association's budget and therefore are not included in that unit's assessment but which "are enforceable in the same manner as unpaid assessments."

The definition of "bylaws" reflects the common functional meaning of that term, regardless of what different phrase might be used in the declaration to describe this instrument. The definition makes clear that: (i) the bylaws is the instrument that "contains the procedures for conduct of the affairs of the association" - as distinguished from the substantive role played by the declaration; (ii) the functional role of the bylaws remains consistent under the Act even if the association is organized as, for example, a limited liability company where the term "bylaws" is not used in the statute authorizing such entities and the instrument serving that function is identified as an "operating agreement"; and (iii) amendments to the bylaws are incorporated into the amended document for purposes of this Act.

However, regardless of the name of the instrument used in the declaration, this Act mandates the minimum contents of the bylaws; see Section 3-106. Further, any provision of the State's statutes governing the content of the bylaws or, as appropriate, the operating agreement, to the extent inconsistent with the requirements of Section 3-106, would be overridden by this Act; see Section 1-108.

Third, "common expense liability" is defined primarily by reference to the substantive section of the Act where the term is used. The term appears in earlier versions of the Act without being defined.

The new definition of "Record" in Section 1-103 (29) makes clear that the definition applies only when the term is used as a noun. The definition derives directly from federal and statute statutes governing electronic signatures; the term is commonly substituted for the word "writing" or "written" in other law.

The new definition of "Rule" in Section 1-103 (31) focuses on the activities to which they apply. That is, rules either "govern the conduct of persons" or they "govern...the use or appearance of property." In either case, the policy of the Act as expressed in Section 3-120 is that such restrictions ought to be the subject by unit owner review before adoption, and they must in all instances be reasonable; see Section 3-120(h).

In contrast, Section 3-120(g) states that the "association's internal business operating procedures need not be adopted as rules". This distinction permits the association's executive board or its management company to adopt or amend at will the wide variety of internal management procedures that govern the association's daily business activities - as opposed to the conduct of persons or the use and appearance of property. It may be helpful to provide a few examples of what the drafters contemplate might be typical internal business procedures that need not be adopted as rules:

- The association wishes to solicit bids from potential contractors for a particular project or service and adopts a procedure for soliciting, reviewing and accepting those bids.

- The board approves a management contract with an outside management company. The management contract contains various procedures governing how the manager is going to carry out its duties with regard to the management of the association.

- The recreation committee adopts a sign-up procedure for using the pool table in the clubhouse.

SECTION 1-104. NO VARIATION BY AGREEMENT. Except as expressly provided in this [act], the effect of its provisions may not be varied by agreement, and rights conferred by it may not be waived. Except as otherwise provided in Section 1-207, a declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this [act] or the declaration.

Comment

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

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

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

4. The following sections permit variation:

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

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

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

Article 1, Part 2, **Sections 1-202, 1-203, 1-205, 1-206, and 1-207**, permit a variety of elections to declarants and unit owners with respect to applicability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 3-112 (Conveyance or Encumbrance of Common Elements). The declaration may vary the percentages of unit owners whose approval is required to convey or encumber common elements. The declaration may also provide that a conveyance or encumbrance of common elements defeats prior encumbrances on those common elements.

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

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

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

only against the units benefitted, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

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

Section 4-101 (Applicability; Waiver). All of Article 4 is modifiable or waivable by agreement in a common interest community restricted to non-residential use.

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

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

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, see Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. See Section 1-112. This section derives from Section 1-102(3) of the Uniform Commercial Code.

SECTION 1-105. SEPARATE TITLES AND TAXATION.

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

(b) In a condominium or planned community:

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

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

(c) Any portion of the common elements for which the declarant has reserved any

development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

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

Comment

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

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

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

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

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

2. This Act, of course, would apply in all respects regardless of the characterization of the unit owner's interests. Thus, for example, recording to the declaration is required, whether or not the owner's interest in a cooperative interest is real or personal property, because the cooperative itself is the real estate.

3. Whether an institutional lender may lawfully make loans on the unit owner's interest may or may not depend on whether that interest is characterized as real or personal property. That

issue is not affected by this Act, however, but by other state law which may permit loans to be made by certain institutional lenders only if secured by an interest in real estate.

