we have not collected because she simply is not going to pay and we have no place to go for money.

I think that if this super lien will work to cut down those costs to the association it will be of benefit. Also the cost incurred by that association, money that you don't collect, winds up to be a common expense to all those other unit owners to share. I have unfortunate situations where associations are out many tens of thousands of dollars which are going to be foisted upon folks who cannot afford to pick up a prorata share of a huge special assessment to cover that, particularly where it's a HOF project. There have been some great disasters for example within a HOF project, where these folks are going to be tagged for \$200 to \$300 apiece, and they are not able to afford probably even \$20 a month in additional assessments.

Buck: This particular six months super lien is the law in ten of thirteen states that have passed the Uniform Condominium Act. It's been accepted by Fannie Mae, Freddie Mac, VA, FHA as an appropriate method of assuring the financial viability of the association. The fact that they are going to sacrifice potentially the priority of six months' assessments, and only regular budget assessments, not special assessments, not fines, not collection costs, is minor compared to the financial viability of the whole system. They have accepted it and are now accepting it quite enthusiastically.

McNall: In addition to the problems that associations have in this particular area, any time a unit is listed for sale, the realtor that is representing that seller had better make sure that there is a thorough understanding of what those unpaid assessments are. That is affirmative representation and of course something the buyer would want to know.

I did have a situation out in Muldoon where a young lady came to me. She had closed on a Friday, and on the following Friday received a special assessment notice for \$6,000. She had spent every dime she had in purchasing her unit, and did not have any money to hire an attorney. I sent her to the Real Estate Commission to file a surety fund claim against the realtor who should have gotten that information from the association and disclosed it. This act of course, takes care of that entire issue.

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Buck: That brings us to the next two sections. There are two sections that should be read together, section 490 and section 590, association records and and resales. Section 490 fairly simply says that the association has to maintain sufficient records to provide resale disclosures. Which brings us to the resale disclosures. This particular provision, although it is a simple one, is probably the provision that had the greatest amount of trauma at the time of the passage of the Connecticut Act. There are a lot of planned communities that simply don't maintain records and they have to get them together. They learn about this requirement when a realtor shows up with a written request for a resale certificate and then they scratch around. In the early days it took more then ten statutory days to come up with these records but they did. In about six months virtually all the community associations in the state are now in compliance, their records have been improved immeasurably and resale purchasers are finding that the whole management quality of these small communities has increased by virtue of the fact of the requirements of regular record keeping, budgeting, financial statements and that the money is being handled. This goes back to the definition of the common interest community. That is ownership of the unit requires contribution to a common fund for the maintenance of other property. The disclosure of where this money goes and the control of where this money goes is central to the philosophy of the common interest ownership act. This particular provision, the resale provision, gives the seller the information of where the money is going.

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McNall: I would like to add a comment as far as the resale certificates are concerned. One of the problems that the real estate industry has right now is that they are looked at as the ultimate deep pocket in every transaction. The seller may be gone, the builder may be gone, you always have the real estate firm as the agents involved. The resale certificate is required to be given by the seller of the unit to the buyer of the unit, which means that information obligation is on the seller not the realtor. The information that is needed to be disclosed is the type of information for which agents are now being sued. By making the unit owner, which is trying to resell his unit, disclose this information, I think is going to provide some measure of protection for the realtors involved. I believe that the real estate industry at this point needs to have this protection.

Buck: I'd like to make one small correction to Mr. McNall's provisions. The seller is responsible for obtaining the information. The association is responsible for its accuracy. The seller must request the information but once they get the information from the association the seller is not responsible for any inaccuracy that the association may have put in there, however, the association may be responsible for that. It does mean that the associations have to be quite careful as to the preparation of these resale disclosures and the result has been that the records have been brought up to date very quickly. In the planned unit development field they were in terrible shape. Condominiums have been better, principally because there was an old statutory structure. There was a formal association and in many cases the realtors knew it was a condominium and the purchaser would ask for a documents of some sort so they could take a look at it, thus the associations were maintaining it. But even in the small ones, the financial records were a mess.

This has been probably an area of impact which took my lecturing to 35 sessions of training for realtors in the state of Connecticut. There were about 200 realtors in every session, to get them to understand what the resale disclosures looked like, how to ask for them, how to present them to the purchaser and giving them some idea of their format. There was one amendment proposed for section 470 which has to do with association records proposing on page 56 line 3 that a professional manager, agent, accountant or party with whom the association has contracted for services, must return all association records within five days of termination of the contract. In the event that the association records are not returned the association may bring a claim. This is under association records, but it does have the effect by being put in one of the section 40 sections of applying this provision to old projects.

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McNall: This gets around to the problem where the association manager may be terminated and refused to return the documents for any number of reasons, the bill's not paid, the dispute or whatever it might be, and allows the association to get those records back very quickly and turn them over to new management or to take them over themselves. This is more important in the sense that the association is now required to provide the resale certificate information within ten days. It was felt by several of the associations that I talked with and several of the managers who have been asked to take over from another manager that this

section protection needs to be put in for the associations.

Buck: The whole resale process I think has been one of the areas that we would really commend the act for in Connecticut. It took a great deal of shaking up when it got started. But now it is in effect, the realtors don't mind it. It was the portion that they were objecting to, because in Connecticut there's still a little bit of caveat emptor left in the law. The realtors were not responsible for innocent misrepresentations and they would just as soon not have to go through this particular trauma. But now that they are accepting it, they are happy with it, and they were threatening that they were going to move for the repeal of the resale section. They did a survey of the multiple listing service in the state of Connecticut, some 11,000 transactions that occurred last year, to discover how many had to be relisted on the computer because people had walked away by virtue of the resale rescission and the answer was two. People don't rescind but they get the opportunity to review. It's an indication that the process is more prophylactic than a threat of rescission.

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Section 670 is a very, very powerful section and it is something that applies to old as well as new and it is in the section 40 sections. It essentially cuts through a lot of problems that have occurred in the past throughout the United States where the question is, "who has the right to sue the declarant in the case of a warranty provision." "Who has a right to appear before a tribunal on an action effecting a common interest community." "Can the association represent the unit owners?" "Can a unit owner undertake an action which is really an action of the association even though there has been losses?" "Do you have to have some kind of relationship between the two parties, for instance, a failure of a particular act to occur in the loss of the real estate commission?" It's possible that the realtor can sue the actual person who caused the failure, rather than having to go through the whole contract change or recheck. The section 670 provision essentially says that any person has the right to sue any person for failure to comply with the act if there are damages, and it allows punitive damages to be awarded for willful failure to comply with the chapter. It does mean that the lawyers' dance, dos-a-dos as to jurisdiction at the courthouse steps, is eliminated and they are right in there discussing the actual case. It is very useful and as I say a very powerful provision.

We've gone over sections 720, 730 and 740 the universal sections, and now come to the definitions in section 990. The definitions in this particular act are extremely important and there are a number of important definitions that I would like to go over. Not just because they are applicable to old projects, because as we deal with the entire act these definitions become extremely important.

The concept of "allocated interest." We don't have something called the percentage interest in the common elements. If we do it doesn't have any effect. Two important allocated interests are the votes and the common expense liabilities. Those two provisions can be different. They could not under the old act. If anybody has conducted a condominium election where one person has 8.13756 votes and the next person has 9.1234 votes and you try to count the votes, at the end, you need a major computer. The ability to separate the votes from the percentage interest in the common elements is something that every manager will be enthusiastic about. Obviously it doesn't override existing documents. Existing condominiums are still stuck with it and in a challenged election having to virtually get a computer to determine who won. But in new communities it certainly will be useful. It allows to have one resident, one vote, or one person, one vote, depending what the documents provide. It also, by virtue of another provision in the act with respect to new communities, allows voting to be split up between different classes of people. In Virginia there are some cases where tenants have partial votes, which is an interesting way of bringing tenants into the opportunity of running the community.

The other aspect to common expense liability is one of the allocated interests that is quite important. It basically is allocated in proportion to burden. How much burden does a particular unit have in a condominium association? It can be under any fair method, it does not discriminate in favor of the declarant. It's a marketing decision. It can be based on values, or square footage as the existing act provides. It can be based upon the number of the square feet of parking lot that have to be maintained, size of the roof, heating bills, a whole masses of areas could go on in that. The allocated interest run through the act and the whole concept of sharing the burden based upon expense burden, rather than value is a possibility which is important.

In a condominium it includes the undivided interest in the common elements, however, the undivided interest in the common elements have no effect. It's really

something that is left over from the old condominium act. It's there because there is a tendency in common element ownership, and a feeling among common law lawyers that there has to be a fraction somewhere so that everybody will know how much they own. But it virtually has no effect except in one instance the combination. If you can't figure out how much the value is it is a residual thing that people fall back on. That is an important aspect.

The "common interest community", very important definition, I've referred to several times. It is central to the act. The obligation to pay for property other than the unit is the obligation which is what we are regulating. The financial relationship between unit owners in common for cooperative efforts, activities, fun and games, is the kind of thing that we feel is important and that's what we are looking at. Almost everything else becomes secondary to that cooperative effort.

A condominium essentially is a common interest community where the common elements are owned as undivided interests as tenants in common. A cooperative is a common interest community where the entire community is owned by the association. A planned community is a common interest community that is not a condominium or a cooperative. It exhausts the various definitions.

A "declarant" is an important definition because is a person who essentially is a sponsor, interestingly enough, the declarant need not declare. The declarant is a person who offers the sale as part of his regular business and thus is like a sponsor in a securities act concept and is a very important definition as the person upon whom certain burdens are involved. "Special declarant rights" and "development rights" are important, in that the special declarant rights are the rights to develop the project, maintain model signs, convey easements and do things of that nature. The declarant only has special declarant rights that are different from unit owners. The basic rule is that every unit owner is equal, except in those animal farms, some are more equal than others. Declarants have special declarant rights. It's felt that these are the only rights that they need. Thus, they cannot have other overriding rights that they can write into the documents that are outside of these particular aspects.

One of the special declarant rights is the development right which is the right to unilaterally change the community by adding units, by adding land, by

withdrawing land, by subdividing units based on the unilateral filing of an amendment of the declarant themselves. This ability to flex the flexible condominium is one of the new and exciting aspects of the act, and one of the things that the developers really like and it also indicates that they do not have to commit to anything more than they have to market at a given time. Under the law, if the unit is within a building you can't create it until the building is finished. Thus what you do is start on a major project such as a 100 unit project. You create 15 units by finishing a building with 15 units in it. Market them, and create development rights or have development rights to create additional units. In a project we are dealing with at the moment, a 150 unit project formed under the old law, we opted to come under the new law for this very reason. We completed 55 units, sold them all so essentially the title for the entire project is done. We have development rights to create 95 more units. These development rights are just merely a right to build a building and locate a unit in various locations on empty land in the project. Technically, as we say, all the interest in the community has been sold except development rights. We are selling those development rights, 25 to one person, 35 to another person. We have a mortgage on the balance which has been assigned to the bank. It's an entirely new concept in the form of ownership and it's a very useful form of ownership for development purposes.

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Halford: In the past when they wanted to do that, did they subdivide the property and go ahead with one section, and that was the common interest to that one. And then go on to the next section and that was the common interest to itself, and the next section an common interest to itself and then somehow recombine them later.

Buck: They never recombine them except that basically that's the way that it was done. There were two or three methods of doing it. One of which was a method whereby the developer would reserve a power of attorney from every purchaser to vote the vote of the purchaser in amending the documents to bring on new units. An irrevocable power of attorney always makes people nervous. Because people die, people sell, and there is a potential error. That's one method. Another method is to have a multiple chain of independent condominiums under an umbrella association which would maintain the common facilities. In one particular project, which we are amending to come under the act, there are seven condominiums each with five directors. Each

condominium has 20 units or less and there are nine members of the master association. In a 150 unit project we have 44 officers. We can't even fill the vacancies. We are now merging them altogether using the common interest ownership act.

Another method that was done is the so called "Chinese menu" system, whereby a developer predicts that he would have 20 units. When he has 20 units there is a percentage allocated to each of the 20 units. At a later date he has 20 more. In column B he puts 40 units and then a different percentage is allocated and then he allocates another 20 units. In column C he has 60 units with a different percentage. He predicted up front. He says what his plans will be, what his construction quality will be, and he sort of predicts ahead of time that automatically there will be a jump from column to column. It's done without statutory authority but it's been insured by title insurance so people can follow the "Chinese menu". In every case when a condominium has been created they are locked into some form of design, except in the chain of multiple condominiums. In that case they declare all the units on paper, some are finished. The paper units sit out there having to contribute to their common expense assessment but are nonexistent. They are just ready to be built around. It has been cumbersome and it has been a problem. The ability to flex the condominium under development rights is one of the big advances in the act.

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Halford: But all the development rights provisions are in the offering statement, so anyone that's buying knows that instead of getting something that's going to grow later from some other source, he knows exactly the growth pattern will be because it's in the offering statement.

Buck: That's correct. If there are development rights, there are an additional 12 questions that must be answered in the public offering statement. Essentially disclosing what plans, or no assurances that there are any plans, that the developer has with respect to the exercise of these development rights. We've found interestingly enough, that the 12 questions have made the developers plan, because they don't want to say that they have no idea what's going to happen in the rest of the development rights property. It could be a hazardous waste dump, or a dried egg factory, or whatever they choose, although, in the old days that's what they would like to reserve the right to do. Now they have to say it, and anything can be done in the adjoining property. They say that they don't want to

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say that so they go ahead and plan it. Again the disclosure has had a salutary effect on the planning aspects of developers just because they had to plan.

McNall: The problem that the developers in Alaska have had is that they have attempted to phase through 25 units to test the market. If they are successful, they want to do a phase two and a phase three. Capitol Ring, for example, has got a phase one, phase two and I think phase three on the Old Seward Highway. Phasing was not actually allowed under our statutes, and I know that developer's counsel who are trying to phase have long and hard arguments trying to get phasing accepted by the lenders, because our statutes simply did not speak to how you do that. This simply takes that problem away from everybody. All you have to do is say what you are going to do. Disclose that you are going to put this in segments of 25 units apiece and get around that entire issue.

Buck: I must obviously hasten to indicate that although the definitions apply to old projects, they only apply to with respect to defining terms. They don't generate the development rights to the old projects. Because of this flexibility I think you will find that a number of projects will wait until the act passes in order to be declared. This has been the effect in a lot of the states. There isn't a rush to the land records to get ahead of it. Because of the developers' goodies that are given in the act the developers say, "Ah, we finally can do what we want to do and we'll wait until the act is effective," before they put it on the land records. There will possibly be a rush to the land records with respect to simple planned unit developments that don't want a public offering statement. In those cases they will be required to give a resale certificate, because interestingly enough, a resale certificate is not just for resales, it's where ever there is a sale of a common interest community unit that a public offering statement is not required. Old projects which are being sold by the developer will have to come up with resale statements within the five day rescission period after the effective date of this act. Nobody gets away unscathed by rushing to the land records. The act itself offers so many goodies that it may be that you'll find in more complex projects they will actually wait for it's effective date.

