

ALASKA LEGISLATURE COMMITTEES FILLED 1900-1900 00/2

3401 HJUD SB 44

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Public Testimony 4/9/85
Senate Judiciary

Present: Senator Kelly, vice chair
Senator Halford
Senator Faiks

WILEY BROOKS:

This is Wiley Brooks. I am a certified property manager with Real Estate Management. I have presently about six home-owner associations, management-wise. I have been in the management business about 7 years. I feel that I am fairly knowledgeable of the old statutes and I've looked over the proposed statutes and see a lot of improvement. And I am for this pushing the bill on through.

If I was giving first priority to my finances I would probably be opposed to this bill because a fair share of my business comes to me because an association has problems. They have money problems, they have management problems, they have developer transition problems and they are looking for assistance to right some wrongs.

Three things have come to be common with homeowners when homeowners take over from developers. They fire the manager, they raise the assessments and they sue the developer. And I don't think that's necessarily necessary. A large share of the phone calls and the business I get would not come if we had well-defined statutes like SB 44.

A large share of the business that comes my way are developer transition related, to be honest. And that's an area in which I see real fine improvements in SB 44. A smart manager won't sign on with a developer. He'll wait until the people are mad with the first management firm and go on with the second echelon. Perhaps I shouldn't say that. I have been successful in taking over some associations from developers and it's worked because it was the desire of the developer to avoid transition problems. And we did most of the things that the proposed SB 44 proposes. And that is the reason it was successful:

- The proper documentation was turned over.
- The building plans were turned over.
- I assisted the developer with a budget and in those cases where I have worked with a developer and gotten in early, we avoided the transition problems.

That's not always the case. With most of the problems that come to me now, they did not get the assistance and they did not have the guidance that they need to make that transition go and not run into those problems.

I don't think there are bad builders. I don't think there are builders that go out there and intentionally do things wrong. Most of them don't have the guidance they need and when they

construct these projects. And if they had these items that SB 44 requires in their loan package, a lot of these problems would be avoided. So I'm of the opinion that this bill will not only assist managers. It will assist builders and it's in the interest of lenders, also.

I think the long range viability of these projects is in the interests of bankers. I'll give you a short example of a project that I have. It was mostly HOF buyers that bought into this project. The initial budgeted monthly home-owner dues were set at \$65 a month. When I got involved, it had been raised to \$90, the insurance premium was due, there was no money to pay for the insurance and they were flat broke. Well, it called for a special assessment and now the assessments are \$130 a month, each. And that's barely covering the operating expenses. A lot of those buyers down there cannot afford that. They qualified on a \$65 a month fee. They cannot afford \$130. It has a high delinquency rate. I've been into it 6 months and there's approximately \$4,000 in the treasury and there is approximately \$4,000 delinquent in this project and the insurance premium is not far away. Some of those that are delinquent are going to the bank and asking for a deed in lieu of foreclosure. One has already been given. They were \$1200 behind in homeowner assessments. And under the present statutes, the association lost that \$1200. They could not afford that.

You know the state of Alaska has made relatively low interest available for homebuyers. In many cases we've built a trap for young buyers with hopes and expectations. These statutes should have been in effect before low interest loans were available. So I urge that we move forward on this bill and try to get it through this Legislative session. I think it's important that we get it in place as soon as possible. The boards which I work for have authorized me to say they are in full support of it. That's all I have.

SENATOR HALFORD: Thank you very much Mr. Brooks. I appreciate the fact that your testimony will probably generate less business in the future if we can get this bill through, but I very much appreciate your testimony and your interest in going through this bill and coming in to say something about it. Thank you. We will take the next witness from Anchorage.

RANDY BOYD: My name is Randy Boyd and I am general manager of Alaska Pacific Mortgage. Today I represent a trade association known as Alaska Mortgage Bankers Association. I would like to read a letter that we've written to the Senate Judiciary Committee:

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 Judiciary Substitute for SB 44, Uniform Common Interest Ownership Act.

Alaska Mortgage Bankers Association has reviewed the bill. 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:

1. 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.

2. Section 34.08.030(e). This section requires addition of unit owners other than the declarant to the executive board upon conveyance of 25% and 50% 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 Alaska Housing Finance Corporation which would be difficult to monitor, since typically the long term loans on individual units close at many different lending institutions.

3. Paragraph (f) of the same section. This section requires a minimum of three members on executive boards. There are a few associations comprised of only two units.

4. Section 34.08.340. This section requires inspection of the common and limited common areas by 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 insure completion.

It should be noted that throughout the bill, performance of certain types of items is required by persons other than those typically performing those functions.

5. Section 34.08.350. Transfer of special declarant rights. This 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 the 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 right solely for transfer to another person. In reality, a lender often must assume completion and maintenance of a project in order to hold sales transactions together, maintain a good relationship with existing unit 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 put the lender in the position of increased liability.

6. Section 34.08.470. Fee for assessment. This section would give a maximum of six 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 Assn, Fannie Mae, regarding this item. Paul Vergets, counsel for Fannie Mae in Los Angeles, has stated verbally that if this section became law, Fannie Mae may require:

- (1) that all association dues be collected on a monthly basis (some associations currently collect annually) and
- (2) association dues be included in the mortgage payment.

Item (2) would greatly increase the responsibility and paper work of mortgage servicers. Although Fannie Mae may not own many loans in the majority of Alaska's common interest communities, it does own some loans in many of the projects, and the impact of such a requirement could be extensive.

In support for our request for thorough review prior to passage, we would bring to your attention a law which passed in Utah in 1983. It gave the associations priority lien rights. Once the impact of the law was discovered -- inability to sell loans on the secondary market, which quickly affected condominium values -- the law was rescinded in special legislation. As I understand, the wording of the Utah law is different than SB 44. However, it does point out problems which can occur when legislation is enacted precipitously.

7. Section 34.08.520 - 590. These sections relate to requirements for information to be furnished to purchasers. (Public Offering Statement). The requirements are burdensome, at times with unworkable time frames, and appear to add financial liability to executive boards, developers and lenders.

8. Section 34.08.530. (1) 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 would be held off the market during the waiting period, with uncertainty as to the sale. Or if not held off 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 would result in additional carrying costs to the seller which would be ultimately passed through to buyers in higher sales prices.

9. (17) Same section. Requires disclosure of financial arrangement on additional payment. 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.

10. 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 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 inspections are typically performed by fee appraisers. Requirement of performance by other entities appears to set another layer of paper work, delay and expense.

We have mentioned problems which are immediately apparent. There are many other areas of concern which have not been addressed. We do not understand their full impact at this time. The bill would require increased policing on the part of the 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. Final enforcement of this bill would be litigation which would benefit few outside of the legal community. The Alaska Mortgage Bankers Assn 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. Thank you very much.

SENATOR HALFORD: Thank you for your testimony Mr. Boyd. The Judiciary Committee has not received a letter from your association. When was it sent?

MR. BOYD: I turned it into the office today and sent a telegram I believe about two weeks ago.

SENATOR HALFORD: Were you on our original mailing list in December --

think we sent out about 500 letters on the original version of the bill and have been corresponding with a number of people in financial institutions as well as others. I am referencing that to your concern about rushing the bill through. I think we've been working on it for about 6 months now.

MR. BOYD: I've received two packages of one copy of the original bill and then the legislative analysis at my institution.

SENATOR HALFORD: When did you receive the first one?

MR. BOYD: I can't remember the exact time frame, but it's been four months.

SENATOR HALFORD: Thank you. I wonder, Don Buck, are you on?

DON BUCK: Yes.

SENATOR HALFORD: Don, could you try to run through some of those considerations and what's happened in other states. The Utah law was mentioned. A number of other things were mentioned. I tried to take notes on them. I hope you did too. If you could kind of run through some of that...

