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ercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

ARTICLE 4

PROTECTION OF PURCHASERS

§ 4-101. Applicability; Waiver

(a) This Article applies to all units subject to this [Act], except as provided in subsection (b) or as modified or waived by agreement of purchasers of units in a common interest community in which all units are restricted to non-residential use.

(b) Neither a public offering statement nor a resale certificate need be prepared or delivered in the case of:

- (1) a gratuitous disposition of a unit;
- (2) a disposition pursuant to court order;
- (3) a disposition by a government or governmental agency;
- (4) a disposition by foreclosure or deed in lieu of foreclosure;
- (5) a disposition to a dealer;
- (6) a disposition that may be canceled at any time and for any reason by the purchaser without penalty; or
- (7) a disposition of a unit in a planned community in which the declaration limits the maximum annual assessment of any unit to not more than \$300, as adjusted pursuant to Section 1-115 (Adjustment of Dollar Amounts) if:

- (i) the declarant has a reasonable and good faith belief that the maximum stated assessment will be sufficient to pay the expenses of the planned community;
- (ii) the declaration cannot be amended to increase the assessment during the period of declarant control without the consent of all unit owners; and
- (iii) the planned community is not subject to any development rights.

COMMENT

1. In the case of commercial and industrial common interest communities, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection

imposed by Article 4 may be substantial. Accordingly, subsection (a) permits waiver or modification of Article 4 protections in common interest communities where all units are restricted to non-residential use. However, except for certain waivers of implied warranties of quality (see Section 4-115) and certain exemptions from public offering statement and resale certificate requirements (see subsection (b)), no express waiver of the protections of this Article with respect to the purchasers of residential units is

permitted by this subsection. Accordingly, by operation of Section 1-104, the rights provided by this Article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use common interest communities, waiver or modification of rights conferred by this Article is restricted to purchasers in wholly non-residential common interest communities.

2. There are many single family subdivision or townhouse-type common interest communities in which the commonly owned and maintained facilities are relatively inconsequential and the assessment for maintenance of the

common areas trivial. For example, the only common facility may be a road, a playground, or an open area. In such cases, the cost of the public offering statement required by this article is not justified any more than it would be justified in the sale of any residence in a subdivision or townhouse development. Therefore, (b)(7) provides that no public offering statement is necessary if the planned community declaration limits the maximum annual assessment of any unit to \$300.00 (adjusted for inflation) and if the declarant has a good faith belief that the stated maximum will be sufficient to pay the expenses of the association.

§ 4-102. Liability for Public Offering Statement Requirements

(a) Except as provided in subsection (b), a declarant, before offering any interest in a unit to the public, shall prepare a public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105, and 4-106.

(b) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant (Section 3-104) or to a dealer who intends to offer units in the common interest community. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).

(c) Any declarant or dealer who offers a unit to a purchaser shall deliver a public offering statement in the manner prescribed in subsection 4-103(a). The person who prepared all or a part of the public offering statement is liable under Sections 4-108 and [§ 4-117 (, 5-105, and 5-106)] for any false or misleading statement set forth therein or for any omission of a material fact therefrom with respect to that portion of the public offering statement which he prepared. If a declarant did not prepare any part of a public offering statement that he delivers, he is not liable for any false or misleading statement set forth therein or for any omission of a material fact therefrom unless he had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission.

(d) If a unit is part of a common interest community and is part of any other real estate regime in connection with the sale of which the delivery of a public offering statement is required under the laws of this State, a single public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105, and 4-106 as those requirements relate to each regime in which the unit is located, and to any other requirements imposed under the laws of this State, may be prepared and delivered in lieu of providing 2 or more public offering statements.

COMMENT

This section permits declarants to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering state-

ment is liable for his own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

§ 4-103. Public Offering Statement; General Provisions

(a) Except as provided in subsection (b), a public offering statement must contain or fully and accurately disclose:

Assumptions concerning the calculation of the amount of reserves, certified by a certified architect or engineer

(1) the name and principal address of the declarant and of the common interest community, and a statement that the common interest community is either a condominium, cooperative, or planned community;

(2) a general description of the common interest community, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings, and amenities that the declarant anticipates including in the common interest community;

(3) the number of units in the common interest community;

(4) copies and a brief narrative description of the significant features of the declaration, other than any plats and plans, and any other recorded covenants, conditions, restrictions, and reservations affecting the common interest community; the bylaws, and any rules or regulations of the association; copies of any contracts and leases to be signed by purchasers at closing, and a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under Section 3-105;

(5) any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for (one) year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include, without limitation:

(i) a statement of the amount, ~~or a statement that there is no amount, included in the budget as a reserve for repairs and replacement~~ *incl the estimated cost of repair or replacement cost &*

(ii) a statement of any other reserves;

(iii) the projected common expense assessment by category of expenditures for the association; and

(iv) the projected monthly common expense assessment for each type of unit;

the estimated useful life of the asset to be rep or replaced.

(6) any services not reflected in the budget that the declarant provides, or expenses that he pays and which he expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;

(7) any initial or special fee due from the purchaser at closing, together with a description of the purpose and method of calculating the fee;

(8) a description of any liens, defects, or encumbrances on or affecting the title to the common interest community;

(9) a description of any financing offered or arranged by the declarant;

(10) the terms and significant limitations of any warranties provided by the declarant, including statutory warranties and limitations on the enforcement thereof or on damages;

(11) a statement that:

(i) within 15 days after receipt of a public offering statement a purchaser, before conveyance, may cancel any contract for purchase of a unit from a declarant,

(ii) if a declarant fails to provide a public offering statement to a purchaser before conveying a unit, that purchaser may recover from the declarant (10) percent of the sales price of the unit plus (10) percent of the share, proportionate to his common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community, and

(iii) if a purchaser receives the public offering statement more than 15 days before signing a contract, he cannot cancel the contract;

(12) a statement of any unsatisfied judgments or pending suits against the association, and the status of any pending suits material to the common interest community of which a declarant has actual knowledge;

(13) a statement that any deposit made in connection with the purchase of a unit will be held in an escrow account until closing and will be returned to the purchaser if the purchaser cancels the contract pursuant to Section 4-108, together with the name and address of the escrow agent;

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

(15) a description of the insurance coverage provided for the benefit of unit owners;

(16) any current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the common interest community;

(17) the extent to which financial arrangements have been provided for completion of all improvements that the declarant is obligated to build pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore);

(18) a brief narrative description of any zoning and other land use requirements affecting the common interest community;

(19) all unusual and material circumstances, features, and characteristics of the common interest community and the units; and

(20) in a cooperative, (i) whether the unit owners will be entitled, for federal, state, and local income tax purposes, to a pass-through of deductions for payments made by the association for real estate taxes and interest paid the holder of a security interest encumbering the cooperative, and (ii) a statement as to the effect on every unit owner if the association fails to pay real estate taxes or payments due the holder of a security interest encumbering the cooperative.

(b) If a common interest community composed of not more than 12 units is not subject to any development rights and no power is reserved to a declarant to make the common interest community part of a larger common interest community, group of common interest communities, or other real estate, a public offering statement may but need not include the information otherwise required by paragraphs (9), (10), (15), (16), (17), (18), and (19) of subsection (a) and the narrative descriptions of documents required by subsection (a)(4).

(c) A declarant promptly shall amend the public offering statement to report any material change in the information required by this section.

COMMENT

1. The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he

is purchasing. Such a result is difficult to achieve, however, in the case of the common interest community purchaser because of the complex nature of the bundle of rights and obligations

which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement appears in Section 4-102(e), and Section 4-108 provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the Act.

2. Paragraph (a)(2) requires a general description of the common interest community and, to the extent possible, the declarant's schedule for commencement and completion of construction for all building amenities that will comprise portions of the common interest community.

Under Section 4-110 the declarant is obligated to complete all improvements shown on a site plan or other graphic representation in the public offering statement or other promotional materials unless they are labeled "NEED NOT BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with those requirements.

3. Paragraph (4) requires the public offering statement to include copies of the declaration, bylaws, and any rules and regulations of the common interest community, as well as copies of any contracts or leases to be executed by the purchaser. In addition, the paragraph requires the public offering statement to include a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities, and other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expires, as provided in Section 3-105. This latter requirement is intended to encourage the preparation of brief summaries of all common interest community documents in laymen's terms, i.e., the "brief narrative description" should be more than a simple explanation of what a declaration (or other document) is, but less than an extended legal analysis duplicating the contents of the documents themselves. The summary requirement is intended to alle-

viate the common problem of public offering statements being drafted in lawyers' terms and being no more comprehensible to laymen than the documents themselves.

4. The disclosure requirement of paragraph (8) is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period. In such a circumstance, the declarant commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping, or other services) will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to each) in paragraph (8), the Act seeks to minimize "lowballing". In order to comply fully with the provisions of paragraph (5), the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the common interest community during that budget year. This requirement as well operates to negate the effects of any attempted "lowballing."

5. Paragraph (9) requires disclosure of any financing "offered" by the declarant. The paragraph contemplates that a declarant disclose any arrangements for financing that may have been made, including arrangements with any unaffiliated lender to provide mortgages to qualified purchasers.

6. Under paragraph (10), the declarant is required to disclose the terms of all warranties provided by the declarant (including the statutory warranties set forth in Section 4-111) and to describe any significant limitations on such warranties, the enforcement thereof, or damages which may be collectible as a result of a breach thereof. This latter requirement would necessitate a description by the declarant of any exclusions or modifications of statutory warranties undertaken pursuant to Section 4-115. The statute of limitations for warranties set forth at Section 4-110, together with any separate written agreement (as required by Section 4-116) providing for reduction of the period of such statute of limitations, must also be disclosed.

7. Paragraph (11) requires that the declarant disclose the existence of any

right of first refusal or other restrictions on the uses for which or classes of persons to whom units may be sold. It also requires disclosure of any provisions limiting the amount for which units may be sold or on the part of the sales price which may be retained by the selling unit owner. In some existing housing cooperatives for low income families the unit owner is required to sell at no more than a fixed sum; sometimes the amount which the unit owner paid; sometimes that plus a fixed appreciation. In addition to that practice, the section contemplates other possible limitations on the owner's right to receive sales proceeds such as a provision under which the developer shares in any appreciation in value.

8. Under paragraph (10), the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the common interest community. Such fees or charges might include swimming pool fees, golf, court, or required membership fees and initiation assessments. Such fees also represent a substantial addition to the periodic assessments.

9. The "financial arrangements" required to be disclosed pursuant to paragraph (17) may vary substantially from one development to another. It is the intent of the paragraph to give purchasers as much information as possible with which to assess the declarant's ability to carry out his obligations to complete the improvements. For example, if a declarant has a commitment from a bank to provide construction financing for a swimming pool when 50% of the units in the common interest community are completed, that fact should be disclosed to potential purchasers.

10. In addition to the information required to be disclosed by paragraphs (1) through (18), paragraph (10) requires that the declarant disclose all other "unusual and material circum-

stances, features, and characteristics" of the common interest community and all units therein. This requires only information which is both "unusual and material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the common interest community, e.g., the fact that buildings have a roof, walls, doors, and windows. Similarly, the provision does not require the disclosure of "unusual" information about the common interest community which is not also "material," e.g., the fact that a common interest community is the first development of its type in a particular locality. Information which would normally be required to be disclosed pursuant to paragraph (19) might include, to the extent that they are unusual and material, environmental conditions affecting the use or enjoyment of the common interest community, features of the location of the common interest community, e.g., near the end of an airport runway or a planned rendering plant, and the like.

11. The cost of preparing a public offering statement can be substantial and may, particularly in the case of small common interest communities, represent a significant portion of the cost of a unit. For that reason, subsection (b) permits a declarant to exclude from a public offering statement certain information in the case of a small common interest community (i.e., less than 12 units) which is not subject to development rights and which is not potentially part of a larger common interest community or group of common interest communities. Essentially, subsection (b) permits a declarant to exclude from a public offering statement those materials which, as a practical matter, require extended preparation effort by an attorney or engineer in addition of the normal effort which must be exerted to provide the declaration, bylaws, plats and plans, or other documents required by the Act.

§ 4-104. Same; Common Interest Communities Subject to Development Rights

If the declaration provides that a common interest community is subject to any development rights, the public offering statement must disclose, in addition to the information required by Section 4-103:

(1) the maximum number of units, and the maximum number of units per acre, that may be created;

(2) a statement of how many or what percentage of the units that may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

(3) If any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas, and the maximum percentage of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

(4) a brief narrative description of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;

(5) a statement of the maximum extent to which each unit's allocated interests may be changed by the exercise of any development right described in paragraph (3);

(6) a statement of the extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the common interest community will be compatible with existing buildings and improvements in the common interest community in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;

(7) general descriptions of all other improvements that may be made and limited common elements that may be created within any part of the common interest community pursuant to a development right reserved by the declarant, or a statement that no assurances are made in that regard;

(8) a statement of any limitations as to the locations of any building or other improvement that may be made within any part of the common interest community pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(9) a statement that any limited common elements created pursuant to any development right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the common interest community, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

(10) a statement that the proportion of limited common elements to units created pursuant to any development right reserved by the declarant will be approximately equal to the proportion existing within other parts of the common interest community, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

(11) a statement that all restrictions in the declaration affecting use, occupancy, and alienation of units will apply to any units created pursuant to any development right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

(12) a statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

COMMENT

This section requires disclosure in public offering statement of the use in which the declarant's exercise of development rights may affect owners who acquire units before rights have been fully exercised. The purpose is to put the purchaser

on notice of the extent to which the exercise of those rights may alter, sometimes quite dramatically, both the physical and the legal aspects of the project. For example, the prospective purchaser may be contemplating the acquisition of a particular unit because

it enjoys a view of open, undeveloped land over which the declarant has, however, reserved development rights. It may be that the boundary of the parcel as to which development rights have been reserved actually coincides with, or runs quite close to, the outer wall of the unit in question. The dis-

closure or statements made pursuant to paragraphs (8) and (12) of this section will indicate to the prospective purchaser the extent (if any) to which he can rely on the declarant not to do anything which would radically alter the view from the unit.

§ 4-105. Same; Time Shares

If the declaration provides that ownership or occupancy of any units, is or may be in time shares, the public offering statement shall disclose, in addition to the information required by Section 4-103:

(1) the number and identity of units in which time shares may be created;

(2) the total number of the shares that may be created;

(3) the minimum duration of any time shares that may be created; and

(4) the extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in Section 3-110.

COMMENT

1. Time sharing has become increasingly important in recent years, particularly with respect to resort common interest communities. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing.

2. Virtually all existing state statutes dealing with condominiums, planned communities or cooperatives are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this Act, however, does not

imply that other law regulating time sharing is affected in any way in a state merely because that state enacts this Act.

The Uniform Law Commissioners' Model Real Estate Time Share Act specifies more extensive disclosures for time-share properties. A "time-share property" may include part or all of the common interest community, and Section 4-109 of the Model Act governs conflicts between this Act and time-share legislation.

§ 4-106. Same; Common Interest Communities Containing Conversion Buildings

(a) The public offering statement of a common interest community containing any conversion building must contain, in addition to the information required by Section 4-103:

(1) a statement by the declarant, based on a report prepared by an independent (registered) architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;

(2) a statement by the declarant of the expected useful life of each item reported on in paragraph (1) or a statement that no representations are made in that regard; and

(3) a list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations.

(b) This section applies only to buildings containing units that may be occupied for residential use.

COMMENT

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

2. Paragraph (a)(1) requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the conversion building. Such information is as useful to declarant as to the purchaser since, under the implied warranty provisions of Section 4-114, a declarant impliedly warrants all improvements made by any person to the building "before creation of the common interest community" unless such improvements are specifically excluded from the implied warranty of quality pursuant to Section 4-115(h).

3. See Comment 0 to Section 2-101 concerning the meaning of "structural components" as used in paragraph

(a)(1). Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3), the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the planned community) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the reasons set forth in the Comment to Section 4-101(a), this section does not apply to units which are restricted exclusively to non-residential use.

§ 4-107. Same; Common Interest Community Securities

If an interest in a common interest community is currently registered with the Securities and Exchange Commission of the United States, a declarant satisfies all requirements relating to the preparation of a public offering statement of this [Act] if he delivers to the purchaser ~~and files with the agency~~ a copy of the public offering statement filed with the Securities and Exchange Commission. [An interest in a common interest community is not a security under the provisions of [insert appropriate state securities regulation statutes].]

COMMENT

1. Some common interest communities will be regarded as "investment contracts" or other "securities" under federal law because they exhibit certain investment features such as mandatory rental pools. See SEC Securities Act Release No. 6317 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this Act, the prospectus filed with and distributed

pursuant to the regulations of the United States Securities and Exchange Commission. Absent this provision, prospective purchasers of common interest communities classified by the SEC as "securities" would have to be given two public offering statements, one prepared pursuant to this Act and the other prepared pursuant to the Securities Act of 1933. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of ci-

ther public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to adopt the agency provisions of Article 5 of the Act. The second sentence

should also be inserted by states opting to incorporate Article 5 of the Act to avoid duplicative regulation of common interest communities by the agency administering the State's securities regulation statutes.

§ 4-108. Purchaser's Right to Cancel

(a) A person required to deliver a public offering statement pursuant to Section 4-102(c) shall provide a purchaser with a copy of the public offering statement and all amendments thereto before conveyance of the unit, and not later than the date of any contract of sale. Unless a purchaser is given the public offering statement more than 15 days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, may cancel the contract within 15 days after first receiving the public offering statement.

(b) If a purchaser elects to cancel a contract pursuant to subsection (a), he may do so by hand delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly.

(c) If a person required to deliver a public offering statement pursuant to Section 4-102(c) fails to provide a purchaser to whom a unit is conveyed with that public offering statement and all amendments thereto as required by subsection (a), the purchaser, in addition to any rights to damages or other relief, is entitled to receive from that person an amount equal to [10] percent of the sale price of the unit, plus [10] percent of the share, proportionate to his common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community.

COMMENT

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) requires that each purchaser be provided with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as

"non-binding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) that a purchaser be provided with subsequent amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the common interest community which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be

permitted to judge for himself the materiality of any change in the nature of the common interest community.

5. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a), the purchaser would, as a matter of right, be able to extend the date of closing for 15 days from the time the public offering statement is provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a), the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to

cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible that under the common law in some states reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under Section 4-117 to collect punitive damages and attorney's fees in connection with his action against the declarant.

§ 4-109. Resale of Units

(a) Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser before execution of any contract for sale of a unit, or otherwise before conveyance, a copy of the declaration (other than any plats and plans), the bylaws, the rules or regulations of the association, and a certificate containing:

(1) a statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit;

(2) a statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling unit owner;

(3) a statement of any other fees payable by unit owners;

(4) a statement of any capital expenditures ~~incurred by the association~~ for the current and 2 next succeeding fiscal years;

(5) a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any specified projects;

(6) the most recent regularly prepared balance sheet and income and expense statement, if any, of the association;

(7) the current operating budget of the association;

(8) a statement of any unsatisfied judgments against the association

and the status of any pending suits in which the association is a defendant:

(9) a statement describing any insurance coverage provided for the benefit of unit owners;

(10) a statement as to whether the executive board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned thereto violate any provision of the declaration;

(11) ~~a statement as to~~ whether the executive board has knowledge of any violations of the health or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the common interest community;

(12) a statement of the remaining term of any leasehold estate affecting the common interest community and the provisions governing any extension or renewal thereof;

(13) a statement of any restrictions in the declaration affecting the amount that may be received by a unit owner upon sale, condemnation, casualty loss to the unit or the common interest community, or termination of the common interest community; and

(14) in a cooperative, an accountant's statement, if any was prepared, as to the deductibility for federal income tax purposes by the unit owner of real estate taxes and interest paid by the association.

(b) The association, within 10 days after a request by a unit owner, shall furnish a certificate containing the information necessary to enable the unit owner to comply with this section. A unit owner providing a certificate pursuant to subsection (a) is not liable to the purchaser for any erroneous information provided by the association and included in the certificate.

(c) A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the purchase contract is voidable by the purchaser until the certificate has been provided and for 15 days thereafter or until conveyance, whichever first occurs.

COMMENT

1. In the case of the resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate for his own account, a public offering statement need not be provided. See Section 4-102(c). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular unit. Accordingly, each unit owner not required to furnish a public offering statement under Section 4-102(c) and not exempt under Section 4-101(b) is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the common interest community and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has

an obligation to provide the information to the unit owner within 10 days after a request for such information. Under Section 4-102(a)(12), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to Section 4-117.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

In excess of \$3,000 approved by the exec bd

§ 4-110. Escrow of Deposits

Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to Section 4-102(c) must be placed in escrow and held either in this State or in the state where the unit is located in an account designated solely for that purpose by [a licensed title insurance company] [an attorney] [a licensed real estate broker] [an independent bonded escrow company or] an institution whose accounts are insured by a governmental agency or instrumentality until (i) delivered to the declarant at closing; (ii) delivered to the declarant because of the purchaser's default under a contract to purchase the unit; or (iii) refunded to the purchaser.

COMMENT

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of Section 4-101. It does not apply, however, to leases of units between private parties.

2. This section provides declarant a number of choices as to the appropriate escrow agent. Whether the escrow agent must deposit the funds in an insured institutional depository, or in a particular type of account, depends on state law or the agreement of the parties. To minimize record keeping, of course, the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted. The account may be held either in the state where the unit is located, or in the enacting state, in recognition that buyers are often from outside the state where the unit is located.

3. The escrow requirements of this section apply in connection with any deposit made by a purchaser, whether such deposit is made pursuant to a

binding contract or pursuant to a non-binding reservation agreement (with respect to which no public offering statement is required under Section 4-101(b)(8)).