A couple of other, what I consider, important provisions. One provision we're proposing a change in which is item 22, page 86, "ownership of a unit" does not include a leasehold interest, including renewable options, of less than 20 years in a unit under this present bill, that's the uniform provision. In

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Connecticut we found that we picked up a lot of communities that had ten year leases and two five year options, clearly intended to be lease hold relationships, not long term equity relationships and so Connecticut has increased it to 40 years. I've recommended that and that is one of the bill provisions that has been submitted to you as a change in definition.

I think those are probably are some of the fundamental definitions that we probably should go through before we go through the rest of the act and the section 990 is the last of the section 40 sections that apply to existing condominiums.

Rodey: Let's stop for just a second, we have with us Linda O'Bannon who has been the chief attorney in the Consumer Protection Division. Perhaps this might be an appropriate time to ask Linda if she has any questions with regard to any of the commentary that has gone on previously on the act. Linda O'Bannon has been in private practice in Anchorage and as I suspect is experienced like the rest of us do with regard to this issue.

Linda O'Bannon: Thank you Mr. Chairman. Yes, I want to second some of the opinions that Mr. McNall has expressed, in that in our Consumer Protection Section of the Department of Law, we have received numerous consumer complaints particularly from condominium purchasers concerning their association assessments that they weren't planning for. Particularly first time condominium buyers who are perhaps unsophisticated, not aware of what was going on and the fact that there were such poor disclosures made at the time of purchasing the unit led to much concern later on when they found out that these problems existed.

Rodey: Will you identify yourself on the record for our tape.

(527)

O'Bannon: My name is Linda O'Bannon, I'm the chief of the Consumer Protection Section of the Department of Law, I'm an assistant Attorney General.

I just want to make some very brief comments that I think is a little break in to the section by section analysis. I've already talked to both Mr. Buck and Mr. McNall earlier today, and Mr. McNall on other occasions. We have been considering certain aspects of the bill. One of the proposed changes was one that I was very concerned about is the definition on interior

space and actual condominium units. That is one of the proposed changes. We had a problem a few years ago with how appraisers and other people involved in real estate business would measure the square footage of condominiums. They were measuring from exterior walls to exterior walls. Our current act, the Horizontal Properties Regime Act, in the definition of an apartment defines the square footage as interior wall to interior wall. I was concerned that this was not accurate, as proposed in SB 44. I talked to Mr. Buck about still allowing the flexibility in forming the type of ownership he was talking about, perhaps for a marina or something, where there actually are no interior walls, but yet providing in the traditional situation of a condominium apartment that the square footage measurement would continue to be from interior wall to interior wall, so that there would not be deception in the market place in the size of the condominium for residential use, which happens often.

Buck: Perhaps if I could add to that. We did discuss this matter. Under the Horizontal Regime the interior measurement of the unit was the basis of allocating the percentage interest in the common elements and had a great deal of significance. Now what we have done is we've put the amendment in the public offering statement so it is disclosed. It doesn't necessarily mean that the percentage interest will be in proportion to that it could be, as we indicated, any burden of common expenses but we now have a uniform system required as one of the questions in the public offering statement to disclose what the interior space is in interior kinds of condominium units, residential buildings with horizontal boundaries. We feel that we are doing it merely as a disclosure, not as a basis for setting assessment or votes or anything of that nature but with the uniform system the uniform disclosure will occur and thus the advertising has to be consistent with the public offering statement and you'll have a system which everybody will be able to compare for evaluation purposes but not for any other purpose.

O'Bannon: Basically, I am speaking from consumer a outlook. In four ways this act addresses consumer protection. One is the disclosure requirements, one is through the section on warranties, and the particular section on escrow deposits and the section on cancellation rescission rights. I'm sure that Mr. Buck is going to go through each of those sections so I won't repeat that but those are all areas that have come to our attention that are really needed. Particularly, disclosure and cancellation rights if you do not receive a full disclosure within 15 days prior to the contract to purchase the common interest ownership. I suppose that would all my general remarks. There is a

recommend that they had hired an agent to sell their time share.

Senator Ziegler: Because of other obligations may I ask at what time do you intend to adjourn.

Rodey: I was going to raise that question. The members of this committee have scheduled their day according to a three o'clock adjournment time and Senator Ziegler was checking the accuracy, I believe, not for the reason that he thought that it was inaccurate. Therefore, several of the members of the committee have other commitments. I'll question Senator Halford, the prime sponsor of the bill, how (indiscernible) in terms, obviously there is a great deal of work to be done. We are fortunate to have Mr. Buck with us and (indiscernible) in this room. Senator Halford.

Halford: What I suggest that we do in terms of format is request that the bill be drafted as a potential committee substitute, including these changes. I also request that the Department of Law and the guests and (indiscernible) and when we take it out the next time we've got everything all together. I don't know what the schedule is in terms of, I hate to lose the resource of Mr. Buck, particularly. I think that we have gone through an awful lot of it and have probably brought I (indiscernible).

End of Tape 1.

Tape 2, Side 1.

Rodey: ...for that reason I would like to spend as much time as possible, appoint as many people as possible, and get the best light on the problems. Is there a possibility that you would be able to join us again within a month or so?

Buck: Probably not, basically it's four days to come here for two. I could certainly join you on the telephone.

Rodey: That was my second suggestion, would be to use Alascom's new video teleconferencing system and actually work ...that would be the ideal situation, the ideal way for us to go back and forth. Obviously we will have to settle for a phone connection at this point. ATT and (indiscernible)

Halford: The only other question that I would also have is that people on the teleconference network, I don't know if they came for testimony or listen to an overview. I think that there is a lot of professional interest out there and a lot of people involved just looking over

the list is very exciting. We should at least let them know exactly when they are going to have an opportunity to present testimony.

Rodey: At this point I think that it is appropriate to hold hearings in Anchorage because of the large number of people, particularly in Anchorage, that are concerned about this and again, we ought to start it sooner rather than later...within the next several weeks.

Halford: Could I make a formal request that we have a potential CS drafted with the proposed changes and.. distribute that to everyone who has shown any interest on your mailing list, Senator Faiks mailing list and my mailing list prior to this so at that point they have the current version prior to the hearing in Anchorage.

Rodey: Yes, I presume that we are going to draft a committee substitute. Mr. Lewis will see to that.

Halford: I assume that we are closing out the day.

Rodey: Yes, I think that we have lost a good portion of the committee except the prime sponsor and the chairman. That's some indication that other members have other obligations. Obviously we are going to spend a great deal more time on this and just to my constituents in Anchorage, we will be providing copies of the committee substitute to Anchorage as soon as possible. I noticed the list and many of them are members of the real estate and legal community and themselves will be important people in disseminating the draft. Hopefully we can rely on the continued guidance of Mr. Buck as well as Mr. McNall. I just wish that he was a little closer. With that I will adjourn the Judiciary Committee.

SB 44

Teleconferenced Testimony
before the Senate Judiciary Committee

February 26, 1985

DON BUCK

My name is Gurdon Buck. I am with a law firm, Robinson and Cole, in Hartford, Connecticut, and I am testifying from Hartford, continuing on the testimony on Senate Bill 44 concerning the Uniform Common Interest Ownership Act.

As a matter of background and to try to catch up from the previous testimony, I am, in addition to being an attorney, a realtor and a national trustee of the Community Associations Institute and the Vice Chairman of the Condominium Committee of the Real Property Section of the American Bar Association. I was also an ABA advisor to the Uniform Law Commissioners Committee that drafted the Uniform Common Interest Ownership Act.

Also as a matter of background, the State of Connecticut passed its version of the Uniform Common Interest Ownership Act effective January 1, 1984 and since that time I have drafted about two dozen sets of documents for projects. As for my interest, I personally principally represent common interest community developers, drafting documents and counseling the acquisition, marketing and transition of control for common interest community projects. We also represent associations, lenders and municipalities in community association matters.

I have been asked to make a brief overview of the Act to try to bring people up to speed. For those of you who are not privy to the testimony earlier on the Act on February 5, the Uniform Common Interest Ownership Act was adopted by the 1982 annual meeting of the National Conference of Commissioners on Uniform State Law. Basically it is an act that regulates three forms of ownership of common interest community projects: the condominium, the cooperative and what used to be called the planned unit development but is now called the planned community in the act.

While there is a common scheme of development (that is, that there is a central community association that provides maintenance and upkeep and services for the units or portions of property within the project and this common scheme is shared by all three forms) the legal consequences flowing from the choice of forms differ substantially. Typically, condominiums have been a regulated form of ownership under statutes -- often, in some states, with consumer protection provided and in Alaska with no substantial consumer protection. Cooperatives and planned unit developments are significantly less regulated and are created by either corporate law or common law covenants in creating the association and the obligation to provide maintenance assessments, often with varying levels of competence with respect to the documents that are provided for the particular associations.

National lenders have found it very difficult to compare laws between states and statutes governing condominiums and

common law rules governing cooperatives and planned communities and they will use varying terminology, varying systems and make it almost impossible to assess the appropriateness of making loans, financing, sale and interstate commerce. Thus the National Conference of Commissioners and Uniform State Laws, in a process starting in 1975, has drafted a series of acts -- the Uniform Condominium Act, the Uniform Planned Community Act, the Model Real Estate Cooperative Act -- and then in 1982 merged all three acts into the Uniform Common Interest Ownership Act regulating all forms of ownership, using unified terminologies, unified systems. The act itself has been passed in one form or another as either the Uniform Condominium Act, the Uniform Planned Community Act or the Model Real Estate Cooperative Act in some 11 states. Oregon has the Uniform Planned Community Act, Virginia has the Model Real Estate Cooperative Act, and the Uniform Condominium Act has been passed in West Virginia, Pennsylvania, New Hampshire, Minnesota, Maine, Missouri, New Mexico, Rhode Island and Nebraska. All of these acts have essentially the same structure but apply only to their form of ownership.

The Uniform Common Interest Ownership Act is presently the law only in Connecticut, but it is being contemplated in West Virginia, Vermont and New Jersey, with significant excerpts being submitted in California. Thus the act itself, as far as its administration, as far as its financibility, its internal operations, has a great deal of experience.

The new aspect of the act, which is the governance of all three forms of ownership, has only had experience in Connecticut, and thus I've been asked to discuss some of the Connecticut experience and to go through the act on a section by section basis, giving a summary and giving some reasons for what's happening and possibly giving some anecdotal information as to what is our experience in Connecticut.

With your permission, I'd like to suggest that as I finish a section, perhaps Bill McNall from Anchorage, who has had a substantial amount of experience in this area of law representing associations and some developers and who was president of the Alaska Chapter of the Community Associations Institute, could step in and perhaps provide some anecdotal support for the needs for some of these particular provisions.

At the February 5th hearing, we went through the Act very generally and then started taking up the bill on a section by section basis. We ended up going through what I call the Section 40 sections. Under Section 38.08.040 -- applicability of pre-existing common interest communities -- there are around a dozen provisions of the Act that apply to all common interest communities that were created in the state before the effective date of the Act, but only with respect to

events or circumstances occurring after this effective date. These particular dozen sections are quite important and we went through them in some detail because they are the ones that we will apply to the existing projects. What I am proposing to do, in order to catch up, is to go through the sections on a sections by section basis, but when I get to one of what I'll call a Section 40 section, I'll gloss over it very quickly because we have gone into it in some detail on February 5th. I hope to try to confine my remarks to no more than another perhaps 45 minutes and then we can answer specific questions with respect to specific elements of the Act itself.

The Act, which is Senate Bill 44, is a proposed revision of the laws applicable to condominiums, planned unit developments and cooperatives. The Act itself is quite orderly. One of its advantages is that the provisions of the Act are in places that you can find them logically. Sort of as I said at the last Testimony, I believe, as the White Queen said, it begins at the beginning, goes through to the end and then stops.

And thus Article 1 covers the general provisions as to the application of the Act on various forms of communities. The Act itself, in Sections 020 and 030, exempts from most of its provisions, small communities. The Act is providing, however, that if the community is subject to development rights or subject to financing from the AHFC, the Act does apply. In every case, even in the small communities, a community may opt into the Act by having its declaration indicate that the Act is applicable.

We've gone over Section 40 -- applicability through pre-existing common interest communities -- and that particular provision is the area where in Connecticut, perhaps we had the most adjustment to make on passage of the Act. This was particularly with respect to the resale procedures and record keeping procedures of some of the communities that have been in existence over the years with no records or primitive records at best. But as far as Connecticut is concerned, the resale system has adapted to the existence of the Act. The sale systems have adapted, and at the moment things seem to be going along fairly well.

Section 50 -- applicability to small pre-existing cooperatives and planned communities -- indicates that if it is a small community and it is less than 12 units it is subject to what we call the three Universal Sections: Subsections 720, 730 and 740. These Universal Sections are extremely important. They are those which essentially are essential for existence of a condominium -- because a condominium is a creature of statute -- and are useful for the existence of a cooperative or a planned unit development, because they define the real estate interests and the interest in the

common elements, the applicability of local ordinances, building codes and regulations indicating that you don't discriminate between the various forms of ownership. They also define eminent domain, which in the case of one of these common interest communities, solves a large number of problems. So I'll be referring to those as the three Universal Sections and those sections apply -- no matter how old, how small, how large. Whatever form a common interest community is, it is governed by those universal sections, 720, 730, 740.

Section 60 is a fairly complex provision. It is in there in order to satisfy constitutional requirements. That is, if a declaration is created prior to the existence of the statute and an association wishes to amend its instruments, it has a choice: it can amend its instruments under the previous law if the amendment was made in accordance with the former law, and that law will continue to apply. However, there are a lot of excellent provisions in the new law which old associations would like to be part of. Thus, what it says is, if the amendment is permitted by this chapter and not permitted by law before the effective date of this Act, the amendment will be made under this chapter. It indicates also that if an amendment grants any person any right, power or privilege permitted by this chapter, any obligation or liability will also apply to this person. This particularly focuses at developers because this Act provides a wide range of flexibility for developers for developing and carrying on their project. Three projects in Connecticut are amending their documents to come under the new Act because of its advantages to the developer. However, if they do come under the new Act, the developers would be liable for the public offering statement, for the warranties and the escrows and the other liabilities that the Act applies.

Section 70, the applicability to the nonresidential common interest community, with the exception of the universal sections, indicates that the Act does not apply to the common interest community where all the units are restricted to non-residential use. Parenthetically, in looking at your definitions, you'll discover that the word residential includes the word recreational. This would be under definition 20(h) in the Act in Section 990. Residential includes recreational purposes, so if a campground, a marina, a stables or some other activity which would be of a recreational nature is being contemplated in the common interest community, then the full panoply of public offering statement and protections must apply, even though it is technically a non-residential project. The philosophy is that a recreational project requires similar consumer protections as a residential project. The chapter applies to communities which are mixed use.