DON BUCK: Ok. I tried to take notes as fast as I could. (Breaking up)... Some of the comments made were, in some cases, correct and it's a matter public policy as to whether it is acceptable to the Legislature.

For instance in 34.08.030, indicating that certain de minimum projects are exempt from the act unless they are subject to financing by Alaska Housing Finance Corporation, which means that a lot of the de minimum projects will in fact be brought under the act. Connecticut has a similar experience, except that if the de minimus project is a conversion project it is brought under the act. And what is happening in these smaller projects is that the documents are being prepared and some straight forward forms have been made available and in fact the purchasers of conversion projects -- even though they may only have half a dozen units -- are getting better consumer protection than they would have, had they not been under the act itself. It was a policy decision made in Connecticut that these projects should be covered and I think the policy decision made by the Senate that AHFC-financed projects should be covered by the act is probably a good one, too. But it does, in fact, put some requirements on the new projects, if they are going to be financed by AHFC.

Section 34.08.330(e), requires one-third of the unit owners who are directors or members of the executive board to be elected by persons other than the declarant. That has been a provision that we've had in the Connecticut since 1976 and it's not been a serious problem. It probably often has served in the breach but by the time transition occurs (in Connecticut's provision that occurs when 60 percent of the units are sold) there is a meeting and there doesn't seem to be any serious consequences. Although I suppose if the developer had been running rough-shod during this period of time, and had had his executive board passing various kinds of rules and regulations, the passage of those rules would have been in doubt. But in fact, it's been a fairly small point.

The point he brought up in Subsection (f) -- the minimum of three members on the executive board -- does come from the UCIOA. And it does in fact trouble us, too. Because we do find that in the two, three or four unit projects, coming up with three members of the executive board is sometimes a bit cumbersome. What we have done, is that we've provided for a three member executive board, but with a potential for vacancy. That's not particularly neat draftsmanship but we can find that the unit owners are automatically on the executive board and we can draft around it. In the case of a project with perhaps six units or less, subject to AHFC financing, under the act it should be possible to have fewer than 3 members on the executive board. Good point.

The issue of certification by the architect or engineer was brought up twice. In Connecticut we don't have a fee appraiser as a licensed professional who is subject to professional discipline. If that person is subject to professional discipline in Alaska, the addition of the word "fee appraiser" to the words "architect" or "engineer" would appear to obviate the problem of inspection and might be, in the Alaska practice, a fairly good amendment.

The issue on transfer of special declarant rights. The deep freeze, as it's called. This is where the lender who obtains title is protected from liability as a declarant, provided he only assumes certain numbers of the declarant rights, but not all of them. In reality, if you read the provision of .08.350, most of those powers that are needed to sell out the existing project -- that is the power to provide for model units for sales, and some control provisions -- are given to a lender even if the special declarant rights are in deep freeze. However, the uniform law commissioners felt that if they were in fact going to start construction again and start exercising the development rights to add units and in fact were going to become developers, that they then had to assume the liability as developers under those circumstances. But if in fact they were going to turn it over to a successor declarant who could then assume these liabilities, it would be appropriate. In fact in Connecticut, what happens is a subsidiary corporation is formed to give some insulation of liability and in most cases the projects are sold (inaudible). But if a lender is going to assume the responsibility of a developer, in fact the liabilities of developers for disclosure should be appropriately in their lap.

Section 34.08.470. Superliens. I have not talked to Mr. Vergetz at Fannie Mae, but I did talk to Mr. Joseph Harris, who is the condominium authority in the general counsel's office in Washington, DC, of Fannie Mae. And he, this afternoon, as we were talking, was conferring with Mr. Vergetz about the policy based on the inquiry from the Alaska Mortgage Bankers Assn.

On October 28, 1980, Fannie Mae sent a letter to all their conventional seller-servicers in Pennsylvania. The subject: Fannie Mae's conventional mortgage purchase policy relative to the Pennsylvania Uniform Condominium Act. And the Pennsylvania

Uniform Condominium Act did, in fact, provide for a limited lien priority under their section 33.15.B, which is the same as your Section 34.08.470. And they indicated that Fannie Mae would approve loans from condominiums that were subject to the Uniform Condominium Act in Pennsylvania provided that the declaration required that all common expenses would be made due and payable in a monthly basis and that the declaration provided for the subordination of fees charges and late charges that could be levied outside of the regularly budget assessment, pursuant to Pennsylvania's 33.02.A 10, 11 and 12, which is your section 34.08.320 (a), 10, 11 and 12. And if those particular provisions were inserted in the declaration, they would accept mortgages from the seller servicers in Pennsylvania.

There is no provision or requirement in there that association dues would be collected with the mortgage payments. And in reality, in the 10 states that have passed in one form or another the Uniform Condominium Act, Fannie Mae has not yet required association dues to be collected in escrow or as part of the mortgage payment. And they have lived relatively happily with the six month superlien.

The Utah experience was an absolute priority, I understand, of the association fees over the assessments and, in fact, not limiting it to six months regularly budgeted assessments. Utah had the Uniform Condominium Act. I do not know at the time of the recession whether they went back to the six-month limitation or not. I am not familiar with it. But the other states that have passed the Uniform Condominium Act have the six months and Fannie Mae has been buying mortgages without requiring association dues to be collected in the mortgage payments. In further discussion with Mr. Harris, he agreed that since de minimus PUDS are exempt from the Fannie Mae requirements entirely (and that is if the association dues are so small as to be appropriately collected annually) they are generally exempted from Fannie Mae review and warranty and thus, in the cases where there were annual assessments, Fannie Mae would not worry about it if it fulfilled the de minimus standards.

So the basic conclusion was that they would not be terribly concerned, but he was going to discuss it with Mr. Vergetz this afternoon and they were going to come up with a policy statement. And Mr. Vergetz, he said, was the spokesman for Fannie Mae in Alaska and would be coming up with something official on that.

Let's see now. The basic package policy was put out from Pennsylvania and then followed substantially in W. Virginia and still remains in effect. They found that they required (in addition to the Pennsylvania requirements) that the title policies contain affirmative insurance, indicating that all of the assessments had been paid up through the date of the policy. The private mortgage assurer would in fact assume these particular charges if they were unpaid. That has been the practice in Pennsylvania, W. Virginia and the other uniform states.

So that's basically the comments I have on 34.08.470.

With respect to the requirement for the Public Offering Statement, in sections 520-590. In fact it is true, that there are additional burdens being put upon the developer to provide full disclosure to the purchasers of planned unit development units and condominium units in Connecticut and states which have passed this act, as well as in those states which have other forms of 2nd generation acts: New York, Florida, California and Michigan (which has its own act, which is different from the uniform act.)

The Public Offering Statement is considered as a public policy statement to be the best way to protect the consumer. And what happens, in fact, however, is that the consumer not so much reads these public offering statements and rescinds but the developer preparing the public offering statement plans better and comes up with the answer to the question he would like to see the public have in the public's hands. And thus the planning and the quality of the project goes up, principally because of the disclosure aspect.

And in fact rescision is very rare. In Connecticut, the realtors were opposed to the resale disclosures because we do not have the law that you have in Alaska that a realtor is liable for misrepresentation. In Connecticut, the realtors, after a year of experience, did a survey of all the multiple listing services in the state (22 of them). There were approximately 4,000 condominium units listed in the MLS as being for sale, and they surveyed the MLS to find out how many were re-listed on the computer after having been listed as having been sold by virtue of a rescision under the 5 day rescision period period for resale certificates. And the answer was 2. Out of 4,000. And so, in fact, the rescision does not happen very often -- and the reason it does not happen is because the disclosures are better. Disclosure is of course the seller's best friend. And in the case of the resale, also the realtor's best friend.