4. In some states current practice permits escrows to be held by certain title insurance or escrow companies, attorneys, or real estate brokers. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

5. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller, or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

6. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this Act does not include bonding as an alternative to the required escrow of deposits.

§ 4-111. Release of Liens

(a) In the case of a sale of a unit where delivery of a public offering statement is required pursuant to Section 4-102(c), a seller

(1) before conveying a unit, shall record or furnish to the purchaser releases of all liens, except liens on real estate that a declarant has the right to withdraw from the common interest community, that the purchaser does not expressly agree to take subject to or assume and that encumber;

(b) in a condominium, that unit and its common element interest,

(1) in a cooperative or planned community, that unit and any limited common elements assigned thereto, or
 (2) shall provide a surety bond or substitute collateral for or insurance against the liens as provided for liens on real estate in (insert appropriate references to general state law or Sections 5-211 and 5-212 of the State Uniform Simplification of Land Transfers Act).

(b) Before conveying real estate to the association, the declarant shall have that real estate released from: (1) all liens the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and (2) all other liens on that real estate unless the public offering statement describes certain real estate that may be conveyed subject to liens in specified amounts.

COMMENT

1. The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. It deals with the unusual case in which a unit has been assigned a limited common element (for example, a parking space) on real estate which the developer has the right to withdraw from the common interest community. In that case, the limited common element can be assigned to the unit without release of liens or assumption of them by the unit owner. Theoretically, a developer might partially avoid the lien release requirement of subsection (a) by placing part of the limited common element improvements such as a parking garage on withdrawable real estate. If doing so, it could separately mortgage that part of the limited common elements without being obligated to discharge the mortgage or secure partial releases when individual units to which the limited common elements are assigned are sold.

If a mortgage or other lien created by or arising against the developer attaches to withdrawable real estate after the declaration has been recorded, a lapse of the developer's right to withdraw the real estate would also terminate the rights of the lienors, since the lien would attach only to the developer's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse

without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the planned community declaration was recorded, lapse of the right to withdraw would not affect the lienor's rights and it could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing limited common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

2. Subsection (b) will most commonly apply in the case of a planned community, where all of the common elements, whatever they may be in a particular project, must be owned by the association, see section 1-103(4), or in a cooperative, where section 2-101 requires that all the real estate comprising the cooperative must be conveyed to the association at the time the cooperative is created. The section would also apply, however, in the event other real estate, such as units or other real property not subject to the declaration, is conveyed to the association.

*Section on Security Bonds
 Substitution of Collateral
 Release of Lien*

§ 4-112. Conversion Buildings

(a) A declarant of a common interest community containing conversion buildings, and any dealer who intends to offer units in such a common interest community, shall give each of the residential tenants and any residential subtenant in possession of a portion of a conversion building notice of the

conversion and provide those persons with the public offering statement no later than 120 days before the tenants and any subtenant in possession are required to vacate. The notice must set forth generally the rights of tenants and subtenants under this section and must be hand delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than 120 days' notice, except by reason of nonpayment of rent, waste, or conduct that disturbs other tenants' peaceful enjoyment of the premises, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession.

(b) For [60] days after delivery or mailing of the notice described in subsection (a), the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases that unit. If a tenant fails to purchase the unit during that [60] day period, the offeror may not offer to dispose of an interest in that unit during the following [180] days at a price or on terms more favorable to the offeror than the price or terms offered to the tenant. This subsection does not apply to any unit in a conversion building if that unit will be restricted exclusively to non-residential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

(c) If a seller, in violation of subsection (b), conveys a unit to a purchaser for value who has no knowledge of the violation, the recordation of the deed conveying the unit or, in a cooperative, the conveyance of the unit, extinguishes any right a tenant may have under subsection (b) to purchase that unit if the deed states that the seller has complied with subsection (b), but the conveyance does not affect the right of a tenant to recover damages from the seller for a violation of subsection (b).

(d) If a notice of conversion specifies a date by which a unit or proposed unit must be vacated and otherwise complies with the provisions of [insert appropriate state summary process statute], the notice also constitutes a notice to vacate specified by that statute.

(e) Nothing in this section permits termination of a lease by a declarant in violation of its terms.

COMMENT

1. One of the most controversial issues in the field of common interest community development relates to conversion of rental buildings to a common interest community. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to common interest community ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curbing the problem of declining urban tax bases. Proponents also point out that

the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization. This section, which seeks to balance these competing interests, is based principally on similar provisions set forth in the condominium statutes of Virginia and the District of Columbia.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (b) provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter

sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to tenants if the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single planned community unit, compliance with the requirements of subsection (b) would be impossible.

3. Jurisdictions with rent control statutes should consider whether

amendments to this section are necessary to conform to the procedures or substantive requirements set out in the rent control laws or whether modifications to the rent control laws may be required as a result of the enactment of this section.

4. Except for the restrictions on permissible evictions stated in subsection (a), this Act does not change the law of summary process in a state. As a result, if a tenant refuses to vacate the premises following the 120-day notice, the usual provisions of the state's summary process statutes would apply, while any defenses available to a tenant would also be available.

§ 4-113. Express Warranties of Quality

(a) Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows:

(1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the common interest community that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the common interest community, creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(2) any model or description of the physical characteristics of the common interest community, including plans and specifications of or for improvements, creates an express warranty that the common interest community will conform to the model or description;

(3) any description of the quantity or extent of the real estate comprising the common interest community, including plats or surveys, creates an express warranty that the common interest community will conform to the description, subject to customary tolerances; and

(4) a provision that a purchaser may put a unit only to a specified use is an express warranty that the specified use is lawful.

(b) Neither formal words, such as "warranty" or "guarantee", nor a specific intention to make a warranty, are necessary to create an express warranty of quality, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

(c) Any conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers.

COMMENT

1. This section, together with Sections 4-114, 4-115, and 4-116, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, that is, with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expect-

tations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

3. Subsection (b) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (a) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning common interest community property during the bur-

gaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representations need be shown in order to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Subsection (a)(1) provides that representations as to improvements and facilities not located in the common interest community may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts, etc., will be constructed in the future and that unit owners will have the right to utilize such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the planned community." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if they are not completed. Such liability is distinct from the declarant's obligations, under Section 4-119, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under subsection (n)(1), a contract provision permitting the purchaser to use a common interest community unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under section 4-115.

4-114. Implied Warranties of Quality

(a) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear excepted.

(b) A declarant and any dealer impliedly warrants that a unit and the common elements in the common interest community are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him, or made by any person before the creation of the common interest community, will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

(c) In addition, a declarant and any dealer warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of

6. The precise time when representations set forth in subsection (a) are made is not material. The sole question is whether the language or other representations of the declarant are fairly to be regarded as part of the contract between the parties.

7. Subsection (b) makes clear that it is not necessary to the existence of a warranty that the declarant have intended to assume a warranty obligation. On the other hand, mere statements of opinion or commendations by the declarant do not necessarily create warranties. Whether a particular statement purports to be merely opinion or commendation is basically a question of whether the purchaser could reasonably rely upon the statement as a meaningful representation or promise with respect to the planned community. That determination depends, in turn, not merely upon the words used but also upon the relative characteristics and skills of the parties. Thus, a representation by a declarant to a novice purchaser that a particular planned community unit is in "good condition" may be more than mere opinion or commendation, while the same statement by a novice seller to a professional buyer would likely be only opinion or commendation, and thus not a warranty.

8. The provision of subsection (e) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate his warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

(d) Warranties imposed by this section may be excluded or modified as specified in Section 4-115.

(e) For purposes of this section, improvements made or contracted for by an affiliate of a declarant (Section 1-103(1)) are made or contracted for by the declarant.

(f) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

COMMENT

1. This section, which is based upon Section 2-309 of UETA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of " *caveat emptor*"). In recent years, that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930's, more and more courts have completely or partially abolished the *caveat emptor* rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under subsection (b), are imposed only against declarants and dealers and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability. However, under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential common interest communities. If, for example, a commercial unit is sold for commercial use and is not suitable for the ordinary uses of common interest community units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the common interest community.

4. The warranty of suitability and of quality of construction arises only against a declarant and dealers. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties made by him. However, if a non-professional seller fails to disclose defects of which

he is aware, he may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-professional seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the common interest community is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the units or common elements unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (e) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (e), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for any violation of housing codes or other laws which renders any existing use of the unit or common elements unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arm's length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (f) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and Section 3-101(b)(1) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by him, even after he transfers all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor

declarant is an affiliate of the original declarant, it is clear, under both Sections 3-101(b)(2) and 3-111(f), that the original declarant remains liable for warranties of quality or improvements made by his successor even after the declarant himself ceases to have any special declarant rights.

8. As to the liabilities of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to Section 3-101(e)(1), for warranties or improvements made by his predecessor. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improve-

ments made or contracted for by him, and is not liable for warranties which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. See Section 3-101(e)(2). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of UETA. The same result is also reached under UETA in the case of a successor who, under UETA Section 3-309(b), would be a dealer since under that subsection the seller is liable only for warranties for improvements made or contracted for by him.

§ 4-115. Exclusion or Modification of Implied Warranties of Quality

(a) Except as limited by subsection (b) with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

(1) may be excluded or modified by agreement of the parties; and

(2) are excluded by expression of disclaimer, such as "as is," "with all faults," or other language that in common understanding calls the purchaser's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any dealer may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

COMMENT

1. This section parallels Section 2-311(b) and (c) of UETA.

2. Under this section, implied warranties of quality may be disclaimed. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability. Although the section imposes no requirement that a disclaimer be in writing, except in the case of residential units, an oral disclaimer might be ineffective under the law of parole and extrinsic evidence.

3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to effectively notify the purchaser of the nature of the disclaimer.

4. Under subsection (b), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a

declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion common interest community might, consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials

comprising or supporting the roof, and all components of the air conditioning system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. How-

ever, under the Act, the implied warranty that a new unit will be suitable for ordinary uses (i.e., habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

§ 4-116. Statute of Limitations for Warranties

(a) A judicial proceeding for breach of any obligation arising under Section 4-113 or 4-114 must be commenced within 6 years after the [claim for relief] [cause of action] accrues, but the parties may agree to reduce the period of limitation to not less than 2 years. With respect to a unit that may be occupied for residential use, an agreement to reduce the period of limitation must be evidenced by a separate instrument executed by the purchaser.

(b) Subject to subsection (c), a [claim for relief] [cause of action] for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(1) as to a unit, at the time the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or at the time of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(2) as to each common element, at the time the common element is completed or, if later, as to (i) a common element that may be added to the common interest community or portion thereof, at the time the first unit therein is conveyed to a bona fide purchaser, or (ii) a common element within any other portion of the common interest community, at the time the first unit is conveyed to a bona fide purchaser.

(c) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the common interest community, the [claim for relief] [cause of action] accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

COMMENT

1. Under subsection (a), the parties may agree that the statute of limitations be reduced to as little as 2 years. However, such a contract provision (which, in the case of residential units, must be reflected in a separate written instrument executed by the purchaser) could, like other contract provisions, be subject to attack on grounds of unconscionability in particular cases.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of a warranty of quality would normally arise when the purchaser to whom it is first made enters into possession. Suit on such a war-

ranty would thus have to be brought within 6 years thereafter. Even an inability to discover the breach would not delay the running of the statute of limitations in this regard.

3. Real estate sales frequently include warranties that certain components (e.g., furnaces, hot water heaters, air conditioning systems, and roofs) will last for a particular period of time. In the case of such warranties, the statute of limitations would not start running until the breach is discovered, or, if not discovered before the end of the warranty term, until the end of the term.

§ 4-117 Effect of Violations on Rights of Action; Attorney's Fees

If a declarant or any other person subject to this [Act] fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. Punitive damages may be awarded for a willful failure to comply with this [Act]. The court, in an appropriate case, may award reasonable attorney's fees.

COMMENT

This section provides a general cause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 2-103(d), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or conveyance if appropriate under the law of the state, or any other remedy normally

available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section specifically permits punitive damages to be awarded in the case of willful failure to comply with the Act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

§ 4-118. Labeling of Promotional Material

No promotional material may be displayed or delivered to prospective purchasers which describes or portrays an improvement that is not in existence unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified either as "MUST BE BUILT" or as "NEED NOT BE BUILT."

COMMENT

This section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with re-

spect to improvements the declarant indicates he intends to make in a common interest community.

§ 4-119. Declarant's Obligation to Complete and Restore

(a) Except for improvements labeled "NEED NOT BE BUILT," the declarant shall complete all improvements depicted on any site plan or other graphic representation, including any plats or plans prepared pursuant to Section 2-109, whether or not that site plan or other graphic representation is contained in the public offering statement or in any promotional material distributed by or for the declarant.

(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the common interest community, of any portion of the common interest community affected by the exercise of rights reserved pursuant to or created by Section 2-110, 2-111, 2-112, 2-113, 2-115, or 2-116.

COMMENT

1. The duty imposed by subsection (a) is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under Section 3-101.

2. Section 4-119(b) requires the declarant to repair and restore the common interest community following the exercise of any rights reserved or created to exercise a development right (Section 2-110), to alter units (Section 2-112), relocate the boundaries between adjoining units (Section 2-112),

subdivide units (Section 2-113), use units or common elements for sales purposes (Section 2-115), or exercise of easement rights (Section 2-116.) Plainly, this obligation on the declarant exists only if the declarant, in his capacity as a unit owner, exercises these rights. If any right to, for example, alter units, is exercised by another unit owner, that unit owner and not the declarant, would be responsible for the consequences of those acts.

§ 4-120. Substantial Completion of Units

In the case of a sale of a unit in which delivery of a public offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed, until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an independent [registered] architect, surveyor or engineer, or by issuance of a certificate of occupancy authorized by law.

COMMENT

The purpose of this section, complemented by Section 4-110, is to assure that the declarant is not able to obtain

use of the purchaser's money until the purchaser is able to get a completed unit.

[OPTIONAL]

ARTICLE 5

ADMINISTRATION AND REGISTRATION OF COMMON INTEREST COMMUNITIES

§ 5-101. Administrative Agency

As used in this [Act], "agency" means [insert appropriate administrative agency], which is an agency within the meaning of [insert appropriate reference to state administrative procedure act]. [Insert any related provisions on creation, selection, and remuneration of personnel, budget, annual reports, fees, and other administrative provisions appropriate to the particular state.]

COMMENT

1. Each state should insert in lieu of the bracketed language in the first sentence that agency, whether it be the Real Estate Commission, the Attorney General's Office, or any other existing or new agency, which the state deems appropriate for regulation of common interest communities.

2. The 1961 Revised Model State Administrative Procedure Act (the "Model Act") had been adopted in 20 states and the District of Columbia by 1981. The appropriate reference in

those states in the definition of "Agency" would be the statute adopting Section 1(1) of the Model Act. In those states which have not adopted the Model Act, reference to a similar statute should be made to insure that the procedures of the agency regulating planned communities are undertaken in accordance with the principles of procedural due process which underlie the Model Act. In those states which do not have an administrative procedure act, appropriate administrative procedure

dures should be included, either in this section or elsewhere in this article, to provide for hearings, appellate review, regulations, and other administrative matters.

3. As indicated, Article 5 was not designed to solve all procedural matters which are appropriate for an agency. Rather, the Act relies on the cross reference to a state administrative procedure act. Even in such

states, however, it may be appropriate to include other provisions, either in Section 5-101 or elsewhere in this article, which are necessary under state practice to insure the proper functioning of a state agency. This might include budget authority, salary levels, civil service requirements, and the like. This may be particularly important when a new state agency is created.

§ 5-102. Registration Required

A declarant may not offer or dispose of a unit intended for residential use unless the common interest community and the unit are registered with the agency, but a common interest community consisting of no more than 12 units and which is not subject to development rights is exempt from the requirements of this section and Section 5-103(a).

COMMENT

1. Registration of a common interest community is only required in the case of a common interest community or unit intended for residential use. Commercial and industrial common interest communities, accordingly, are exempt from registration under this Act. Also exempt from the requirement of registration is a small common interest community containing 12 or fewer units, as long as the common interest community is not subject to development rights. However, the small common interest community and the industrial or commercial common in-

terest community are still subject to scrutiny by the agency under its general powers, despite the fact that registration is not required.

2. If Article 5 were adopted in a particular state, a declarant could not offer or dispose of a residential unit unless that unit were registered with the agency. However, he could offer and dispose of the unit after registration was approved but before the common interest community was created, subject to the requirements of Sections 2-101 and 5-103.

§ 5-103. Application for Registration; Approval of Uncompleted Units

(a) An application for registration must contain the information and be accompanied by any reasonable fees required by the agency's [rules] [regulations]. A declarant promptly shall file amendments to report any actual or expected material change in any document or information contained in the application.

(b) If a declarant files with the agency a declaration or proposed declaration, or an amendment or proposed amendment to a declaration, creating units that he proposes to convey before they are substantially completed in the manner required by Section 4-120 and, in a condominium, by Section 2-101(b), the declarant shall also file with the agency:

(1) a verified statement showing all costs involved in completing the buildings containing those units;

(2) a verified estimate of the time of completion of construction of the buildings containing those units;

(3) satisfactory evidence of sufficient funds to cover all costs to complete the buildings containing those units;

(4) a copy of the executed construction contract and any other contracts for the completion of the buildings containing those units;

(5) a 100 percent payment and performance bond covering the entire cost of construction of the buildings containing those units;

(6) plans for the units which, in the case of a condominium or planned community, shall conform to the requirements of Section 2-109(c);

(7) if purchasers' funds are to be utilized for the construction of the common interest community, an executed copy of the escrow agreement with an escrow company or financial institution authorized to do business within the state which provides that:

(i) disbursements of purchasers' funds may be made from time to time to pay for construction of the common interest community, architectural, engineering, finance, and legal fees, and other costs for the completion of the common interest community in proportion to the value of the work completed by the contractor as certified by an independent [registered] architect or engineer, on bills submitted and approved by the lender of construction funds or the escrow agent;

(ii) disbursement of the balance of purchasers' funds remaining after completion of the common interest community must be made only when the escrow agent or lender receives satisfactory evidence that (A) the period for filing mechanic's and materialman's liens has expired, (B) the right to claim those liens has been waived, or (C) adequate provision has been made for satisfaction of any claimed mechanic's or materialman's lien; and

(iii) any other restriction relative to the retention and disbursement of purchasers' funds required by the agency; and

(8) any other materials or information the agency may require by its [rules] [regulations].

(c) The agency may not register the units described in the declaration or the amendment unless the agency determines, on the basis of the material submitted by the declarant and any other information available to the agency, that there is a reasonable basis to expect that the units to be conveyed will be completed by the declarant following conveyance.

COMMENT

1. Subsection (a) is a general provision empowering the agency by regulation to develop requirements for information to be submitted to the agency, and for the imposition of reasonable fees by the agency. Such rules or regulations, under the Model Act, could be adopted only after providing notice to interested persons and an opportunity to be heard. See Section 3 of the Model Act. The article encourages, but does not require, development of uniform regulations between states adopting Article 5. See Section 5-107(e).

2. Under Section 2-101(h) a condominium declaration may not be recorded until all structural and mechanical systems for units which will be created by the recording are substantially completed. While there is no similar requirement for planned communities and cooperatives, Section 4-120, which is applicable to all types of common interest communities, prohibits conveyance of units before they are substantially completed.

In addition, under Section 4-110, any deposit made in connection with the purchase or reservation of a unit must

be held in escrow until closing. The combined effect of Sections 2-101(h), 4-120 and 4-110 is to insure that any funds of a purchaser are held in escrow until his unit is substantially completed and the purchaser has title.

Subsection (b) is a departure from the requirements of Sections 2-109(b) and 4-120. The need for consumer protection suggests that substantial completion of a residential unit should be a prerequisite for conveying the unit to a purchaser in the absence of an agency to control and review planned community projects. Under subsection (b), however, a declarant may file a declaration or proposed declaration, or an amendment to a declaration, for the purpose of creating a common interest community in which the units are not substantially completed. Subsection (b) contemplates that the agency might nevertheless register the units described in the declaration or amendment, if the agency were satisfied that the units would be completed. Registration would then permit the declarant to offer to sell and convey the uncompleted units.

In addition, paragraph (7) of Section 103(b) contemplates that purchase funds might be used, despite the language of Section 4-110 for construction of the planned community, unless are imposed, however, to insure that disbursements are made in accordance with the value of work completed and approved by an escrow agent.

Note that the common elements in common interest community under

the Act need not be completed at the time of the sale, even in the absence of an agency. Completion of common elements, however, is governed by Section 4-119 (Obligation to Complete and Restore).

3. The agency, by regulation, should determine the parties whom the payment and performance bond required under paragraph (b)(5), indemnifies.

5-104. Receipt of Application; Order of Registration

(a) The agency shall acknowledge receipt of an application for registration within [5] business days after receiving it. Within [90] days after receiving application, the agency shall determine whether:

(1) the application and the proposed public offering statement satisfy the requirements of this [Act] and the agency's [rules] [regulations];

(2) the declaration and bylaws comply with this [Act]; and

(3) it is likely that the improvements the declarant has undertaken to make can be completed as represented.

(b) If the agency makes a favorable determination, it shall issue promptly an order registering the common interest community. Otherwise, unless the declarant has consented in writing to a delay, the agency shall issue promptly an order rejecting registration.

COMMENT

This section provides reasonable lines for agency review of an application for registration, and describes standards by which the application should be measured. The agency is directed to review the documents provided to the purchaser, and is given a great deal of discretion in mandating form and content of the public offering statement; see Section 5-110.

The agency is also charged with reviewing those common element improvements which a declarant has agreed to make, and which would be listed under Section 4-118 as "MUST BUILD," to determine whether the declarant has the financial capacity to complete them.