Section 80 -- applicability to out of state common interest communities. The chapter does not apply to out of state common interest communities. But the consumer protection provisions (that is, the requirements for a public offering statement) are required where the disposition of a common interest community unit is signed in Alaska by a person, unless it is otherwise exempt.

Now Article 2 -- now that we've gone through the fundamentals of the applicability provisions. Article 2 covers the creation, alteration or termination of common interest communities. Article 2 is principally the developer and the developers' draftsman's article. It provides for the technical provisions as to how to create a common interest community. Very simply, it is created by a declaration. The declaration has a few mandatory items in it. It is relatively easy to create a common interest community. That is, if you describe the community with units and the ownership of the unit mandates the payment of maintenance, insurance or taxes on property or the unit, you have a common interest community. And the instrument, however designated, which creates that obligation is the declaration.

Another element of Article 2 which is important is that it provides bandaids for sloppy draftsmen. That is, if a draftsman created a very simple declaration and didn't define items such as the activities of the association or the boundaries of the unit -- a very important item to an association council (because maintenance boundaries seem to be a continual low level source of irritation) -- the Act goes ahead and writes into the declaration statutory definitions. These may not be the ideal answer, but at least they are answers and settle a lot of disputes. And probably one of the reasons for the length and complexity of the Act is many of these provisions which say "except as provided in the declaration" such as Section 100. These are the definitions. So what they are doing is providing answers to hard questions that the common community association institution has been raising where a draftsman forgets to provide them or where the draftsman is indefinite. And those particular provisions we found to be very useful.

Section 110 is one of the Section 40 sections, and it provides for a number of what I would call prophylactic provisions supporting the validity of the declarations. So only those lawyers who have listened tightly in the first year of law school know all the problems against the rule of perpetuity, but it does indicate that it doesn't defeat any provisions of the declaration -- you don't have to worry about it.

Section 120, the description of the units, provides for a shorthand description. It is another one of the Section 40

sections that will allow the ease of conveyancing of common interest community units after the passage of the Act.

Section 130, the contents of the declaration. The basic contents of the declaration are relatively straight forward. Provided that the declaration is filed with these particular elements in it, it will conform to the statute. Enough information will be given for title purposes in order to create the common interest community.

Subsections 8, 9 and 10 are provisions for development rights. Development rights are a term created by the Uniform Condominium Act of 1980 and the Uniform Planned Community Act of 1980 as well (formerly called additional withdrawable and subdividable land under the original Uniform Condominium Act) whereby a developer or declarant can unilaterally amend the declaration to change the community in order to create new units, add land, withdraw land or subdivide a unit into units in common elements. These particular powers are extremely valuable. They are essentially a new form of real property ownership that can be sold. As I have explained, we have a client who has created 55 condominium units on a parcel of land which is zoned for 150. He has reserved the right to create an additional 95 condominium units on empty land within the project. Those reserve rights are called development rights. He has sold out his 55 units for all intents and purposes, so technically the 55 units together with their assigned interest in the common elements, their vote in the association and everything necessary to run the project, have been sold and are gone, but the development rights unit remains. He has sold 25 development rights units to another builder and is reserving the balance in a bank, so to speak, secured by the mortgage loan. And he doesn't own anything that you can put your hand on. It is a very interesting philosophy. It gives you some idea of the scope and flexibility of the Act and obviously some of the wide ranging powers that the Act permits.

Section 140 permits leasehold common interest communities. Like the Section 130, they have to be disclosed, there has to be a sufficient information and there are some elements of consumer protection: if an individual unit owner makes timely payment on that unit owner's share of the rent, the leasehold cannot be terminated and everybody thrown out. However, it does permit the development of leasehold common interest communities.

Section 150, on Page 9, the allocation of allocated interest. Allocated interests are a new term created by the Common Interest Ownership Act. Under the Condominium Act, there was something called a "percentage interest in the common elements". With a percentage interest in the common elements, you received a vote and you received a proportionate share in the common expense liability and they all had to

equal the percentage interest in the common elements. There is no real rhyme or reason for doing that. What the Act does is allow these three interests to be allocated differently. However, the fraction or percentage interest in the common elements for a condominium has no practical effect under the Act and is just there because we common law lawyers like to think that when there is a tenancy in common there is a fractional interest that is spelled out somewhere.

In reality, the practical impacts of the allocated interest are in the percentage interest of common expenses and the percentage interest in the votes, and it can be a fraction or a percentage. They can be different. And they can be under any formula, provided they do not discriminate in favor of the units owned by the declarant or the affiliate of the declarant. So, any rational method of allocating the allocated interest would be spelled out in the declaration and based upon the market and the desires and the kind and quality of the units.

Whether they are garages, marinas, storage, office units, professional units, parking space units, the allocation would describe the formula which is used to establish these allocations and would describe, for the initial created community, what the allocated interests are for the first units being created. It is again a very flexible aspect and it has a well thought out approach to a problem. And, typically in Connecticut, what we are doing is that we're having an allocated interest in the common interest in the expenses which is based upon the burden that the particular unit imposes upon the community -- sometimes based on bedrooms, sometimes on square footage, sometimes on the square footage of roof, sometimes on the value and sometimes on the amount of siding that is put up. Sometimes, in many cases, we are doing it equal. In almost every case, the voting, however, is on a one unit one vote basis, but it can be one person one vote or any other method that is non discriminatory.

There are a few other interesting allocations under Section 150. The declaration can provide that different allocations can be provided to units on different matters. In Virginia there is one project where the tenants have a partial vote and the occupant has a partial vote and if it's an owner-occupant they have a whole vote. This brings tenants into the voting of the affairs of the association and that's permitted under the Act if somebody is so interested. Then there are some general provisions prohibiting partition and, in the cooperative, indicating that the ownership interest can't be made without possessory interest in the unit, so they are never separated.

Section 160, the limited common elements, permits an allocation of specific portions of the common elements to persons less than all the persons in the project, so it takes

care of balconies and other elements of that nature. It is also possible to allocate common expense liabilities based upon common elements burdens so there are a number of ways that common element expense can be allocated besides basic fraction which is a residual number under the declaration.

Plats and plans under Section 170 is a fairly complex provision. We've prepared checklists, which Bill McNall has, giving the surveyors, engineers and architects instructions as to how to prepare the plats and how to prepare the plans. Technically, a plat is a survey which would be prepared by a surveyor, that is a picture of the property as it existed at the time of the creation of the first units, and then the time of creation of subsequent units. A plan is a drawing showing what contemplated units are going to be looking like. A plat may show the intended locations and dimensions of contemplated improvements, in which case that particular provision should probably be done by a planner. Any contemplated improvements must be labeled with the words "must be built" or "need not be built". On Page 13, this is the first reference to those very, very important consumer protection provisions. That is, we are making statutory representations to purchasers and to anybody who comes in contact with the plats and plans, over what the developers are committing to and what they need not build and thus are not committing to. It is one of the essential disclosures of the Act. In advertisement, as you'll discover later on, if something is not labeled "need not be built", it must be built -- it becomes an affirmative representation.

The plans for the units under Subsection D are essentially floor plans, which we used to call building plans, wherein the dimensions of the unit are specifically identified and those particular dimensions are laid out on the plans so that boundaries of the units, which are described in the declaration by narrative, are now shown in a physical, graphic manner. The requirement of Subsection (g), certification of the plan, must be made by an independent surveyor, architect or engineer. The intent of this is that the particular disciplines which undertake the particular aspects, whether surveying, whether engineering or whether architecture, would be the ones who would certify as to their own professional discipline. And in the case of a subdivision -- for instance a cluster subdivision where all you have is the subdivision map, units consisting of house lots and common elements possibly consisting of a well site or a private road -- the entire certification would be made by a surveyor. However, where there is architecture and engineering data appearing, their disciplines may require that the engineer or architect sign it.

Section 180 is the exercise of the development rights that I have described. As developers unilaterally exercise their development rights (and it is important to indicate that they cannot exercise a development right unless they have reserved

it in a declaration) they prepare and record amendments to the declaration. Thus, whatever the development right was, they create units or they withdraw land or they add land. If they create units, the declarant is the unit owner automatically of those units. The process of exercising development rights is usually undertaken by a one or two page amendment. A new plat or plan is appropriate showing where the new property is. It can be done fairly quickly and easily with a fairly simple amendment provided it has been adequately protected in the documents.

If property is subject to development rights -- that is, if there is a project whereby a portion of the property will be subject to the right of the developer to add or create units (in most cases most of the property when it begins) -- the developer is liable for all of the expenses allocated to the property subject to development rights. Thus developers may terminate the rights and would probably want to terminate the rights as soon as they had used them up. And it is to the interest of the developer to terminate the development rights as soon as they are used because of the obligation for maintenance, tort liability and taxes on the development rights land.

Page 15, on alterations to the units: unit owners may in fact have a specific power to alter units and may under Page 16, under Section 200, relocate boundaries between units. In Section 120, if the declaration permits, it may be subdivided into two or more units. In the commercial context, this is a very useful provision. In California and Connecticut, prior to the existence of the Act, when you had a commercial or an office condominium you had to divide it up into little mini-units of one square foot apiece and then you would assign as many of these as were needed to a given office and then allow people to buy these units back and forth. Very cumbersome. And sure enough, somebody would want six inches instead of a foot and thus they would discover their documents prohibited it. Subdivision makes it very easy.

Section 220 is the easement for encroachments, indicating that it is quite likely that the building when finished will not exactly comply with the plans. This provides an easement for these minor encroachments that may occur by virtue of construction, sinking or shifting of a unit. There is still a requirement to adhere to the plans.

There are certain powers (Section 230) used for sales purposes, that the declarant has the right to maintain sales and management and models. These are the only rights that declarants can reserve that discriminate in their favor. They are, for all intents and purposes, essentially appropriate for the declarant.

Section 240, the easement rights, are other special declarant rights for use of the easements for the property.

Section 250 provides for amendment process which is uniform. There have been a number of declarations which have been created merely by reference to a master deed requiring 100 percent to amend, which we call the bullet proof project. Conditions do change, but an amendment is necessary. They're detailed as to how the amendment is done in Section 250.

Section 260 is termination. There is a substantial provision on termination in Section 260. Suffice it to say virtually all the permutations and combinations of termination are described in great detail -- as to how they are voted in by an 80 percent vote, how the proceeds are whacked up, how they are re-submitted and what happens to subordinate lienors and with adequate protection for any kind of secured lender involved.

Which brings us up to Section 270, the rights of the secured lender.

This is basically what the rights of the secured lender are not. However, it does permit, as the old statutes did not in many states permit, that there be a condition that a specified percentage of those holding security interest approve certain actions of the unit owners. But they cannot deny or delegate control of the administrative affairs or prevent the executive board from settling litigation or prevent an insurance trustee from receiving or distributing insurance proceeds.

In many cases, you'll read the old statutes and you'll discover for instance that the amendment process must occur by the vote of (x) percent, 70 percent, or whatever of the unit owners. You'll then discover that the lenders are not mentioned. There is a likely possibility that by not mentioning them, they are left out. Thus if the unit owners go ahead and do it without the lenders' consent the lenders may not have the ability to object. The lenders are concerned about this. This gives secured lenders some additional protection.

The Act itself, as we have described, gives things to people that they need. It takes away things as well and it represents a compromise in the drafting because of the large number of interest that were involved: lenders, developers, associations, consumers and folks of this nature.

Section 280, master associations, permits the delegation of certain powers from a sub-association to a master association. Now, under the old act, in order to get flexibility, many developers created a chain of independent condominiums, all governed by a master association and there was simply no

authority to delegate the board of directors powers to the master association. This cures that.

Section 290, merger or consolidation, is one of the Section 40 sections applicable to old as well as new condominiums and allows the merger or consolidation of common interest communities. In many cases where you have a multi-phase project of multiple condominiums, the ability to merge them all, even in the old concept, is very useful.

Section 310 is the first section of Article 3, management. We've gone through now what I call the developers' articles, the creation, alteration and termination -- the developers' and lawyers' article. We now go to the day to day management. This is an area where even the most sophisticated states, until the passage of the Uniform Condominium Act, had virtually no law. They were giving the associations virtually no powers and no specific remedies for the activities that the association had to undertake in order to fulfill its governance responsibilities. Article 3 is probably one of the articles that is most useful as far as the ongoing operation of the associations is concerned.

It provides that an association must be organized no later than the date on which the first unit is conveyed. There have been projects where the developer will convey the unit and organize the association at a later date and find that all the financing, covenant powers, the responsibilities and rights, the accountability and everything is all muddled up. This makes it very clear to organize first.

Section 320 is partially -- through Section 6 and from 11 on -- a Section 40 section. It specifically grants to the unit owners association a number of powers which the association really does need. Many of them were granted by the non-stock or stock corporation laws, if the developer for them was under the stock or non-stock corporation law. Many were not. There are always questions whether or not the association could adequately represent unit owners as a class, whether it could go into litigation on matters of common interest, contracting powers, regulatory powers, the acquiring of real estate and personal property and all of these other powers which were not in the original statutes and in many cases were left to question. Section 320 gives the association this power and is a very important one to recommend to you.

Section 330, executive board members and officers, basically gives the executive board virtually the carte blanche to run the association except as otherwise limited in the declaration. Thus the executive board is given virtually all the powers to run the association except to amend the documents and to elect themselves. And then the declaration can divide the powers appropriately between the executive board

and the association, depending upon the size and style of the association.

Section 340, transfer of association control. The termination of declarant control is a word of art. This is not in the Uniform Act. It is something we highly recommend. Connecticut has a similar provision. It is adopted from the Florida statute and it does give a list of items that the declarant must transfer to the unit owners at the time they relinquish control. The control is relinquished under the powers -- Section (e) on Page 31, which indicates that not later than 60 days after conveyance of 25 percent, one quarter of the members of the executive board must be elected by unit owners. After conveyance of 50 percent of the units that may be created, not less than one third must be elected by unit owners. Then under Section (d), 60 days after conveyance of 75 percent of the units, or two years after declarants have ceased to offer units for sale, or two years after the right to add units was exercised, the declarant must call a meeting and the unit owners may elect the members of the board. Interestingly enough, the declarant can vote at that meeting but cannot vote at the earlier provisions.

But the termination of the developer declarant control is a term that is actually defined in Section 330, subparagraph (d), and at that point, then the developer or declarant must transfer a list of essential items to allow the association to operate in a meaningful manner, including financial statements and the source documents for the financial statements from the beginning of the incorporation of the common interest community.