And so the preparation of the Public Offering Statement has in fact increased the quality being provided and that has pretty much universally occurred. And I was reminded of that provision with Mr. Brooks' testimony in that a developer provided a \$65 a month fee. Had the act been in place, if the developer in fact was subsidizing or not providing services that would have to be provided by the association, he would have had to have said so exactly in answer to one of the statutory questions. It would have been disclosed and thus the people who qualified on \$65 a month would not be looking at \$135 or \$150 a month fees right now. They would have known that there had been a subsidy. The lenders could have found that answer out and that could have been adequately disclosed. The subsidy is not prohibited. All that is required is that the subsidy be disclosed.

Which brings up the question of 17, the disclosure of financial arrangements for additional phases. He is correct. In fact,

lenders usually don't commit to the financing of subsequent phases. What happens as far as the answer to the Public Offering Statement is concerned, is that there is no financial arrangement for the completion of the subsequent phases. Thus it means that the developer has a sparkling brochure showing club house facilities and additional parking and additional drainage and water and open space and park areas and lakes. If he has no financing for the completion of all of these amenities, it will be disclosed. It doesn't mean that they must have financial arrangements made. It merely says that if they don't, it is disclosed and the consumer gets a clear crack at it.

And likewise, if a developer's sales agent represents by this condominium unit that its going to look over lovely recreational amenity, and in fact there's no financial arrangement for doing so, the developer can be protected because the financial disclosures in the Public Offering Statement said so. And the agent can be in trouble, but at least the developer is protected because, in fact, he's given the disclosure.

Section 34.08.700. With respect to the certifications by the architect or engineer. To repeat, if the fee appraiser is a licensed professional and is in fact subject to professional discipline, malpractice and so forth, and can, in fact, provide this kind of information, I can see no objection to adding a fee appraiser under whatever appropriate licensing provisions Alaska has as an entity that would certify completion.

I know there are many areas which of course I have not addressed. It's a complex statute and many, many hours can be spent on going through it. I'd like to assure the members of the Alaska Mortgage Bankers Assn that Fannie Mae, Freddie Mac, VA and FHA were all on the advisory committees that drafted the act and we did spend close to five years in discussing these particular points. That is not to say that you can't come up with a new one, but a tremendous number of these particular points can be explained. The commentary does it fairly accurately, but I'd have to again commend this particular bill to your favorable consideration and thank you again for allowing me to speak.

SENATOR HALFORD: Thank you very much, Don. There are a couple of areas that I wish you would -- as you're sitting there and we take some more testimony -- look at and possibly give us some language on. One is the point on the members of the executive board. If there needs to be language added to the section on the executive board of the de minimum common interest project, we need to know where that language should go to be able to reduce that number of members back to a smaller number in those cases. Also, with regard to fee appraisers. I don't think we have a state licensing provision. However, I think there are probably national provisions on appraisal and there may be some way that we can in this legislation reference someone licensed by some kind of a national organization and add that to the persons who can make that approval. If you

would be thinking about those two things while we go on to some testimony, then we'll come back to you.

If we could go back to Anchorage and take the next witness.

FRED FERRARA: My name is Fred Ferrara. I am a real estate appraiser and president of Alaska Valuation Service, an appraisal consulting firm. I am here testifying today on behalf of a trade association, the Building Industry Association of Anchorage -- better known as the Homebuilders Association in most parts of Alaska. We've looked at the bill for some time.

For the most part I think that most of the response we've gotten from our members has been favorable. For one thing the disclosure requirements are plain and the developer would know what he has to do in order to comply with the Act. We believe that's appropriate. We did have a few of the same concerns that were voiced by the Mortgage Bankers Assn and I think those have been discussed fairly well for us. I can take that back to our membership and explain some of those.

Some of the other provision that we are concerned about also were brought up, particularly about the architect requirement. Many of the projects do not have a registered architect connected with the project. Perhaps in preparation for some plans and so forth but usually not in the inspection process. As an appraiser, I can speak to the other part of it. The appraisers are not licensed in Alaska. Many of the appraisers are covered by insurance. There is an omissions insurance policy which many of the lenders do require that they approve each year, so perhaps that would be a substitute. Beyond that: the national organizations. There are several major ones, but the two major organizations which are most recognized are the American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers, which have a number of members in Alaska. Those appraisers, I think you will find, probably do many of the existing condominium projects or common interest ownership already. They are the appraisers involved in those projects in many instances. So they may be covered at the present time, at any event. But there is no licensing for appraisers in Alaska now. But the Homebuilders were concerned of course that they will have to retain an architect who is not involved in the project to certify it or something, which may be difficult to do and a costly process. Just to certify that a project was in fact done. The other aspects of the bill, I think are fine.

We've got some concern -- we didn't understand how it would apply and what the track history has been. We have made some contact in Connecticut with a few developers and builders who are participating in it, including an attorney and a developer, a Mr. Cone. I think Mr. Buck would be familiar with him. And the response that I got back and we received from them was that basically the bill was working fine. They have not had any particular amount of litigation under case law, so they could not really say how it would come out if it came to any kind of adjudication of that

sort. So to some extent we are a little concerned in that we are at the cutting edge more or less of new legislation and the amount of the population in Alaska is such that we are concerned that the case law would be slow to develop here because we have so few people and so few cases. Perhaps some other states would have larger populations and many more projects of this nature and would develop their case law and their back up much sooner than we would and we would have many questions which would be unanswered for a number of years. We don't know how to solve that problem at this point in time. There obviously would be no other regulations or other supplemental or other types of things which would explain this bill. Everyone would have to go back to the statute.

So all in all, I can definitely say our local association is in favor of the bill as it is with the amendments that have been made, with some questions relative to some things that have been brought up and some things that have been mentioned and the Mortgage Bankers Assn has mentioned earlier.

It's a new thing. We are concerned we don't know how it would apply to us. But we think the disclosure requirements are good. We don't see it solving the problems that many people are mentioning as to projects. We don't see it solving the fact that perhaps there has been a building or construction project and something is sinking. This bill won't solve that. It won't solve the problem that all of a sudden some of the expense of operation of the project have changed drastically, that taxes go up, or that insurance policies go up and the monthly payment is not sufficient to cover it. It may cover it if the monthly payment was supposed to have been double. But if the monthly payment has to rise by 30 to 40% due to inflation or whatever, this bill is not going to solve that problem either. I don't think anything will do that.

But as you say, it will allow the developer to line out all the points and people will be able to see it and make a decision on it. And the developers to some extent will feel that it may serve to limit their liability in a way because they have disclosed all of the facts which were considered pertinent and perhaps they may have a better occasion if it comes to law to prove their position that they were doing things properly in conjunction with market conditions at that time.

So overall I would say that our organization is in favor of the bill. We would like to see it passed. We do feel perhaps there are a few questions and it would probably benefit from some additional study. But we could live with it. The question is, do we want to see it passed now and make changes later as they come up. Or do we want to make the changes now before the bill gets passed. We haven't resolved that question in our own minds. That is the extent of my testimony.

SENATOR HALFORD: Thank you very much for your testimony. I would

point out that the bill has a delayed effective date. It goes until the first of January, 1986. Senator Kelly has a question.

SENATOR KELLY: My question, Fred, is on the qualifications of appraisers. What if we were to use appraisers qualified by the Alaska Housing Finance Corporation. Would that solve the problem?

FERRARA: We would have no problem with it. I would imagine Alaska Housing may have some problem with it, because at present they don't qualify appraisers except for the mobile home appraising program. That's the only qualifications list they maintain. It is the responsibility of the individual lenders at present to qualify the appraiser they use for an appraiser report. If they would come up with an approved appraiser list, the appraisers would qualify for that and one of the requirements would be perhaps an errors and omissions insurance in an adequate amount to cover it. I'm sure you'd find appraisers, you know, coming up with that very quickly in order to meet those requirements. Fannie Mae did have the approval list in past years when they were active in the market. They terminated that list about four years ago and as a result now there is virtually no approval process except what the individual lenders go through in the state.