In the event the agency were to issue an order rejecting registration under subsection (b), an important issue concerning judicial review of that order may arise in some states.

The order would appear to be a denial of an application for a license as defined in Section 1(3) of the Model Act; it would be a "contestable," however, within the meaning

of Section 1(2) of the Model Act, only if "an opportunity for hearing" is provided. No right to a hearing, or right of appeal, is provided in the Act.

The order rejecting registration thus might not be appealable under Section 15 of the Model Act, because judicial review is provided under Section 15 only for "contested cases." While that section does not limit utilization of, or the scope of judicial review available under, other means of review, some courts have held that, in the absence of specific statutory authority to hear an appeal from an administrative decision, courts have no jurisdiction to entertain such an appeal. See, e.g., *Rybinski v. State Employees' Retirement Comm.*, 173 Conn. 402 (1977).

Accordingly, the law of each state should be carefully reviewed. In cases where the state administrative procedure act provides for appeals from decisions on licensing matters made by state agencies regardless of the availability of a hearing, no amendment would be required.

§ 5-105. Cease and Desist Orders

If the agency determines, after notice and hearing, that any person has disseminated or caused to be disseminated orally or in writing any false or misleading promotional materials in connection with a common interest community or that any person has otherwise violated any provision of this [Act] or the agency's [rules] [regulations] or orders, the agency may issue an order to cease and desist from that conduct, to comply with the provisions of this [Act] and the agency's [rules] [regulations] and orders, or to take affirmative action to correct conditions resulting from that conduct or failure to comply.

§ 5-106. Revocation of Registration

(a) The agency, after notice and hearing, may issue an order revoking the registration of a common interest community upon determination that a declarant or any officer or principal of a declarant has:

(1) failed to comply with a cease and desist order issued by the agency affecting that common interest community;

(2) concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of units in that common interest community;

(3) failed to perform any stipulation or agreement made to induce the agency to issue an order relating to that common interest community;

(4) misrepresented or failed to disclose a material fact in the application for registration; or

(5) failed to meet any of the conditions described in Sections 5-103 and 5-104 necessary to qualify for registration.

(b) A declarant may not convey, cause to be conveyed, or contract for the conveyance of any interest in a unit while an order revoking the registration of the common interest community is in effect, without the consent of the agency.

(c) In appropriate cases the agency, in its discretion, may issue a cease and desist order in lieu of an order of revocation.

COMMENT

1. This section permits the agency, after notice and hearing, to revoke a prior registration of a common interest community. Under Section 15 of the Model Act, the revocation would not be effective until the last day for seeking review of the agency order. While the filing of the appeal would not stay the

agency's decision, the agency or reviewing court could grant a stay of the revocation. Naturally, this result may vary in a particular state.

2. A declarant is prohibited from disposing of any interest in a unit when registration has been revoked, without consent of the agency.

§ 5-107. General Powers and Duties of Agency

(a) The agency may adopt, amend, and repeal [rules] [regulations] and issue orders consistent with and in furtherance of the objectives of this [Act], but the agency may not intervene in the internal activities of an association except to the extent necessary to prevent or cure violations of this [Act]. The agency may prescribe forms and procedures for submitting information to the agency.

(b) If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of this [Act] or any of the agency's rules or orders, the agency without prior administrative proceedings may maintain an action in the [appropriate court] to enjoin that act or practice or for other appropriate relief. The agency is not required to post a bond or prove that no adequate remedy at law exists.

The agency may intervene in any action involving the powers or responsibilities of a declarant in connection with any common interest community for which an application for registration is on file.

(d) The agency may accept grants in aid from any governmental source and may contract with agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this [Act].

(e) The agency may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the agency's duties.

(f) In issuing any cease and desist order or order rejecting or revoking registration of a common interest community, the agency shall state the basis for the adverse determination and the underlying facts.

(g) The agency, in its sound discretion, may require bonding, escrow of portions of sales proceeds, or other safeguards it may prescribe by its [rules] [regulations] to guarantee completion of all improvements which a declarant is obligated to complete pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore).

COMMENT

1. Under subsection (a), the agency is empowered to adopt regulations and issue orders in furtherance of the objectives of this Act. Those objectives are the same as the underlying purposes of the Act. The agency, however, is prohibited from intervening in the internal activities of the association except to the extent necessary to prevent or cure violations of this Act. The principal purpose of the agency is to regulate the behavior of the declarant, not the behavior of individual unit owners. If, however, the declarant is misusing the association by virtue of his power to control its activities, and thereby violating the Act, the agency may act to prevent the violation.

2. Subsection (g) empowers the agency to require bonding, escrow, or other safeguards to guarantee completion of improvements labeled "MUST BE BUILT" (Section 4-118).

A substantive requirement for bonding is not included under Article 4 for all common interest communities, in all circumstances. While some states

have adopted bonding and escrow requirements for completion of the common elements in condominiums (see, e.g., Section 47-710, Conn. Gen. Stat.), the available economic evidence indicates that a universal bonding requirement would increase the cost of units, and that the cost of such provisions may not always be justified. The principal concern for consumer protection in this regard has been resolved in the Act by requiring substantial completion of all units prior to conveyance (Section 4-120) and by requiring labeling of common elements as either "MUST BE BUILT" or "NEED NOT BE BUILT."

At the same time, particularly in the case of common interest communities registered under Section 5-103(b), there may be individual cases where the agency, in its discretion, may find escrowing or bonding to be in the public interest. For that reason, this power is included only as a permissible power for the agency under Article 5.

§ 5-108. Investigative Powers of Agency

(a) The agency may institute public or private investigation within or outside this State to determine whether any representation in any document or information filed with the agency is false or misleading or whether any person has engaged, is engaging, or is about to engage in any unlawful act or practice.

(b) In the course of any investigation or hearing, the agency may subpoena witnesses and documents, administer oaths and affirmations, and receive evidence. If a person fails to comply with a subpoena or to answer questions

propounded during the investigation or hearing, the agency may apply to the [appropriate court] for a contempt order or injunctive or other appropriate relief to secure compliance.

COMMENT

The powers enumerated in Sections 5-107 and 5-108 are specifically granted to the agency because of judicial de-terminations in various states that, in the absence of such statutory powers, agencies have no authority to act.

§ 5-109. Annual Report and Amendments

(a) A declarant, within 30 days after the anniversary date of the order of registration, annually shall file a report to bring up-to-date the material contained in the application for registration and the public offering statement. This provision does not relieve the declarant of the obligation to file amendments pursuant to subsection (b).

(b) A declarant promptly shall file amendments to the public offering statement with the agency.

(c) If an annual report reveals that a declarant owns or controls units representing less than [25] percent of the voting power in the association and that a declarant has no power to increase the number of units in the common interest community, or to cause a merger or confederation of the common interest community with other common interest communities, the agency shall issue an order relieving the declarant of any further obligation to file annual reports. Thereafter, so long as the declarant is offering any units for sale, the agency has jurisdiction over the declarant's activities, but has no other authority to regulate the common interest community.

COMMENT

1. This section requires annual reports from a declarant to the agency in order to keep the information filed with the agency current. This requirement parallels the declarant's obligation to provide a current public offering statement to unit owners. See Section 4-103(c).

2. Under subsection (c), if the period of declarant control has passed, the declarant is relieved of the obligation

to continue to file an annual report. However, the obligation to continue to provide public offering statements is imposed on a declarant under Section 4-103(c) so long as he is offering any unit for sale. The agency would thus continue to have jurisdiction over the declarant's activities, but would have no other authority to regulate the common interest community.

§ 5-110. Agency Regulation of Public Offering Statement

(a) The agency at any time may require a declarant to alter or supplement the form or substance of a public offering statement to assure adequate and accurate disclosure to prospective purchasers.

(b) The public offering statement may not be used for any promotional purpose before registration and afterwards only if it is used in its entirety. No person may advertise or represent that the agency has approved or recommended the common interest community, the disclosure statement, or any of the documents contained in the application for registration.

(c) In the case of a common interest community situated wholly outside this State, an application for registration or proposed public offering statement filed with the agency which has been approved by an agency in the state where the common interest community is located and substantially complies with the requirements of this [Act] may not be rejected by the agency on the grounds of non-compliance with any different or additional requirements imposed by this [Act] or by the agency's [rules] [regulations]. However, the agency may require additional documents or information in particular cases to assure adequate and accurate disclosure to prospective purchasers.

COMMENT

1. Subsection (c) attempts to facilitate interstate sales of units by requiring the agency in the enacting state to accept an agency-approved public offering statement from the state where the common interest community is located. This avoids the need for a different public offering statement in several states for the same project. If no agency exists in the state where the common interest community is located, however, a public offering statement must be prepared and approved before offering an out-of-state unit in an enacting state.

2. Because of the bracketed language contained in Section 1-208, which should be inserted in the Act if Article 5 is enacted, a foreign common interest community must only be registered under this Article in an enacting

state if a declarant in "offering" units in that common interest community in the enacting state. Thus, general advertising which did not meet the definition of "offering" could be circulated in the enacting state without registration. If an "offering" is once made, however, then all of Article 5 applies to the foreign common interest community. Any "disposition" of a foreign residential common interest community in an enacting state, of course, would require delivery of a public offering statement even in the absence of an agency; see Section 1-208. If no agency exists in the enacting state, any disposition in that state would be illegal if the common interest community were not registered in the enacting state; see Section 1-208.

THE CONNECTICUT COMMON INTEREST OWNERSHIP ACT: WHAT CONNECTICUT REAL ESTATE ATTORNEYS NEED TO KNOW

By William R. Breetz, Jr., Esq. ¹

PART I

On July 8, 1983, Governor William O'Neil signed Public Act 83-474, An Act Concerning A Common Interest-Ownership Act. The bill had been unanimously approved in both houses of the General Assembly. Its effective date is January 1, 1984, except for the conversion provisions, which became effective when the bill was signed.

In 71 pages and 96 sections, the Common Interest Ownership Act (the "Act") supplants the Connecticut Condominium Act of 1976, now codified as Chapter 825 of the General Statutes. The Act also applies the statutory framework of condominiums to cooperatives, all so-called "PUDs" or cluster housing projects, and to every other form of "common interest community". It applies to all new projects, and several sections apply retroactively to all pre-existing condominiums, cooperatives and PUDs. Finally, the Act entirely redrafts current Connecticut statutes granting special status to conversion tenants, although most of the substantive results remain the same under both old and new law.

The Act is based almost entirely on the Uniform Common Interest Ownership Act, ("UCIOA") promulgated by the National Conference of Commissioners on Uniform State Laws in August, 1982. ² Connecticut is the first State in the country to adopt UCIOA. This sweeping and very comprehensive legislation represents the most fundamental change in the law of common interest communities ever adopted in Connecticut.

The purposes of this article are to generally describe the basic concepts that underlie the Common Interest Ownership Act, to identify the projects to which the Act is applicable, and, in very summary fashion, to highlight a few of the Act's major provisions. In a subsequent installment, we will consider in more detail other major provisions of the Act, including conversions, warranty provisions, disclosure, resale certificates, association lien priorities, association financing and ways in which the document drafter can simplify documentation.

THE BASIC CONCEPTS

A. Basic Structure of the Act.

The Uniform Common Interest Ownership Act contains four articles, or major subdivisions. Article I

contains General Provisions, including definitions and sections governing applicability of the Act. The broad concepts which distinguish the Act are first found in these definitions.

Article 2 describes the manner of creation, alteration and termination of common interest communities, including technical provisions with respect to the establishment and legal requirements of a project. Much of the tremendous flexibility of the Act, from the developer's perspective, may be found here.

Article 3, entitled "Management of the Common Interest Community", generally describes the organization and powers of the unit owners association, the method of control of the association, and transfer of development rights. It deals generally with the activities of the association both during and after the period of declarant control. It also contains important provisions on insurance, liens for assessments, and a variety of other matters. Article 3 works many fundamental changes in the powers of the association and the conduct of its affairs.

Article 4 contains the principal sections designed for the protection of purchasers, including the disclosure requirements of the Act, broad warranty provisions, and a variety of other matters. Importantly, this article changes the "bundle of rights" afforded condominium buyers by Chapter 825, and extends those rights to cooperative and planned community purchasers.

In the format of the Act as passed, the provisions of Article 1 are contained in Sections 1 through 20, with the provisions on applicability contained in Section 15 through 20. Article 2 is contained in Sections 21 through 43 of the Act; Article 3 is contained in Sections 44 through 62 of the Act; and Article 4 is contained in Sections 63 through 82 of the Act. The conversion provisions of the Act, which amend entirely existing Connecticut conversion statutes, are contained in Sections 83 through 95. Finally, Section 96 describes the effective dates of the Act.

Attached as an appendix to this article is a table of contents of the Act, with a cross reference table to the parallel sections of UCIOA. Reference to the parallel sections of UCIOA will be helpful to practitioners in a number of ways, even though a series of minor amendments were made in adapting UCIOA to the unique experience of Connecticut in the field, and to suggestions of those influential in the Act's adoption in Connecticut. ³

B. What is a Common Interest Community?

A "common interest community" is defined in §3 (7) of the Act.

It means

"real property described in a declaration with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for (1) real property taxes on, (2) insurance premiums on, (3) maintenance of, or (4) improvement of, any other real property other than that unit described in the declaration.

"Ownership of a Unit" includes holding a leasehold interest of 20 years or more in a unit, including renewal options".

This generic definition is used throughout the Act to refer to three particular forms of common interest communities: condominiums, cooperatives and planned communities. Each of those forms is a separately defined term. ⁴

The definition of "common interest community" encompasses every form of ownership in which any recorded instruments create a contractual relationship between the owner of a "unit", his fellow unit owners, and their association in which a unit owner must pay common charges to support either the common property which is a part of the common interest community or units other than the unit subject to the charges.

Note that the definition of "planned community", set out in Footnote 4, is a residual concept; any ownership arrangement which meets the definition of "common interest community", but does not meet the definition of either a condominium or cooperative, would be a planned community. The concept of a planned community encompasses most known forms of planned unit developments, cluster housing, shared facility projects, homes association, and the like. Thus, there are but three forms of common interest community: (1) condominiums; (2) cooperatives and (3) everything else.

C. Other Important Concepts

In addition to the generic concept of a "common interest community" and the residual concept of "planned community", the Act introduces a number of newly defined terms which are likely to become part of the lexicon of the practitioner in the field. Among the most important are "development rights", "special declarant rights", "allocated interests", "declarant", "declaration", and "unit".

1. "Development rights", defined in §3(14), means

any right or combination of rights reserved by a declarant in the declaration to (A) add real property to a common interest community; (B) create units, common elements, or limited common elements within a common interest community; (C) subdivide units or convert units into common

elements; or (D) withdraw real property from a common interest community.

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

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

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

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

As a matter of simple logic, there are few other things that could be done to a real property regime which are not included within the concept of development rights. This great flexibility, particularly when coupled with the broad definitions of "unit" and "real estate", the power to create leasehold projects, and the right to subordinate unit mortgages to blanket mortgages on either the units, common elements, or both, is the principal attraction of the Act to the development community. Developers also like the fact that the Act, while requiring the developer to impose a limit on the time within which these rights must be exercised, abolishes the current statutory time limits imposed by Chapter 825 on the exercise of development rights. Thus, it would be possible — although not likely — for a declarant to reserve the right to expand a planned community for a period of, for example, 50 years.

2. "Special Declarant Rights." Development rights are different than "special declarant rights" which are defined in §3(29) of the Act. While lengthy, the special declarant rights are the control rights which a declarant typically reserves during the marketing phase to control the association, use easements, complete improvements and complete marketing efforts. The definition resolves a number of issues which have concerned developers by setting objective criteria for the exercise of those rights.

Unlike development rights, the Act imposes time limits, similar to current law, which will cut off the declarant's right to control the association, regardless of the time frame imposed by the declaration. Other special declarant rights, however, are not limited in that way.

3. "Allocated Interests" are defined in §3 (2) of the Act. Basically, "allocated interests" are the interests which are assigned to each unit in any form of common interest community. The important ones, common to all projects, are the proportionate share of common expense liabilities, and votes in the association, allocated to each unit. Whether a cooperative, condominium, or planned community, every unit in the project must have a share of the votes and common expense liabilities.

In addition, condominiums and cooperatives have unique allocated interests. Condominiums are distinguished from other forms of ownership because of the undivided interest in the common elements which is vested in each unit owner. That distinction is maintained in the Act and, in order to meet the definition of a condominium, an undivided interest in the common elements must continue to be allocated to each unit.

For cooperatives, the distinguishing feature is that the association owns all the real estate comprising the project, including the real estate comprising each unit. Each unit owner, however, has an "ownership interest" in that association. This "ownership interest" must, under the Act, continue to be allocated to each unit in order to define that project as a cooperative.

With very rare exceptions, the unique allocated interests of condominiums and cooperatives have no functional value; it is the votes and common expense liabilities which will be the principal factors on which potential unit owners should focus.

Consistent with the concept of flexibility in the Act, but very different from current condominium law, the allocated interests are not tied to each other, but may be assigned on totally different, even arbitrary, bases. Thus, for example, voting could be equal among all units, or based on whole numbers, while common expense liabilities could be based on relative size of units. Moreover, particular common expenses could be based on usage, with others based on size, or equality. This flexibility, again, is typical of the Act. Allocation of interests is generally discussed in §27 of the Act; §58 considers special problems associated with assessments for common expenses.

4. "Declarant" is defined in the Act in §3(12) as

any person or group of persons acting in concert who (A) as part of a common promotional plan, offers to dispose of his interest in a unit not previously disposed of or (B) reserves or succeeds to any special declarant right.

Importantly, the Act identifies a declarant as a person offering to convey his own interest, thus excluding brokers from the definition. Alternatively, "declarant" includes any person who "reserve or succeeds" to special declarant rights, which include the right to exercise development rights. Because the definition is so sweeping, a variety of special provisions are included in the Act to insure that some successors to special declarant rights, particularly lenders, are insulated from the

otherwise significant impact of that status, including its liabilities; see, e.g., Section 47 of the Act, concerning transfer of special declarant rights.

5. "Declaration". The definition of "declaration" in §3(13) is necessarily circular. It is defined as "any instruments, however denominated, that create a common interest community, including any amendments to those instruments". Thus, the term would apply not only to the traditional condominium declaration with which most practitioners are familiar, or the declaration of covenants, conditions and restrictions (CC&R's) so common in planned unit developments it would also include for example a series of deeds to units with common mutually beneficial restrictions, or to any other instruments which create the relationship which constitutes a common interest community. If those recorded instruments create that relationship, then those documents constitute a declaration and must contain, for new projects, the information required by Act §25, et seq.

6. "Unit". A "Unit" under Act §3(31) includes "a physical portion of a common interest community designated for separate ownership or occupancy" "Unit" thus becomes a very flexible concept, enabling a declarant to characterize anything as a unit which he intends to separately sell.⁶ Comments to the Act points out that a unit may be a parcel of real estate filled with air or water; thus, the definition enables marinas, air rights projects, campsites and other forms to be more readily developed as common interest communities, in marked contrast to the often complex mechanisms inventive practitioners have used to avoid the constraints of the present Connecticut condominium statute. Compare, for example, the description of the first Connecticut marina condominium in Stone, "Where Do I Dock My Boat?", Chicago Title "Perspectives" No. 3, Fall, 1982, at page 1.

APPLICABILITY

A. What Projects are affected by the Act?

The applicability of the Act is broad and sweeping. It is fair to say that every common interest community in Connecticut, and some outside the state, will be affected by this Act, regardless of the particular form of ownership or the date on which the declaration for that project was recorded. Most importantly, the Act will reach every pre-Act condominium, cooperative or cluster housing development in Connecticut, although the extent of the Act's impact depends on a variety of factors.

B. What Factors Affect Applicability?

Basically, the level of applicability of the Act to any individual project will depend on one or more of the following factors:

1. The date of creation, that is, the date the declaration is or was recorded. In the text that follows, a project whose declaration was recorded before January 1, 1984 is known as an "old" or "pre-act" project, while a project whose declaration is recorded on or after January 1, 1984 is a "new" project.

2. Size of the Project. A project which contains 12 units or less is exempt from certain provisions of the Act, even if it is a "new" project. "Old" projects of 12 or fewer units are also treated differently from other pre-Act projects. From time to time, the text refers to "large" and "small" project rules.

3. Permitted Uses. Nonresidential projects are exempt from all but 3 sections of the Act, unless the declaration expressly provides otherwise.

4. Existence of Development Rights. "Development rights" are the rights which a developer may reserve in the declaration to expand or contract the project or convert common elements within the project to units or limited common elements. The concept was described more fully above. The absence of development rights, in combination with a "small" project, affects the applicability of certain provisions of the Act.

5. Forms of Ownership and Common Expense Restrictions in the Declaration. Certain limitations apply either to "de minimus" planned communities, or to limited equity cooperatives.

6. New Construction or Conversion. The Article 5 rules — sections 83 through 95 — apply to conversion projects, and apply whether or not other provisions of the Act are applicable.

7. Location in or out of the State. A project located outside Connecticut is subject, in limited circumstances, to the disclosure provisions of the Act.

8. Individual Transfers. Particular transactions are exempt from the disclosure requirements of the Act.

C. The Factors at Work: Applicability "In a Nutshell".

1. Out of State Projects. In considering applicability, the easiest distinction to be made is between "in state" and "out of state" projects. Applicability to out of state projects is described in §20 of the Act.

The basic rule is that if a project is located outside Connecticut, only the public offering statement ("POS") provisions of the Act, contained in Section 63 through 82, apply to that project. Moreover, they apply to the out of state project only if: (a) the project is "offered" in Connecticut, see Act §3(12); and (b) either the buyer or seller signs the contract in this State; and (c) no other exemption from the POS requirements exists. See the exemptions described in §63 of the Act.