This particular provision has created a lot of heat and light because of the fact that developers have been operating under the concept of form and forget. Then all of a sudden control gets transferred and the developer for the first time in years brings out the books of the association and tries to figure out what he was supposed to have been doing. Now it makes it very clear from the beginning that the developer will have a transition process that is reasonable. He can prepare for it in an orderly manner. This is not a Section 40 section, so it applies only to those projects declared after its effective date and they'll still have to muddle along with the old ones. It's probably the only way it can be done.

Section 350, the transfer of declarant rights, permits a declarant essentially to assign or transfer the declarant rights to a successor who need not be the declarant. That is he puts the declarant's rights into deep freeze. The successor, who more likely than not is a foreclosing mortgage lender, can keep the declarant rights in deep freeze without being tarred with the liabilities of the declarant until they bring a successor on line, thaw the declarant rights out and give them to a successor. Successors then have the full

powers of exercising special development rights and things of that nature -- at which time they assume all the liabilities.

Section 360 terminates contracts and leases of the declarant and its affiliate where the association votes after the termination of the declarant control, but not less than ninety days after. This would obviate the possibility of long-term management contracts between developer and his relatives and friends, long term Muzak contracts where the developer's only liable to change the cassette once a month and receives \$1000 per month for the purpose. This particular provision allows that kind of contract to be terminated.

The by-laws are a fairly short document under Section 370. It provides for a minimum number of corporate pieces of information which we would most likely find in a corporate set of by-laws. Interestingly enough, the by-laws can be amended any way that the declarant says they are. In the model forms we have opted to indicate that the by-laws can be amended by the association executive board upon notice, comment and a vote of a larger than the normal majority of executive board members. Thus it means anything of permanent nature appears in the declaration. The by-laws are generally a day to day operating chart of the project. And unlike the former Act, they need not be recorded.

The Section 380 is a very basic section indicating that the association is responsible for the common elements. It goes into some detail, with the exception as I explained before, that the declarant is liable for the expenses in connection with real estate subject to development rights. There is a meeting. There is a new provision in this particular Act which is somewhat surprising to associations that the association must have a meeting once a year. This is even during the period of declarant control.

In addition, there is a provision for budgetary provisions. The budget must be submitted to the meeting. By a percentage appearing in the documents, the association can provide for a veto to unit owners for the budget. So, even during the period of declarant control there has to be an annual meeting. An interesting issue.

Under quorums, there is an automatic quorum of 20 percent if the by-laws are silent but, likewise, the by-laws can provide a larger percentage by quorum, and the executive board is 50 percent. It is possible, and in Connecticut, under our quorum provisions, we provide in our standard by-laws that a quorum consists of the person present, provided that there has been full notice to the unit owners. Because we have found in many cases the establishment of a quorum particularly in a condominium such as a marina or a recreational

facility is quite difficult to obtain, even the small percentage of 10 percent.

Section 410, tort contract liability, is essentially a limitation of liability on unit owners. It is a Section 40 section, applicable to old projects and is very useful.

Section 430 is something that's brand new. It's a whole new idea in a condominium and it's very rare in a planned community. It permits portions of the common elements to be conveyed or subjected to a security interest by a vote of 80 percent of the votes of the association. (This parenthetically is the same number that we would require to terminate the common interest community.) It allows, for instance, the clubhouse or the well or the sewer plant to be secured by a security interest with an agreement to the particular entity loaning the money and allows a partial sale. Obviously that's one of those amendments that lenders would want to have a voice in and they can under the statute. It's a very useful technique. It's not been used yet in Connecticut that I know of because the general power to assign the interest of the association in the common assessments is allowing the association to give a wide variety of credit and the collateral assignment of assessment income now allows an association to provide for credit. Most of them are taking their loans out using a cycle of assessment income rather than security of interest on the common elements.

Section 440 is an insurance -- more of a housekeeping item -- and it provides for the kind of insurance an association should maintain. There's a dichotomy in here. That is, a common interest community with horizontal boundaries (i.e. floors and ceilings) must provide insurance covering the entire common interest community including all buildings and improvements including those within the units. If it does not have horizontal boundaries, that is, if it is something like a house lot where the boundaries extend from the center of the earth and the heavens, blanket insurance is optional. It doesn't matter whether it is a condominium or planned community or coop, these rules apply across the board.

Section 450, on surplus funds. They are basically divided, of course, into common expense liabilities.

Section 460 is the assessment for common interests, with particular provisions for reallocations of common expenses in accordance with specific burdens that are imposed -- such as judgments or assessments -- or specific services that are provided by a unit owners. Interestingly enough, all of these are common expense assessments, all of them are lienable, all of them are collectible under the statutory lien. It is a very useful element because in many cases they are not proportionate to percentage interest in the common elements as they were in the condominium.

Under Section 470, the lien for assessments. This is a very powerful remedy indicating the lien is perfected at the time of the filing of the declaration. This is a Section 40 section. It applies to old communities as well as new communities. It also provides that the lien is superior to the lien of first mortgage interests to the extent of six months of assessments that would have become due prior to the institution of actions that would force the lien.

This super lien is now the law in most of the states that have passed the Uniform Condominium Act. It is acceptable to the Fannie Mae, Freddie Mac and the FHA. All of them recognize that the institutional powers to collect a few months of assessments that are there and keep the financial viability of the association above water is more important than perhaps, as I say, just a few months or six months of assessments which might be ahead of the first mortgage loans. It obviously has facilitated collection of liens because the lender is interested in those payments, as is the individual unit owner.

The procedure for collection and foreclosure I'll skim over because it is relatively technical. Suffice it to say that there is no longer a necessity to file a notice of lien. The lien exists by virtue of the declaration. Upon commencement of foreclosure and the appropriate remedies, the lien can be undertaken.

Section 480 is the divisions of various kinds of attachments, mechanics liens and items of that nature, judgments liens and how it is undertaken.

Section 490 is another Section 40 section, on association records. It is very simple. They are required to keep financial records sufficient for the association to provide resale certificate. In Alaska you have added what I think is an excellent provision. It provides that the professional manager or managing agent or other person with whom the association has contracted for services must return all association records within five days of termination of contract. Because of the responsibility of an association to provide a resale statement within ten days, they obviously need the records. If they're having a dispute with their financial manager and he won't give them the records, this obviously has some substantial provisions.

Section 500 is a housekeeping item where the association is acting as trustee as they often do in an insurance provision.

Article 4 is the consumer protection provisions. I'll run through them fairly quickly because I can see my allocated time is running out.

Article 4, Section 510 applies to all units which are subject to this chapter. However, there are a number of exemptions -- that is, the sale of the unit that is non-residential, for instance, or disposition of the unit where the declaration limits the maximum assessment to \$300 per year per unit. In those particular cases, the public offering statement is not required.

There is substantial liability when the public offering statement is prepared. It has to be delivered to a purchaser who offers a unit to a purchaser before sale. The public offering statement then gives the purchaser a 15 day rescission period, during which time he can walk away from the deal after reviewing the public offering statement.

Section 550. These are the basic questions that a public offering statement should supply. There are 20 questions, just like in the old quiz game. Those 20 questions must be answered for every common interest unit where a public offering statement is required. In addition, there is another round dozen of questions under Section 540 that must be answered if development rights are reserved. Because of the unilateral power of a developer to change the condominium or the common interest community, those 12 questions describe what the plans are in the future. Or, they give assurances that there are no plans and anything can happen with respect to the development rights plans.

With the same effect, time share gives four questions out of the Uniform Act and three additional questions which I would commend to you with respect to time sharing. The result of this is, in Connecticut, that if in fact time sharing is not contemplated, it is prohibited in the declaration, because the developers don't want to go through the answers of these questions which would require planning of something that is not contemplated. So technically, in Connecticut, in most of our cases where we're not contemplating time sharing, we prohibit it. And that gets us out from under answering those questions which come up under Section 550.

In Section 560, there are three basic questions having to do with the engineering aspect and the useful life and the cost of curing the outstanding notices of violation where there is a conversion building. Conversion buildings are buildings that were occupied by tenants before the common interest community was offered as a common interest community. And thus, if it is a used building, the declarant is obligated to provide certain engineering, code and useful like items with respect to the provisions here.

This is a very important provision. It is one of the reasons -- the tenant protections and the tenant information -- Connecticut passed the Uniform Common Interest Ownership Act. It wanted this particular information as a tenant

protection to be given to conversion tenants in all forms of common interest communities.

Section 570. If it is registered with the United States, the registration satisfies the public offering statement.

The 15 day rescission under Section 580 is spelled out.

Section 590, which is also a Section 40 section -- resales. It provides for when a unit is being sold where a public offering statement is not required. This will encumber the sale of units in old communities and even new sales by developers if there was a community declared before the effective date of the Act. There is a requirement in that particular case for the answers to some 14 questions. They give a statement of the community's financial activities and affairs, what is going on, and a general coverage of the character of the community, including the declaration, the by-laws and the rules.

The association is responsible for delivering this particular resale statement within ten days after a written request and the payment of a fee to the association. And the purchaser is not liable for any unpaid assessments greater than the amounts set forth in the certificate. Thus the association has to be fairly careful with the delivery of these resale statements. Now, it is important to emphasize that this applies to old communities as well as new communities because it is a Section 40 section.

And it applies when a public offering statement is not delivered. So in every sale of a common interest community in Alaska you will get either a public offering statement or a resale statement (unless it is exempt because it is non-residential or less than \$300 per unit.)

Section 600 provides for escrow deposits until delivered to the declarant at closing or by default or by refund. The release of liens indicates that any lien that the purchaser doesn't agree to has to be released at closing. The conversion building element in Section 320 gives some specific rights to residential tenants, the residential sub-tenant, to purchase their particular unit. They're obligated to receive a full public offering statement not later than 120 days before the tenant is required to vacate. And for the first 60 days they have the first right to purchase.

This ameliorates the trauma of conversions and is one of the provisions, as I said, that called for Connecticut to pass the Act covering all forms of ownership.

Section 630, the express warranties of quality, is a fairly carefully drafted situation providing for express warranties. It indicates that models, descriptions,

affirmations of facts or promises create an express warranty. Section 640 develops the implied warranties which basically are spelled out in some detail. I'll skim over those even though I know there may be some questions and some important sections.

Section 650 indicates the implied warranties may be excluded provided that they're fully disclosed. But a simple general disclaimer is not sufficient to disclaim the implied warranties. And then there is a specific statute of limitations of Section 660, allowing for enforcement. But it also allows for the shut off of these warranties, which could possibly run forever.

Section 670 is one of the most interesting and most powerful provisions of the Act. It is a Section 40 section covering old condominiums and communities. It essentially says that anybody -- or any class of people adversely affected for failure to comply with the Act -- has a cause of action against any other person. You don't have to worry about the issues of standing or any of the other areas that lawyers do their dances over at the threshold of the court house. The question is, if there has been damage, if they have been adversely affected, they have a claim for appropriate relief.

Section 680, labelling of materials, another consumer protection provision, indicates that promotional materials showing a contemplated improvement must be conspicuously labeled "must be" or "need not be" built. And if they have not labeled it "need not be built", under Section 690 it is assumed that they must build it.

Section 700 requires an architect's certificate of completion if the unit is to be conveyed if a public offering statement is required. And that means that no unit can essentially be conveyed until the unit has been created and the building is complete.

Article 5, the general provisions, which in the Uniform Act were in Article 1, gives some fairly general activities which can be undertaken and shows the applicability of the various aspects of the Act. It gives some very powerful positions to the Act itself with respect to other laws, with respect to documents. It indicates that the Act in most cases is supreme unless the Act specifically provides for those particular provisions where they can be varied.

I would commend to your attention the commentary to this particular provision in the Uniform Act where it lists the number of provisions which may be varied by the declaration or the by-laws or by agreement. And they're very large. It turns out that probably 2/3rd of the Act may be varied, but

where they cannot be varied, obviously this particular provision means that the Act is supreme.

The separate titles and taxation in the proposed bill changes the common interest ownership provision indicating that in a cooperative the unit owners' interest in the unit and allocated interest are real property for all purposes.

The Connecticut provision makes the unit in a cooperative financeable and subject to real estate mortgages. But it does create a certain amount of problems which can be solved by sensitive drafting (some problems with respect to the chain of title allocated to a cooperative unit owner's interest) but the declaration can be filed and, as I say, sensitive drafting can cure that. In the Uniform Common Interest Ownership Act there is the alternative of having a cooperative unit's interest being personal property, which in some cases may be relatively useful.

The separate titles and taxation section -- 720 -- like 730 and 740, is universal, and has solved a number of problems in Connecticut with respect to taxation of common elements, indicating the unit owner's interest is real estate and is taxable and it can be separately conveyed. This makes the title insurance people happy.

Section 730 is a Section 40 section and a universal section, as a matter of fact. It indicates that the application of local ordinances and building codes doesn't discriminate between physically identical portions and kinds of property. This is quite useful because it means the building inspectors won't require full scale firewalls in an apartment building that happens to be a condominium but not in an apartment building that does not happen to be a condominium.

Section 750 is an important section. It supplements general principles of law so that you can create contract rights.

Section 760, 770, 780 are basically boiler plate contracts and appear in universally all uniform laws.

Section 790, an unconscionability provision. Very powerful with respect to overwhelming developers who decide to write documents that are totally one-sided. The court can go and look at it to find out if they are unconscionable. This is a provision that comes out of the uniform laws and a number of uniform laws have it.

Likewise, Sections 800, 810. These are uniform law provisions. Adjustment of dollar amounts (that is, the \$100 threshold under 820 and the \$300 threshold in the Section 510) are adjusted based upon a 1979 index which is now the uniform index used for all the uniform condominium acts

throughout the United States. That is the reason why that very strange formula is in there. That formula also is a standard formula used by the Uniform Law Commissioners for CPI adjustments in other uniform acts providing for CPI's.

That brings us to the definitions. There are a number of important items in here. I'll skip through.

You should review the "affiliate of a declarant". It is quite important.

The Alaska bill has added an excellent one in Definition 9 on Page 84, indicating that a conversion building includes a mobile home site as well as a building that was occupied by persons other than the purchasers. So the conversion protections are now offered for mobile home sites as well as buildings.

The definition of a "declarant" isn't necessarily the person who declares. It is the person who sponsors or actually offers the units for sale as a regular course of business.

"Ownership" interestingly enough does not include just owning, but also includes leases in excess of 40 years in a unit in Definition 22 on Page 87. On Page 87 there is a mistake that should be corrected -- on Line 21, 20 years should be 40 years to be consistent with the 40 years on Line 3.

The definition on Page 88 of "special declarant rights" is very important with respect to developers. Those are the rights which the developer may reserve for the developer's benefit and no others and thus there can be no additional unilateral rights reserved. But we have found that those rights are all the developer needs. They include development rights to exercise the development right under subsection (b). And they include a number of other special declarant rights which, as long as they are held by a person, that person is declarant and subject to the liability and obligations. But they all can be held. There is a relatively good summary of those things that the developer really needs and in fact that they need no more.