SENATOR HALFORD: There is another way to deal with the de minimus projects with AHFC financing. That is that we could maintain the exemption in the legislation and have AHFC by regulation require those parts that they thought were appropriate. That at least would give them some guidelines that are better than they have now. But it would allow some flexibility in the small projects that are only covered because they are financed by AHFC.

DONALD HARMON: My name is Donald Harmon. I've been on the board of directors and am president of Alaska Landings Homeowners Assn for the last two and a half years. I've come here today to talk to you about the little people. The people, after all the litigation and everything is passed. The people that are buying these homes and the day to day problems they are faced with -- mainly dealing with the board of directors.

These people are mostly young single families, young single people or older people who are told by the realtors that all of the problems are going to be taken care of by someone else. This is the way these things are sold. This is what I was told. The whole point I'm getting at is the misrepresentation that is involved with the lack of proper legislation.

I was told that everything would be taken care of. I had just sold a home that I was constantly taking care of -- the lawn, and all kinds of things. It was a relief to me that someone else would be taking care of it. Once I started reading through my deeds and by-law. I began to realize that nobody was going to take care of this, other than myself or my neighbor. And as I started talking to my neighbors, as the units started to be closed, no one was interested in taking care of this. Everybody was thinking

that someone else would take care of it because they got pretty well the same story that I did. And from talking to the managing agent, who the builder was working with, it was pretty obvious that we were going to have some definite problems.

I was trying to protect my investment. I didn't want my property value to just go right out the door. I wanted somebody to be taking care of this.

And the manager said, "We will handle everything, don't worry about it."

I said, "Well, what about the dues? A lot of people here, myself included, have pretty much extended ourselves the maximum the state will allow in order to qualify for this home, even though it is so small. I have extended myself totally. And the dues will probably go up 10 to 20 percent." And I said, "Why is that?"

And he said, "Standard practice. Mostly that the developer will -- in order to sell the unit -- try to keep the dues low for the sale."

And I said, "Well, can't we live with this budget. Isn't it comparable to what we actually have to pay?"

And he said, "Yes, but it's pretty standard procedure that we'll have to go increase by 10 to 20%."

And I said "Why? Why is this?"

"Just standard procedure."

OK, as the association was formed, it was time for us to take over. I was elected board member and president and trying to deal with the manager that the builder was associated with. I was beginning to realize that we, the homeowners, were not in control of the situation. It was the manager who was trying to manage the property himself -- he might have thought it was in our best interest to try to manage the property himself, and make all of our decisions for us.

I did not believe that was true. I asked for documentation of the bills, how much are we paying here, how much are we paying for gas, water, ground maintenance. He could not supply me with that. He said, "It's no problem. You don't have to worry about this. I'll take care of it." I was beginning to see a very serious communication problem between the board and the managing agent and so we started looking around. We found one that we could communicate with effectively and who we felt comfortable with... (change tape)...

And I said (to the old manager), "Why not?"

And he said, "We need a hand-written letter from the board of directors." So I typed up a letter myself and sent it in to him and he got it.

I said, "Now can we have our paper work?"

And he said, "No, we need a hand-written letter."

I said, "Do you mean written in longhand?"

He said, "Yes."

I could not believe this was actually happening. I was appalled that this was even happening. I was convinced even more that he was working with the builder as a buddy system, or they had worked on many projects and they just worked smoothly together. I do that with people myself. If there's a problem involved, I work with people I can work out something smoothly with. I don't really blame either the builder or the developer. I didn't blame them at this point because I figured that they were just trying the easiest route in order to take care of the association.

But it was the homeowners, according to the state Legislature in the by-laws and decs, who were responsible for taking care of it. It was not the builder, it was not the managing agent. This time I got very serious about the decs and by-laws and started reading them. What was the governing body behind this? The Horizontal Property Regimes Act. I asked our new manager to give me a copy of this, which he did. I tried reading it and I could not understand it. I did not know what it was about. I'm used to reading technical manuals, too, but that was a little too involved for me to even understand.

As time went on, the new managing agent showed very much interest in us. I was pleased by this. Then we had to deal with the builder, or the developer, who was a conglomeration of builder, banker, real estate. He put this all together. We were the first board of directors. They knew what the decs and the by-laws said but they did not disclose very much of this information to us at all. We found out everything ourselves from research, (us being the board of directors and the new property manager).

We found out that we were responsible for quite a few things. We're not just responsible for a single family home. We are responsible for 102. I am responsible for 102 people with houses. Not just my own.

We were beginning to realize that the developer was falling behind on a lot of his responsibilities as the one paying home-owners dues. He started falling behind. We thought we would give him a little time to catch up. He was having troubles selling units. He started falling behind in the warranty items. The warranty items were being drastically disregarded because he was on to a new project. We had to send him paperwork from a lawyer about the

warranty work, which he finally started doing again, but now time has gone on and we are giving him ample time to pay home-owners dues and he is now \$16,000 in arrears. And we've had to take him to court to make him pay his home-owners dues. And he set up the decs and by-laws in the first place. They signed the things and got the whole thing started. They, if anyone, should know what their responsibilities are.

Another problem with disclosure was we have a railroad crossing entering right into our complex that as we started very seriously into our decs and by-laws, we found out that the association is responsible for any accident that is involved there. Thus we have a security gate system there. You drive up, it opens, you come in and punch a number. It was sold as a security item for the complex. But we were told by the developer, by the realtors who sold the units to me and my neighbors -- everybody -- that it was an added feature the developer has given to you, for your security.

And then we find out that in order for him to develop that project he had to enter into a contract with the State of Alaska in order to get a railroad crossing there. One of the requirements was his electric gate or some type of security gate. We were misrepresented again. We were told that it was an added feature for our benefit. Now the board of directors, after finally finding the agreement between the original board of directors and the developer and the lawyer who got this all together, after we finally get a copy of this, we find out that we are possibly liable for about \$11,000 in payments on this gate. And also, yearly expenses that will have to be general assessments, or added assessments to the home owners. And this we are finally finding out after two years. We have had to get a lawyer on this too because after reading the decs and by-laws we are finding out how serious this is.

I believe that SB 44 is going to clarify everybody's responsibilities and liabilities in order to give a new homeowner an idea what he is getting into.

Don't get me wrong. I'm not bitter about this. When I got into this I was very naive about this whole situation. I've learned a lot and I'm glad that I did. But I don't think that it was necessary to have to learn it this way. If there was proper legislation in order to guard some of the home owners that are getting into it on a very honest basis and are being totally misled. That's all I have at this time.

SENATOR HALFORD: Thank you very much. Those are some of the problems we are trying to address. Could we take the next witness from Anchorage? We also have representatives here from the Division of Banking and Securities on a specific question that we will be taking up after we finish the last person who wants to speak from Anchorage.

GIL LULAY: Good afternoon. I'm Gil Lulay. I am employed by Marston

Properties. I am a community associations manager. I also live in a condominium association, so I see the problems from several different angles. There are three points that I would like to make.

One is the records responsibilities. I believe Mr. Harmon spoke about those just before me. The records are an integral part of the history of an association, the life of that association. Good record keeping and transfer and availability of records is really essential for the well-being of the association to do the work that it has to do. The provisions that are made for record keeping in this law are very valuable.