The underlying public policy is clear. If an out of state seller is actively offering units for sale in this state, and is actively asking buyers to sign contracts in this state, then the State has a legitimate interest in insuring that the level of disclosure offered to its re-

sidents should be the same, regardless of where the project is located. Thus, the disclosure requirements would apply to such an out-of-state offer. The out-of-state offeror has ample protection; it may make clear that it does not offer units in this state, or it may refuse to accept contracts signed in this state, or it may do both. When both circumstances exist, however, the project has sufficient contacts with the State to justify applicability of the disclosure provisions.

Except for disclosure, the Act has no applicability to a project located outside this state, and the substantive laws of the foreign jurisdiction would apply. In contrast, "in state" projects are subject to the substantive provisions of the Act, although in several different degrees.

2. "New" and "old" projects. The most substantial distinction to be made with respect to applicability is for "new" projects, that is, projects whose declarations are recorded on or after January 1, 1984.

The basic rule for new projects is that the entire Act applies; see §15 of the Act. There are, however, 3 significant limitations to that rule.

(a) Commercial Projects. If all units in a common interest community are restricted to nonresidential use as, for example, in a medical office condominium, then only Sections 5, 6 and 7 of the Act apply to that project unless the declarant elects to have the entire act apply. See §6(a)(1). The impact of those 3 sections, which apply collectively in several instances, is described in the footnote.⁵

Even if the entire Act applies to a commercial project, many provisions of the Act may be varied by agreement. In addition, much of the regulatory burden imposed on common interest communities — for example, in the area of disclosure — would not apply to commercial projects, even if the declarant elected to have the entire Act apply. See §63(b)(5).

(b) "Small" Project Exception. If a new project contains 12 units or less and is "simple" — that is, no development rights are reserved — then the structural requirements of the Act apply to such a project, but no POS need be prepared and no resale certificates are required in those projects at any time. See §16(c). The resale certificate requirements of the Act, contained in §71, are described below at footnote 7. This changes the current rule for condominium disclosure under Chapter 825, where a POS is required regardless of size. The policy underlying this distinction is to minimize the cost of disclosure, which can significantly affect the price of units in a small project.

(c) "De minimus" Planned Communities. A "de minimus" planned community is described in terms of limitations in the declaration with respect to common expense liabilities. See §16(a)(2) of the Act.

Basically, if the declaration for a planned community provides that the annual common expense liability of each unit in the project may not exceed \$100 then, again, only sections 5, 6 and 7 apply to that project

unless the declaration provides that the entire Act applies. In calculating that \$100 figure, the developer may exclude "optional use fees" and "insurance premiums paid by the association". Moreover, the \$100 figure is subject to adjustment under Section 14 of the Act, as the Consumer Price Index Increases. It is likely that, in July of 1984 (which would be the first time that the adjustment figures would be applied) the dollar limitation in §16(a) (2) will increase to between \$120 and \$130.

In addition, if the declaration for a "simple" planned community limits maximum annual common expense assessments to \$300 — including all charges — and meets certain other requirements, then it is subject to all substantive provisions of the Act, but no public offering statements or resale certificates are required. See §63(b)(7).

As a practical matter, very few projects currently have limitations in the project documents which place a cap on the amount of common charges which an association may assess. Such a limitation imposes a potential burden on the financial viability of an association and should, as a policy matter, be avoided except in those circumstances where a minimal charge is plainly warranted. For some projects, however, particularly subdivision projects or other single family home developments where the association does not maintain substantial reserves, does not perform maintenance on the units, and has only very modest recreational facilities or perhaps private roads, a limitation of the magnitude permitted by the Act may be reasonable. In those circumstances, the limited applicability of the Act will simply serve to insure that problems of taxation and eminent domain, which apply to all common interest communities, are resolved.

A drafter choosing to take advantage of the possible \$100 exemption would, of course, be obliged to fall back on the common law in attempting to resolve many of the thorny issues that exist in the field. The Act contemplates, however, that private contractual arrangements may be available to solve those issues, and the parties should not be obliged to work within the strictures of the Act where the economic impact of the "common interest" aspects of the community is so minor.

(d) A Word on Conversions. Note that the conversion provisions of Article 5 apply to every common interest community, whether new or old, even if part of the project might otherwise be exempt from the Act. See §16(b).

3. Applicability to "Pre-Act" Projects. Perhaps the most controversial provisions, and certainly the provisions immediately reaching the greater number of units in the state, are those affecting "old" or "pre-act" projects.

The rules for pre-act projects are somewhat more complex than the rules applicable to new projects. The basic rules are that (1) "the law of the project" — that is, the statutory or common law under which the pro-

ject was created — continues to apply to a pre-act project; (2) some provisions of the new statute, however, automatically apply to all old projects although the extent of applicability depends on whether a pre-act project contains 12 units or less; and (3) old projects, whether large or small, have a variety of "opt-in" elections which permit existing owners to take advantage of additional provisions of the new Act which they may find desirable.

It is useful, in dealing with pre-act projects, to describe them as "small pre-act" projects and "large pre-act" projects.

(a) Small Pre-Act Projects. See Section 18. If a pre-act project (1) is a cooperative or planned community, but not a condominium, (2) has 12 or fewer units; and (3) is not subject to development rights, then only sections 5, 6 and 7 apply to that project. Note that there is no exemption for small pre-act condominiums. Any pre-Act condominium was created since 1963 either under the original Connecticut Unit Ownership Act or under the Condominium Act of 1976; thus, its documents already comply, in one fashion or other, with the rather stringent requirements of those statutes. Therefore, all condominiums, of whatever size, are treated in the same manner as large pre-act projects.

Small pre-act projects may elect broader treatment under the new Act. Acting in accordance with §18 of the Act, the unit owners of a small pre-Act project may elect, in conformity with the law applicable to their project and with the amendment procedures of their old declaration, to be treated in accordance with §19 of the Act. Such an election would have the effect of treating such projects as if they were larger projects. It would thus make a number of additional sections automatically applicable, and would provide additional "opt-in" rights, as described in §19.

(b) Large Pre-Act Projects, and all Pre-Act Condominiums. See Section 17. Essentially, §17 requires that 12 enumerated sections of the Act, and the definitions as necessary, shall automatically apply to large pre-act projects and to all pre-act condominiums. ⁷

Importantly, these automatically applicable sections apply only prospectively, that is to "events and circumstances occurring after January 1, 1984". Moreover, the sections do not invalidate existing provisions of documents for those pre-act projects.

Many of these sections will work substantial changes in the activities of existing associations. In addition to Sections 5, 6 and 7 which have been described earlier, the automatically applicable sections enhance the powers of the association, resolve significant issues of tort and contract liability, grant priority of the association's lien over first mortgages, impose an obligation on the association to retain records and to provide resale certificates, clarify the rights of action given unit owners

and the association, and include provisions for attorneys' fees. Attorneys representing pre-act associations should carefully examine the automatically applicable sections to determine what impact they will have on their clients.

(c) **The Opt-in Provisions.** Section 19 of the Act provides that any pre-act project subject to that section — that is, any large pre-act cooperative or planned community, any pre-act condominium, and any electing small pre-act cooperative or planned community — may amend its declaration and bylaws to accomplish any result permitted by the Act. The kinds of amendments contemplated by this Section are many; the section is designed to make the much broader flexibility of the Act available to an old project to, for example, enhance its borrowing capacity, permit a restructuring of the bylaws, enlarge the activities of the association, or a variety of other changes. Importantly, any such amendment must be accomplished in conformity with the law of the project — that is, the law under which it was created — as well as the procedures set forth in the current documents of the project. Thus, while the Act permits the declaration to be amended, for example, by 67% of the unit owners, a declaration for an existing project which required a 90% vote to amend could only be amended with that 90% unit owners' consent. Moreover, to prevent abuse, the section provides that if any new rights, powers or privileges are granted to any person, then any correlative obligations, liabilities and restrictions in the Act also apply to that person. Accordingly, an amendment under this section would automatically pick up the entire bundle of rights and responsibilities applicable to any particular transaction, regardless of any attempt in the amendment to limit that result.

(To be Continued in Fall Issue)

FOOTNOTES

¹ Mr. Breetz is a principal in the Hartford law firm of Reid and Riege, P.C., and is the Chairman of the Connecticut Law Revision Commission. As a reporter for the National Conference of Commissioners on Uniform State Laws, he was the principal draftsman of the Uniform Common Interest Ownership Act and its constituent Acts, including the Uniform Condominium Act, the Uniform Planned Community Act and the Model Real Estate Cooperative Act. The amendments to UCIOA, and were prepared under the auspices of the Law Revision Commission, which recommended its adoption in Connecticut.

² It may be helpful to understand the background and development of the Uniform Common Interest Ownership Act.

Recognizing the need for a comprehensive statute responsive to the explosive growth and variety of condominium development in this country since the first state condominium statute was enacted in 1963, the National Conference of Commissioners on Uniform State Laws undertook to draft the Uniform Condominium Act in the Fall of 1975. UCA was completed and adopted by the Conference in 1977. It has since been adopted in eight states, including Maine, Minnesota, Missouri, Nebraska, New Mexico, Pennsylvania, Rhode Island and West Virginia.

As an outgrowth of UCA, the Conference promulgated the Uniform Planned Community Act in 1980. UPCA was designed to apply to all forms of common interest ownership, other than cooperatives and condominiums. In 1980, the Conference also adopted substantial amendments to the 1977 version of the Condominium Act, so that UCA and UPCA were identical, except in those areas where differences in the nature of the ownership forms warranted special treatment.

In 1981, the Conference promulgated the Model Real Estate Cooperative Act, applying the principals of the UCA and UPCA to cooperatives.

All three acts used the identical section numbering systems, with four mandatory articles and an optional article 5 on administration. This enabled the Conference, in 1982, to merge the three acts into a single statutory vehicle, the Uniform Common Interest Ownership Act, which applies to all 3 forms of common ownership. The merged Act is barely 10 pages longer than any of its single constituent parts.

Reference to the parallel section of these Uniform Acts may be helpful to practitioners since each of the uniform acts, including the merged Act, is accompanied by a set of detailed comments describing the impact of the statute and the relationship of one section to another. Copies of the individual Acts, with their comments, appear in West's Uniform Laws Annotated. They may also be obtained by letter to Ms. Alicia Pond, Executive Secretary, Uniform Laws Conference, 645 North Michigan Avenue, Suite 510, Chicago, Illinois 60601.

³ While The Connecticut Act is based almost entirely upon the Uniform Common Interest Ownership Act, our Judiciary Committee chose to delete the reference to a "uniform" act because of minor differences between the Uniform Act and the Connecticut version. Notwithstanding those minor variations, it is hoped that the codified version of the Common Interest Ownership Act in Connecticut will reflect the section titles and numbering system of the Uniform Act, as was done with the Uniform Commercial Code. This will permit ready reference to the uniform acts, with their comments, and to statutes and case law in other states which have adopted any of these uniform acts. Such a system would also enable other states to more easily relate their consideration of the uniform acts to Connecticut's enactment. At the date of this writing, no final determination had been made by the Legislative Commissioner's Office with respect to the form of codification.

⁴ A "condominium" is defined in Act §3 (8).

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

A "cooperative" is defined in Act §3 (10).

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

A "planned community" is defined in Act §3 (23).

"Planned community" means a common interest com-

munity that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community.

5 Section 5 is entitled "separate titles and taxation". The present rule in §47-79 C.G.S. is that condominium units must be separately taxed and assessed and no separate tax bill may be assessed on the common elements. Section 5 continues that result. Most significantly, the same rule is applied to planned communities; cooperative units, however, will not be separately taxed. This will change the practice under which municipalities tax the value of individual PUD units, and also levy a separate tax on the common property, since it is a separate parcel owned by the association, even though the common property has no economic value apart from the units. If the common property remains subject to development rights, however, it must be separately taxed and assessed, and the declarant alone is liable for those taxes.

Section 6 is a direct prohibition on local regulations of conversions, reflecting the same public policy of §47a-23c., C.G.S.

Section 7 contains a variety of provisions dealing with the unique aspects of eminent domain in the common ownership context. It supplements, and does not supplant, general state statutes dealing with the subject.

6 The definition of "unit" includes a concise separate provision to describe what it is that a unit owner "owns" in a cooperative. It is designed to carefully distinguish between the unit owner's possessory interest in the unit coupled with his ownership interest in the association, and the fee ownership of the real estate comprising that unit, which is vested in the association. The section provides that a sale, conveyance or encumbrance of a unit owner's interest does not affect the association's interest in that unit.

7 Section 17 provides:

Except as provided in Section 18, (an exception for small pre-act projects) Section 5, 6, 7, 23, 24 and 41, subdivisions (1) to (6), inclusive, and (11) to (16) inclusive, of subsection (a) of section 45, sections 54, 59, 61, 71 and 79, and section 3 to the extent necessary in construing any of those sections, apply to all common interest communities created in this state before the effective date of this act; but those sections apply only with respect to events and circumstances occurring after the effective date of this act and do not invalidate existing provisions of the declaration, bylaws or surveys or plans of those common interest communities.

The impact of Sections 5, 6, 7 is described in Footnote 5.

Section 23 is entitled Construction and Validity of Declaration and Bylaws. Its major impact, other than dealing with severability, conflict and rule against perpetuity problems, is to insulate the title of the units and common elements from claims of unmarketability as a result of an "insubstantial" failure of the declaration to comply with the Act.

Section 24 is entitled Descriptions of Units, and merely validates the use of an abbreviated reference to the unit's identity in deeds and other instruments requiring a legally sufficient description of a unit.

Section 41 is entitled Merger or Consolidation of Communities. Like present §47-88, C.G.S., §41 provides a flexible mechanism for pre-act communities to merge or consolidate with other communities where such an action is viewed as desirable by the unit owners.

Section 45 describes the powers of the association. The powers newly granted to pre-act associations are to (1) adopt and amend bylaws and rules; (2) adopt and amend budgets and collect assessments; (3) hire and fire; (4) institute, intervene in and defend litigation in both a direct and representative capacity "on matters affecting the common interest community"; (5) make contracts and incur liabilities; (6) regulate the use and repair of the common elements; (11) impose charges and interest for delinquent assessments or violation of rules; (12) impose charges for preparing amendments or resale certificates; (13) indemnify directors and officers and provide directors and officers liability insurance; (14) assign its rights to future common expense assessments; (15) exercise other powers confined in the project documents, and (16) exercise all powers exercisable by other "legal entities of the same type as the association" which, under typical Connecticut practice, are the powers of nonstock corporations under Chapter 600 of the General Statutes. A number of these powers plainly exceed the present authority of many current unit owner's associations.

Section 54 is entitled Tort and Contract Liability. Its principal impact is to (i) make the declarant liable for claims against the association occurring during the period of declarant control, (ii) provide procedural devices to assist the association in asserting its claims, and (iii) insulate unit owners from liability.

Section 61 requires the association to keep certain financial records, and to make them available to unit owners.

Section 71 requires every unit owner in a common interest community — except owners in certain small projects — to provide a resale certificate to a purchaser "before execution of any contract for sale . . . or otherwise before conveyance . . ." The association is required to prepare the certificate, which contains a substantial amount of information concerning the project, within 10 days of a request. To enforce the obligation, the purchaser has an unqualified right to cancel a sales contract until 5 days after the certificate is delivered, although actual conveyance cuts off the cancellation right. This new obligation of a seller, and new right of a buyer, is likely to be the subject of substantial discussion in future months.

Section 79 provides a clear right of action to any person for violation of the Act, and empowers the court, "in an appropriate case", to award attorneys fees.

Cross-Reference Table — Public Act 83-474
CONNECTICUT COMMON INTEREST OWNERSHIP ACT

ARTICLE I — General Provisions

PART I

Definitions and Other General Provisions

Public Act Section No.	Uniform Act	Section Title
1	1-101	Short Title
2	1-102	Applicability
3	1-103	Definitions
4	1-104	Variation by Agreement
5	1-105	Separate Titles and Taxation

THE CONNECTICUT COMMON INTEREST OWNERSHIP ACT: WHAT CONNECTICUT REAL ESTATE ATTORNEYS NEED TO KNOW

By

William R. Breetz, Jr., Esq.

Part II

Part I of this Article, which appeared in the last issue of *Perspectives*, reviewed applicability and some other major concepts of P.A. 83-474, the Connecticut Common Interest Ownership Act (the "Act"). The Act becomes effective on January 1, 1984, except for the conversion provisions which became effective July 8, 1983.

This part examines in greater detail the principal issues affecting attorneys who represent buyers and sellers of individual units. Part III to appear in the winter issue of *Perspectives* will examine the impact of the Act on the developer, and on the lender involved in construction loans or in securing secondary market commitments for end loans in common interest communities.

THE LAWYER'S DILEMMA.

Most Connecticut attorneys will first wrestle with the Act when asked by a purchaser to review a Public Offering Statement ("POS") received from a developer, or when representing a unit buyer or seller on resale. This section focuses on the Act from that perspective, and asks "what should I, as buyer's counsel, worry about?" A subordinate but very real issue that buyer's counsel must ask is, "How can I provide adequate representation to a client at a fee which the client is willing to accept?" The economics of this equation do not always work easily, and a concern voiced repeatedly by the drafters of the Act was how the Act would affect buyer's counsel, faced with the obligation to provide a reasoned explanation of a complex transaction at a reasonable price. Although perhaps not readily apparent at first reading, the Act was drafted with a standard in mind of being readily understood, after some effort, by the average attorney. Hopefully this series of articles will facilitate that process.

AN OVERVIEW FROM THE BUYER'S PERSPECTIVE. The individual buyer usually does not have enough leverage to cause a change in the project documents of a common interest community, although this may not be true for lawyers representing multiple buyers, or buyers in small projects. At the same time, knowledgeable counsel often can secure individual concessions in the client's sales contract, particularly during the "cooling off" period.

Counsel's other roles are to explain the implications of the transaction, and to insure that good title is transferred. The POS is helpful in fulfilling the former role. The greatest consumer protection provided by the Act is disclosure, and the POS should provide buyer's counsel the information necessary to evaluate the transaction and advise a client.¹ While the Act provides great flexibility to the developer creating a project, it also requires that each of the development rights to be retained be disclosed in detail. Buyer's counsel needs to understand the implications of some of those development rights, as well as greater flexibility in financing afforded the developer in the Act.

Significant warranties and other consumer protections are provided by the Act. The majority of the provisions benefiting the purchaser are contained in Article 4 of the Act, Sections 63 through 82. Special provisions benefiting purchasers and tenants in conversion projects are contained in Article 5, Sections 83 through 95. The Act also has significant new provisions governing the association's relationship to its individual owner/members. A buyer should be aware of what the association can do for, and to, that buyer.

Finally, a number of conveyancing matters are treated in the Act. These should not affect the buyer's interest, but will affect the lawyer's role of insuring transfer of good title.

DISCLOSURE.

1. Summary of the disclosure provisions of the Act:
 - a. The Act generally adopts the same broad disclosure requirements imposed on "declarants" - typically, the developer - by the Connecticut Condominium Act of 1976, Chapter 825;
 - b. The Act expands the amount of mandated disclosure in significant ways;
 - c. The Act applies this increased level of disclosure to planned communities and cooperatives, where no disclosure was previously required;
 - d. This level of disclosure applies to all "new" projects - that is, projects created after January 1, 1984 - unless the project or the particular transaction is exempt from disclosure;

e. With respect to "old" projects - that is, projects created before January 1, 1984 - other forms of disclosure, either the present POS requirements for "old" condominiums or resale certificates under §71 for "old" planned communities or cooperatives, are required of declarants; and

f. A short form of disclosure, the §71 resale certificate, is required of all unit sellers in nearly all projects, both old and new.

2. **Applicability and Exemptions.** Buyers' counsel should know the disclosure to which his or her client is entitled. Section 63 discusses applicability of the disclosure requirements.

"New" Projects. Disclosure must generally be provided by a declarant of any common interest community created after January 1, 1984. Buyers of units in nonresidential projects may waive disclosure. Limited exemptions from disclosure are granted in §63(b) for particular transactions - that is, a gift, court-ordered disposition, disposition by government, or disposition pursuant to a "nonbinding reservation agreement," which is a reservation which may be canceled by the purchaser at any time without penalty.²

There are only two significant exemptions from disclosure for entire "new" projects: (a) "simple" planned communities with annual assessments limited to \$300 per year; and (b) "simple" common interest communities, including condominiums, containing 12 or fewer units. Both exemptions have significant limitations.³

The collective effect of these limitations will be that relatively few new projects will be free from disclosure under those provisions. Some "old" planned communities which in fact operate below this figure may wish to amend their declarations, under the "opt-in" provisions of the Act, in order to avoid the necessity of resale certificates under §71. Other old projects may find the certificates desirable.

Moreover, although there is no statutory mandate that disclosure be provided in such cases, the experience of many planned community developers under current law is that a POS in some form is a useful marketing device for his real estate broker. For that reason, buyers' counsel may find that disclosure will be provided in some projects which are not mandated to disclose.

"Old" Projects. The POS requirements do not apply to projects created before January 1, 1984. Accordingly, a pre-Act condominium declarant must still provide a POS complying with Chapter 825, while a declarant of either a pre-Act cooperative or planned community is not required to provide any POS. In every case where delivery of a POS is not required, however, §71 requires that every "old" and "new" project unit owner must furnish a variety of documents, including a resale certificate, to a unit purchaser before execution of any contract for sale of a unit, or otherwise before conveyance. For that reason, declarants offering units without

a POS in projects created before January 1, 1984 will be required to comply with the more limited disclosure imposed under §71. This should change the practice of developers of currently existing planned communities which are not yet sold out. Buyer's counsel should look for the §71 certificates because of the cancellation rights and information those certificates provide. See the analysis of resale certificates, *infra*.