Page 89, "time share" definition under Section 31 is the definition that comes from the Uniform Real Estate Time Share Act and is similar to the one in the National Association of Real Estate Licensing Law Officials Act indicating how a time share operates.

The "unit owner" includes the declarant. There's some clarifying language in there. It basically indicates someone who owns a unit. All right, there are a few provisions under Section 2 of the Act on Page 90 to conform this act and integrate it into the Horizontal Properties Regimes Act.

However, it is important the Horizontal Regimes Act be recognized as still being in effect and still acting as the fundamental law operating for the existing condominiums in Alaska, subject only to the Section 40 provisions.

FJLL McNALL: The importance of several of these sections cannot be minimized in light of the current state of law in Alaska vis a vis, among other things, realtor liability.

Section 170 specifically talks about identifying projects which either "must be built" or "not be built". As things stand right now, if there is a representation being made in some form of document and it turns out to be inconsistent with the project as completed, the realtor who was out there listing or selling those units may be potentially liable. If the developer has perchance left the state in the process of development, of course the realtor is sitting out here being the only one around.

Organizing the associations -- Section 310. I have handled numerous cases where the association was not developed until long after half the units had been sold, often times not until the 75th percentile of ownership had been conveyed, at which time the developer then created the association. This means that essentially unit owners that were members of the association at the time of the conveyance because of mandatory membership were paying assessments into the association that simply didn't exist. The process of trying to determine through an accounting process afterwards is often very difficult. Developers, of course, do not understand why the owners are upset.

I have even seen documents that were prepared to establish upon the developer the obligation to create the associations after the 75th percentile of ownership had been conveyed. Totally inconsistent with how corporations are supposed to operate. I have also recently seen a document that required the association to have its first annual meeting three years after the development process was started.

During the operation of the association, this is probably the biggest problem area that I've had to deal with. There seems to be constant conflict between the developers and the association directors as to how the association is to be operated. Our existing statutes give us no protection whatsoever, no assistance whatsoever, in devising these boards. Section 330 is going to be a substantial benefit.

The transition from developer control section -- Section 340 -- is going to eliminate many of the problems that we have been asked to handle in the past. Developers often times do not want to turn over documents or simply have lost them in the process somehow. Quite frankly, associations

need to have copies of plats and specifications, of underground site locations, so that if they're doing any sort of work or repair they know where the pipes and gas lines are and that sort of thing. They need to have copies of the books, they need to have copies of the checks.

We have presently been asked to straighten out a situation where the developer has entered into a lease with the firm providing the washer and dryer for the project unfortunately didn't bother to enter into that on behalf of the association, but simply did it himself -- and the fees being charged are exorbitant. The association wants to get rid of those and I'm afraid that this is a case that's going to wind up going to court because the parties cannot agree on how to handle it. It simply could have been avoided by, in part the transition statute, as well as the part I'll get to in a bit -- allowing the association to void the contract as reached by the developer.

As far as the encumbrance of the common elements is concerned, I think you'll find that in future associations you're going to have the ability to assign their future income ranks or encumber their common elements -- whatever is going to require you to allow them to borrow money from lenders and to be able to do some of those repairs. Often times, the reserve process that the association must go through to raise the money is not adequate. Or you'll have an emergency situation which means that some unit owners will have a huge assessment which they can ill afford. The ability to go to the lending institutions to borrow the money is something that this Act contemplates and I think reality in the practical world will require associations and the lenders to work it out in the future.

Public offering statement. I think this, of course, is very important. It specifically sets the board's requirements for the information that must go to the consuming public. This is, of course, important in light of the fact that right now those making those representations are a lot of real estate people who are trying to guess what the developer is going to really do. Public offering statements make the developer commit. It makes him make the decisions or reserve the right to make those decisions.

(Indiscernible) along the same lines as resale certificates requiring the association and the seller to make specific (inaudible) important because this is going to limit some of the litigation that is presently out there.

I like the idea of expressed warranties and implied warranties, the modification of warranties being spelled by statute. Presently we have only case law to guide us and it is, in my opinion, inadequate. Everybody winds up guessing whether or not there is a warranty present or how long it might last.

The eminent domain issue. I have just been asked again with an eminent domain matter where the declaration is inconsistent with our present statute and the association is trying to figure out how to divide the money up between the lenders, itself and the unit owners that are damaged. And, it being most difficult, this section 740 certainly will assist them.

MARK BARNES. This is Mark Barnes. I am from the Alaska Banker's Association. I would like to raise an issue with the Committee which I think it should be aware of.

The bill seems like a good bill in the sense... (and I'm not representing, right now, the banker's position on this. I understand lenders have had some input as to legislation.) Under the current status in Alaska law, a lender who is simply participating as a routine lender in a real estate transaction, normally is not held to be liable for subsequent defects in the real estate. Normally, warranties, if they exist, are accrued to the developer. My only concern is what kind of new liabilities would Alaska lenders assume under this legislation? It appears to me they don't seem to assume any new liabilities, but that doesn't seem to be entirely clear. The case law in our state is that unless they're an active participant in the development, (in other words, if they have some kind of management or participatory development with the developer), then they're normally held liable for these defects that subsequently show up in the real estate. (...) Is there any intent for a lender to assume new liabilities under this Act?

Buck: No, not at all. As a matter of fact, the deep freeze provision of the Act (which is what I think you're talking about) is the basic provision whereby the lender is specifically held not to be a declarant but is subject to declarant liabilities if as a successor declarant he only takes certain of the declarant rights: the right to sell, the right to put up signs, and models. The Act itself was designed specifically to provide a construction lender who takes over a project with the responsibility only with respect to those particular aspects which were assigned to it in its loans. It was written in by the lenders group. It is Section 350, Page 35 of the revised bill, indicating that the special declarant rights may be transferred only by an instrument. And with the special declarant rights go special declarant obligations.

So unless there is a specific transfer then there are no rights at all with no declarant obligations. Then there is a specific provision upon transfer. Upon Section (d), upon foreclosure, the successor essentially is subject to the rights and obligations under (e) (1), but if he is not subject to the rights and obligations he has only specific limited rights under 3. I believe that's the way the deep freeze is. He is not subject (on Line 27, Page 37) to liability

obligations as declarant. Except the obligation to provide a public offering statement. It was fairly well thought out with respect to construction lenders that they would not be liable.

Now this does not change the common law joint venture. If, however, a lender has exercised the control over the common law that would make him a joint venture, I think this doesn't change it. But I think that they can reserve all the rights that a lender would normally need to take over the rights of a declarant upon foreclosure, but not become a declarant subject to declarant liabilities. So there is no intent that there would be a joint venture predicament coming up on the lender in this Act.

SENATOR HALFORD. Okay Anchorage, do you have any other questions. Does any other person want to testify...If there is any other public comment or testimony from Anchorage we can go ahead and hear it now.

MODERATOR. We have one other individual who would like to testify.

BETTY COOK. As I testified before, we are in favor of SB 44. We have a couple concerns I'd like to go into. On the first page, we feel that projects of less than 12 units should not be exempt from the entire chapter. Owners of small projects tend to need just as much protection as those in larger projects. (Indiscernible) poorly managed project or misinformation can be just as detrimental to owners of small projects.

And Section 030, we'd like clarification: if the word "or" at the end of line 27 means that projects with annual fees of less than \$100 would also be exempt, regardless of the number of units. It is kind of unclear and we would like to know if this is the intent, or if the word "or" should be changed to "and".

BUCK. No, the answer is "or". The intent of the draftsman in that particular case is even if it's a large project of 50 or 60 house lots in it, but its only function is the maintenance of the sign at the end of the street, or the maintenance of a detention area, or maybe a piece of open space, and all it has to do is provide insurance for it -- that it would not have to go through the formalities of this particular Act. Form an association, have annual budget meetings, have annual assessments and have all that. Unless it opted into the Act. So the answer is that the intention of the Act was "or".

The whole issue of de minimus was an issue that was discussed at great length, with great heat and light, by the Uniform Law Commissioners. The number 12 and the \$100 was frankly a matter of just attempting to draw a line. There is a recognition, quite clearly, that very small projects, with

very small interests, that are subject to the Act, probably should not have to go through the formality of the Act. The question how small is small. The Uniform Law Commissioners came up with 12. That particular provision, as I say, was a matter of an attempt to draw a line. I think the comment was designed so that even though there may be a lot of units, if the common expense assessments are very small per unit per year, then it would be exempt from the Act. Unless they opted it. It's quite likely that in many cases they will opt in. Alaska Housing Finance Corporation could require as a condition of financing that they opt in because they have the power to do so. But there was a feeling that there is a point where small is too small.

COOK. My comment would be that I disagree with that. I think the philosophy is good behind it that de minimus PUDs do not need to be as concerned. But there are small units out there -- I know of a three-unit project -- that have some very large assessments on their property. The problems with those three people are just as much as the problems with 100 people in a unit. The disclosures are not made. If the projects are that small, the public offering statement would not be that cumbersome to give and it certainly would give protection to those buyers in those units left on a project of less than 10 units.

We would also like to see provisions made for the enforcement of the bill. The bill offers good protection but it offers the consumers no easy way to insure that protection.

The super lien provisions we are in favor of -- although they create a lien that could be superior to the Alaska Housing lien. We feel that it makes for financially health associations and the amount is so minimal that we are in favor of that part of the bill.

We appreciate the opportunity to testify and we've given the bill to our legal counsel to answer the main question that Mr. Barnes brought up and how to conform to the bill if it is passed: what legal problems that it might cause for us. We'd like to be further informed of hearings so that we may testify after we have our legal counsel opinion.

BUCK. I have to admit that the problem of the de minimus project is one that we did wrestle with. And all I can offer is that all the interests were represented in the drafting of the initial Act -- the consumer interest, the developer interest, the lender interest. The municipal officials and governmental officials all came out and finally, sort of reluctantly, said 12 and \$100 is probably as fair as we can get. It is a policy question and it certainly, I think legitimately, is a policy question that the Legislature should consider.

I have to indicate that the two-unit common interest community, we all agree (which probably consists only of a party wall) should probably be exempt from the Act.

I would also like to point out that this Act is not going to satisfy the problems for new home warranties. New home warranties is a different battle and a different battlefield. The bill provides some relatively good warranties within its provisions, but perhaps the Legislature should look at the new home warranties provision with respect to single family houses alone. Because many of these problems can occur just because it happens to be a single family house and the building didn't fulfill the builder's promises. I think it provides an orderly system for warranty administration if it happens to be a common interest community. But when it gets down to 12 or under, I think more likely than not, what you're dealing with are problems that are problems that occur with single family house builders, not so much a problem with (indiscernible). Although I admit that if there are three houses and the entire roof goes, all the roofs go. And the fact that it is a common interest community or not isn't going to give it much help.

Had they had a public offering statement and some affirmative representation, they would be getting a better handle.

SENATOR HALFORD. Thank you.....



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February 8, 1985

Ms. Ann Plunket
Senate Judiciary Committee
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Juneau, AK 99811

Re: Common Interest Ownership Act

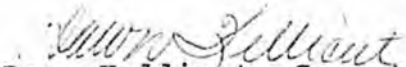
Dear Ann:

Pursuant to our recent telephone conversation, I am enclosing the attached list of attorneys and addresses who Mr. McCollum believes to be interested receiving any information with regard to the Common Interest Ownership Act.

If you have any questions, please do not hesitate to give me a call.

Very truly yours,

BANKSTON & McCOLLUM


Dawn Kellicut, Secretary to
James H. McCollum

Encl.

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Official Business

Alaska State Legislature

February 19, 1985

Pouch V
State Capitol
Juneau, Alaska 99811

VTITLEV VFIRST NAMEV VLAST NAMEV
/If Not Empty, POSITION/VPOSITIONV
/End If//If Not Empty, COMPANY/VCOMPANYV
/End If/VADDRESSV
VCITYV, VSTV VZIPV

Dear VTITLEV VLAST_NAMEV:

I appreciate your continued interest in the legislative efforts to revise the state's laws governing common interest ownership property. As you know, the Uniform Common Interest Ownership Act (UCIOA) was introduced in the State Senate and is now known as Senate Bill 44. The legislation is pending before the Senate Judiciary Committee, which I chair.

The Senate Judiciary Committee has held two hearings on SB 44. The first was a brief overview. At the second hearing, the Committee heard expert testimony presented by Bill McNall and Don Buck. Mr. McNall is an Anchorage attorney, specializing in common interest property, and founder of the Greater Alaska Community Associations Institute. Mr. Buck is a Connecticut attorney and a leading authority on UCIOA and common interest ownership property. Their comments were of tremendous assistance to the Committee.

The next hearing on SB 44 is scheduled for February 26, at 1:30 p.m. in Juneau. This will be teleconferenced in Anchorage. Mr. Buck will be participating from Connecticut and Mr. McNall will be participating in Anchorage. It is anticipated that the first hour and one-half will be devoted to completing the section-by-section analysis which was begun at our last hearing. The next hour and one-half will be open to public comment.

If you are in Juneau on February 26th, please contact the Judiciary Committee at 465-3717. As I stated, this will be teleconferenced in Anchorage at the Teleconference Network Office, located at 1024 West 6th Avenue. I strongly encourage you to observe or participate. If you are unable to attend, I welcome your written comments.

Senate Bill 44
February 19, 1985
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Enclosed is a proposed Committee substitute for SB 44 which is under review. I hope that you agree that this legislation is a good beginning to balance the needs of developers, realtors and unit owners.

Thank you again for your interest.

Sincerely,

Pat Rodey
Senator

Enclosure

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SB

44

(FILE 6):

CS AND CHANGES

4-4-85

New proposals

SB44 AMENDMENTS

(References are to lines in CS)

Page 54, line 27 should read:

- #1 judgment was entered; no other property of a unit owner is subject to the claims of creditors of the association; ✓

hold [Page 75, section 34.08.670, add sentence:

- # Violations of this chapter constitute unfair methods of competition and unfair or deceptive acts or practices under AS 45.50.471.