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

5. Subsection (b) integrates the language of UCA and UPCA regarding condominiums and planned communities. A condominium or planned community may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently, for example, with existing rental apartment projects which are converted into either condominiums or planned communities. Subsection (d) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the common interest community is created may be permitted under general state law, which permits or requires separate taxation of individual parcels of real estate. When separate tax assessments become mandatory under this section, the assessment for each unit must be based on the value of that individual unit, under whatever uniform assessment mechanism prevails in the State or locality. Importantly, no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively, even though, in the context of planned communities, the common elements owned by the association might be subject to taxation as a separately owned parcel of real estate, in the absence of this provision.
Any common element subject to development rights, however, must be separately assessed and taxed to the declarant, see subsection (c), in recognition of the independent economic value that those development rights have. This would be true even if the real estate subject to development rights is a part of the common interest community and lawfully "owned" by the unit owners in common, since the rights are in fact an asset of the declarant.

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

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

8. Questions have arisen regarding the consequences of foreclosure of a tax lien on units or development rights in a common interest community.

Under one theory, because real estate taxes are liens on real estate which have priority over all subordinate interests, foreclosure of the real estate tax lien on a unit could result in partial termination of the common interest community, and thus remove the unit from the common interest community. This result would follow if the tax lien were treated under Section 2-118(l) as a "lien . . . against a portion of the real estate comprising the common interest community [which] has priority over the declaration . . . ."

Such a result, however, is inconsistent with the expectations of other unit owners in the complex. The appropriate result is that because, under this section, each parcel of real estate is a separate parcel for tax purposes, foreclosure of a tax lien on that parcel simply results in a sale or transfer of an interest in that parcel, as part of the common interest community, unless the parcel being foreclosed is withdrawable real estate.

9. It is also possible that a taxing authority may seek to foreclose on a declarant's development rights. Foreclosure of real estate taxes levied against withdrawable real estate, just as in the case of a foreclosure by a voluntary lienholder, may result in removal of that real estate from the common interest community; see Section 2-118(k). However, foreclosure of real estate owned by the declarant which has not yet been added to the common interest community will have no effect on the common interest community unless the taxing authority also acquires the development right to add that real estate to the common interest community.

10. Under Section 3-104(c), of course, foreclosure of a tax lien for unpaid taxes levied against development rights would permit the taxing authority to take title to those development rights and exercise or transfer them as they could any other interest in real estate. However, development rights lapse pursuant to Section 2-110 if they are not exercised within the time limit established by the declaration. This result, implicit under the Act, is expressly the law in some States. See, e.g., Conn. Gen. Stat. Section 47-229(e). If development rights lapse when a tax lien against those rights exists under Section 1-105(c), then whether or not those development rights apply to common elements which have previously been added to the common interest community makes no difference; the municipal lien holder is in no different position than a lender who holds a security interest in those development rights. Accordingly, while the tax lien itself would not be enforceable against the land it would continue to be the obligation of the declarant, as provided in the last clause of this subsection.

SECTION 1-106. APPLICABILITY OF LOCAL ORDINANCES, REGULATIONS, AND BUILDING CODES.

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

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

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

Comment

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

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

3. While subsection (a) prevents discrimination against all forms of common interest communities under building codes, subsection (b) does not prevent local law making authorities from using zoning, subdivision, and other real estate regulations to specifically regulate the planned community form of ownership, in ways different from rental project, or condominiums. This distinction simply recognizes the existing practice in some communities that permits a local zoning board, as a condition of granting a cluster housing zoning permit, to require the right of prior plan approval. However, such regulations may not be used to proscribe the condominium or cooperative form of ownership, or to discriminate against these two types of common interest communities. Accordingly, a community could not prevent a condominium conversion by applying setback requirements between apartments which would not apply if all the apartments

were owned by a single owner, or by requiring more parking for condominiums than for rental apartments.

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

SECTION 1-107. EMINENT DOMAIN.

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

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (i) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration and

(ii) the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and to the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially-acquired unit participating in the reallocation on the basis of its reduced allocated interests.

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

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

Comment

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

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

Example 1: Suppose that all allocated interests in a nine-unit common interest community were originally allocated to the units on the basis of size. If eight of the units are all equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is removed from the common interest community by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have $22^{2/9}$ % while each of the small units would have $11^{1/9}$ %.

Example 2: Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection

(b) provides that the allocated interests would automatically shift to $5^{5/19}$ % for the partially taken unit, $21^{10/19}$ % for the largest unit, and 1010/ 19 % for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken units' reallocated interests are $5^{5/19}$ % rather than 5%.