3. **Liability for Failure to Disclose.** Because the Act relies primarily upon disclosure for consumer protection, there are 2 forms of liability imposed on declarants who fail to properly disclose. In the case of a complete failure to disclose, the consequence is described in §71(c):

"If a person required to deliver a POS fails to provide a purchaser with the POS and all amendments thereto as required by subsection (a), the purchaser, in addition to any rights to damages or other relief is entitled to receive an amount equal to 10% of the sale price of the unit plus 10% of the proportionate share of any indebtedness of the association secured by security interests. . . ."

The 10% penalty is designed as an "atomic bomb", requiring no evidence of actual damages or other proof except that the POS or the amendments were not delivered as required by statute.

Sections 64(c) and 79 set out the standard of liability for failure of the POS to adequately disclose:

"The declarant . . . is liable to all persons claiming an interest in the common interest community . . . under Section 79 of this Act for any false or misleading statement set forth therein or for any omission of a material fact therefrom with respect to that portion of the public offering statement which is prepared. If the declarant did not prepare any part of the public offering statement that he delivers he is not liable for any false or misleading statement . . . unless he had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission." (emphasis added).

Section 79 of the Act provides that if a declarant or other person fails to comply with the Act, any person or class of persons adversely affected by the failure has a claim for appropriate relief, including the right of punitive damages for willful failure to comply and, in an appropriate case, reasonable attorneys fees.

From the buyer's perspective, this liability system represents a significant improvement on the old provisions of §47-90a which provided condominium purchasers the right to reconvey a unit, in addition to other (unspecified) remedies, within one year following purchase for failure to disclose under Chapter 825. Section 47-90a will, in a sense, self destruct on January 1, 1985, one year after the last project may be created under Chapter 825.

4. **Buyer's Right to Cancel. The 15 day "Cooling Off" period. The Importance of POS Amendments.**

In Section 70(a), the Act continues current condo-

minium law that permits a purchaser, before conveyance, to cancel a sales contract within fifteen (15) days after executing it. The right is absolute, and the buyer is entitled to full return of any deposit. In an ideal world, the buyer's attorney should review the POS during that fifteen (15) day period; unfortunately, counsel often does not have the opportunity to review the POS until a loan commitment has been secured, and the buyer realizes that he may have to pay an attorney's fee in order to close. In some instances, however, the requirement in §65(b) that "a declarant promptly shall amend the POS to report any material changes or information to be required to be included in the POS", coupled with the requirement in §70(c) that those amendments must be provided to a purchaser, may offer additional opportunity for negotiation.

Those sections clearly identify the declarant's obligation to keep the contract purchaser informed of changes in or affecting the project. The requirement that amendments to the POS be provided the purchaser does not extend the 15 day "cooling off" period. Indeed, the delivery of such amendments is required even if the cooling off period has expired. The purpose of the requirement is to insure that unit purchasers are advised of any material changes in the project which may affect their contract under general law. A material change in the project affecting buyer's unit or the project as a whole, of course, would normally constitute a novation and such amendments could be significant in negotiations between buyer and seller. The penalty for failure to promptly provide the amendment would appear to come within the 10% penalty provisions of §70(c), although that result is not completely clear from the text of the Act.

The impact of possible amendments to the POS is often addressed in the declarant's form sales contract, since the possibility of future changes in the project documents after the project is being marketed haunts declarant's counsel. For the same reasons, the relevant clauses in the sales contract should concern buyer's counsel.

The most common amendment problem faced by declarant is that the end lender seeking loan purchase commitments from secondary market mortgage buyers - FNMA, FHCMC and others - may require changes after lender's counsel reviews project documents which may have already reached the sales force. The other common problem is the declarant who changes his mind as to various aspects of the project, or responds to market conditions, after marketing has begun. Some developer's counsel seek to avoid these potential problems by providing, in the sales contract, that the declarant reserves the right to unilaterally change the POS or declaration as he sees fit. A more balanced contract clause would permit document amendments to meet requirements imposed by institutional end lenders or the secondary market. Buyer's counsel should refuse to accept the broader clause, and should insist on the right to cancel a contract containing either clause if any material changes are made.

5. Substantive Disclosure Requirements.

The broadest disclosure standard of the Act is contained in §65(a) (19), which requires that the POS "fully and accurately disclose . . . (19) all unusual and material circumstances, features and characteristics of the common interest community and the units." The balance of §§65 through 68 discusses particular items of disclosure. Thus:

- Section 65 discusses disclosure applicable to all common interest communities.
- Section 66 requires additional disclosure for projects where development rights are reserved.
- Section 67 requires additional disclosure for projects where units are being sold in time shares; and
- Section 68 requires special disclosures for projects which involve conversion of existing buildings.

Disclosure in all Projects. Since §65 require many disclosures currently required by Chapter 825, this part focuses on the mandated disclosure of §65 only to the extent it changes current condominium law.

As a matter of style, the actual name of a condominium or other common interest community need not include the form of ownership; thus a condominium known as "Happy Acres" need not be called "Happy Acres Condominium" but may simply be called "Happy Acres".

Section 65(a)(2) requires a declarant to disclose, among other things, his schedule of commencement and completion of construction of buildings and amenities, to the extent known. In considering that disclosure, the constraints imposed by a construction lender should be examined. Many phased project developers will face time limits within which commitments for construction financing in subsequent phases is available.

Subsection (a)(3) requires a declarant to disclose the number of units in the common interest community. In an expandable project, the POS should include the number of units to be in Phase 1 when the declaration will be recorded, while, under Section 66, the POS should disclose the number of units that may ever be a part of a planned community. Unlike current condominium law, there is no time limit on the period within which those units may be built, except the declarant's self-imposed limit.

The POS must include a brief narrative description of contracts or leases that may be subject to cancellation by the Association. See §65(a)(4). This includes all agreements with the declarant or a related party, any management or employment agreement, any lease of parking and recreational facilities, as well as any contract or lease which is not "bona fide", or is "unconscionable" or "commercially unreasonable."

Under subsection (5), the POS must include a budget for one year after the first conveyance and thereafter the current budget of the association. This mandates amendments to the POS for budgets in years after the first year. Unlike current law, the budget must include assumptions concerning occupancy and inflation. In a significant departure from current law, there is no

requirement in either a conversion or new condominium or other project, that there be "adequate" or even any reserves for repairs or replacement, but the fact that there are no reserves in the budget must be disclosed. The standard of "adequate" under old law raised a series of difficult problems.

Subsection (6) requires disclosure of a practice known as "low balling." If, as a marketing device, a developer intentionally reduces current common expenses in order to encourage sales, and instead provides those services himself to the project at no fee during the sales period, the anticipated effect of those increased services on future common charges must be disclosed. If a declarant failed to disclose such uncharged services, and they were "material," the declarant might be subject to liability under §79 for the cost of providing those future services.

All fees due from the purchaser at closing must be described in the POS; see §65(7). Under §65(9), the declarant must describe not only the financing which he is offering, but financing which he may have "arranged."

The declarant, under subsection (12), must disclose any unsatisfied judgments or suits pending against the association and any other pending suits "material to the common interest community of which the declarant has actual knowledge," even though the declarant is perhaps not a party to those actions.

Subsection (17) requires the declarant to disclose the extent to which he has arranged financing to complete improvements which he is required by his project documents or promotional materials to complete; §§80 and 81 describe the substantive obligation on declarants; see that discussion, *infra*.

Under subsection (18), the declarant is required to provide a brief narrative description of zoning and other use requirements "affecting" the common interest community. This is a potentially significant matter, particularly as to abutting land which the developer may or may not own or have knowledge of.

Again, §65(d) requires the declarant to promptly amend his POS to report material changes in the information required to be disclosed.

Disclosure of Development Rights. Under Section 66, all the declarant's development rights must be disclosed in detail, together with an indication of the self-imposed period of time within which those rights may be exercised, or will lapse. The subjects about which disclosure must be made are detailed, although the declarant is frequently permitted to state that he "makes no assurances" with respect to a particular issue.

Section 66(12) is a potentially important provision. It requires the declarant to describe the extent to which any assurances which he has made with respect to the exercise of development rights would apply or not apply if those rights were not exercised. For example, assume a declarant reserved the right to add 50 additional acres of land to a condominium, and assured potential purchasers that if he added the land, he would also build a swimming pool and 100 townhouses on that land.

The POS would have to indicate what the consequences might be, in that case, if the declarant chose not to add that land.

Time Shares. Section 67 requires particular disclosure in the case of time shares. Otherwise, the Act generally does not specifically affect time share projects, although the general requirements of §65 would apply.

Conversion Buildings. Section 68 discusses the special information which a POS must contain concerning a conversion building. The material required is somewhat different than that provided for condominiums under current law. For example, the Act eliminates the current requirement that a 3 year budget of past building expenses be provided, since past operating expenses are frequently not available or, when available have often borne little relationship to the experience of the project after conversion. There are other changes which become apparent when this section is compared to present §47-88b(a)(1) through (4). Importantly, the information required by §68 must be provided even in a common interest community which contains no more than 12 units and where no other disclosure is required; see § 3(b).

6. The Resale Certificate

Section 71 is an important new device benefitting buyers and their attorneys in both "old" and "new" projects. Section 71 applies automatically to all pre-existing projects, unless exempt. As a result, owners of units in all existing condominiums, planned communities and cooperatives must provide a resale certificate upon resale unless the project is either under 12 units or is a project whose declaration restricts annual assessments to \$300 per year; see footnote⁴, *supra*.

Section 71 requires that the buyer be given a copy of the declaration, bylaws, rules and regulations of the association, and any current POS if any special declarant rights - which include declarant control of the association, as well as all development rights - are still outstanding. The buyer is also entitled to a certificate containing 10 enumerated facts, most of which relate to the financing condition of the project. Two of these - the effect on the proposed disposition of rights of first refusal, and the extent to which monthly common charges have been paid - are required by current law for condominiums, although the deadline now required for delivery is simply prior to conveyance.

The remaining required information includes fees payable by the seller; a statement of the association's projected capital expenditures for 2 years; a statement of any reserves of the association; a statement of any judgments against the association, or pending suits in which the association is the defendant; a statement of insurance coverage; restrictions or limitations on the amount of profit that a unit owner may secure upon sale; and, in a cooperative, an accountant's statement if any has been prepared concerning the deductibility of any portion of common charges under federal income tax.

The Act requires a unit owner to furnish the certificate, but also requires the association to provide the seller information that he needs. The certificate must be furnished before execution of a sales contract, if there is one, and otherwise before conveyance. Subsection (c) provides, however, that a unit owner is not liable to a purchaser for failure or delay in providing the certificate.

While the public policy represented by the mandated resale certificate is important, the enforcement mechanism has created some controversy among real estate brokers. To provide a meaningful sanction for delivery of the certificate, the purchase contract is voidable by the purchaser until the resale certificate has been provided and for 5 days thereafter or until conveyance, whichever first occurs. No reason is required; this is simply an additional "cooling off" period and enforcement mechanism.

Thus, while conveyance cuts off any rights of cancellation, a resale purchaser has the right to cancel his sales contract for 5 days after a resale certificate is delivered. In states which have enacted the Uniform Condominium Act, this provision has apparently not proved to be a problem. A possible solution to the broker's perceived dilemma may be for the broker to secure the required information from the unit owners association when the listing is secured, and provide it to every prospective purchaser.

When representing a resale purchaser, buyers' counsel should be aware of the implications of §71, both as to the information which the client is entitled to receive, and the 5 day "cooling off" cancellation period that it provides.

7. Labeling of Promotional Material.

In addition to the POS, §§80 and 81 of the Act are important constraints on a developer's promotional activity. Section 80 provides that no promotional material may be displayed or delivered to prospective purchasers which describes or portrays an improvement which is not in existence unless that promotional material is conspicuously labeled either "must be built" or "need not be built". Under §81, unless improvements are labeled "need not be built", the declarant must complete all improvements depicted on site plans or other graphic representations. These sections are likely to change the content of promotional materials in significant ways, and thorough counsel would welcome the opportunity to compare the promotional material with the POS.

WARRANTIES

Sections 75 through 78 treat the express and implied warranties provided by a declarant under the Act. Counsel should be aware that the warranties under the Act, combined with existing statutory warranties, form a complex set of warranties that sometimes overlap. Other statutory warranties include the new home warranties under §§47-116 through 120, the 3 year "code compliance" warranty of §46-121, C.G.S., and

the federal Magnuson/Moss Act warranties for tangible personal property, 15 U.S.C. §2301 et seq.

Express Warranties. Section 75 sets out a series of express statutory warranties. No provision of the Act permits waiver of those express warranties, but the warranties are limited to the extent that they must be "relied on by the purchaser." See §75(a). Accordingly, it would be useful for counsel to ask the client whether or not any representations or promises coming within these warranties were made. The fact that a form sales contract prepared by the seller provides that no such promises were made or relied on - a quite typical provision - should not be binding on the buyer if such promises in fact existed and were relied on. See §§11 [unconscionability] and 12 [obligation of good faith] of the Act; see generally, Restatement 2d, Contracts, §§380, 381. This appears to be the law in this state and elsewhere. See the authority cited in the footnote.⁴

Section 75(a)(1) provides that representations made which relate to the unit, use of the unit, or rights appurtenant to the unit or to the common interest community, create an express warranty that the unit, area improvements, and related rights and uses will conform to the representation.

Section 75(a)(2) provides that a model or description of the physical characteristics of the common interest community, including plans and specifications for improvements, create an express warranty that the common interest community will substantially conform to the model or description.

Third, under §75(a)(3), a description of the amount of real property comprising the common interest community creates an express warranty that the common interest community will conform to the description.

Finally, a provision that the purchaser may put a unit only to a specified use, such as a residential use, is a warranty that the use is lawful.

Section 75(c) contains a neat compromise between competing interests, the effect of which is not immediately clear under current Connecticut case law. It provides that a conveyance of the unit transfers to the purchaser all express warranties made by previous sellers, but only to the extent that a similar transfer of warranties occurs upon a conveyance under Chapter 827 of the general statutes. Thus, any rights of resale purchasers to claims against the original declarant must be interpreted in a future judicial decision.

Implied Warranties. Section 76 deals with implied warranties, which are given to a buyer upon purchase unless expressly excluded. Those warranties are as follows:

Under §76(a), a unit must be in at least as good condition at the time of conveyance or delivery of possession as it was at the time the sales contract was signed.

Section 76(b) (concerning construction quality.) Under this section, the declarant warrants that a

unit and the common elements are suitable for their intended use and that the improvements made by the declarant and by any other person prior to creation of the common interest community - an important provision in conversion projects - will be (1) free from defective materials and (2) constructed according to law, in accordance with sound engineering and construction standards, and in a workmanlike manner.

Under §76(c), a declarant warrants to a residential purchaser there an existing use does not violate applicable law at the time of conveyance or occupancy.

Importantly, the warranties on the common elements provided to the purchaser under §76 also extend to the association; see §76(g).

Exclusion of Warranties; Limitation on Warranty Period. Section 7 deals with limitations or exclusions of implied warranties. Most importantly for the residential purchaser, no general disclaimer is effective. A declarant may disclaim liability in an instrument signed by the purchaser "for a specified defect or class of defects", but only if that defect "entered into and became a part of the basis of the bargain." The official Comments to §4-115 of the Act indicate that this requirement of a signed instrument "is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties."

Plainly, buyers' attorney should carefully review the closing package prepared by the seller, including any such waiver document - which must be included in the POS by virtue of §65(a)(4) - and apprise the client both of the rights being waived, and the consequences of waiver. Note that, even if implied warranties under the Act are waived, the warranty under §47-121, C.G.S., which overlaps the Act's warranty, may not be waived.

If the implied warranties are not limited or excluded, an action to enforce them must be brought by a unit owner within 3 years of purchase of a unit or, as to a common element, within 3 years after first use. See §78.

OTHER SIGNIFICANT BUYER ISSUES

1. ESCROW OF DEPOSITS

If a purchaser makes any deposit when buying a unit from a declarant, that entire deposit must be held in escrow; see §72. The declarant himself may not be the escrow agent. The Act does not require payment of interest on an escrow deposit, but the parties may contract for interest. The escrow requirements apply in connection with any deposit made by a purchaser, whether pursuant to a binding sales contract or a nonbinding reservation agreement, and regardless of the characterization of the deposit as some other form of payment. Counsel for buyers therefore should not accept the occasional practice in which a portion of a deposit is characterized as a payment for custom work

in a separate contract, and thereby alleged not to be subject to the provisions of this section. Counsel should also be aware of §75(b), which provides that "any person who procures the wrongful release of any escrow funds . . . with intent to defraud the purchaser, shall be guilty of embezzlement."

While those escrow rules provide important protection for buyers, the Act rejects the current rule of §47-74d(b), C.G.S. requiring an escrow of 5% of sales proceeds until all common elements in a condominium are completed. This significant limitation of cash flow penalizes all developers of major phased projects, despite the fact that very little evidence existed of abuse. In those cases where developer abuse did exist, the 5% escrow was of very minimal help.

2. RELEASE OF LIENS AT CLOSING

Section 73, on release of liens, states a very different rule than that currently existing for condominiums under §57-87(a), C.G.S. First, the section contemplates that there may be underlying liens, either on the unit or on the common elements, which the buyer may assume and thus which need not be released at closing. Thus, the unit need not be released from liens on potentially "withdrawable" land, or from liens "which the purchaser expressly agrees to take subject to or assume". A buyer's willingness to assume a lien, of course, is a matter of contract.

Moreover, the declarant may convey common elements to the association subject to underlying liens in specified amounts. It may be anticipated that this device will be used in some cases as a means to reduce unit purchase prices; this will appear to make the units more competitively priced and, depending on the underwriting used by end lenders, may increase the number of buyers who qualify for a loan in the project, since their incomes may now meet the loan-to-value ratio applied by a lender. Such debt structure may help some buyers acquire housing they otherwise would not qualify for, and may permit declarants to take advantage of favorable blanket mortgages. Thus, buyers in some cases will be aided by this flexibility. The practice should have essentially the same economic impact as land leases used in some Connecticut projects.

There is, of course, a potential dark side to such liens. Debt service on those loans may significantly increase common charges, and the interest paid by the association on its debt is not likely to be tax deductible to the unit owner, in contrast to the classic cooperative result under §216 of the Internal Revenue Code. For marginal buyers, the impact of this debt may burden the family budget, particularly if debt service is structured as a "springing charge" some years in the future. Such charges have been seen in a number of conversion projects where, for example, the manager's apartment has been treated as a unit which the association is required to purchase some years in the future, when the declarant anticipates that all the units will be sold. Accordingly, buyer's attorneys faced with

underlying debt, either on the units or on the common elements, should counsel their clients on the financial implications of those loans, and the unwelcome surprise they may represent.

3. INSURANCE.

Buyer's counsel should be aware of Section 56, which imposes significantly different insurance requirements than the rules presently existing for condominiums. There are, of course, no current rules affecting planned communities and cooperatives, except those imposed by the secondary market.

Section 56 is a lengthy section with many provisions of particular interest to the association. From the buyer's perspective, the importance of the section is that it requires the association to maintain, to the extent reasonably available, casualty insurance of the common elements of not less than 80% of actual cash value. The association also must maintain liability insurance in an amount set by the directors or the declaration covering all risks commonly insured against for death, bodily injury and property damage arising out of or in connection with the use or ownership of the common elements. In a building that contains units having horizontal boundaries - that is, high rise or other buildings where a unit encroaches on the air space of another unit - the association must also maintain casualty insurance on the units in a minimum amount of 80% of actual cash value. That insurance need not include improvements and betterments installed by unit owners. Be aware that even though the Act requires a minimum of 80% actual cash value - in order to avoid co-insurance problems - the current requirements of the secondary market are that the association must carry casualty insurance in an amount equal to 100% of replacement cost, a substantially more expensive product. Obviously, the premiums for this insurance are reflected in the common charges paid by unit owners. The owner, as a result, will not be required to carry any insurance for his own benefit in many projects, other than a contents policy and a personal liability policy. The POS is required to describe the insurance coverage carried for the benefit of unit owners.

4. ANALYZING DEVELOPMENT RIGHTS AND FLEXIBILITY.

The buyer's attorney should be aware of the significantly greater flexibility given a declarant in allocating common expense liabilities, votes and common element interests in projects, as well as creation of development rights. For that reason, he should review and understand the developer's flexibility, to be described in more detail in the next part of this article. A few highlights are given here.

Allocated Interests. In a change from condominium law, votes and common expenses may be allocated on a basis which is different from each other or from common element interests. Common expense liabilities, for example, may be the same as voting rights, or

common expenses may be allocated on the basis of relative size or any other basis, while votes are equal. Moreover, a variety of special allocations of common expenses may be made, and the method by which these expenses are allocated to various units will have a significant impact on an owners' monthly charges. Understanding this, a review of the budget will be very helpful, and the impact of "low balling" should be considered.

Development Rights. Buyer's attorneys should understand the concepts of "convertible land," "convertible units", "additional land" and "withdrawable land." The buyers risk of unanticipated changes in project's quality and lifestyle will be substantially greater where declarants reserve long time periods within which to exercise development rights, and where "no assurances are made" respecting such things as future unit sizes, styles, amenity packages, or even sufficient units to carry front-ended recreational packages.

Changes in Unit Size and Mix. Traditionally, it has been assumed that the number of units in a condominium is fixed by the declaration, and that the boundaries of those units are immutable. Sections 31, 32 and 33 of the Act, however, provide substantial flexibility in these respects, and unit owners and their lawyers ought to be aware of these possibilities.