Page 85, line 8, new definition of "dealer" to read:

- #3 (11) "dealer" means a person who owns either six or more units, or 50% or more of all the units in a common interest community. ✓

- #4 Page 87, line 21 should read:
of less than [20] 40 years; or ✓

- #5 Banking & Securities proposed amendment
page 66, line 6. ✓

- #6 Conversion properties -(next page) ✓

- #7 page 12 - highlighted ✓

- #8 page 76 - highlighted ✓

CONVERSION PROPERTY AMENDMENTS

Sec. 34.08.440 (page 45, line 21) should read:
against or, in the case of [a] conversion [building] property,
against fire and

Sec. 34.08.560 (page 65, line 21) should read:
COMMON INTEREST COMMUNITIES CONTAINING CONVERSION [BUILDINGS]
PROPERTY. (a) The public offering statement of a common
interest community containing [a] conversion [building]
property must contain, in addition to the information
required by by AS 34.08.530,

(page 65, line 26):
installations material to the use and enjoyment of the
[building] property;

(page 66, line 4):
(b) This section applies only to [a building] property
that contains a unit

(page 70, line 15):
Sec. 34.08.620. CONVERSION [BUILDINGS] PROPERTY. (a) A
declarant of a common interest community containing [a]
conversion [building] property, and any dealer who intends to
offer units in a common interest community containing conversion
units, shall give each residential tenant and each residential
subtenant in possession of a portion of [a] conversion [building]
property notice of the conversion and provide each person
with the public offering statement no later than [120] 180
days before the tenant and any subtenant in possession is
required to vacate. If the conversion property consists of a
mobile home park, notice of the conversion and delivery of the
public offering statement must be provided no later than one
year before the tenant and any subtenant in possession is
required to vacate. The notice must set out generally the
rights of tenants and subtenants under this section and must
be hand delivered to the unit or mailed by prepaid United
States mail to the tenant and subtenant at the address of the
unit or any other mailing address provided by a tenant. A
tenant or subtenant may not be required to vacate upon less
than [120] 180 days' notice, and in the case of tenants and
subtenants of mobile home parks upon less than one year's
notice, except by reason of nonpayment of rent, waste, or
conduct that disturbs other tenants' peaceful enjoyment of
the premises and the terms of the tenancy may not be altered
during the period.

The failure to give notice as required by this section is a defense to an action for possession.

(b) For [60] 90 days after delivery or mailing of the notice described in (a) of this section, the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases the unit. If a tenant fails to purchase the unit during the [60] 90-day period, the offeror may not offer to dispose of an interest in the unit during the following 180 days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant. This subsection does not apply to a unit in [a] conversion [building] property if the unit will be restricted exclusively to nonresidential use or if the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

(page 84, line 29)

(9) "conversion [building] property" means [a building or mobile home site] real estate that [,] before creation of the common interest community, was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers;

7

1 Sec. 34.08.170. PLATS AND PLANS. (a) Plats and plans are a
2 part of the declaration and are required for all common interest
3 communities except cooperatives. Separate plats and plans are not
4 required by this chapter if the information required by this section
5 is contained in either a plat or plan. Each plat and plan must be
6 clear and legible and contain a certification that the plat or plan
7 contains the information required by this section. The recording office
shall prescribe the style, size, form, and quality of plats and plans
filed under this chapter.

8 (b) Each plat must show:

9 (1) the name and a survey or general schematic map of the
10 entire common interest community;

11 (2) the location and dimensions of the real estate not
12 subject to development rights or subject only to the development right
13 to withdraw, and the location and dimensions of each existing improve-
14 ment within the real estate;

15 (3) a legally sufficient description of the real estate
16 subject to development rights, labeled to identify the rights applica-
17 ble to each parcel;

18 (4) the extent of each encroachment by or upon a portion of
19 the common interest community;

20 (5) to the extent feasible, a legally sufficient descrip-
21 tion of each easement serving or burdening a portion of the common
22 interest community;

23 (6) the location and dimensions of any vertical unit bound-
24 aries not shown or projected on plans recorded under (d) of this
25 section and the identifying number of the unit;

26 (7) the location with reference to an established datum of
27 any horizontal unit boundaries not shown or projected on plans re-
28 corded under (d) of this section and the identifying number of the
29 unit;

8

1 representation is contained in the public offering statement or in
2 promotional material distributed by or for the declarant.

3 (b) The declarant is liable for the prompt repair and restora-
4 tion, to a condition compatible with the remainder of the common
5 interest community, of a portion of the common interest community af-
6 fected by the exercise of rights reserved under or created by AS 34.-
7 08.180, 34.08.190, 34.08.200, 34.08.210, 34.08.230, or 34.08.240.

8 Sec. 34.08.700. SUBSTANTIAL COMPLETION OF UNITS. In the sale of
9 a unit for which delivery of a public offering statement is required,
10 a contract of sale may be executed, but an interest in the unit may
11 not be conveyed until the declaration is recorded and the unit is
12 substantially completed as evidenced by a recorded certificate of
13 substantial completion executed by an independent registered archi-
14 tect, surveyor or engineer, or by issuance of a certificate of occu-
15 pancy authorized by law.

16 ARTICLE 5. GENERAL PROVISIONS.

17 Sec. 34.08.710. VARIATION BY AGREEMENT. Except as expressly
18 provided in this chapter the provisions of this chapter may not be
19 varied by agreement and rights conferred by this chapter may not be
20 waived. A declarant may not act under a power of attorney or use any
21 other device to evade the limitations or prohibitions of this chapter
22 or a declaration recorded under it.

23 Sec. 34.08.720. SEPARATE TITLES AND TAXATION. (a) In a cooper-
ative, a unit owner's interest in a unit and its allocated interest
is a real property interest for all purposes, except that the real
property constituting the cooperative shall be taxed and assessed as
a whole and a unit owner's interest shall not be separately taxed.

24 (b) In a condominium or planned community,

25 (1) if there is a unit owner other than a declarant, each

Included in 1st
C.S.

SB 44 -- Changes

Page 1. Lines 18 to 23.

Sec. 34.08.020. APPLICABILITY TO SMALL COOPERATIVES. If a cooperative contains only units restricted to nonresidential use or contains no more than 12 units and is not subject to any development rights [,] or [IF IT IS THEN SUBJECT TO] financing from the Alaska Housing Finance Corporation, it is subject only to AS 34.08.720, 34.08.730 [850] and 34.08.740 [860] unless the declaration provides that the entire chapter is applicable.

Page 1. Line 25 to 27.

Sec. 34.08.030. APPLICABILITY TO SMALL LIMITED EXPENSE LIABILITY COMMON INTEREST [PLANNED] COMMUNITIES. If a common interest [PLANNED] community contains no more than 12 units and is not subject to any development rights or [IF IT IS THAN SUBJECT TO] financing from the Alaska Housing Finance Corporation...

Page 2. Line 4...

...the common interest [PLANNED] community is subject only to AS 34.08.720 [710], 34.08.730, and 34.08.740, unless the declaration provides that the entire chapter is applicable. A declarant shall not divide real property under single ownership into two or more common interest communities to avoid applicability of this chapter.

Page 3. Line 15...

Sec. 34.08.070. APPLICABILITY TO NONRESIDENTIAL COMMON INTEREST
[PLANNED] COMMUNITIES. (a) Except for AS 34.08.720, 34.08.730, and
34.08.740, which will apply, t[T]his chapter does not apply to a common
interest [PLANNED] community in which each unit is restricted exclusively
to nonresidential use unless the declaration provides that the chapter
does apply to the common interest [PLANNED] community.

(b) This chapter applies to a common interest [PLANNED] community
containing some units that are restricted exclusively to nonresidential
use and other units that are not restricted exclusively to nonresidential
use only if the declaration provides that the chapter applies to the
common interest [PLANNED] community or the real estate comprising the
units that may be used for residential purposes would be a common
interest [PLANNED] community in the absence of the units that may not
be used for residential purposes.

Page 15. Line 18.

(e) The declarant can terminate the development rights by an
amendment to the declaration.

Page 32. Line 10 to 13.

Sec. 34.08.340. TRANSFER OF ASSOCIATION CONTROL. (a) Before, or not more than 60 days after[,]
the termination of declarant control,
[THE TIME THAT A UNIT OWNER OTHER THAN THE DECLARANT ELECTS A MAJORITY OF THE MEMBERS OF THE EXECUTIVE BOARD OF A COMMON INTEREST COMMUNITY,]...

Page 33. Line 10 to 13.

(9) all tangible personal property that is property of the common interest community, represented by the declarant to be the property of the association [PART OF THE COMMON ELEMENTS] or ostensibly the property of the association [PART OF THE COMMON ELEMENTS]...

Page 35. Line 5.

...transfer of control [.] pursuant to representations in the public offering statement.

Page 56. Line 3.

(b) Any professional manager, managing agent, accountant or other party with whom the association has contracted for services must return all association records within five days of the termination of the contract. In the event the association records are not returned, the association, in its discretion, may bring a claim for injunctive relief, damages, or both.

Page 58. Lines 21 and 22.

(2) a general description of the common interest community, including, in a building constructed for residential purposes with horizontal boundaries, the area of the interior surface of floors available for residential purposes and,

Page 68. Lines 10 and 11.

(b) The association, within 10 days after a written request by a unit owner and payment of a reasonable fee pursuant to AS 34.08.320(12), shall furnish...

Page 77. Lines 15 to 18.

...Upon acquisition, unless the decree otherwise provides, the allocated interests of the unit are, automatically, [AS A MATTER OF LAW], reallocated to the remaining units...

Page 78. Lines 2 to 5.

(2) the portion of the allocated interests divested from the partially acquired unit are, automatically, [AS A MATTER OF LAW], reallocated to the unit...

Page 81. Line 9 and 10.

(2) the dollar amounts must [MAY] not change if the amounts required by this section are those currently in effect under this chapter as a result of an earlier application of this section;

Page 84. Line 11.

(9) "conversion building" means a building or a mobile home site that...

Page 86. Line 14.

(22) "ownership of a unit" does not include a leasehold interest, including renewal options, of less than 40 [20] years in a unit;

Page 88. Line 25...

Rewrite (33) to read:

(33) "unit owner"

(A) a declarant or

(B) other person who owns a unit or

(C) a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease that on its expiration or termination will remove the unit from the common interest community;

(D) does not include a person having an interest in a unit solely as security for an obligation'

(E) includes

(i) in a condominium or planned community the declarant as the owner of any unit created by the declaration;

(ii) in a cooperative, the declarant as the owner of any unit to which allocated interests have been allocated until that unit has been conveyed to another person.

Page 89. Line 23 and 24.

that [WHICH] becomes subject to AS 34.08 or (do not delete) the Horizontal Property Regimes Act (AS 34.07.010 - 34.07.460)

Page 90. Line 6.

percent of the amount determined:

(1) if the community has been declared pursuant to AS 34.07.010 -
34.07.460 by:

(a) dividing the surface area of the common areas and facilities
attendant to the ...

(b) multiplying the result obtained in (1) of this subsection
by the total amount of the claimant's lien claim.

(2) If the community has been declared pursuant to AS 34.08, by
the allocated interest in the common expenses.

Page 90. Line 18.

[SEC. 4. AS 34.07 IS REPEALED].

Short Title.

Comments. The official comments of the Uniform Common Interest
Ownership Act should be considered for adoption, either by including a
section in the bill or by adopting a letter of intent.

SENATE BILL 44
Sectional Analysis

(includes changes proposed in committee substitute)
(prior to 4/4/85)

This bill creates a new chapter to AS 34, entitled Common Interest Ownership Act, and contains comprehensive provisions designed to unify and modernize the law of common interest communities such as condominiums, cooperatives, planned unit developments, and time shares. Presently, only condominiums are regulated by state law under the Horizontal Property Regimes Act, AS 34.07, which was adopted in 1963. Not only is the Horizontal Property Regimes Act dated, it does not effectively address problems such as: creation, alteration and termination of common interest communities; management of the common interest community; protection of purchasers; warranties; unit boundaries; powers and duties of associations; and numerous other important matters which arise out of the creation, marketing and ownership of common interest property.

The Uniform Common Interest Ownership Act (UCIOA) was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws. UCIOA represents the culmination of the Conference's 9 year effort to offer comprehensive legislation to the states which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership. Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership by consolidating the Uniform Condominium Act, Uniform Planned Community Act and the Model Real Estate Cooperative Act.

ARTICLE I. APPLICABILITY

This chapter applies to all common interest communities created in Alaska after the effective date of this act (January 1, 1986). The Alaska Cooperative Corporation Act and the Horizontal Property Regimes Act do not apply to common interest communities created after January 1, 1986. Exclusively nonresidential common interest communities are only subject to Sections 34.08.720, 34.08.730 and 34.08.740 of this chapter, unless they elect to be subject to the entire chapter.

Exceptions exist to the general rule of applicability:

1. A common interest community created prior to the adoption of this chapter may elect, under AS 34.08.060, to have the provisions of this chapter apply. Except for preexisting small cooperatives and planned communities which are not subject to development rights, certain provisions under AS 34.08.040, apply automatically to events and circumstances occurring after the effective date of this act, but do not invalidate existing provisions of declarations, bylaws, or plats or plans.

Provisions that automatically apply include: separate titles and taxation, applicability of local ordinances, regulations and building codes, eminent domain, construction and validity of declaration and bylaws, description of units, merger or consolidation, powers of unit

owners' association, tort and contract liability, lien for assessments, association records, resales, effect of violation on rights of action, and definitions.

2. Small cooperatives (no more than 12 units) created after the effective date of this act, are subject only to the provisions regarding local ordinances, regulations and building codes and eminent domain, unless:

future development right are retained or financing through AHFC is utilized, or,

the cooperative's declaration makes the entire chapter applicable.

3. Small (no more than 12 units and not subject to any development rights or AHFC financing) and limited expense liability common interest communities (as measured by the size of its common expense assessments) created after the effective date of this act, are subject only to provisions relating to separate titles and taxation, local ordinances, regulation and building codes, and eminent domain, unless the declaration provides that the entire chapter applies.

ARTICLE II. CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES.

Sec. 34.08.090. CREATION OF COMMON INTEREST COMMUNITIES. Creation of common interest communities is accomplished by recording a declaration in each recording district in which a portion of the common interest community is located, and indexing in the grantee's and grantor's index. In cases of cooperatives, the declaration must also convey the real estate to the association. In cases of condominiums, substantial structural completion is also required before the condominium is created.

Sec. 34.08.100. UNIT BOUNDARIES. Except as may be provided in a declaration, unit boundaries for common elements and individual units are defined.

Sec. 34.08.110. CONSTRUCTION AND VALIDITY OF DECLARATION AND BYLAWS. Construction and validity of the declaration and bylaws are established. All provisions of the declaration and bylaws are severable. In the event of a conflict between the declaration and the bylaws, the declaration prevails, unless the declaration is inconsistent with this chapter. Title to a unit and common elements is not unmarketable or otherwise affected if the declaration insubstantially fails to comply with this chapter.

Sec. 34.08.120. DESCRIPTION OF UNITS. Sufficient legal description of a unit is detailed.

Sec. 34.08.130. CONTENTS OF DECLARATION. The required contents of a declaration are itemized under this section.

Sec. 34.08.140. LEASEHOLD COMMON INTEREST COMMUNITIES. This section sets out provisions and requirements concerning leasehold common interest communities. Leases which may result in terminating the common interest community or reducing its size, must be recorded. Lessors of those leases in condominiums or planned communities must sign the declaration. Required contents of the declaration are itemized. After the declaration for a leasehold condominium or planned community is recorded, the leasehold interest of a unit owner who timely pays rent and complies with relevant covenants may not be terminated. A unit owner's leasehold interest in a condominium or planned community is not affected by failure of any other person to pay rent or fulfill any other covenant.