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

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

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

Example 1: Suppose in a commercial common interest community consisting of four units, each unit consists of a factory and parking lot, and the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit number one are equal, and that ½ the parking lot is taken by eminent domain, leaving the factory and ½ the lot intact. Under the formula set out in the statute, unit number one's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

Example 2: Suppose that a common interest community contains ten units, each of which is allocated a 1/10 undivided interest in the association. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the ownership interest of all the units will be reallocated so that the partially-taken unit has a 1/19 undivided interest in the common elements and the remaining nine units each has a 2/19 undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to ½ of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining nine units each having a 10% undivided interest.

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

Legislative Note – (11/07): The practice of the states may vary with respect to the documentation *of eminent domain awards, and the word "decree" should therefore be considered for amendment* as appropriate.

SECTION 1-108. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW

APPLICABLE. The principles of law and equity, including the law of corporations [,] [and] any other form of organization authorized by the law of this state [,and unincorporated associations], the law of real estate, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this [act], except to the extent inconsistent with this [act].

Comment

1. This Act displaces existing law relating to common interest communities and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely an illustration, no listing could be exhaustive.

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

SECTION 1-109. CONSTRUCTION AGAINST IMPLICIT REPEAL. This [act]

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

Comment

This section derives from Section 1-104 of the Uniform Commercial Code.

SECTION 1-110. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

Comment

This Act should be construed in accordance with its underlying purpose of making the law uniform with respect to all forms of common interest communities, as well as the purposes stated in the Prefatory Note of simplifying, clarifying, and modernizing the law of common interest communities, promoting the interstate flow of funds to common interest communities, and protecting consumers, purchasers, and borrowers against common interest community practices which may cause unreasonable risk of loss to them. Accordingly, the test of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

SECTION 1-111. SEVERABILITY. If any provision of this [act] or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [act] are severable.

Legislative Note: Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.

SECTION 1-112. UNCONSCIONABLE AGREEMENT OR TERM OF CONTRACT.

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

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

(1) the commercial setting of the negotiations;

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

(3) the effect and purpose of the contract or clause; and

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

Comment

This section is similar to Section 2-302 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act. The rationale and Comments provided in those sections are equally applicable to this section.

SECTION 1-113. OBLIGATION OF GOOD FAITH. Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement.

Comment

This section sets forth a basic principle running throughout this Act: in transactions involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as sued in this Act, means observance of two standards: "honesty in fact," and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.

SECTION 1-114. REMEDIES TO BE LIBERALLY ADMINISTERED.

The remedies provided by this [act] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However,

consequential, special, or punitive damages may not be awarded except as specifically provided in this [act] or by other rule of law.

Comment

The 2008 deletion of subsection (b) in Section 1-114 does not substantively amend the Act, since the same concept is embedded in amended Section 4-117 of the Act.

SECTION 1-115. ADJUSTMENT OF DOLLAR AMOUNTS.

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

(b) The dollar amount specified in Section 1-203 and any amount stated in the declaration pursuant to that section, must change on July 1 of each year if the percentage of change, calculated to the nearest whole percentage point, between the Index at the end of the preceding year and the Reference Base Index is 10 percent or more, but (i) the portion of the percentage change in the Index in excess of a multiple of 10 percent must be disregarded and the dollar amount shall change only in multiples of 10 percent of the amount appearing in this [act] on the date of enactment; (ii) the dollar amount must not change if the amount required by this section is that currently in effect pursuant to this [act] as a result of earlier application of this section; and (iii) in no event may the dollar amount be reduced below the amount appearing in this [act] on the date of enactment.

(c) If the Index is revised after December, 1979, the percentage of change pursuant to this section must be calculated on the basis of the revised Index. If the revision of the Index changes the Reference Base Index, a revised Reference Base Index must be determined by multiplying the Reference Base Index then applicable by the rebasing factor furnished by the Bureau of Labor

Statistics. If the Index is superseded, the Index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for consumers.

Comment

1. The 1994 revision deleted the reference to Section 4-101(b)(7) to reflect the fact that another amendment deletes that section from the Act.

2. Subsection (c) requires recalculation of the Consumer Price Index if the Reference Base Index should be changed by the Department of Labor.