Section 31 provides that if a person acquires two adjoining units, the owner may remove or alter intervening partitions or "create appurtenances therein" without approval from the association unless the declaration limits that result. Section 32 provides that, subject to the provisions of the declaration, the boundaries between adjoining units may be relocated so that, for example, a bedroom belonging to one unit could be sold to the owner of another unit, changing the bedroom mix. This may be accomplished by agreement of the two adjoining unit owners.

Finally, under §33, if the declaration affirmatively provides for the subdivision of units, a single unit may be subdivided into two or more units, or units and common elements, or only common elements. This is likely to be a commonly used device by declarants in larger buildings, where entire floors are declared as units subject to subsequent partition. In reviewing declarant's development rights, a buyer's attorney would want to pay attention to the number of units which may be created as a result of subdivision, and whether that space might become common elements to be supported by common charges.

Exercising Development Rights. The Act resolves a number of issues which have plagued both developers' and association counsel over many years. Section 35 makes clear that the declarant may maintain sales offices, management offices and models in the units, but only if the declaration permits them. It also provides that the declarant may maintain signs on the common elements. Section 36 provides that the declarant has an easement through the common elements necessary

for exercising whatever rights he may have reserved in the Act.

Having a picture in mind of how development rights may be exercised over time and realizing the great extent of the developers flexibility will permit buyer's counsel to analyze a project in general terms much more quickly than the layman. Since the Act presumes a free market will control the possible excesses of the development community, and since the POS is designed to facilitate an understanding of reserved development rights, the attorney may increasingly become the only "outside expert" available to advise the unwary buyer. The task is a formidable one.

5. DECLARANT'S LIABILITY.

Buyer's counsel should be aware that the declarant and any association directors appointed by him are fiduciaries of unit owners under the Act, so long as they control the association; see §46(a)(1). As such, they have substantial liability to unit owners for expenses that they may cause or force upon the association during the period of declarant control.

Buyer's counsel will also want to be aware of Section 54 of the Act, which provides that only the declarant is liable for his torts in connection with any part of the common interest community which he has the responsibility to maintain. Additionally, a unit owner is insulated from any claims arising from wrongs done by the association; if that wrong occurred during the period of declarant control, the declarant alone, and not the association, is liable for losses not covered by insurance. Declarant is also liable for all costs that the association incurs as a result of breach of contract or other wrongful act or omission. Any statute of limitations affecting the association's right of action against the declarant is tolled until after the period of declarant control terminates, and a unit owner is not precluded from maintaining an action under this section because he is a unit owner or because he is a member of the association. The association may bring an action against the declarant, or any other person, as representative of all the unit owners; see §45(a)(4).

6. LIENS RESULTING FROM JUDGMENTS AGAINST THE ASSOCIATION.

Section 60 has a potentially significant impact on unit owners. Basically, the section provides that a money judgment against the association, if recorded, is not a lien on the common elements but is a lien against all the units in the common interest community at the time the judgment was rendered. Section 60 represents a significant, and somewhat controversial, policy respecting the best means of enforcing money judgment against associations. The section is designed to enhance the ability of associations to secure services from creditors, and recognizes that the units rather than the common elements are usually the economic basis of the project. If a money judgment is rendered against the association, it may not be recorded for at least thirty (30) days, and the association is required under

subsection (c) to promptly send notice of the judgment to each unit owner. This is intended to insure that the unit owners will be aware of the lien about to be created on their units. If liens on units are created as a result of the judgment, subsection (b) permits a unit owner to secure a release of that lien by paying his pro rata share of the lien, or by posting a bond.

7. ASSOCIATION'S LIEN FOR COMMON CHARGES.

Buyer's counsel should be aware of the increased power which the association has to enforce its lien for common charges, fines and other charges against unit owners. These rights are generally described in §§59 and 60. In summary, the association has a statutory lien for its common charges, and no further record notice of the lien need be made by the association. To the extent of six months common charges, the association also has a "super lien" which is senior even to first mortgages on the unit which become effective after the effective date of the Act.

8. SPECIAL PROVISIONS APPLICABLE TO CONVERSION BUILDINGS.

The Act attempts to clarify the special rules in Connecticut for the protection of conversion tenants. They are important both for tenants who want to buy, and tenants who wish to continue renting. For the investor buying an occupied conversion unit, these rules potentially spell the difference between a profitable and a poor investment.

Section 84 defines several terms, including "conversion notice", "converted unit", "conversion tenant", and "transition period", being a period of time beginning on the date a tenant's apartment becomes a "converted unit" and ending 180 days after the tenant receives a conversion notice, or, if later, at the expiration of his lease.

Conversion tenants have the following rights, subject to certain qualifications which should be reviewed:

1. Under Section 85, tenants must be given at least 180 days notice prior to the time the tenant will be asked to vacate his unit.

2. Under Section 86, after receipt of a conversion notice a tenant has a 60 day exclusive right to purchase the unit that the tenant occupies.

3. Under Section 87, after the tenant receives a conversion notice, he may terminate any existing lease on 30 days notice, regardless how long the lease may have to run.

4. Under Section 88, some conversion tenants are entitled to a relocation payment equal to the greater of 2 months rent or \$1,000, whichever is greater. Relocation payments are payable only if a tenant's "household income" is less than \$21,000 if the tenant is unmarried, or \$25,000 if married. A technical question, unanswered by the Act, is what constitutes a "household", if 2 or more unrelated persons or groups of persons are living in an apart-

ment, with or without a lease, at the time it becomes a converted unit. Whatever the Legislature intended, it is entirely possible, and common in many cultures, that several "households" may occupy a single apartment.

5. During a tenant's transition period, every conversion tenant may be evicted only for "good cause". "Good cause" includes refusal to pay a fair and equitable rent increase.

6. After his or her transition period ends, a conversion tenant may be evicted for any reason, including expiration of a lease, unless that tenant is also a "protected tenant". A "protected tenant" is any tenant living in a building or complex containing 7 or more units who is either over 62 years old, blind or physically disabled or whose spouse, sibling, parent or grandparent living with that tenant meets those criteria. There is no income limitation.

7. A protected conversion tenant may never be evicted, except for "good cause", prior to January 1, 1988. We may expect that the Legislature will be asked to eliminate the 1988 deadline.

8. Under Section 90, a conversion tenant's rent may not be increased during his or her transition period for any reason. After the transition period ends, a conversion tenant's rent, whether or not protected, may be increased only to the extent the increase is "fair and equitable", based on the same criteria considered by fair rent commissions. At least 60 days notice of any proposed rent increase must be given to a conversion tenant.

These rules obviously offer significant insulation for existing tenants from the consequences of conversion; Conversely, they may significantly affect the market value of an apartment building, particularly one occupied by a predominantly elderly group of tenants. This insulation does not presently extend to tenants in units who first rent after the unit is either converted, or who rent units in a newly constructed building subjected to a declaration before the tenant occupies. It is likely, however, that legislation will be introduced in the 1984 Legislature seeking to reverse that result. This would extend the so-called "subjective rent control" of fair rent commissions to all new apartment and condominium construction in Connecticut, posing substantial issues of public policy.

MISCELLANEOUS CONVEYANCING ISSUES.

The Act imposes a variety of changes which do not particularly affect the buyer's interest, but may affect the practice of lawyers representing buyers and sellers of units in common interest communities.

1. Description of Unit Boundaries. Current condominium practice is to include an extended description, in the declaration, of what portions of the building are part of the unit and which portions are part of the common elements. In an attempt to obviate the need for this extended description, §22 of the Act permits the declarant to simply designate the "walls, floors and

ceilings" as the boundaries of the unit. The declarant is not obliged to use that description, but if he does, §22 describes what the consequences of such a description are. As a result, in a normal high rise building, "walls, floors and ceilings" may be the only boundary descriptions contained in the declaration and that should serve the need of most owners.

2. Legal Descriptions of Units; Limited Common Elements.

Section 24 is a concise statement of all that must be said with respect to the unit in order to constitute a legally sufficient description. Henceforth, if: (1) the name of the common interest community; (2) the recording data for the original declaration; (3) the town in which the community is located; and (4) the identifying number of the unit, are stated in a deed or mortgage, that is a legally sufficient description of the unit and all rights, obligations and interests appurtenant to that unit, including its limited common elements. Thus, it would be legally sufficient to deliver a warranty deed to "Unit 6 in Happy Acres, Hartford, Connecticut, the declaration of which is recorded in Volume 2000, Page 192 of the Hartford Land Records." Caveat: if a buyer indicates that there are limited common elements appurtenant to the unit he wants to buy - parking spaces, patios, balconies, storage areas, sheds, garages, etc. - counsel should insure that the declaration has clearly achieved the intended result, and that the client understands whether he, or the association, must pay to maintain them.

3. Title Searching. Section 37 describes the method by which amendments to the declaration are made and the manner in which they are recorded. Because the Act changes the current method by which certain amendments to the declaration are made and indexed, an attorney searching the title of a unit in a common interest community created after January 1, 1984 should be aware of the provisions of §37.

Section 37 provides that an amendment to the declaration "shall be indexed in the grantee's index in the name of the common interest community and the association and in the grantor's index in the name of the parties executing the amendment." Often, the association will be the grantor. The one exception is contained in Section 32(a) of the Act with respect to amendments concerning a boundary between adjoining units. In cases of boundary amendments, the amendment must be indexed in the name of the grantor and the grantee, as well as in the name of the association. The declaration itself must be indexed in the grantee's index in the name of the common interest community and the association and in the grantor's index in the name of each person executing the declaration. See §21. Thus, a lawyer interested in obtaining a clear record of all amendments to the declaration affecting a particular unit would run the name of the common interest community in the grantee's index, run the name of the association in both the grantees' index and the grantors' index, and run the seller's title in the usual fashion.

FOOTNOTES

¹ The limitations of space do not permit an extended discussion of what might be done to create a clearing house in Connecticut of summaries of project documents. The fact is that at various times in the development of a project, documents are reviewed in detail, and it would be a relatively simple process for lenders or title companies to require written summaries to be prepared by reviewing counsel of all projects in excess of, say, 20 units. A cooperative effort by lenders and title companies across the state to compile such summaries in a standard format and in a central location would provide a great service, at reasonable cost, to buyers, attorneys, brokers, property managers and spot lenders.

² While no POS is required under the Act before a buyer signs a nonbinding reservation agreement, see §63(b)(5), this has not been the case under current condominium law. See §47-74f(a), C.G.S.

³ With respect to a planned community project, §63(d)(7) provides that disclosure is not required in a planned community "in which the declaration limits the maximum annual assessment of any unit to not more than \$300", as adjusted for the Consumer Price Index. To enjoy this exemption, however, (1) the declarant must have a reasonable and good faith belief that the assessment will be sufficient to pay the assessment to the project; (2) the declaration may not be amended to increase the assessment during the period of declarant control without 100% unit owner consent; and (3) the planned community may not be subject to any development rights, such a expandability.

Under §16(c), if a common interest community contains no more than twelve units and is not subject to development rights, no POS or resale certificate is required. This changes the result in condominiums under current law, where disclosure is required for all condominiums regardless of size. This continues the present result in small cooperatives and planned communities, however, since no disclosure is required in any such project. The public policy inherent in this exemption reflects the fact that disclosure in a simple under-13 unit project may cost more than the benefits conferred.

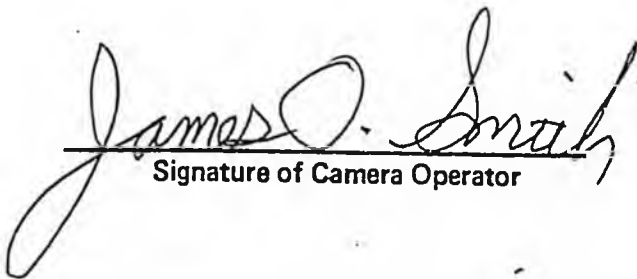
⁴ Cases such as *Ursini v. Goldman*, 118 Conn. 554, 173 A. 789 (1934), and *Corona v. Esposito*, 230 A.2d 624 (Conn. 1966), hold that a party to a written contract is not bound by its terms if something was said or done to mislead the party. In *Corona*, the purchaser of an automobile under a contract which stated that buyer took "as is" was permitted to rescind because contrary oral representations were made before the contract was signed. A misrepresentation of a material fact, even if not intentionally made, is sufficient to permit rescission of a written contract. See *State v. Hartford Acc. and Inden Co.*, 138 Conn. 334, 341 (1951). Cancellation of a contract for the purchase of real estate is no different. See, e.g., *Sinder v. Sinder*, 171 A.2d 248 (Maryland 1961).

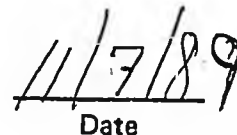


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Signature of Camera Operator


Date

SB

44

(FILE 3):

CORR. REC'D



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

TONY KNOWLES
Mayor

April 11, 1985

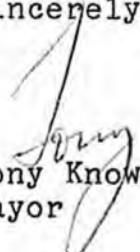
Sen. Patrick M. Rodey
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Member ^{Pat} of our Delegation:

I am writing you to urge your support for passage of a new Uniform Common Ownership Interest Act this session. We have long needed a better definition and clarification of the rights and responsibilities of both developers and individual property owners. The existing Horizontal Property Regimes Act does not sufficiently address the situation. The continued growth and the changes in our housing stock, particularly the increase in multi-family units, makes enactment of an improved law even more important.

A great deal of work has been done this session to refine the proposed Uniform Common Ownership Interest Act, and I would appreciate your support for the legislation.

Sincerely,


Tony Knowles
Mayor

ALASKA MORTGAGE BANKERS ASSOCIATION

P.O. BOX 4-2691/ANCHORAGE, ALASKA 99503

April 4, 1985

Senator Pat Rodey
Senate Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator:

The Alaska Mortgage Bankers Association is an organization which represents 29 financial institutions composed of four national banks, five state banks, four credit unions, two savings and loan associations, 13 mortgage companies and one savings bank, collectively employing in excess of 6,000 people in the state of Alaska.

Thank you for the opportunity to comment on the Judiciary Substitute for Senate Bill 44, the Uniform Common Interest Ownership Act.

The Alaska Mortgage Bankers Association has reviewed the bill, and while it appears to offer some improvements over current statutes, it is an extensive piece of legislation which should be thoroughly reviewed in order to ascertain its full impact.

Following are some specific comments:

Section 34.08.030: This section proposes to exempt small and limited expense common interest communities from most of the bill's requirements; however, since these communities would not be exempt if they are "...subject to financing from the Alaska Housing Finance Corporation...", in reality there will be few, if any, communities eligible for exemption.

Section 34.08.330 (e): This section requires addition of unit owners, other than the declarant, to the Executive Board upon conveyance of 25 percent and 50 percent of the units to individual unit owners. While the concept of individual unit owners' representation on the Executive Board has merit, compliance with this requirement would probably result in a new requirement of the lenders by AHFC which would be difficult to monitor since typically the long term loans on individual units close at many different lending institutions.

(f) This section requires a minimum of three members on Executive Boards. There are a few Associations comprised of only 2 units.

Section 34.08.340: This section requires inspection of the common and limited common areas by a certified architect or engineer. This type of inspection is typically performed by a fee appraiser who provides a list of unfinished items. If the items cannot be completed due to weather or other adverse conditions, it is normal for a cash escrow to be established to assure completion.

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

Section 34.08.350, Transfer of Special Declarant Rights is of particular concern to construction lenders. The concept appears to be that a lender obtaining title through process of foreclosure, deed in lieu of foreclosure, sale under Bankruptcy Act, etc. is protected from additional liability or obligation as a Declarant if the lender declares "...in a recorded instrument an intention to hold the rights solely for transfer to another person...". In reality, a lender often must assume completion and maintenance of the project in order to hold sales transactions together, maintain a good relationship with existing owners and avoid potentially expensive litigation. By the time a construction lender must take over property through foreclosure, deed in lieu, etc., the project usually has a poor image in the community which would only be worsened by putting the project on hold pending sale by the lender to another person. The ultimate result of this bill could be to place the lender in a position of increased liability.

Section 34.08.470, Lien for Assessments: This section would give a maximum of 6 months' Association dues priority lien rights over a first mortgage. The Alaska Mortgage Bankers Association has requested a policy statement from the Federal National Mortgage Association (FNMA) regarding this item. Paul Vergets, Counsel for FNMA in Los Angeles, has stated verbally that if this section became law, FNMA may require 1) all Association dues be collected on a monthly basis (some Associations currently collect annually), 2) Association dues be included in the Mortgage Payment. Item 2 would greatly increase the responsibilities and paperwork of mortgage servicers. Although FNMA may not own many loans in the majority of Alaska Common Interest Communities, it does own some loans in many of the projects, and the impact of such a requirement could be extensive. As support for our request for thorough review of this bill prior to passage, we would bring your attention to a law which passed in Utah in 1983 which gave Associations priority lien rights. Once the impact of the law was discovered (inability to sell the loans on the secondary market, which quickly affected condominium values), the law was rescinded in special legislation. It is our understanding the wording of the Utah law was different than Senate Bill 44; however, it does point out the problems which can occur when legislation is enacted precipitously.

Section 34.08.520 through 34.08.590: These sections relate to requirements for information to be furnished to purchasers of units. The requirements are burdensome, at times with unworkable time frames, and appear to add substantial liability to Executive Boards, developers and lenders.

Section 34.08.530 (11) This section, allowing a buyer 15 days after receipt of the public offering statement in which to cancel a contract for purchase of a unit, could prove costly to a developer. Units will be held off the market during the waiting period, with uncertainty as to the sale, or if not held off the market, may result in litigation if "sold" to more than one purchaser. In most instances, purchasers who, shortly after signing a contract, decide they do not wish to pursue the transaction, receive their Earnest Money back from the seller. This requirement will result in additional carrying costs to the seller which will ultimately be passed through to buyers in higher sales prices.

(17) requires disclosure of financial arrangements on additional phases. While lending institutions may anticipate financing all phases of a project it is not typical to commit to additional lending prior to completion and marketing of the current phase.

Section 34.08.700: This section requires substantial completion be "...evidenced by a recorded certificate of substantial completion executed by an independent registered architect, surveyor or engineer, or by issuance of a certificate of occupancy...". Certificates of Occupancy are not available in many areas of Alaska. Requirement of a certificate by a registered architect, surveyor or engineer again adds to the cost, both direct costs and those due to delay. Final inspection are typically performed by fee appraisers; requirement of performance by other entities appears to set up another layer of paperwork, delay and expense.

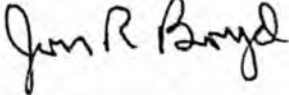
We have mentioned problems which are immediately apparent. There are many other areas of concern which have not been addressed, as we do not understand their full impact at this time. The bill would require increased policing on the part of lenders by secondary market investors; realistically, this will result in higher fees to developers and therefore, higher costs to homebuyers.

The Section Analysis is brief and, in our opinion, misleading, in that it glosses over the actual impact of the bill on developers, lenders, Executive Boards and the secondary market.

Finally, enforcement of this bills' provisions will be by litigation, which will benefit few outside the legal community.

The Alaska Mortgage Bankers Association is ready and willing to work with the legislature and/or legislative staff on this bill, but we urge you to fully consider the impact and delay passage until all sections can be thoroughly reviewed.

Sincerely,



Jon R. Boyd
Director
Alaska Mortgage Bankers Association

attachment: Membership list, Alaska Mortgage Bankers Assoc.

:su

*
* DELIVER TO: JFOM *
*
* ORIGINAL *
* SENT: 04/03/85 TIME: 16:39 *
* FROM: DAVID JENSEN *
* SUBJECT: POM *
* PRINT DATE: 04/03/85 TIME: 16:40 *
*

TO: SENATORS FAIKS, HALFORD, RODEY
REPRESENTATIVE UEHLING
FROM: WILEY BROOKS
1200 I STREET
ANCHORAGE, ALASKA 99501 (H)277-2484
SUBJ: SB44

I BELIEVE IT IS EXTREMELY IMPORTANT THAT SB 44 BE ENACTED THIS SESSION. IT IT'S A GOOD BILL FOR DEVELOPERS, LENDERS, MANAGERS AND MOST IMPORTANTLY COMMUNITY ASSOCIATION UNIT OWNERS. I URGE THAT YOU DO ALL WITHIN YOUR MEANS TO INSURE THIS BILL BECOMES LAW SOON. SIGNED, WILEY BROOKS - PRESIDENT ELECT, ALASKA CHAPTER OF R.E. MANAGEMENT.

EDH

STATE OF ALASKA

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

DIVISION OF BANKING, SECURITIES & CORPORATIONS

BILL SHEFFIELD, GOVERNOR

POUCH D
JUNEAU, ALASKA 99811

Banking & Securities (907) 465-2521
Corporations Section (907) 465-2530

ANCHORAGE

Corporation Information (907) 563-2163

April 4, 1985

Honorable Patrick Rodey
Chairman
Senate Judiciary Committee
Pouch V
Juneau, Alaska 99811

Dear Senator Rodey:

Re: Senate Bill 44
"An Act relating to the Uniform
Common Interest Ownership Act"

I would like to address my comments to proposed AS 34.08.570 on page 66, line 6, of the bill.

That section provides that if an interest in a common interest community is currently registered with the United States Securities and Exchange Commission (SEC), the declarant may rely on the public offering statement authorized by the SEC rather than using a public offering statement as provided for by Section 530.

This is a good provision. It will do away with a requirement to provide two similar offering statements and the SEC offering statement will in most cases provide more information than is mandated by Section 530. Purchasers, in addition, will have recourse under the Federal Securities Acts.

As Administrator of the Alaska Securities Act, AS 45.55, I do suggest that the sentence on page 66, lines 12 and 13, "An interest in a common interest community is not a security under AS 45.55," be amended to read, "An interest in a common interest community is not subject to the registration requirements of AS 45.55."