The acquisition of the leasehold interest of a unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests, unless the leasehold interest of all unit owners subject to that reversion or remainder are acquired. If the number of units in a common interest community are decreased upon expiration or termination of a lease, the allocated interest must be reallocated and confirmed by an amendment to the declaration.

Sec. 34.08.150. ALLOCATION OF ALLOCATED INTERESTS. The required allocation of allocated interests of each unit (common elements, common expenses of the association, and votes in the association) for condominiums, cooperatives and planned communities are outlined and must be included in the declaration. Formulas used to establish or reallocate allocations of interest must be included in the declaration. The allocation of votes may be different depending upon the subject of the vote.

In a condominium, the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void. In a cooperative, any purported conveyance, encumbrance, judicial sale or other voluntary or involuntary transfer of an ownership interest in the association made without the possessory interest in the unit to which that interest is related is void.

Sec. 34.08.160. LIMITED COMMON ELEMENTS. The declaration must specify to which unit or units each limited common element is allocated. An allocation may not be altered without the consent of the affected unit owners. Unless the declaration provides otherwise, a limited common element may be reallocated by an amendment to the declaration, copy to the association and proper recordation. A common element not previously allocated as a limited common element must be allocated according to the declaration. The allocations must be made by amendments to the declaration.

Sec. 34.08.170. PLATS AND PLANS. Plats and plans are a part of the declaration and are required for condominiums and planned communities, but not for cooperative. Items to be included in plats and plans are outlined.

Sec. 34.08.180. EXERCISE OF DEVELOPMENT RIGHTS. This section generally describes the method by which any development rights may be exercised. The development process may continue only within the self-determined constraints originally described by the declarant. Amendments with specific information to the declaration are required to be prepared, executed and recorded. Plats and plans or new certifications must be recorded for condominiums or planned communities.

If the declaration provides that all or a portion of the real estate is subject to a right of withdrawal the following limits apply:

if all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

if any portion is subject to withdrawal, it may not be withdrawn after a unit in that portion has been conveyed to a purchaser.

Sec. 34.08.190. ALTERATIONS OF UNITS. Permissible alterations of the interior of a unit and impermissible alterations of the exterior of a unit and the common elements are detailed under this section. These rules may be varied by the declaration.

Sec. 34.08.200. RELOCATION OF BOUNDARIES BETWEEN ADJOINING UNITS. Subject to the provisions of the declaration and other provisions of law, boundaries between adjoining units may be altered by an amendment to the declaration upon application to the association by the owners of those units. Any reallocation of allocated interests must be specified in the application and determined reasonable by the executive board.

Sec. 34.08.210. SUBDIVISION OF UNITS. Unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided, unless the declaration is amended to permit it.

Sec. 34.08.220. EASEMENT FOR ENCROACHMENTS. If the physical boundaries of any unit or common element encroach on any other unit or common element, an easement exists. The easement does not effect liability that may exist.

Sec. 34.08.230. USE FOR SALES PURPOSES. This section prescribes the circumstances under which portions of the common interest community - either units or common elements - may be used for sales offices, management offices, or models. The declarant must describe the right to maintain such offices in the declaration. This section is subject to the provisions of other state law and to local ordinances.

Sec. 34.08.240. EASEMENT RIGHTS. This section grants to a declarant an easement across the common elements which may be reasonably necessary for the discharging of the declarant's obligations or exercising of special rights, and is subject to any restrictions in the declaration. This section also grants unit owners in a planned community an easement for access, support and enjoyment in the common elements, but these rights may be limited by the declaration.

Sec. 34.08.250. AMENDMENT OF DECLARATION. This section recognizes that the declaration may be amended by various parties at various times in the life of the project. The basic rule is that the declaration, including the plats and plans, may only be amended by a vote of 67% of the unit owners.

The declaration may be amended by a declarant upon exercising any development right or by the association in cases of eminent domain, reallocations following the termination or expiration of a lease, common element reallocated as limited common elements, relocation of boundaries between adjoining units, or subdivision of units. Unit owners may amend a declaration in cases of reallocation of limited common elements, relocation of boundaries between units, subdivision of units, or termination of common interest community.

A declarant is not permitted to use any device, such as powers of attorney executed by purchasers at closing, to circumvent requirements of unanimous consent under subsection (d). Each amendment to the declaration must be properly prepared, executed, recorded, certified and indexed.

Sec. 34.08.260. TERMINATION OF COMMON INTEREST COMMUNITY.

As a general rule, 80% of the votes in the association is required for termination of a project. The declaration may require a larger percentage of the votes and in a nonresidential project a smaller percentage is permitted. A termination agreement is effective only upon recordation, and may provide that all of the common elements and units of the common interest community be sold. Until the sale has been concluded and the proceeds distributed in accordance with this section, the association continues in existence with all powers it had before termination.

Calculations and priorities for creditors which might result upon termination of a common interest community are outlined. This involves competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted and unsecured creditors of the association. Different treatment for these interest is provided depending upon the type of common interest community involved.

Sec. 34.08.270. RIGHTS OF SECURED LENDERS. A lender's security may be dramatically affected by acts of the association. For that reason this section permits the declaration to provide that lenders ratify specified actions of the association. No requirement for approval may operate to:

1. prohibit control over the general administrative affairs of the association;
2. prevent the association or executive board from commencing, intervening in, or settling any litigation or proceeding; or,
3. prevent any insurance trustee or the association from receiving and distributing any insurance proceeds except as provided under

this chapter.

Sec. 34.08.280. MASTER ASSOCIATIONS. It is common in large or multiphased condominiums or planned communities for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller projects. This section details the requirements of a master association. Generally, the powers of a unit owners' association may only be exercised by, or delegated to, a master association if the declaration for the common interest community permits that result. Provisions on notice, voting, quorums, records, meetings and other matters which apply to the unit owner's association would apply to a master association.

Sec. 34.08.290. MERGER OR CONSOLIDATION OF COMMON INTEREST COMMUNITIES. There may be circumstances where common interest communities may wish to merge or consolidate their activities by the creation of a single common interest community; this section provides for that possibility. A merger or consolidation agreement must be prepared, executed, recorded and certified, and must provide for the reallocations of the allocated interests in the new association.

Sec. 34.08.300. ADDITION OF UNSPECIFIED REAL ESTATE. This section was designed to allow developers the ability to add after-acquired parcels of real estate to planned communities. This power is available only if the declarant makes clear in the original declaration that this development right has been reserved. The declarant may impose his/her own time limit on the period during which this development right may be exercised. To foreclose the possibility of an increase in the density of the project beyond that which was originally contemplated, the number of units is limited to the amount specified in the original declaration and the amount of real estate added may not exceed 10% of the real estate originally subjected to the declaration.

ARTICLE III: MANAGEMENT OF THE COMMON INTEREST COMMUNITY.

Sec. 34.08.310. ORGANIZATION OF UNIT OWNERS' ASSOCIATION. A unit owners' association must be organized no later than the date the first unit in the common interest community is conveyed. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the common interest community even during a period of declarant control.

Sec. 34.08.320. POWERS OF UNIT OWNERS' ASSOCIATION. Subject to the provisions of the declaration, the powers of the association are enumerated under this section, and include, the right to: adopt and amend bylaws, rules, regulations, budgets; collect assessments; hire and discharge managing agents, employees, agents, contractor; institute, defends or intervene in litigation; make contracts and incur liabilities; regulate the common elements; acquire, hold, encumber and convey right, title or interest to real estate or personal property; grant easements, leases, licenses and concessions through or over the

common elements; and assign its right to future income. The declaration may extend the powers of the association.

Sec. 34.08.330. EXECUTIVE BOARD MEMBERS AND OFFICERS. Except as provided in the declaration, bylaws, or other provisions of this chapter, the executive board may act in all instances on behalf of the association and are liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. A high standard of duty is imposed on the board members because they are vested with great powers over the property interests of unit owners. The duties and powers of the board members and officers are listed. Highlights include:

- adoption of proposed budgets and presentation to the unit owners for ratification;

- termination of declarant control no later than the earlier of:
 - 60 days after conveyance of 75% of the units,
 - 2 years after all declarants have ceased to offer units for sale, or
 - 2 years after any right to add new units was last exercised.

Sec. 34.08.340. TRANSFER OF ASSOCIATION CONTROL. Before, and not more than 60 days after the termination of declarant's control, the declarant shall relinquish control of the common interest community and the unit owners shall accept control. At this time the declarant must deliver to the community all property of the unit owners and the common interest community held or controlled by the declarant. A list of items that must be transferred is provided. The records must be reviewed by an independent certified public accountant. Before the transfer an inspection of the common areas and limited common areas must be completed by a certified architect or engineer. The transfer of control to the association shall be based upon the declarant's obligation to complete all repairs and finish all incomplete work within a reasonable time after transfer.

Sec. 34.08.350. TRANSFER OF SPECIAL DECLARANT RIGHTS. This section deals with the manner in which obligations and liabilities imposed upon a declarant by this chapter are transferred to a third party by a transfer of the declarant's interest in a common interest community. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to the declarant's rights, especially persons such as mortgagees. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he/she was in control of the community, while relieving a declarant, who transfers all or part of his/her special declarant rights in a project, of the responsibilities of a successor over whom he/she has no control.

Sec. 34.08.360. TERMINATION OF CONTRACTS AND LEASES OF DECLARANT. This section deals with a common problem in the development of common interest community projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf

of the association, long-term contracts and leases with himself/herself or with an affiliated entity. Management and employment contracts, leases of recreational or parking areas or facilities; other contracts or lease between the association and a declarant or an affiliate of a declarant; or any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the existing circumstances may be terminated.

Sec. 34.08.370. BYLAWS. The bylaws of an association must provide: for the number of members of the executive board, and titles of the officers of the association; for the election of the officers of the association; for the qualifications, powers, and duties, terms of office and manner of electing and removing executive board member and officers and filling vacancies; which, if any, of its powers the executive board or officers may delegate; which of its officers may prepare, execute, certify and record amendments to the declaration; for a method of amending the bylaw; and other matters allowable under the declaration.

Sec. 34.08.380. UPKEEP OF COMMON INTEREST COMMUNITY. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Limited common elements are treated as common elements, unless the declaration provides otherwise.

Sec. 34.08.390. MEETINGS. A meeting of the association must be held at least once each year. Other special meetings may be held. Notice of meetings must be given to all unit owners and must state the items on the agenda.

Sec. 34.08.400. QUORUMS. Unless the bylaws provide otherwise, a quorum is present throughout a meeting if persons entitled to cast 20% of the votes for election of the board are present in person or by proxy at the beginning of the meeting. Unless the bylaws specify a larger percentage, a quorum is considered present throughout a meeting of the board if persons entitled to cast 50% of the votes on the board are present at the beginning of the meeting.

Sec. 34.08.410. VOTING AND PROXIES. Votes allocated to a unit may be cast under a proxy duly executed by a unit owner. Other provisions regarding proxies are included. Provisions for lessee voting is included. Votes allocated to a unit owned by the association may not be cast.

Sec. 34.08.420. TORT AND CONTRACT LIABILITY. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. The association or any unit owner has a right of action against the declarant for any losses suffered as a result of an action based upon a tort or breach of contract arising during any period of declarant control.

Sec. 34.08.430. CONVEYANCE OR ENCUMBRANCE OF COMMON ELEMENTS. A condominium or planned community association may sell or encumber

portions of the common elements and a cooperative association may sell part, or encumber all of the cooperative.

Sec. 34.08.440. INSURANCE. The association shall maintain, to the extent reasonably available, property and liability insurance on the common elements. Association insurance on "stacked" units is required.

Sec. 34.08.450. SURPLUS FUNDS. Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of common expenses and reserves must be paid or credited to the unit owners proportionately.

Sec. 34.08.460. ASSESSMENTS FOR COMMON EXPENSES. Assessments must be made at least annually, and based on a budget adopted at least annually by the association. Assessment rules are provided. Any common expense caused by the misconduct of any unit owner may be assessed by the association against that unit exclusively.

Sec. 34.08.470. LIEN FOR ASSESSMENTS. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens enjoy statutory priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. As to first security interest the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the security interests of lenders. If the lender wishes, an escrow for assessments can be required. Other foreclosure provisions are included.

Sec. 34.08.480. OTHER LIENS. Provisions are included for other liens with special procedures and requirements for condominiums, planned communities and cooperatives.

Sec. 34.08.490. ASSOCIATION RECORDS. The association shall keep sufficiently detailed financial records and these must be available for reasonable examination. Association records in the possession of managers, agents, accountants, or any other person under contract with the association, must be returned to the association within 5 days of the termination of such contract.

Sec. 34.08.500. ASSOCIATION AS TRUSTEE. This section outlines the relationship between third persons dealing with the association.

ARTICLE IV: PROTECTION OF PURCHASERS

Sec. 34.08.510. APPLICABILITY. This section permits waiver or modification of Article IV protections in common interest communities where all units are restricted to nonresidential use. Public offering statements and resale certificates are not required on:

gratuitous disposition of a unit;

disposition pursuant to court order;

disposition by a government or governmental agency;

disposition by foreclosure;

disposition to a dealer;

disposition that may be canceled at any time and for any reason by the purchaser without penalty; or,

disposition of a unit in a planned community if the declaration limits the maximum annual assessment of any unit to \$300 and if the declarant has a good faith belief that the stated maximum will be sufficient to pay the expenses of the association.

Sec. 34.08.520 LIABILITY FOR PUBLIC OFFERING STATEMENT REQUIREMENTS.

This section permits declarant to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering statement is liable for his/her own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

Sec. 34.08.530. PUBLIC OFFERING STATEMENTS GENERALLY. This section protects the purchaser by giving him/her an opportunity to understand the nature of the unit which is being purchased. A lengthy list of information must be provided to each purchaser before a contract is signed.

Sec. 34.08.540. COMMON INTEREST COMMUNITIES SUBJECT TO DEVELOPMENT RIGHTS. This section requires disclosure in the public offering statement of the manner in which the declarant's exercise of development rights may affect purchasers who acquire units before those rights have been full exercised. The purpose is to put the purchaser on notice.

Sec. 34.08.550. TIME SHARES. This section requires additional disclosure in the public offering statement for ownership or occupancy of any units in time shares.

Sec. 34.08.560. COMMON INTEREST COMMUNITIES CONTAINING CONVERSION BUILDINGS. In the case of common interest community containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public offering statement. This is because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of common interest community sales.

Sec. 34.08.570. COMMON INTEREST COMMUNITY SECURITIES. The purpose of this section is to permit the declarant to file or deliver, in lieu of a

public offering statement specifically prepared to comply with the provision of this chapter, the prospectus filed with and distributed pursuant to the regulation of the U. S. Securities and Exchange Commission.