In 1987, the Bureau of Labor Statistics did in fact change the CPI for Urban and Clerical Workers, which used a 1967 base year, by adopting a rebasing factor. The new Index uses a base year of "1982-84 = 100."

While the index referenced in this Uniform Act is now obsolete, the drafters declined to modify the Uniform Act to delete reference to the old index. As of mid-1993, all the States which had adopted a version of UCIOA incorporated this indexing section. There is no reason to suggest that those adoptions were in error or that they even require amendment, since the statute as drafted has a functioning and mandatory self-correction mechanism.

However, States which choose to adopt this Act after 1994 should revise subsection (a) – as Nevada did, for example – to refer to "1982-84 = 100," rather than "1967 = 100."

Subsection (c) of the Act requires an adopting State to revise the Reference Base Index when, as is now the case, the "revision of the index changes the Reference Base Index." The rebasing factor for the 1967 Index furnished by the Bureau of Labor Statistics is 0.3357175. Applying that rebasing factor to the original December, 1979 Reference Base Index of 230 yields a Revised Reference Base Index of 77.215, or 77.

The December 1994 Index (using the 1982-84 = 100 Base) was 147.2. Accordingly, a recalculation of the $300 figure in Section 1-203 as of July 1, 1995 would be done as follows:

December 1979 Index =		77	(1967 Reference Base Index of 230, multiplied by the rebasing factor and rounded to the nearest whole percent).
December 1994 Index =		147.0	(Using 1982-84 = 100 Index for the end of 1994, the year preceding 1995, rounded to the nearest whole percent).
Difference	=	70.0	

70 is 90.9% of the Reference Base Index, or more than a 10% increase. Thus, on July 1, 1995, the $300 amount specified in Section 1-203 would increase. Because the amount of increase

"in excess of a multiple of 10% must be disregarded," the dollar amount of $300 increases by 90%, or $270. Therefore, as of July 1, 1995 the triggering dollar amount would be $570, or $47.50 per month.

SECTION 1-116. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

In 2000, Congress enacted the "Electronic Signatures in Global and National Commerce Act", 106 PUB.L.NO. 229, 114 Stat. 464, 15 U.S.C. § 7001, et seq. (popularly known as "E42 Sign"). E-Sign largely tracks the Uniform Electronic Transactions Act (UETA). Section 102 of E-Sign, entitled "Exemption to preemption", provides in pertinent part that:

> (a) A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law–
>
> (1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999" [with certain exceptions] or
>
> (2) (A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if [they meet certain criteria] and
>
> (B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

15 U.S.C. § 7002(a). The inclusion of this section is necessary to comply with the requirement that the act "make[] specific reference to this Act" pursuant to 15 U.S.C. § 7002(a)(2)(B) if the act contains a provision authorizing electronic records or signatures in place of writings or written signatures.

[PART] 2

APPLICABILITY

SECTION 1-201. APPLICABILITY TO NEW COMMON INTEREST COMMUNITIES.

Except as otherwise provided in this [part], this [act] applies to all common interest communities created within this state after [the effective date of this act]. The provisions of [insert reference to all present statutes expressly applicable to planned communities, condominiums, cooperatives, or horizontal property regimes] do not apply to common interest communities created after [the effective date of this act]. Amendments to this [act] apply to all common interest communities created after [the effective date of this act] or made subject to this [act] by amendment of the declaration of the common interest community, regardless of when the amendment to this [act] becomes effective.

Comment

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

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

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

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

In carrying out this philosophy with respect to "new projects, the Act applies to all common interest communities "created" within the State after the Act's effective date; at the same time, special limitations on that applicability are provided in the case of certain new cooperatives and planned communities in the following sections. This is the effect of the first sentence of the section. The second sentence makes clear that the provisions of old statutes expressly applicable to common interest communities do **not** apply to common interest communities created after the effective date of this Act.

"Creation" of a common interest community pursuant to this Act occurs upon recordation of a declaration pursuant to Section 2-101; however, the definition of "Common Interest Community" in Section 1-103(7) contemplates that de facto common interest communities may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a project. Any real estate project which includes individually owned units meeting the definition is therefore subject to the Act if created within the State after the Act's effective date. No intent to subject the project to the Act is required, and an express intention to the contrary would be invalid and ineffective.