SEC Securities Act Release No. 5347, a copy of which is enclosed as Exhibit 1, describes situations in which real estate programs can and should be construed to be securities subject to the Federal Securities Acts. This can occur when a rental pool or management for profit is involved. State courts, although not bound to do so, frequently look to federal court decisions to determine whether the securities law of its state should apply to a particular real estate investment program.

COPY

There are certain types of real estate programs which should be subject to the Alaska Securities Act although not necessarily to the registration requirements of the act if Senate Bill No. 44 is passed. If a real estate program is a security (most are not), the Alaska Securities Act would not come into play unless there were violations of the fraud provisions, AS 45.55.010. In addition, purchasers would be able to look to AS 45.55.220(a)(2) for recovery. Regulation would not be duplicative because the offeror would still prepare only one public offering statement as provided for in Section 530 of Senate Bill 44.

Where purchasers are buying a condominium in order to provide for themselves a primary residence a security is not involved. Judge Pegues recently followed this rationale in Gertsch et al. v. Perez et al., 3 Blue Sky Law Reporter (CCH) ¶172,121 at 70,840 (1984). This case involves the Mobile Haven Mobile Home Park. Judge Pegues followed the U.S. Supreme Court case of United Housing Foundation, Inc. v. Forman, 421 U.S. 837,858 (1975) in holding that although shares of "stock" were issued to show ownership a security was not involved because people were buying housing, a necessity of life. A copy of Judge Pegues' decision is enclosed as Exhibit 2.

Brigantine Bay, Exhibit 3, is an example of a real estate security program. The Alaska Department of Law, Consumer Protection Section, investigated abuses in that program and when it filed a complaint alleged among other things violations of the Alaska Securities Act.

Enclosed as Exhibit 4 is a letter of this division dated July 23, 1982 in the matter of International Investments Cooperative Housing Corporation in which the division took the position that the program as proposed would constitute a security. Beginning on page 4 of that letter note that the sponsor proposed to form a cooperative housing project and to sell shares not just to those who intended to use an apartment as a primary residence, but to nonresidents who would purchase shares of the cooperative for investment purposes. I believe investment purchasers of such a program should have the protection of the Alaska Securities Act.

Should my suggestion not be acceptable, a less desirable change to lines 12 and 13, page 66, could read, "An interest in a common interest community is not a security under AS 45.55 if the real property is located in this state."

An Alaska resident who purchases property in this State is in a better position to examine the property and, if necessary, bring some type of action under Senate Bill No. 44 than if the property is located out-of-state. There have been particular problems with time share sales, particularly in the vacation oriented areas.

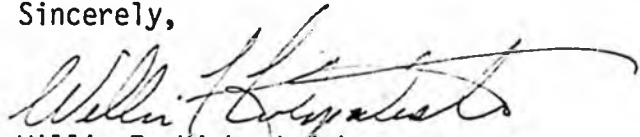
Honorable Patrick Rodey

-3-

April 4, 1985

If you have any questions or if I can furnish additional materials,
please feel free to contact me.

Sincerely,



Willis F. Kirkpatrick
Administrator of Securities

WFK/wfs2039W
4485b
Enclosures

cc: Loren H. Lounsbury, Commissioner (0800)
Jeff Bush, Assistant Attorney General
Department of Law (0300)

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION SECTION

February 28, 1985

BILL SHEFFIELD, GOVERNOR

XX REPLY TO

— 1031 W 4th, SUITE 110
ANCHORAGE, ALASKA 99501
PHONE (907) 279-0428

— 1st NATIONAL CENTER
100 CUSHMAN SUITE 400
FAIRBANKS, ALASKA 99701
PHONE (907) 456-8589

— S S FULLER BLDG
4th & HARRIS, SUITE 214
POUCH K
JUNEAU, ALASKA 99811
PHONE (907) 465-3592

— STATE COURTHOUSE, ROOM 26
P O BOX 671
VALDEZ, ALASKA 99686
PHONE (907) 835-2462

The Honorable Pat Rodey
The Honorable Jan Faiks, and
The Honorable Rick Halford
Alaska State Legislature
Pouch V
Mail Stop 3100
Juneau, Alaska 99811

Re: SB 44 and HB 138

Dear Senators:

Since the Senate Judiciary hearing on February 26, 1985, on SB 44 I have had an opportunity to review SB 44 and the Uniform Common Interest Ownership Act, including the comments of the National Conference of Commissioners on Uniform State Laws, and to determine its possible interplay with HB 138 which proposes regulation of timeshares in our state for the first time. Upon close review of both bills it appears that both types of legislation could be passed by the legislature without conflict. In the comments to the Uniform Interest Common Ownership Act section 4-105, the commissioners noted:

1. Time sharing has become increasingly important in recent years, particularly with respect to resort common interest communities. In recognition of this fact, this section requires the disclosure of certain information with respect to timesharing.
2. Virtually all existing states statutes dealing with condominiums, planned communities or cooperatives are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of timesharing in this Act, however, does not imply that other law regulating timesharing is affected in any way in a state merely because that state enacts this Act.

The Uniform Law Commissioners' Model Real Estate Time-share Act specifies more extensive disclosures for time-share properties. A

"timeshare property" may include part or all of the common interest community, and section 1-109 of the Model Act governs conflicts between this Act and time-share legislation. [Emphasis added]

Section 4-105 of the Uniform Common Interest Ownership Act is identical to SB 44 § AS 34.08.550 TIMESHARES (beginning on page 64 at line 29), except that SB 44 adds additional provisions for disclosures in timeshare sales in subparagraph (5), (6) and (7).

In sum SB 44 (or the Uniform Common Interest Ownership Act) does not preclude the passage of specific timeshare legislation.

There should, however, be an amendment to HB 138 or any proposed timeshare legislation which would be similar to the Uniform Law Commissioners' Model Real Estate Timeshare Act section 1-109 "Conflicts with Other Statutes" which would provide:

In the event of any conflict between this Act and the Horizontal Property Regimes Act, AS 34.07.010 - 34.07.460 [and the Uniform Common Interest Act, AS 34.08.010 - 34.08.995, if SB 44 passes], the provisions of this Act prevail, but this Act does not invalidate or otherwise affect rights or obligations vested under those statutes before the effective date of this Act, or the manner of their exercise or enforcement.

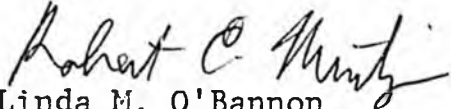
Thus, we would propose an amendment to HB 138 as follows:

Sec. 45.50.656 CONFLICTS WITH OTHER STATUTES. In the event of any conflict between the Act and the Horizontal Property Regimes Act, AS 34.07.010 - 34.07.460, the provisions of this Act prevail, but this Act does not invalidate or otherwise affect

rights or obligations vested under those statutes before the effective date of this Act, or the manner of their exercise or enforcement.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

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

LMO/ssr

cc: Norman Gorsuch
Elizabeth Hickerson
Senate Advisory Council
1024 West 6th Av., Suite 203
Anchorage, Alaska 99501



Alaska State Legislature

Official Business

December 3, 1984

Pouch V
State Capitol
Juneau, Alaska 99811

Senator Pat Rodey
Alaska State Legislature
2335 Lord Baranof
Anchorage, Alaska 99503

Dear Senator Rodey:

With the opening of the next legislative session soon upon us, we wanted to share with you legislation we are considering introducing which may be of considerable interest to you. As you know, the condominium industry is growing by leaps and bounds throughout Alaska. With this growth, the Legislature has realized the existing Horizontal Property Regimes Act is severely limited in its applicability to common interest ownership.

As we're sure you realize, this situation is not peculiar to only Alaska. In response to the growing need nation-wide, the National Conference of Commissioners on Uniform State Laws developed the "Uniform Common Interest Ownership Act (UCIOA)". Professionals from every aspect of the industry were involved in the development of this model legislation -- from title insurance companies, architects, mortgage associations, the National Association of Home Builders, engineers, federal agencies, attorneys to realtors. It is this model legislation on which we propose to base our discussion of Alaska's version of UCIOA. The legislation is basically designed to provide consumers, developers and lenders with a consistent pattern of rights and obligations which will apply to all "common interest" developments -- whether they be condominiums, planned communities or cooperatives.

Because the legislation will touch in some way many of your constituents involved in the industry, we wanted to apprise you of this area of legislative effort. We are also interested in learning your reaction to the proposed bill and will be glad to provide you with a copy of UCIOA as well as the first draft as soon as it is available. In addition, a work session will be held on Friday, December 14th from 10 a.m. to noon at the Legislative Information Office first floor conference room (1024 West Sixth Avenue). If you're interested in a copy of the legislation and/or will be able to attend the meeting, please give Jan Faiks' office a call at 274-6611.

It's a comprehensive piece of needed legislation and the cooperation of all involved will be necessary to make certain the needs of everyone are satisfactorily addressed. We hope we will be able to count on your input.

Sincerely,


Jan Faiks
Senator


Rick Halford
Senator

BAILY AND MASON

LAWYERS

A PROFESSIONAL CORPORATION
1130 WEST SIXTH AVENUE, SUITE 100
ANCHORAGE, ALASKA 99501
TELEPHONE (907) 276-4331

MARK E. ASHBURN
DOUGLAS B. BAILY
LEWIS F. GORDON
JULIAN L. MASON III
DONALD W. McCLINTOCK III

March 1, 1985

Ms. Dea Turner
Executive Officer
Alaska Association of Realtors
1818 W. Northern Lights Blvd.
Suite 104
Anchorage, Alaska 99503

Re: Definition of "Dealer" in
Senate Bill No. 44

Dear Dea:

This firm has been asked to render an opinion on the meaning on the term "dealer" as defined in Senate Bill No. 44 (Alaska's proposed version of the Uniform Common Interest Ownership Act) at proposed §34.08.990(11). That definition provides:

(11) "dealer" means a person engaged in the business of selling units who is not an owner of a common interest community or of a unit within a common interest community.

This definition differs from that provided in the model Uniform Common Interest Ownership Act at §1-103:

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

The definition provided in Senate Bill No. 44 clearly subjects real estate agents and brokers to the obligations of "dealers" found in Senate Bill No. 44, which obligations are in turn derived from the model act. For example, a declarant may transfer responsibility for preparation of all or a part of the statement to a dealer who intends to offer units in a common interest community. §34.08.520(b). A

Ms. Dea Turner
Page 2
March 1, 1985

declarant or dealer who offers a unit to a purchaser is required to deliver a public offering statement to each purchaser. §34.08.520(c) and 580. Both a declarant and a dealer warrant to a purchaser of a unit that may be used for residential use that a contemplated continuing use does not violate applicable law at the earlier time of conveyance or delivery. Senate Bill No. 44 at §34.08.640(c).

While these same duties are imposed on "dealers" in the model act, the definition of "dealer" is less clear. The undefined phrase "for his own account" causes the interpretation problem. The commentary to the model act's definition of "dealer" indicates that it is a newly defined term, not used in any of the three predecessor acts, the Uniform Condominium Act, the Uniform Planned Community Act, or the Model Real Estate Cooperative Act.

It appears that the only state that has adopted the Uniform Common Interest Ownership Act at this time is Connecticut. The Connecticut version of the act, Public Act No. 83-474, provides the following definition of a "dealer":

(11) "Dealer" means a person who owns either six or more units, or 50% or more of all the units, in a common interest community.

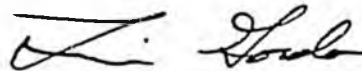
It is clear under the Connecticut act that a dealer refers to one with a significant ownership interest in a common interest community. The Connecticut act retains the model act definition of a "declarant." Thus, under the Connecticut act, a real estate agent or broker is not subject to the same requirements that an Alaskan agent or broker would be subject to under Senate Bill No. 44. In other words, it appears that the only state that has enacted the Uniform

Ms. Dea Turner
Page 3
March 1, 1985

Common Interest Ownership Act imposes "dealer duties" only on owners of a significant interest in a common interest community, and not on real estate agents and brokers. This contrasts with Senate Bill No. 44, which imposes duties on non-owner sellers, i.e., agents and brokers.

Very truly yours,

BAILY & MASON



Lewis F. Gordon

LFG:dt

Municipality of Anchorage



P.O. BOX 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4960

TONY KNOWLES,
MAYOR

INTERGOVERNMENTAL AFFAIRS
February 21, 1985

Hon. Pat Rodey
Pouch V
Juneau, Alaska 99811

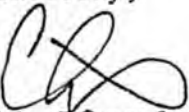
Dear Sen ^{Pat}Rodey:

Thanks for your February 19 letter regarding UCIOA.

I've notified the Judiciary Committee that I'll be in Juneau on February 26 and will plan to testify on the subject, although I understand there's a conflict at 2:00 when Justice Rabinowitz will give his State of the Judiciary address. I've given them the Municipality's Juneau number (586-2401) so a message can be left for me.

I hope to see you around town next week.

Sincerely,


Chip Bennerlein



NATIONAL MULTI HOUSING COUNCIL

Suite 306 • 1150 Seventeenth Street N.W. • Washington, D.C. 20036 • (202) 659-3381

February 4, 1985

Senator Pat Rodey
Pouch V
State Capitol
Juneau, Alaska 99811

Dear Senator Rodey,

Thank you for contacting me regarding Senate Bill 44, the Uniform Common Interest Ownership Act (UCIOA) which is now pending before your committee.

I appreciate your invitation to testify before your committee on February 5th regarding The National Multi Housing Council's support of UCIOA. Unfortunately, I have several important meetings which I must attend here in Washington on that date or else I would have been delighted to tell you why NMHC members support UCIOA's enactment and why we have recommended several strengthening amendments. For your information I have enclosed a press release setting forth NMHC's position on this important issue.

You indicated in your letter that there will be future opportunities for public testimony. I would appreciate you keeping me informed as to those dates and I will try to arrange my schedule so that I could appear at one of these future hearings.

Again, thank you for contacting NMHC regarding UCIOA and good luck in your efforts to get it enacted in Alaska. If I can be of any further assistance in this worthy effort, please do not hesitate to let me know.

Looking forward to working with you I remain,

Yours truly,

Stephen D. Driesler
Executive Vice President

cc: Senator Rick Halford
Senator Jan Faiks



NEWS RELEASE

National Multi Housing Council • Suite 306 • 1150 Seventeenth Street N.W. • Washington, D.C. 20036 • (202) 659-3381

FOR IMMEDIATE RELEASE

Contact: Stephen Driesler
(202) 659-3381

NATIONAL MULTI HOUSING COUNCIL BEGINS NATIONWIDE DRIVE FOR UNIFORM CONDO CONVERSION LAW

WASHINGTON, February 14, 1984 -- Inaugurating its campaign for nationwide adoption of the Uniform Common Interest Ownership Act (UCIOA), the National Multi Housing Council (NMHC) is urging governors in all fifty states to pass a sweeping legislative package designed to give existing tenants greater protection during the conversion of their apartments into condominiums.

In letters to governors, the Council stressed the need for uniform laws which are fair for apartment tenants, condominium purchasers and developers.

This action follows the unprecedented decision by the National Multi Housing Council Board of Directors to endorse the Uniform Common Interest Ownership Act and to offer stronger protections to elderly and handicapped tenants, and families with children in school.

"Twenty years ago, when condominiums were new in America, developers sought -- and received -- legislation enabling their creation. From that time, the condominium concept radically altered something as fundamental as housing," wrote Robert Sheridan, NMHC co-chairman.

"Along with this radical departure from single family ownership of detached homes came problems of public acceptance and adjustments, especially for apartment tenants being relocated. Attempting to alleviate these initial problems, a second generation of condominium legislation ensued; much of it heavily favored the displaced apartment dwellers, tenant action committees and opponents of condominium conversion who, all too frequently, lost sight of facts amid the wrenching experiences of charges and countercharges," the letter said.

"Tough restrictions of condominium conversions are well intentioned but, we believe, they are an over-reaction," Geoffrey Stack, NMHC Secretary, further elaborated. "The results have often been disastrous to communities, rather than helpful. Benefits of condominiums have either been ignored or underplayed in conversion debates.

"Sometimes, we, in the industry, contributed to this unproductive environment by bristling at any hint of regulation. In the early days, the business community saw regulation as a noxious proposition. Now, 20 years later, the housing industry has matured and the National Multi Housing Council is piloting a national effort toward passage of the UCIOA and NMHC amendments," Stack said.

The letter emphasized that, "Members of the NMHC recognize they must take the lead in improving the condominium conversion process and encourage states to enact the UCIOA. The industry has the knowledge, the ability and certainly the incentive to take the lead in reducing the anxiety which condominium conversion may cause some tenants.

"The UCIOA and Council amendments strive for uniformity, not at the expense of compassion -- but also not unrealistically or unfairly to developers who have invested heavily in making the American dream a reality, and not unjustly to consumers who are seeking to opportunity for home ownership," Sheridan wrote.

* ATTACHED: A fact sheet prepared by the National Multi Housing Council answering specific questions about the Uniform Common Interest Ownership Act and Council amendments.

Q. WHAT ARE THE MAJOR PROVISIONS OF THE UCIOA?

A. Major UCIOA provisions dealing with many tenant/buyer/developer problem areas are:

- * A 120-day notice of conversion to tenants;
- * 60-day tenant right of first refusal to purchase their units;
- * No public offering of the tenant's unit on more favorable terms than those offered to the tenant for 180 days;
- * An engineer's or architect's inspection report on the condition of structural and mechanical systems;
- * List of outstanding building code violations, if any, and the cost to rectify;
- * Disclosure of current building income/expense statements; and
- * Projected condominium association budget, including any reserves for major repairs and renovation.

Q. WHAT ARE THE PRINCIPLE COMMUNITY BENEFITS OF CONVERSIONS?

A. The following benefits of converting an apartment building to a condominium have often been ignored in the conversion debate:

- * Condominium conversions expand the supply of affordable homes;
- * Conversions prevent the possibility of decay and abandonment of rental housing;
- * Condominium conversions help stabilize and often improve neighborhoods;
- * Owning a condominium is often the only way to own a home in some highly desirable neighborhoods;
- * Recycling of outmoded industrial and commercial buildings to condominium homes can create viable new uses and neighborhoods;
- * Condominium homes, especially converted units, fit today's new and changing lifestyles and household size patterns;
- * Conversions are the primary form of entry-level housing for home buyers;
- * Conversions usually involve renovation and rehabilitation and so stimulate construction employment and the local economy;
- * Condominium associations are a new and vital type of neighborhood group; and
- * Conversions have a significant, positive fiscal impact on a community, especially on the local property tax base.

Q. WHAT ARE COMMON PROBLEMS CREATED BY CONDOMINIUM CONVERSIONS WHICH THE UCIOA AND NMHC AMENDMENTS HELP ALLEVIATE?

A. Problems created by conversions need not be "solved" by indirect methods, such as moratoria, price restrictions, windfall taxes or rent control. The following considerations are recognized by the industry; the UCIOA and NMHC amendments address them:

- * Not every tenant wants to buy a condominium;
- * Some tenants might like to own a condominium, but not the unit they currently rent;
- * Some tenants simply cannot afford the down payment or the monthly cost of owning their units;
- * Tenants who buy may pay more per month to own than to rent;
- * Some tenants who do not buy pay more rent after they move;
- * Some non-purchasing tenants must move to other neighborhoods,
- * Elderly and handicapped tenants may be least able to buy and most affected economically and emotionally if they cannot; and
- * Converted buildings are sometimes old and often have not been totally renovated prior to conversion.

Q. WHO MAY I CONTACT FOR MORE INFORMATION ABOUT THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE NATIONAL MULTI HOUSING COUNCIL AMENDMENTS, THEIR EFFECT ON MY STATE AND HOW THEY WILL CREATE AN ATMOSPHERE OF COOPERATION AMONG CONDOMINIUM DEVELOPERS, OWNERS, MANAGERS AND PROSPECTIVE BUYERS AND NON-BUYING APARTMENT DWELLERS?

A. The National Multi Housing Council, 1150 17th Street, N.W., Suite 306, Washington, D.C. 20036, (202) 659-3381, eagerly awaits your inquiries about the UCIOA and the Council's stronger amendments. It has taken the unprecedented step of endorsing and pushing for passage of both the act and amendments. Call or write the Council and more information and a comprehensive review of the condominium conversion climate in the United States will be provided.

Q. WHAT HAS BEEN THE EFFECT OF SOME OF THE LATEST RESTRICTIONS TO CONDOMINIUM CONVERSIONS?

A. While most constructive second generation legislation was enacted at the state level, many new anti-conversion laws are primarily local legislative efforts aimed at meeting the particular demands and fears of local tenant groups. They are fundamentally different in their variety, purposes and provisions. Some of them, explicitly or covertly, intend to end condo conversions completely. The effect of some new restrictions has been to increase the cost of condominium conversions so substantially that the relative price advantage the consumer has in buying a converted unit disappears.

Q. WHAT ARE MAJOR SHORT AND LONG TERM EFFECTS OF RESTRICTIVE CONDOMINIUM LEGISLATION?

A. Overly restrictive condominium legislation sends signals to developers who could play a part in making both rental and ownership units more available. It says:

* There is no incentive to build new rental apartments, because developers cannot plan on a conversion at a later time. Developers increasingly cannot build and operate rental projects profitably without some form of government assistance or subsidy -- unless they can recoup their investment at a later date by converting apartments to multifamily housing units.