Sec. 34.08.580. PURCHASER'S RIGHT TO CANCEL. This section provides a "cooling off" period for purchasers. Purchasers must be given a public offering statement and all amendments prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. Any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must be provided to the purchaser. Unless the purchaser is given the public offering statement more than 15 days before execution of a contract, the purchaser may cancel the contract within 15 days after first receiving it.

Sec. 34.08.590. RESALE OF UNITS. In the case of resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate, a public offering statement need not be provided. However, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulation of the association and a variety of fiscal, insurance and other information concerning the common interest community and the unit must be provided.

Sec. 34.08.600. ESCROW OF DEPOSITS. This section applies to the sale by persons required to furnish public offering statements of residential units and of nonresidential units unless waived. It does not apply to resales of units between private parties.

Sec. 34.08.610. RELEASE OF LIENS. In the case of a sale of a unit where a delivery of a public offering statement is required, a seller, before conveying a unit, shall record or furnish to the purchaser releases of all liens. Exceptions are provided for real estate that a declarant has a right to withdraw from the common interest community.

Sec. 34.08.620. CONVERSION BUILDINGS. This section is an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners. When a declarant decides to convert a building or mobile home park to common interest ownership, 120 days notice of the conversion with a public offering statement must be given to the residential tenants and subtenants. If the building or mobile home park will be converted to residential use, the tenants must also be given a opportunity to purchase their units. The declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to the tenants if the dimensions of their previous apartment have been substantially altered.

Sec. 34.08.630. EXPRESS WARRANTIES OF QUALITY. Expectations of the purchaser created by the particular conduct (facts, promises, rights, models, descriptions, etc.) of the declarant in connection with the inducement of the sale create express warranties of quality. This is based on the principle that once it is established that the declarant has acted to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the

expectation. Statement of mere opinion or commendation of the real estate or its value does not create a warranty.

Sec. 34.08.640. IMPLIED WARRANTIES OF QUALITY. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties are imposed only against declarants and dealers and not against unit owners selling their units to others.

Sec. 34.08.650. EXCLUSION OR MODIFICATION OF IMPLIED WARRANTIES OF QUALITY. Under this section implied warranties of quality may be disclaimed, however, the disclaimer to each defect or failure must be in a signed instrument. This is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain.

Sec. 34.08.660. STATUTE OF LIMITATIONS FOR WARRANTIES. Unless otherwise agreed to in a separate instrument executed by the purchaser, breach of any warranty obligations must be brought within 6 years after the cause of action arises.

Sec. 34.08.670. EFFECT OF VIOLATIONS ON RIGHTS OF ACTION. This section provides a general cause of action or claim for relief for failure to comply with this chapter by either a declarant or any other person subject to the chapter's provisions.

Sec. 34.08.680. LABELING OF PROMOTIONAL MATERIAL. This section requires the labeling of improvements depicted on promotional material to assure that purchasers are not deceived about improvements the declarant intends to make.

Sec. 34.08.690. DECLARANT'S OBLIGATION TO COMPLETE AND RESTORE. Except for improvements labeled "NEED NOT BE BUILT", the declarant must complete all improvements depicted on plans, representations, and promotional materials. The declarant is also liable for prompt repair and restoration of the common interest community following the exercise of any rights reserved or created to exercise a development right, alter units, relocate boundaries, subdivide, use units or common elements for sales purposes or exercise of easement rights.

Sec. 34.08.700. SUBSTANTIAL COMPLETION OF UNITS. The purpose of this section is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

ARTICLE V. GENERAL PROVISIONS.

Sec. 34.08.710. VARIATION BY AGREEMENT. This chapter is generally designed to provide great flexibility in the creation of common interest communities, and therefore this section permits the parties to vary many provisions. In many instances, however, provisions of the chapter may not be varied because of the need to protect purchasers, lenders, and

declarants. This section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the chapter.

Sec. 34.08.720. SEPARATE TITLES AND TAXATION. A unit owner's interest in cooperatives is real estate. In condominiums or planned communities, each unit and its interest in the common elements constitutes a separate parcel of real estate. Each unit must be separately taxed and assessed. Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant. If there is no unit owner other than a declarant, the real estate comprising the common interest community may be taxed and assessed in any manner provided by law.

Sec. 34.08.730. APPLICABILITY OF LOCAL ORDINANCES, REGULATIONS, AND BUILDING CODES. The purpose of this section is to resolve the relative roles of the state and local communities in regulating the creation of common interest communities. The underlying concept is to make clear that the local government has a legitimate interest in regulating the use of real estate, in accordance with established zoning, building codes and similar practices, and that such practices continue to have equal applicability to common interest communities.

Sec. 34.08.740. EMINENT DOMAIN. The provisions of this chapter is not intended to supplant the usual rules of eminent domain but merely to supplement those rules in addressing the unique problems which eminent domain raises in the context of a common interest community.

Sec. 34.08.750. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW APPLICABLE. This chapter displaces existing law relating to common interest communities and other law only as stated by specific sections and by reasonable implication therefrom. Unless specifically displaced, common law rights are retained.

Sec. 34.08.760. CONSTRUCTION AGAINST IMPLICIT REPEAL.

Sec. 34.08.770. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

Sec. 34.08.780. SEVERABILITY.

Sec. 34.08.790. UNCONSCIONABLE AGREEMENT OR TERM OF CONTRACT. Upon finding that a contract or contract clause was unconscionable at the time the contract was made, a court may refuse to enforce the contract in whole or part.

Sec. 34.08.800. OBLIGATION OF GOOD FAITH. This section sets forth a basic principle running throughout this chapter: in transactions involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties.

Sec. 34.08.810. REMEDIES TO BE LIBERALLY ADMINISTERED.

Sec. 34.08.820. ADJUSTMENT OF DOLLAR AMOUNTS. Calculation are outlined for adjustment of dollar amounts discussed in other sections.

Sec. 34.08.830. TRANSFER OF A UNIT IN A COOPERATIVE. If a unit in a cooperative is transferred by the unit owner the interest in the unit that is transferred is the right to possession of the unit under a proprietary lease coupled with the allocated interest of the unit. The association's interest in the unit is not affected by the transfer.

Sec. 34.08.990. DEFINITIONS.

Sections 2 and 3 make necessary revisions to other sections of Title 34.

NOTE: Under the proposed committee substitute, the Horizontal Property Regimes Act is not repealed. This is due to the fact that condominiums now in existence were formed under the old act and will continue to be regulated in part under that law. Unless existing declarations are amended to provide regulation under the Common Interest Ownership Act, only future occurrences or actions after the effective date of this chapter are governed by this new chapter.

Section 5 makes this act effect January 1, 1986.

Alaska State Legislature

RECEIVED MAR 04 1985

Advisory Council Members
Senator Bennett, Chairman
Senator Kerttula
Senator Abood
Senator Sackett



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SENATE ADVISORY COUNCIL

MEMORANDUM

TO: SENATOR JAN FAIKS
SENATOR RICK HALFORD

FROM: ELIZABETH J. HICKERSON 

SUBJECT: SB 44, UCIOA

DATE: FEBRUARY 27, 1985

Attached is a list of proposed changes to SB 44. These have been discussed before Senate Judiciary, and therefore I will not discuss these now. There are other concerns that have been brought to my attention that I wish to share with you both.

1. Sec. 34.08.170. Plats and Plans

The state recorder, Rose Farren, suggested that she be given the same authority over the size and quality of plats and plans filed in her office as is presently provided under the Horizontal Property Regimes Act. The following sentence will extend the authority under SB 44:

"The recording officer shall prescribe the style, size, form, and quality of plats and plans filed under this chapter."

2. Sec. 34.08.720. Separate Titles and Taxation

The state assessor, Mike Worley, was concerned that if cooperatives are given an opportunity to have the units owners' interests designated as personal property, rather than real property, that those local governments which exempt personal property from taxation will lose revenues. I discussed this matter at length with Mr. Worley and Don Buck. It is important to note that in cooperatives, the association holds title to the property, and therefore the association is liable for property taxation regardless of how the owners' interests are defined. If the owners' interests are defined as personal, then the association pays the property taxes. If the owners' interests are defined as real property, then

the individual owners pay the property taxes. Connecticut was faced with this issue and decided to classify the unit owners' interests as real property or real estate. This resulted in providing special forms for those preexisting cooperatives established as personal property to convert to real property. This also reduced the ability of cooperatives to offer interest in the association as personal property. Cooperatives had been used by low income people as a means to enter the housing market, which required very low down payments. Don Buck is the expert on this, so if you all want more information he should be consulted.

In Alaska, it is unclear how many cooperatives exist. Mr. Worley sent me a letter which stated that in Fairbanks North Star Borough that there are "771 co-op parcels (condominiums) on their roll. The current assessed value of those parcels is \$69,393,549." Following a telephone conversation with Mr. Worley, he verified that this letter combined all condominiums and cooperatives. Condominiums and cooperatives are very different in ownership and are treated differently throughout SB 44.

To make a long story short, it was suggested that SB 44 adopt the Connecticut language:

"In a cooperative, a unit owner's interest in a unit and its allocated interest is a real property interest for all purposes, except that the real property constituting the cooperative shall be taxed and assessed as a whole and a unit owner's interest shall not be separately taxed."

This language pleased Mr. Worley, who I am still not sure understands the difference between a condo and a coop. Whether the UCIOA or Connecticut language is adopted the "project" is going to be subject to real estate taxes. The difference is who is billed for the taxes, the association or the individual unit owners.

3. Mary Puksta, a paralegal with Hoge and Lekisch in Anchorage, submitted a list of needed changes. I reviewed these with Mr. Buck and Mr. McNall and concluded the following.

Quorums and Voting and Proxies are treated differently under AS 10.20.076 and AS 10.20.071, than under SB 44. This conflict is taken into account under Sec. 34.08.750 of SB 44, which provides that other property and corporate laws "supplement the provisions of this chapter except to the extent inconsistent with this chapter." This translates to mean that SB 44 can provide different laws related to common interest ownership property and will not be affected by other laws which also address issues such as voting, meetings, quorums, etc.

The legislature needs to make policy decisions on these issues. According to Buck, there is no problem in reducing the validity of a proxy to 11 months to conform with AS 10.20.071 (under SB44 it is effective for 12 months). Buck also believes that there is no problem in reducing the quorum from 20% under SB 44 to 10% under AS 10.20.076 as long as the declaration provides for reduced percentages and notice of meetings with a set agenda to the association members. AS 10.20 is the law of nonprofit corporations, whereas, SB 44 specifically regulates common interest ownership.

Ms. Puksta correctly points out that under section 34.08.440, Insurance (page 48, line 24), that the reference to AS 34.08.860 should be changed to read AS 34.08.740. This is Mr. Dick Bradley's mistake in drafting.

Ms. Puksta's concern over section 34.08.470, Lien for Assessment, is without merit. This section provides a means by which an association's lien may be foreclosed, either as a mortgage or deed of trust on real estate, or as a lien under AS 34.35.005 (Foreclosure in Superior Court). If a lien is foreclosed as a mortgage or deed of trust, deficiency judgements are prohibited. If the lien is foreclosed under AS 09.45.170, then deficiency judgements are not prohibited. The association is given a choice on the means of foreclosing. Therefore, SB 44 is consistent with the Alaska laws on foreclosure.

Ms. Puksta is correct that the reference on page 87, line 21, to 20 years should be 40 years, if the entire change on leaseholds is adopted by the Committee.

4. Mr. Bob Kean, Kean and Associates, is a land surveyor in Anchorage. Mr. Kean contacted me regarding his concern over the plats and plans section 34.08.170. Mr. Kean has two concerns: more guidelines should be provided for the content of plats and plans; and, the law should specify what a surveyor, architect and engineer may and may not certify. Following discussions with Mr. Kean and Mr. Buck, I suggested that Mr. Kean review the manual adopted by Connecticut which provides guidelines for all professionals who work with common interest ownership property. Mr. Kean seemed content that a manual for Alaska, based on the Connecticut model would provide sufficient direction.

However, Mr. Kean was still concerned that surveyors', architects' and engineers' duties should be specified. Mr. Buck stated that nationwide, there are turf wars being fought among these professionals and suggested that the proper place to address this is under our professional licensing statute, AS 08.48.011, since the battle involves all property development not just common interest ownership.

5. The Connecticut Bar Association developed a manual for implementation of its Common Interest Ownership Act. This manual is a guide only, and according to Mr. Buck should not be part of a statute or regulation. Connecticut is willing to allow Alaska the use of and possible adoption of the manual. Ms. Cheryl Frasca has raised the issue with me, and suggested that perhaps a state agency should be asked to develop a manual for Alaska. The most appropriate agency to undertake such a request seems to be AHFC. I spoke with Betty Cook at AHFC about this possibility, and she was "open" to the idea. Ms. Cook stated that she felt that she had staff internally who could compile an Alaska manual. I am concerned that AHFC does not have qualified staff to adequately complete the assignment if requested. Also, if AHFC develops a manual, it may be seen as a regulation, rather than as a guide. Finally, I wouldn't want to reinvent the wheel, if Connecticut's could easily be adopted. Mr. Buck is available for negotiations on this matter.

6. Betty Cook raised a concern over the applicability of SB 44 to small common interest communities. Under SB 44 (section 34.08.030), common interest communities of 12 or less units, not subject to development rights or financing from AHFC and residential communities whose annual average common expense liability does not exceed \$100, are only subject to the separate titles and taxation, applicability of local ordinances, regulations and building codes, and eminent domain provisions. Ms. Cook believes that these communities should be subject to the entire provisions of SB 44.

I discussed this with Mr. Buck and he stated that there had been lengthy discussions on this very issue during the drafting of UCIOA. Both Mr. Buck and Ms. Cook agree that duplexes and Zero lot lines should not be subject to the entire act. This issue needs to be addressed by the legislature.

There may be additional concern voiced by existing common interest communities regarding the application of SB 44 to small communities if only one unit is financed through AHFC. Mr. Buck seems to think that this really is not a problem, but did feel that it might be cumbersome. Ms. Cook appears to be adamant that if AHFC is financing a unit, that additional regulation for the community is necessary.

7. The realtors have advocated replacing all references to "dealers" with "brokers". This appears to conform with the Alaska laws on real estate transactions, however, the realtors should present testimony on this issue.

8. Finally, I am concerned about the availability of Mr. Buck's gratuitous services in the future. I believe that I am free to contact him on simple issues without interfering with his law practice, and he has been most gracious,

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however, it is unclear about his services for more indepth discussions. I wanted to bring this to your attention, as it may be helpful in planning future hearings on this bill.

Enclosed is a list of all persons on the mailing list. These people were mailed a packet of information on SB 44. If I may be of additional service to either of you on this project, please contact my office.

Enclosures (3)