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

2. The 1994 amendment makes clear that if an amendment to the Act is adopted after the Act is initially adopted in any State, the same body of law will thereafter apply to all common interest communities created under the Act or subjected to it. This is the corporate model, and avoids perpetuating the retroactivity issue which this Act addressed initially in Sections 1-204, 1-205, and 1-206. Note that the amendment would **not** automatically apply to common interest communities created **before** the original effective date of the Act even though limited provisions of the Act do apply retroactively. Instead, an "old" project would have to be "subjected" to the Act by vote of its unit owners under Section 1-206.

Since the Act permits the declaration to vary the default results under the Act, the drafters also contemplate that, in those cases where the pre-existing declaration conflicts with the new amendment to the Act, the old declaration will prevail, unless the owners vote to amend the declaration to change that result.

SECTION 1-202. EXCEPTION FOR SMALL COOPERATIVES. If a cooperative contains no more than 12 units and is not subject to any development rights, it is

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

Comment

1. Section 1-201 provides generally that the Act applies to all cooperatives "created" within the State after the Act's effective date. Under Section 1-202, however, only two sections of this Act automatically apply to a cooperative created after the effective date of this Act if that cooperative contains only 12 units or less and is not subject to development rights. Importantly, Section 1-105, which permits the declarant to determine whether the cooperative interests are real or personal property, does not apply unless the declarant elects to have the entire Act apply. Thus, the determination of whether the cooperative interests in a small cooperative created after the effective date of the Act are real or personal property may depend on other state laws. The Act, however, also permits such a cooperative to elect to be subject to the entire Act.

2. The default rule of the Act is that only two sections of the Act automatically apply to a "small" cooperative. However, the fact that the declarant may choose not to have the entire Act apply to a cooperative which meets the criteria of this section does not mean that the same declarant may not also choose to incorporate discrete provisions of the Act directly into the documents creating that cooperative. This might be done by simply repeating the text of the statute as a provision of the declaration. If this were to occur, those provisions would then apply as a matter of contract rather than by statute, and a reviewing court would presumably review them under the common law or other statutory law of the State, rather than under this Act.

3. The 1994 amendment to Section 1-207 adopts the policy that a non-residential common interest community of any type is not subject to the Act unless the declarant elects that result. The 1994 amendment to this section reflects that policy, since the original text was more restrictive for nonresidential cooperatives.

SECTION 1-203. EXCEPTION FOR SMALL AND LIMITED EXPENSE LIABILITY PLANNED COMMUNITIES.

(a) Unless the declaration provides that this entire [act] is applicable, a planned community that is not subject to any development right is subject only to Sections 1-105, 1-106, and 1-107, if the community:

(1) contains no more than 12 units; or

(2) provides in its declaration that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance

premiums paid by the association, may not exceed $300, as adjusted pursuant to Section 1-115.

(b) The exemption provided in subsection (a)(2) applies only if:

(1) the declarant reasonably believes in good faith that the maximum stated assessment will be sufficient to pay the expenses of the planned community; and

(2) the declaration provides that the assessment may not be increased above the limitation in subsection (a)(2) during the period of declarant control without the consent of all unit owners.

Comment

1. Section 1-201 provides generally that the Act applies to all planned communities "created" within the State after the Act's effective date. Section 1-203, however, makes only a few of the Act's sections applicable to either planned communities containing 12 or fewer units with no development rights or to de minimis planned communities – as measured by the size of its common expense assessments – unless the planned community's declaration makes the entire Act applicable.

2. The 1994 amendment incorporates into Section 1-203 two limitations that previously existed in Section 4-101(b)(7).

(a) Subsection (a), which was formerly all of Section 1-203, was amended to increase the number of planned communities which are not automatically subject to the full provisions of the Act. This has been accomplished by increasing the dollar amount in subsection (a)(2) from $100 per year to $300 per year.

(b) Subsection (b) was added to incorporate an important limitation on the flexibility granted to declarants to create planned communities which are subject to only a few sections of the Act. Again, the limitation derives from former Section 4-101(b)(7). Specifically, the exemption in (a)(2) applies to "de minimis" planned communities, that is, communities, regardless of size, with very few common elements and "commonness" measured by the fact that the maximum annual common charges, exclusive of optional fees and insurance premiums, were once only $100 a year and are now $300 a year. Under subsection (b), this cap must be reasonable and not amendable during the period of declarant control.

SECTION 1-204. APPLICABILITY TO PRE-EXISTING COMMON INTEREST COMMUNITIES.