* Thousands of rental units would, annually, become tax delinquent or abandoned as owners simply gave up in the face of escalating operating costs and lagging rents. Restrictive legislation may well doom apartment buildings in older neighborhoods -- units which could otherwise be recycled and bring about a turnaround in a residential area. Instead, the neighborhood could become locked into a continuous decline, becoming extremely difficult to upgrade and rehabilitate. This would be particularly harmful to younger workers in larger cities -- such as New York, Boston, Atlanta, Chicago and Washington, D.C. -- which act as regional magnets for urban, job seekers; older buildings converted to condominiums have provided these workers with home ownership in close-in locations at more affordable prices.

* It says "go slow" on any capital improvements because owners of existing buildings fear their opportunities for return on that additional investment might be negligible -- if there is any opportunity for return at all. The real losers are people living in units, the neighborhood and community.

Q. WHAT IS THE REAL PROBLEM FOR CONVERSION OPPONENTS?

A. When pressed to express their real concern, advocates of tough restrictions on condominium conversions usually admit their first priority is to preserve an adequate supply of rental housing. Their method is to slow or halt the rate of conversions. Conversions, in their opinion, worsen an already serious rental housing shortage. Reputable studies have shown this is not true.

Q. IS THERE A RENTAL HOUSING SHORTAGE CAUSED BY CONDOMINIUM CONVERSIONS?

A. There is no significant shortage of rental housing, according to the U.S. Department of Housing and Urban Development. A 1980 HUD condominium survey concluded that 366,000 rental units, or approximately 1.31 percent of all occupied rental housing units United States, had been converted between 1970 and 1979. Based on the HUD conclusion that every 100 converted units results in a net loss of five rental apartments, then only slightly more than 18,000 rental units in the entire country were "lost" to conversions during the 1970s. That is a tiny fraction of the 26.5 million rental units in this country. If conversions were permanently halted -- an extreme "remedy" of this so-called rental housing shortage -- we might conclude that approximately 1,800 more rental units per year would be available nationwide.

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EAGLE RIVER, ALASKA 99577-2889
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PLEASE REPLY TO THE ABOVE
ADDRESS.

PLEASE REPLY TO THE ABOVE
ADDRESS.

January 31, 1985

The Honorable Senator Pat Rodey
Chairman, Judiciary Committee
Pouch B
Juneau, Alaska 99811

Re: Senate Bill 44, Common Interest Ownership Act

Dear Senator Rodey:

The following review is designed to point out a few of the important differences between the existing act (A.S. 34.07.) and Senate Bill 44. As you are aware the existing act covers only condominiums and does not cover planned unit developments, leasehold planned communities, planned communities, timeshare communities, or cooperatives.

<u>Specific Area of Concern</u>	<u>AS.34.07.</u>	<u>SB 44</u>
1. Association Insurance needs.	Generally addressed by AS 34.07.400	Detailed insurance requirements contained in AS 34.08.440

Insurance needs of the associations should be clearly spelled out to avoid confusion on the part of developers and association boards and assure adequate coverage. The new statute requires insurance to be at 100% of the replacement value, for example.

2. Transition Problems	Not addressed	Detailed requirements contained in AS 34.08.340
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There must be a specific statute which identifies those items or acts which must be completed as part of turning the control of the project over to the owners. This new section accomplishes that purpose. Owners, directors, managers and developers benefit by having the requirements clearly established.

Specific Area of Concern

AS.34.07.

SB 44

The declarant is required to provide the board with all financial records, amendments to declarations or bylaws, warranties from suppliers and subcontractors and so forth. Plans for the building and underground utilities must be provided. The Associations and the unit owners will benefit by having such information. A punch list of common area repairs must be made thus eliminating disputes over common area repairs. This will tend to reduce unnecessary litigation.

3. Developer reservation of rights. Not addressed Addressed in detail AS.34.08.180

Developers must be able to phase projects. Purchasers should know what the developer must build and what the developer may build to avoid misleading representations. By avoiding innocent misrepresentation the developer, realtor and homebuyer will benefit. Unnecessary litigation can be avoided.

4. Association Budget for Reserves Not addressed Addressed in detail As 34.08.____

The method of computing reserves should be clearly understood by developer and owners. In this manner "low balling" of budgets can be limited. Proper budgeting for reserves will avoid unexpected special assessments or large increases in the monthly assessments Homebuyers will be assured of having a monthly assessment within their projected household budget.

5. Maintenance of Units Not addressed Addressed in

Developer, managers, and boards often dispute whether an item within a unit is the association's responsibility, or the unit owner's responsibility. The new definition will help avoid these disputes. The new unit boundary definition allows clear

Specific Area of Concern

AS.34.07.

SB 44

distinction to be drawn between owner responsibility and association responsibility. Owners will know that they are responsible for certain maintenance items and can plan accordingly. Arguments about such maintenance items should be limited.

- | | | |
|---|---------------|--|
| 6. Transfer of reserves rights by declarant | Not addressed | AS 34.08.350 allows declarant to transfer rights reserved by declarant to third parties, generally builders or other developers. |
|---|---------------|--|

This section allows the developer to transfer specific declarant rights to another developer. In this manner a project can proceed even though the initial developer may choose not to do further work.

- | | | |
|---|---------------|--|
| 7. Termination of Contracts entered into by developer | Not addressed | AS 34.08.360 allows the association to terminate contracts entered into by declarant and avoids unfair contracts |
|---|---------------|--|

This section avoids situations where a developer may have entered into a contract on behalf of the association on terms that are unfavorable. The association has the right to cancel. This avoids the situation where snow removal is being done by the developer's wife's company at exorbitant rates.

<u>Specific Area of Concern</u>	<u>AS.34.07.</u>	<u>SB 44</u>
8. Assessments for Common Expenses	AS.34.07.380 and .450(7)	AS 34.08.460 more clearly spells out assessment re- quirements.

What is, or is not a common expense, is sometimes a problem. In the case of a P.U.D. there is no statutory definition to aid the association. This section solves those problems.

9. Borrowing by Associa- tion	Not addressed	AS 34.08.320(a) (14) specifically allows asso- ciations to assign future in- come
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Associations presently have no ability to borrow funds by assigning future income. As potential borrowers the association needs to have statutory authority to assign future income to secure borrowing for repairs.

10. Disclosure to Purchasers	Not addressed	AS 34.08.530 sets forth speci- fic information which must be contained in the Public Offering Statement clearly spelled out in AS 34.08.460
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Numerous complaints by unit owners involve nondisclosure of future plans by the developer. The Public Offering statement

Specific Area of Concern AS.34.07. SB 44

tells potential purchasers and realtors exactly what the project entails and should reduce misleading information being given to buyers. AS 34.08.680 requires the declarant to mark promotional literature with "must be built" or "need not be built" to avoid confusion. Buyers will have available information which will advise them of the developers intentions and plans. Such information will substantially reduce complaints by purchasers.

11. Liability for Assess- ments for Common Expenses	Addressed but confusing	Clearly spelled out in AS 34.08 .460
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Developers often believe they do not have the same liability as unit owners to pay for common expense assessments. This statute clearly sets forth those responsibilities.

12. Access to Records	AS.34.07.290 allows access to financial expen- diture records	AS 34.08.490 allows access to all records
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Some developers and managers refuse to allow associations to have access to corporate records prior to transition. This statute clearly sets forth the unit owners right to access all records.

13. Resale Disclosure	Not addressed	AS 34.08.590
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Many complaints have involved nondisclosure of material facts by unit owners upon resale. The problem can be substantially resolved by requiring the unit owner to give the required information to a purchaser. To do this the associations will be required to keep all the records current. Unit owners, buyers realtors and managers will benefit from up to date informaton.

<u>Specific Area of Concern</u>	<u>AS.34.07.</u>	<u>SB 44</u>
14. Express Warranties of Quality	Not addressed	AS 34.08.630 sets forth how express warranties are created and what they are.

Numerous difficulties are involved in warranty disputes. These statutes clearly set forth what a warranty is.

15. Implied Warranties	Not addressed	AS 34.08.640 sets forth implied warranties. AS 34.08.650 discusses how warranties can be modified or excluded. AS 34.08.660 establishes a statute of limitations for implied warranties.
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Under present Alaska law an implied warranty goes on until the court decides the time period is too long. This statute sets up specific implied warranty periods and avoids much confusion that exists in the area of implied warranty liability.

16. Organization of Unit Owners	Not addressed	Requires association corporations to be formed no later than the date of first conveyance of unit.
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Senator Pat Rodey
January 31, 1985
Page -7-

Numerous disputes involve situations where the association was not created until time of transition. Thus owners were paying assessments to a nonexistent association prior to transition. This section requires the declarant to have the association in place prior to the conveyance of the first unit so the unit purchaser will be a member of an existing association.

There are numerous other differences between the present act and Senate Bill 44. The purpose of this summary is to highlight specific areas that have caused difficulties in the past and reflect the fact that these areas are covered in Senate Bill 44.

Sincerely yours,

LAW OFFICES OF VINCENT VITALE
A Professional Corporation

By: *William L. McNall*
WILLIAM L. McNALL

WLM:ail

FOR IMMEDIATE RELEASE

Contact: Stephen Driesler
202/659-3381

NATIONAL MULTI HOUSING COUNCIL ANNOUNCES UNPRECEDENTED
ENDORSEMENT OF CONDOMINIUM CONVERSION LAW

Washington, D.C., January 12, 1984 -- In a landmark decision, the National Multi Housing Council (NMHC) Board of Directors endorsed the Uniform Common Interest Ownership Act (UCIOA). The Council also took the further unprecedented step to recommend strengthening the UCIOA by expanding certain protections for tenants living in apartments slated for conversion to condominiums.

The board announced its intention to press state legislatures to enact the UCIOA along with the NMHC strengthening amendments.

"The variety and degree of complexity of condominium conversion laws across the country range from those establishing minimum information disclosures to outright moratoria. Many of these restrictions are based on fear, not facts. The result has curtailed social and physical enhancement of neighborhoods and inner cities, denied basic housing to prospective homeowners and ultimately added costs to the consumer," Robert Sheridan, NMHC co-chairman said. Sheridan is chief executive officer of Robert Sheridan and Partners, a major national condominium development firm headquartered in Chicago.

"The UCIOA and the proposed NMHC amendments strive for uniformity, not at the expense of compassion, but also not unrealistically or unfairly to developers who have invested heavily in making the American dream a reality," Sheridan pointed out.

"As condominium conversion activity has heightened in recent years, members of the National Multi Housing Council have become increasingly aware of, and sympathetic to, problems created for some tenants. It is our experience that the elderly, handicapped and families with school-aged children undergo the greatest stress and inconvenience if they choose not to buy a converted unit," Sheridan said.

"For these reasons, the Council recommends the UCIOA be broadened to guarantee greater protection for the elderly and handicapped. This includes extending to one year the relocation period with relocation expenses paid for by the developer, and allowing for termination of existing leases without penalty.

For families with school-aged children, NMHC suggests additional flexibility to allow them to remain in their unit until the end of the school year," explained Geoffrey Stack, president of Regis Homes, Inc. and secretary of NMHC. Stack is a leading condominium developer from Newport Beach, California.

"The decision to endorse the UCIOA and the proposal of strengthening amendments is a bold move for any housing association, because of the industry's tendency to resist regulation. Now, 20 years after the first condominium laws, the industry has matured; it has the knowledge, the ability -- and certainly the incentive -- to take the lead in reducing the anxiety which condominium conversion may cause for some tenants," said Sheridan.

"The Council believes the industry must take the lead in encouraging states to enact the UCIOA. The industry can -- and must -- rectify the oversights which couldn't be foreseen during the infancy of condominium conversion in America," Stack added.



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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
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Sheridan concluded "It is highly desirable, for reasons of uniformity and fairness, that UCIOA and NMHC amendments apply to all condominium conversions, once enacted." Therefore, the NMHC also recommends the UCIOA be modified to clearly state that adoption of the Act would override any local ordinances or regulations which would be in conflict with the provision of the UCIOA. This is necessary to secure uniformity which is one of the main purposes of the Act.

The four NMHC suggested amendments to the UCIOA which would provide even greater protections for the elderly, handicapped and families with school-aged children, are specifically:

- o Allow elderly and handicapped tenants to remain in their units for one year after receiving an offer to buy or until the expiration of the existing lease, whichever is greater, with no additional increase in rent.
- o Provide relocation assistance equal to two months rent to elderly and handicapped tenants who vacate their units within 12 calendar months after receiving the notice of conversion.
- o Permit elderly and handicapped tenants to, without penalty, terminate an existing lease after giving 30 days' notice.
- o Allow families with minor, school-aged children to remain in their units until the present school year is finished, even if all other applicable expiration dates have passed.

These amendments are designed to strengthen UCIOA provisions which already deal with most of the tenant/buyer/developer problem areas. The major condominium conversion provisions of the UCIOA are:

- o A 120-day notice of conversion to tenants;
- o 60-day tenant right of first refusal to purchase their unit;
- o No public offering of the tenant's unit on more favorable terms than those offered to the tenant, for 180 days;
- o An engineer's or architect's inspection report on condition of structural and mechanical systems;
- o List of outstanding building code violations, if any, and cost to rectify;
- o Disclosure of current building income/expense statements; and
- o Projected condominium association budget, including any reserves for major repairs or renovation.

-30-

A national non-profit trade association, the National Multi Housing Council represents builders, condominium and apartment developers, owners and managers involved in all phases of multifamily housing. The organization serves as a clearinghouse for information on multifamily housing issues and offers legislative representation at the federal, state and local government levels to foster policies that would encourage the development of rental apartments and condominiums to meet America's growing needs now and for the future.

Governor

First residential PUD approved by commission

By JIM SPRINGER

MAT-SU—A proposal to build 14 condominium units on 7.3 acres at Big Lake became the first residential planned unit development (PUD) ever to be approved by the Borough Planning Commission.

The commission approved an application by Steven Rudd, under the 1981 PUD ordinance, to put seven duplex condominiums on his property in Lake Park Subdivision on the shore of Big Lake. The precedent-setting action came after a lengthy presentation by Rudd's consultant, and from others who criticized the plan.

One man testified that the land on which the development was proposed for was too wet to safely contain septage from the 14 units.

"The reason it hasn't been developed in the past is that it's very wet," said

Ralph Hansen. He said the ground was floating, matted vegetation that sprung underfoot.

Three others, including Assemblyman Vern Ungrecht, testified that the ground was swampy and that septic drainage would be a problem.

But the Planning Commission, leaving the septic drainage question for the Department of Environmental Conservation to rule on, took the Planning Department's recommendation, including several stipulations, and gave it the go ahead.

Among those stipulations was that Rudd document or acquire right-of-way on an abutting road, and upgrade the road to collector standards to provide access from the PUD to South Big Lake Drive.

The planned unit development ordinance provides an alternative to

the standard subdivision procedure for developers who comply with its provisions. It allows higher density development than the subdivision ordinance if mitigating measures such as buffers and open space are provided for, and numerous other special requirements are met.

On the heels of the residential PUD action, the Planning Commission opened hearings on a proposed commercial and industrial PUD ordinance that would be a counterpart to the residential version. Like the residential PUD ordinance, the commercial and industrial ordinance would give developers an alternative to the subdivision ordinance that they now operate under.

The hearing on that ordinance will be continued at the next Planning Commission meeting, scheduled for Dec. 26.

MEA budget \$38 million

By JIM BRUGGERS

PALMER—Matanuska Electric Association has drafted a tentative 1985 budget of nearly \$38

more than half of MEA's proposed budget.

Wages, salaries and benefits for about 218 employees—up 28 from

ways. For example:

•In 1974, MEA had 1,150 miles of transmission lines. By the end of 1985, more than 2,359



NEW CHALLENGES—A former diver for the Palmer High School swimming team, Tammy Bospflug is now trying

Lake Lucille condos bring crowd to City Hall

By ED BENDER

WASILLA—After a length y and sometimes emotional discussion of a proposal to build up to 70 condominiums on Lake Lucille, the City Council Monday night tabled a motion to change a land use ordinance allowing the project, and will seek additional public response.

About 100 people packed the City Council Chambers to air concerns about the development by local builder Stan Morris of 65-70 condominiums on a seven-acre tract of land on the lake's southeast shore. The land is currently owned by Council Member Pat Carter, who abstained from voting on the issue.

People opposed to the project said that such dense development will do irreparable damage

to the lake, increase traffic on an already poor road, increase taxes for area residents and set a dangerous precedent for developers.

Those favoring a change in the land use ordinance, which now limits the area around the lake to single-family dwellings, said condominiums are an effective, responsible use of the land.

Another public hearing on the proposed ordinance change was scheduled for the next regular council meeting at 7:30 p.m. Monday, Feb. 11.

In all, 13 lake-area residents opposed allowing the ordinance change, which if approved would then allow Morris to present his plans to the Planning Commission for review before receiving a land use permit.

Six people spoke in favor of the change.

Explaining his project to the audience and council, Morris said, "We have gone to a great deal of trouble to avoid negative aspects."

The condominiums will be a ranch and townhouse style with cedar siding, he said, and the area around will be landscaped to create a park-like environment. The dwellings will sell for between \$80,000 and \$140,000—about \$100 per foot.

The homes will cover 22 percent of the seven acres and have a 70-foot buffer of trees next to the lake. To protect the lake, the project will, when possible, be hooked to city utilities, such as sewer and water systems, he said.

In addition, Morris said he is (Continued on Back Page)

Reed resigns council

By ED BENDER

WASILLA—Following through on a promise made before the recent mayoral election, Council Member Ruth Reed on Monday resigned her seat on the City Council, to reduce the number of council members to six.

Reed's action comes in the wake of the election of local businessman Charlie Bumpus as mayor of this city.

The council certified the election results at Monday's meeting. Final tallies show Bumpus receiving 367 votes, and DeCamp 334.

Bumpus will be officially sworn into office at 7:30 p.m. Feb. 4 at City Hall.

Reed promised to resign several weeks ago when the council discussed electing a new mayor, and the state statute requiring a first-class city have a six-member council.

Two council members, Pat Hjellen and Ken DeCamp, had stated their intentions to run for mayor. If Hjellen or DeCamp had been elected mayor, then the seven-member, second-class city council would have been reduced to six members.

But if someone outside the council were elected, the council would consist of seven members. To resolve the possible conflict, Reed said she would resign.

Local businessman Charlie Bumpus defeated incumbent Mayor Ken DeCamp in the runoff election last week.

"It worked out just fine," said Reed, who supported DeCamp in the election. "I said I would leave, it makes me real happy to resign now.

"I can be much more effective outside the council."



NEW MAYOR
Council certified to 334 votes. DeCamp at 367 p.m. Monday at

Request for new Palmer-Wasilla H

Back page

Condos

(Continued from Front Page)

more than willing to help with the yearly project of oiling the dirt and gravel road currently passing the site, and will help pay paving costs if necessary.

"We are going to time this project so it coincides with city facilities," he said.

The housing is designed and priced for young professionals, he said, likening the units to Porsches or Corvettes, which an owner gives great care.

"We are not looking for recreational buyers here," he said. "We are looking for permanent Wasilla residents."

Voicing the most vehement opposition to ordinance change were Rod and Colleen Cottle,

who live near the project site, and who spent two afternoons discussing the project with area residents.

"If we are willing to stand around and let a lot of California fast-talkers do this, then we deserve what we get," said Rod, who also said he was a long-time friend of Pat and May Carter. "Right now, I feel I'm talking against the California fast-movers."

Rod read a letter from a resident of Lake Wasilla, where townhouses were built. Those townhouses, the letter stated, contributed to a higher crime rate and disruption of a sedate lifestyle.

Rod also read from a study of a proposed park on the south shore. That study states, he said, that the lake is very sensitive to changes.

"I am not willing to sit back and say (development) is inevitable," he said.

"Rod and I want to live on the lake for the rest of our lives," Colleen said. "We do not want to go through a traffic jam to get home."

After explaining that he had held onto the land until he found a project he felt was worthy, Pat Carter said: "I am going to sell the land. Whoever gets it next is not going to be as considerate as I have been the last 40 years"

Palmer needs new, n city hall, consultants

By JIM BRUGGERS

PALMER—Confirming what some city officials said last fall, a consulting firm reported last week that the Palmer City Hall here is old, cramped and in need of replacement.

The architectural firm of Maynard and Parich has recommended that the council build a new city hall instead of two other alternatives: renovating the Matanuska Electric Association Building or the present city hall.

The report was commissioned by council members last fall, following a proposal to buy the Matanuska Electric

Association headquarters downtown Palmer. The proposal drew sharp criticism from numerous residents who said they believed the council was rushing into the project without enough knowledge of the issue.

In a presentation Tuesday to council members, architect Michael Schy said that the cost of either of the two buildings would be nearly the same as constructing a new facility, but a renovated final product would not be as good.

In looking at comparisons between the alternatives, Schwartz said the

Hurley's legislative pay cut bill draws little

By JIM SPRINGER

Although a petition calling for the repeal of the 1983 legislative pay raise bill had 26,000 signatories statewide, only seven citizens took part in a teleconferenced House committee hearing on a bill to accomplish the repeal.

One thousand petition

Committee (HB 48) was authored by Hurley. It would compensate legislators at a rate of \$21,084 per year, instead of \$46,800, which was the rate the Legislature set in 1983. It would also reestablish a daily, per diem allowance, for the days legislators spend in Juneau during the session. In passing the pay raise bill the

former compensation rate.

It is so far the only legislation introduced by Hurley this session.

"I was disappointed about the lack of turnout here in the hearing since I thought we had given enough notice and since so many people have signed the petition," Hurley said.

interested in," said the freshman representative.

She said one reason for the poor turnout may have been because the hearing was held on a rainy Saturday.

Opponents of her bill, two of whom spoke in the teleconference, say the higher pay rate is important to attract high-caliber legislators who may not

where it was before. Your income of 20,000 per year in session you had per Most people take a leave absence or work when they are home—they aren't just full-time legislators. Most keep their businesses while they are in session," she said.

"I'm an advocate of citizens' Legislature.