The second point is the problems that we're running into with collection. As the default records escalate with the mortgage companies, the collection problems also escalate. In one particular association which I manage there have been two deeds of trust in lieu of foreclosure signed and in both of these there have been delinquencies that have had small claims actions initiated. But in one particular association there is a clause in the declaration that says with the deed in lieu, any assessment becomes the common liability of all the other owners. That's not a common provision, I find, in many of the declarations, but it is spelled out specifically in this particular document. It is also one of the associations in which there are many HOF buyers, who again are maxed out with regard to their ability to assume additional financial liability. The superlien, as it is referred to, and addressed in the document, would offer some assistance in that. It is not going to be the answer to all collection problems, but it would certainly provide some assistance.

The third point is also a point that I found Mr. Harmon speaking of from his personal experience. I see it from the other side. It is that the strongest asset that an association has is the informed participation of its homeowners. I manage 13 associations and many of the owners in those associations come in with what I refer to as a regimentality. They do expect that, since they are paying their assessment, that the management company is then going to take care of everything, as a landlord does. That we are their landlord. And that if there is a problem, all they need to do is call it to our attention and it will be taken care of.

The things that we can do as a management company depend upon the cooperation and the functioning of the board of directors. The board is what sets the policy. They are the ones that make the decisions and give us the direction.

If the board is not involved in the association, if the homeowners do not realize that they have bought into a multimillion dollar business when they bought their home -- that they didn't buy just the inside of their unit, but that they bought an operating business that has a budget, that it has property in various states of repair that is going to require various kinds of work to

maintain it -- if they don't realize the complexities of handling that is involved, that they are just a co-owner, that it requires a level of cooperation that is not required in the ownership of an individual residence, there can be resistance to participating in that process. Resistance to going to association meetings or to participating in a board of directors. And that resistance can be devastating to the morale and the general live-ability of the association. Information is the first step. To inform them, to let them know that they are buying into something that is rather complex. Again it isn't the end of the problem or the whole solution, but it is a good first step as they begin their home owner ownership. Thank you.

SENATOR HALFORD: Thank you very much. I think now we'll hear from Willis Kirkpatrick with the Division of Banking and Securities.

WILLIS KIRKPATRICK: Thank you Mr. Chairman. My name is Willis Kirkpatrick, Director of the Division of Banking and Securities. We have one amendment that we would like for the committee to consider and that occurs on page 66 on lines 12 and 13. There is a provision there that the bill you have before you says it is not a security under the Alaska Securities Act. We would like to amend that to bring it within the scope of the Securities Act, but not as a registration requirement. Section 10 of the Alaska Securities Act of 1959 has fraud provisions in it and by including it with the body of 45.55, it would give attorneys a right of action against fraud or in cases of investment contracts were misrepresentations are made. I have with me Ed Watkins, securities examiner and investigator with my agency, who could discuss with you what some of those abuses have been or could be.

SENATOR HALFORD: Thank you. I am trying to think what the effect of that is on another proposed amendment, Unfair Trade Practices. Currently you do have access to condominium problems under the existing law?

WILLIS KIRKPATRICK: Only in the area where it can be found to be investment contracts. In the situation of time shares, we are proposing that that be left with the Department of Law and the Consumer Protection Act.

SENATOR HALFORD: But under current law, if they are found to be securities, then you do have access.

WILLIS KIRKPATRICK: Yes.

SENATOR HALFORD: So we wouldn't be changing current law. We would simply be stating that instead of a complete exemption, it would be an exemption from the registration part. This is not a change from current law.

Discussion of amendments...

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 or 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 ARFC, 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 remain. 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 150, 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 a proper 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 -- resale. 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.....

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 assessment.

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, 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.



RECEIVED APR 13 1985

OFFICE OF THE MAYOR
POUCH 6-650
ANCHORAGE, ALASKA 99502

TONY KNOWLES
Mayor

April 11, 1985

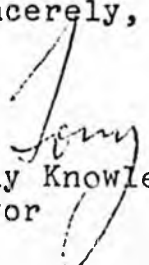
Sen. Rick Halford
Alaska State Legislature
Pouch V
Juneau, Alaska, 99811

Dear Member of ^{rick} 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

Dear Mike,

We are mobile home trailer owners and are aware that we could be able to finally own our lot; with your help. I don't know if HB #155 passed the Senate, but I do know it passed the House. SB #44 passed the Senate & is now in your House Judiciary Committee. Mike, please read this bill before your session concludes. We would feel so much more secure if we could own our own lot. Thank you for your valuable time.

Sincerely yours

John A. ALT

JOHN A. ALT

AIC USAF

Elmendorf AFB, AK

2221 Muldoon Rd. #909

Anchorage, Alaska

99504

M. M. Miller
(Sunder)

REMARKS OF
DERRILL SMITH

ON

CSSB 44
THE UNIFORM COMMON INTEREST
OWNERSHIP ACT

before

THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ALASKA STATE LEGISLATIVE

Thursday, May 9, 1985

ANCHORAGE, ALASKA

CHAIRMAN MILLER, MEMBERS OF THE COMMITTEE, MY NAME IS DERRELL SMITH AND I AM PRESIDENT OF THE ALASKA BANKERS ASSOCIATION. THE ALASKA BANKERS ASSOCIATION WISHES TO THANK THE COMMITTEE FOR THE OPPORTUNITY TO TESTIFY BEFORE IT TODAY ON THE SENATE JUDICIARY COMMITTEE'S SUBSTITUTE FOR SENATE BILL 44, WHICH IS THE PROPOSED CODIFICATION IN THE ALASKA STATUTES OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT. FIRST MR. CHAIRMAN, LET ME COMMENT ON THE ALASKA BANKERS ASSOCIATION. THE ASSOCIATION REPRESENTS VIRTUALLY EVERY MAJOR BANK IN THE STATE, AND THE VIEWS EXPRESSED BY THE ASSOCIATION REPRESENT THOSE OF THE TOP MANAGEMENT IN EACH FINANCIAL INSTITUTION. THE ASSOCIATION MAINTAINS A CONTINUING AND ACTIVE INTEREST IN STATE AND FEDERAL LEGISLATIVE AFFAIRS THAT CAN IMPACT THE ALASKA BANKING INDUSTRY.

SINCE THE INCEPTION OF THIS SESSION OF THE LEGISLATURE, THE ALASKA BANKERS ASSOCIATION COMMITTEE ON LEGISLATIVE AFFAIRS HAS VIEWED WITH INTEREST THE INTRODUCTION OF SENATE BILL 44 AND THE IMPACT THAT IT WOULD HAVE ON THE FINANCING OF COMMON INTEREST OWNERSHIP PROPERTY IN THE STATE OF ALASKA. MR. CHAIRMAN, WE DID NOT PARTICIPATE TO ANY GREAT DEGREE IN THE REVIEW OF THIS LEGISLATION IN THE SENATE, PRIMARLY BECAUSE OUR MEMBERSHIP WISHED TO REVIEW THE LEGISLATION WITH SOME CARE. AFTER THAT PROCESS HAD BEEN COMPLETED, WE DID AND ARE WORKING WITH THE SPONSORS OF THE LEGISLATION ON THE SENATE SIDE TO MAKE THEM

AWARE OF OUR CONCERNS ABOUT THE LEGISLATION, AND OUR SUGGESTIONS FOR IMPROVING THE BILL. THEREFORE, THIS IS REALLY THE FIRST OPPORTUNITY WE HAVE TAKEN TO FORMALLY MAKE THE VIEWS OF THE ASSOCIATION KNOWN ON THIS BILL.

THE ASSOCIATION SUPPORTS MANY OF THE OBJECTIVES THAT ARE SET FORTH IN THIS LEGISLATION, ESPECIALLY THOSE WHICH IMPROVE CONSUMER PROTECTIONS IN THE PURCHASE OF COMMON INTEREST OWNERSHIP PROPERTY. GENERALLY, WHEN IT COMES TO REAL ESTATE THAT OUR MEMBERSHIP IS FINANCING, IF A CUSTOMER'S INTERESTS ARE PROTECTED, THEN ULTIMATELY SO ARE OURS. WHILE THE ACT HAS MANY LAUDABLE ELEMENTS TO IT, THERE ARE TWO PRIMARY AREAS OF CONCERN TO ALASKA'S BANKERS.

OUR FIRST AND PRIMARY CONCERN WITH THE LEGISLATION IS THE ADDITIONAL LIABILITY THAT THE LENDING COMMUNITY MAY ACQUIRE AS A RESULT OF THE ACT'S PASSAGE. YOU MAY BE AWARE THAT THE ALASKA SUPREME COURT HAS HELD IN WIERZBICKI V. ALASKA MUTUAL SAVINGS BANK, 636 P.2d 998 (ALAKSA 1981) THAT A LENDER FINANCING THE CONSTRUCTION OF A NEW HOME OWES NO DUTY OF DUE CARE TO PROSPECTIVE PURCHASERS OF THE HOME IF THE LENDER'S PARTICIPATION IN THE CONSTRUCTION IS LIMITED TO THAT OF A CONVENTIONAL CONSTRUCTION LENDER. A CONVENTIONAL CONSTRUCTION LENDER USUALLY DOES NO MORE THAN, "LEND MONEY AT AN INTEREST RATE ON THE SECURITY OF REAL PROPERTY,". BRADLER V. CRAIG, 274

CAL. APP. 2d 466, 79 CAL. REPORTER 401 (CAL.APP. 1969).

LENDERS ALSO FREQUENTLY APPROVE, ON A PERIODIC BASIS, PLANS AND SPECIFICATIONS FOR HOMES, TOWNHOUSES AND OTHER RESIDENTIAL PROJECTS THEY ARE LENDING ON, AS WELL AS INSPECTING THE PROJECTS DURING THEIR CONSTRUCTION. THIS CONDUCT HAS ALSO BEEN HELD TO BE NO MORE THAN ANY "CONVENTIONAL" CONSTRUCTION LENDER WOULD DO.

DESPITE ALASKA CASE LAW, AND WHAT WE UNDERSTAND TO BE THE LEGISLATIVE INTENT OF NOT OVERRULING WIERZBICKI, AND NOT CREATING NEW STATUTORY DUTIES FOR LENDERS UNDER SB 44, WE BELIEVE THERE IS A SIGNIFICANT RISK THAT SUCH DUTIES WOULD BE CREATED BY THE ADOPTION OF THE ACT IN ITS PRESENT FORM. SPECIFICALLY, ARTICLE I OF THE UNIFORM ACT REQUIRES THAT EXTENSIVE OBLIGATIONS BE UNDERTAKEN BY A DEVELOPER TO PERFECT HIS DEVELOPMENT RIGHTS. THE DEVELOPER ALSO ASSUMES, PURSUANT TO ARTICLE IV OF THE UNIFORM ACT, FURTHER OBLIGATIONS TO CORRECTLY REPRESENT THE PROJECT AND ITS DECLARATIONS TO CONSUMERS. BECAUSE THESE NEW OBLIGATIONS WILL REQUIRE MORE EXTENSIVE REVIEW BY LENDERS OF A DEVELOPER'S PROPOSALS, AND ALSO REQUIRE MORE EXTENSIVE MONITORING DURING CONSTRUCTION, WE DO SEE THE POTENTIAL IN PARTICULAR CIRCUMSTANCES FOR THE WIERZBICKI DOCTRINE TO BE SET ASIDE AND LENDERS VIEWED AS BEING IN "JOINT VENTURE" WITH DEVELOPERS, AND THUS INCURRING UNINTENDED LIABILITY.

TO CORRECT THIS PROBLEM, WE BELIEVE WE HAVE REACHED AN UNDERSTANDING IN CONCEPT WITH THE SENATE SPONSORS OF THIS BILL ON AN AMENDMENT WHICH IS NONCONTROVERSIAL, AND WOULD AFFIRM THE PRINCIPLES IN WIERZBICKI. THE SUGGESTED AMENDATORY LANGUAGE, WHICH HAS NOT YET BEEN AGREED TO WITH THE SENATE SPONSORS, IS ATTACHMENT ONE TO THE COPIES OF THE TESTIMONY I AM PROVIDING TO THE COMMITTEE TODAY. OF COURSE, MR. CHAIRMAN, WE STAND READY TO WORK WITH THE HOUSE STAFF ON SIMILAR LANGUAGE SHOULD THE COMMITTEE BE DISPOSED TO ACCEPT THE SUGGESTED CHANGE IN THE BILL.

THE SECOND MAJOR CONCERN OF THE ASSOCIATION ARE THE PROBLEMS THAT LENDERS FACE WHEN A MAJOR CONSTRUCTION BORROWER DEFAULTS ON A COMMON INTEREST OWNERSHIP PROJECT, SUCH AS A TOWNHOMF OR CONDOMINIUM PROJECT. AS PROPOSED IN THE BILL AS § 34.08.350 IS INTENDED TO PROTECT LENDERS AS TRANSFEREE DECLARANTS WHEN FORECLOSURE BECOMES NECESSARY. IN § 350 WE FEEL ADDITIONAL CHANGES SHOULD BE MADE TO PROTECT A LENDER'S FORECLOSURE RIGHTS AND TO GIVE SOME GREATER FLEXIBILITY TO THE LENDER AS A TRANSFEREE DECLARANT. THE CONCEPT OF PUTTING ALL DECLARANT LIABILITY IN "DEEP FREEZE" UNTIL A LENDER, AS A TRANSFEREE DECLARANT, CAN FIND A "SUCCESSOR DECLARANT" WHO IS WILLING TO TAKE ON A BAD PROJECT WITH TREMENDOUS LIABILITY MAY NOT WORK IN A STATE LIKE ALASKA. THE IDEA OF SELLING AWAY

LIABILITY SEEMS ATTRACTIVE AT FIRST, BUT IN REALITY A LENDER MUST OFTEN ASSUME THE COMPLETION OF A PROJECT. IF THIS OCCURS, THEN IT IS CLEAR UNDER § 350 THAT A LENDER WOULD HAVE TO ASSUME ALL THE OBLIGATIONS REQUIRED UNDER THE ACT OF A SUCCESSOR DECLARANT. UNDER THIS APPROACH, IT BECOMES MORE LIKELY THAT A PROJECT WILL REMAIN IN LIMBO, PERHAPS EVEN WITH SOME OCCUPANTS, LONGER THAN IT WOULD HAVE TO BECAUSE NO RESPONSIBLE ENTITY WOULD MOVE TO CORRECT PROBLEMS OR COMPLETE THE PROJECT DUE TO THE POTENTIAL FOR COSTLY LITIGATION ON WARRANTY CLAIMS.

WE ARE PROPOSING TO THE COMMITTEE TODAY IN ATTACHMENT TWO TO MY TESTIMONY AMENDATORY LANGUAGE WHICH WOULD ALLOW THE LENDING COMMUNITY THE FLEXIBILITY IT NEEDS TO FIND ANOTHER INVESTOR FOR AN UNCOMPLETED PROJECT, WITHOUT THE LENDER HAVING TO ASSUME A SUCCESSOR DECLARANT'S FULL LIABILITY. THE GOAL IS TO GIVE ALASKA LENDING INSTITUTIONS THE FLEXIBILITY TO, "BRING UNCOMPLETED STRUCTURES UP TO CODE" SO THAT A PROJECT BECOMES MORE ATTRACTIVE AND IT THEN BECOMES POSSIBLE TO TRANSFER THE PROJECT TO A SUCCESSOR DECLARANT WHO WOULD THEN COMPLETE THE PROJECT IN TOTAL, MARKET IT, AND SELL IT TO THE PUBLIC. NOW IT MAY BE, MR. CHAIRMAN, THAT THERE WILL BE LENDING INSTITUTIONS THAT WILL IN FACT WISH TO BECOME FULL SUCCESSOR DECLARANTS. IN THAT CASE, WE HAVE NO OBJECTION TO A LENDING INSTITUTION WHO CHOOSES TO BECOME A SUCCESSOR DECLARANT ASSUMING ALL THE LIABILITY THAT COMES WITH THAT CHOICE. HOWEVER, WE STRONGLY

URGE THE COMMITTEE TO CONSIDER AN AMENDMENT IN THIS AREA OF THE BILL WHICH WILL ENSURE A MUCH MORE RAPID RESOLUTION OF A PROJECT'S FUNDING AND COMPLETION PROBLEMS OVER WHAT WE FEEL IS THE MORE INFLEXABLE LANGUAGE PRESENTLY EXISTING IN THE BILL. ASSUMING THE COMMITTEE AGREES WITH OUR RECOMMENDATION IN ATTACHMENT TWO, AT LEAST IN CONCEPT, I AM SURE THAT YOUR STAFF AND LEGISLATIVE COUNSEL COULD WORK WITH US IN DRAFTING ANY NECESSARY REVISIONS TO THE AMENDMENT.

MR. CHAIRMAN WITH THESE MODEST AMENDMENTS THAT WE HAVE SUGGESTED TO THE COMMITTEE, THE ALASKA BANKERS ASSOCIATION COULD ACCEPT THE PASSAGE OF SENATE BILL 44. THE ADOPTION IN ALASKA OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT HAS THE POTENTIAL FOR POSITIVELY BENEFITING THE GENERAL PUBLIC, AS WELL AS THE REAL ESTATE AND LENDING COMMUNITIES. HOWEVER, AS IS OFTEN TRUE WITH UNIFORM ACTS THEY ARE MEANT ONLY AS A GUIDE TO THOSE LEGISLATIVE BODIES THAT ARE CONSIDERING THEM. WE FEEL THAT IT IS EXTREMELY IMPORTANT THAT THIS ACT BE CAREFULLY WEIGHED IN VIEW OF THE SOMEWHAT UNIQUE OPERATING CIRCUMSTANCES OF ALASKA'S FINANCIAL INSTITUTIONS. AS THE COMMITTEE PROCEEDS IN ITS DELIBERATIONS ON THIS MEASURE, THE ALASKA BANKERS ASSOCIATION STANDS READY TO OFFER ANY FURTHER INFORMATION, OR ASSISTANCE TO THE MEMBERS OR STAFF OF THE COMMITTEE THAT MAY BE NEEDED. THANK YOU AGAIN, MR. CHAIRMAN, FOR THE OPPORTUNITY TO TESTIFY BEFORE THE COMMITTEE TODAY. I WOULD NOW BE PLEASED TO

ANSWER ANY QUESTIONS FROM YOU OR OTHER MEMBERS ON THE POSITION
OF OUR ASSOCIATION.

1047B

ATTACHMENT 1

*Section _____. At page _____, line _____, Section 34.08.27 is amended to read as follows:

"Sec. 34.08.270 RIGHTS OF SECURED AND UNSECURED LENDERS.

"(a) A financial institution (including commercial banks, mutual savings banks, savings and loan associations, credit unions and mortgage companies) when acting as an ordinary money lender (whether secured or not) and providing financing

(1) for any common interest subject to the provisions of this Chapter; or

(2) to any declarant, unit owner or purchaser for that person's interest subject to the provisions of this chapter,

shall not be liable under this chapter to any person for any act, omission, warranty, product or structural defect, obligation, breach of contract or other duty arising from the common interest or interests so financed.

"(b) For purposes of this section "acting as an ordinary money lender" means any reasonable action (including, but not limited to, property inspections, review of public offering statements, approval of declarations, plats and construction plans and requiring proof of compliance with laws or codes) to protect a lender's security interest or otherwise assure the

proper use of, or repayment of its loan. No lender acts as an ordinary money lender when it is an affiliant of the declarant or possesses a direct equity interest (other than those foreclosed upon) in the promotion, development, and sale of a common interest or interests.

"(c) A 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 the action, but a requirement for approval does not operate to

(1) deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board

(2) prevent the association or the executive board from commencing, intervening in, or settling any litigation or proceeding;

(3) prevent an insurance trustee or the association from receiving and distributing insurance proceeds except under AS 34.08.440.".

0889M

ATTACHMENT TWO

*Section _____. At page _____, line _____, Sec. 34.08.350, subsection (e), paragraph (4), is amended to read as follows:

"(4) a successor to the special declarant rights held by a transferor who succeeded to the rights under a deed or other instrument of conveyance in lieu of foreclosure or under a judgment or instrument conveying title under (c) of this section may declare in a recorded instrument, including one conveying title under (c) of this section-

(A) an intention to hold the rights solely for transfer to another person; or

(B) an intention to hold the rights for transfer to another person after making, finishing, or completing improvements in conformity with the declaration to the units or common elements for purposes of preserving or improving the same; and

(C) until transferring the special declarant rights to a person acquiring title to a unit or real estate subject to the developer's rights owned by the successor, or until recording an instrument permitting exercise of all those rights, the successor may not exercise any of the rights other than those specified in (B) of this paragraph

and [a] the right held by the transferor of the successor to control the executive board under AS 34.08.330(d) for the duration of any period of declarant control and an attempted exercise of rights is void; and

(D) so long as a successor declarant may not exercise special declarant rights under this subsection, and for purposes of (B) of this paragraph so long as the successor declarant transfers within the time period specified in this paragraph the rights to a subsequent successor declarant who will assume liability for the improvements made by the successor declarant, the successor declarant is not subject to liability or obligation as a declarant other than liability for acts and omissions under AS 34.08.330(d) [.] ; and

(E) if a successor declarant fails to transfer special declarant rights to a subsequent successor declarant within 5 years of the date of recording an instrument under (B) of this paragraph, then the successor declarant becomes subject to the obligations and liabilities imposed by this chapter or the declaration as specified in (2) (A) and (2) (B) of this subsection."



**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 Gruesendorf
Representative Don Clocksin
Representative Mike M. Miller
Representative Rick Uehling
Representative Pat Porchot

John Parker
Gary Dardoff
Henry McWarren
David Brook
Mark Sparrow
Virginia Kilduff
Patrick J. Arguine
James J. Winters
Clair G. Walker
Thomas
Charlotte Lehmann
Meg Deen
Wendy Mann
Maureen S. Clayton
James A. Potts
Catherine Colayser

[Handwritten signature]

RE/MAX eagle river
post office box 772849
eagle river, alaska 99577
(907) 694-4200

Representative Mike M. Miller
Chairman
House Judiciary Committee

April 25, 1985
905 Muldoon Rd. Sp. 75A
Anchorage, Ak. 99504

APR 25
1985

Dear Representative Miller:

I am writing to you concerning recent legislation being circulated between the House and Senate that deals with the potential ability of mobile home owners to purchase the lots on which their homes rest. I have not read either HB 155 or SB 44 and have no desire to enter the political aspects of one over the other. I would, however, urge all legislators to put all political motives aside while considering what may prove to be very serious economic consequences for thousands of people in the state of Alaska.

There are many reasons that people buy mobile homes, but most often in the main it is a stepping stone. Not everyone starts out with the job or financing that allows them to purchase a house with \$1000/month or more payments. I personally bought a mobile home in Anchorage - as an investment, as opposed to throwing that money away in rent - because

I was also paying for land near Homer with the intent of eventually moving there.

I am fortunate in that my trailer is on the lower end of the price range - eventual sale price between 10 to \$15,000. But folks I know are in high ticket mobile homes, 30, 40, \$50,000. That is serious investment as far as I am concerned.

It is one thing to fall on hard times as a "real" home owner, when one may be able to at least borrow property tax money from friends. It is entirely another to be forced from one's tens of thousands of dollars investment by the closure of a trailer court. In a stringent economic situation, that ~~is~~ ^{is} exactly what many trailer owners would face. The cost of buying a private lot on which to place an "orphaned" trailer could bankrupt many people. Obviously, purchasing the trailer's original lot may be less severe; not only would it be somewhat less expensive because of size, also hundreds if not thousands would be saved in moving expenses for the trailer itself. Finally, resting on its owner's lot, as

opposed to someone else's, the trailer would indeed become a viable investment, not only for present owners, but for future step-stone Alaskans.

Representative Miller, trailer owners are not second-class citizens. They have made investments and surely contribute as much to Alaska as other fixed-home owners. Please rally all forces available to ensure that present and future mobile home owners will not lose their investments.

Sincerely,

James L. Bachman Jr.

JAMES L. BACHMAN JR.

4/29/85

REP WHITE M MILLER

APR 29 1985

DEAR SIR

PLEASE HELP THE
PEOPLE IN THE TRAILOR PARK TO
GAIN A LITTLE MORE PEACE OF
MIND AND MAYBE BUILD UP THEIR
ASSETS AND SECURITY AT THE SAME
TIME. I AM SURE THAT THE
OWNERS WILL BE TREATED FAIRLY
BUT MY MAIN CONCERN IS
FOR THOSE OF US THAT NEED
THIS SECURITY

PLEASE PUSH FOR LEGISLATION
ON BILL SB 44. I THANK
YOU AND I ALSO THANK SEN.
TIM KELLY FOR HIS EFFORTS TO-
WARDS THIS BILL AND I REMAIN

YOURS TRULY

MILLIAM ALLEN

7800 DEBARR RD

ALASKA VILLAGE - 552

ANCHorage AK 99504

APR 22 1985
Paul R. Larson
7800 Debarr Rd.
Space 304
Anchorage, AK 99504

April 22, 1985

Representative Mike M. Miller
Alaska House Judiciary Committee Chairman
Pouch V
Juneau, AK 99811

Dear Representative Miller:

I am a mobile home owner and space renter. I feel that myself, other mobile home owners, and the State of Alaska would benefit from the passage of Senate Bill 44, the Uniform Common Interest Ownership Act. I respectfully urge you to bring this legislation before the House Judiciary Committee.

Sincerely,

Paul R. Larson

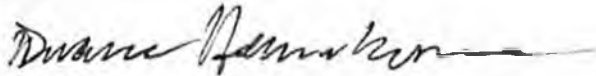
DUANE D. HENRICKSEN
7800 DeBarr Rd. #112
ANCH AK 99504

THE HOUSE JUDICIARY COMMITTEE
CHAIRMAN REPRESENTATIVE MIKE M. MILLER
POUCH V, JUNEAU AK 99811

RE: HB155, SB44

IT IS TO THE BEST INTEREST(S) OF MYSELF AND OTHER HOME OWNERS,
RENTERS, AND 'PROSPECTIVE BUYERS', (THE LATTER BEING MY POSITION),
THAT CONCERNS 'US' TO URGE YOU AS OUR REPRESENTATIVE TO BRING THE
ABOVE REFERENCED LEGISLATION BEFORE THE COMMITTEE FOR ITS' APPROVAL.

SINCERELY



DUANE D. HENRICKSEN

DDH:ddh

April 26, 1985

Mike M. Miller
Pouch V
Juneau, ALaska 99811

Dear Sir:

This is with reference to SB44 (mobile home park condominimizing).

Everyone is not fortunate enough to be in a position to purchase anything more expensive than a mobile home. I feel this would provide an excellent solution to residents of mobile home parks. Problems such as raising the space rent when the service has not improved seem to be never ending.

My family and I have resided in mobile home parks in Anchorage for a number of years and feel that this option would greatly benefit us and our friends and neighbors.

Sincerely,



Mary P. Hyland
resident of
Riviera Terrace MHP
3307 Boniface Pkwy #11-B
Anchorage, ALaska 99504

Donna Mozy
705 Muldown Rd H210
Aurich AK 99504

April 28, 1985

Mike Miller

I hope the SB44 will
pass the house. I would love to
buy the land my mobit home
is on. It used to work for a
place to live then all by a sudden
they tell you to move. This is very
hard on the little people. please
do your best

Thank you
Donna Mozy

7800 DeBarr Rd, Sp 240
Anchorage, AK 99504

April 29, 1985

Pouch V,
Juneau, AK 99811

Dear Representative Miller:

Since becoming a resident of a trailer park here in Anchorage, I have been concerned with the prospect of losing my home because of the lack of protection afforded to mobile home owners in Alaska.

Recently, a Leotian refugee family lost their mobile home because their trailer park was converted into a condominium. I had helped them purchase their mobile home and now they hold me somewhat responsible for this loss. They only got 10% of what they paid for their home at the auction block.

Please, don't let this travesty continue. All mobile home owners of Alaska need protection from this kind of lawlessness. Please pass SB44 before the end of this session, so I can at least face my Leotian friends again.

Sincerely Yours

James Cronin

WHILE YOU WERE AWAY

FOR M. L. Hayden DATE 4/25 TIME 200 A.M. P.M.

M Valerie Russell

OF _____

PHONE 562-6740

AREA CODE *NUMBER EXTENSION

MESSAGE SB44 supports

Kaylene

SIGNED

TOPS FORM 4002

TELEPHONED

RETURNED YOUR CALL

PLEASE CALL

WILL CALL AGAIN

CAME TO SEE YOU

WANTS TO SEE YOU

LARRY R. WEEKS
ATTORNEY AT LAW
319 SEWARD STREET • JUNEAU, ALASKA 99801
(907) 586-6812

APR 24 1985

22 April 1985

Representative Mike Miller (Juneau)
Pouch V
Juneau, Alaska 99811

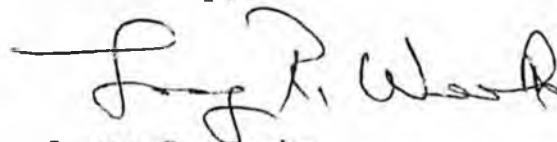
Dear Representative Miller:

I would like to encourage you to pass out Senate Bill 44 as soon as possible. I represent two condo associations in Juneau and one Mobile home Association and I can assure you that there are substantial problems in the Juneau area that are addressed by this bill and solutions that are long overdue. There are outrageous instances of over-reaching by developers and owners that this bill deals with in affirmative ways.

I understand that it is a long bill. It is but the legislation that is needed is not simple. It deals for the most part with the biggest investment people make in their lives and has a dramatic impact on them.

Thank you for your consideration.

Sincerely,



Larry R. Weeks



ALASKA PUBLIC INTEREST RESEARCH GROUP
Post Office Box 1093/Anchorage, Alaska 99510/(907) 278-3661

April 19, 1985

Representative Mike Miller, Chair
Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Miller:

I am writing to urge you to move SB44, the Uniform Common Interest Ownership Act, through your committee as quickly as possible. While I am aware that SB44 is a rather involved, lengthy bill, it is also a much needed bill in this state. That we here in Alaska live with a common interest ownership act which is over 20 years old is a bit ludicrous. Common interest properties have become an extremely popular form of ownership. SB44 addresses the issues associated with common ownership and offers protection to buyers; protection which has been sorely missing.

It is important to act on this bill yet this session. If passed before session ends, this bill will go into effect January 1, 1986. If it is postponed until next session, we won't see it implemented until January, 1987. I think that is too long to wait for SB44. We need it now.

I appreciate your attention to this matter and hope you find that you will support this bill and do what you can to keep it moving. Thank you.

Sincerely,

Gail Neubert
Consumer researcher