(a) Except for a cooperative or planned community described Section 1-205 or a nonresidential common interest community described in Section 1-207, the following sections

apply to a common interest community created in this state before [the effective date of this act]:

(1) Section 1-105;

(2) Section 1-106;

(3) Section 1-107;

(4) Section 1-206;

(5) Section 2-102;

(6) Section 2-103;

(7) Section 2-104;

(8) Section 2-117 (h) and (i);

(9) Section 2-121;

(10) Section 2-124;

(11) Section 3-102(a)(1) through (6) and (11) through (16);

(12) Section 3-103;

(13) Section 3-111;

(14) Section 3-116;

(15) Section 3-118;

(16) Section 3-124;

(17) Section 4-109;

(18) Section 4-117; and

(19) Section 1-103 to the extent necessary to construe those sections.

(b) The sections described in subsection (a) apply only to events and circumstances occurring after the effective date of this [act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those common interest communities.

Comment

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

2. The Act adopts a novel three-step approach to common interest communities created before the effective date of the Act. First, certain provisions of the Act described in Section 1-204 automatically apply to "old" common interest communities, but only prospectively, and only in a manner which does not invalidate provisions of declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created common interest communities where not automatically displaced by the Act. Third, under Section 1-206, owners of "old" common interest communities may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by "old" law, so long as (a) the amendment is adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act. In addition, as in the case of "new" projects, special exceptions are provided, in Section 1-205, for "small" projects.

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

First, Section 1-204 provides that the enumerated provisions automatically apply to common interest communities created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of common interest communities created under early condominium statutes, or under common law. To avoid possible constitutional challenges, these provisions, as applied to "old" common interest communities, apply only to "events and circumstances occurring after the effective date of this Act;" moreover, the provisions of this Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments.

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

Example 2: Under Section 1-204, Section 3-118 (Association Records) automatically applies to "old" common interest communities. As a result, a unit owners' association of an "old" common interest community must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents," even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

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

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

> **Example 3**: Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-112 does not automatically apply to "old" common interest communities, if the unit owners of a pre-existing community amend their declaration to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

4. The 2008 amendments to this section add several existing and new sections of the Act that apply to projects created before the effective date of this Act in a particular state. Those new sections are:

Section 1-206, which addresses amendments to governing instruments of a project;

Section 2-102, dealing with Unit boundaries;

Section 2-117 (h) and (i), which ease the amendment process, both for amendments that require lender consent and for amendments requiring a greater than 80% vote of unit owners;

Section 2-124, a new section dealing with termination of a project following a catastrophe;

Section 3-103 dealing with the make-up of the executive board and the declarant's right to control the association at the outset of the project;

Section 3-108 dealing with meetings of unit owners and of the executive board; and

Section 3-124, a new section dealing with litigation involving the declarant.

5. In considering which sections of the Act might be applied automatically to projects created under other law, the drafters remain concerned to avoid constitutional infirmity as a consequence of challenges under Article I, Section 10 of the United States Constitution, which bars

a State - but not the federal government - from passing any law "...impairing the Obligation of Contracts...."

That subject, which was addressed in Comment 3 to this section in the original version of this Act, has subsequently been raised in a number of litigated cases, with mixed results. **Compare, e.g.,** Fourth La Costa Condominium Owners Ass'n v. Seith, 159 Cal. App. 4th 563 (2008) (statute not unconstitutional) with Association of Apartment Owners of Maalaea Kai, Inc. V. Stillson, 116 P.3d 644 (Hawaii 2005) (statute unconstitutional as applied).

The policy issues are not free from difficulty. On the one hand, for reasons of consistent management, judicial interpretation and consumer expectations among common interest communities in the same State, a single body of law that applies with equal force to all common interest communities in a State regardless of when created, would be greatly preferable. This, of course, is the general result in the field of corporate law, where all amendments to corporate statutes generally apply to all corporations in a state, regardless of whether they have retroactive application.

On the other hand, aside from the issue of possible constitutional infirmity, at least one practical reason - that being the "law of the project", which is known to all residents of a common interest community from the time they first became residents - is often raised to justify a refusal to apply new real estate laws retroactively to older projects.

The 2008 amendments continue to strike a middle ground between these positions.

SECTION 1-205. APPLICABILITY TO SMALL PREEXISTING COOPERATIVES AND PLANNED COMMUNITIES. If a cooperative or planned community created within this state before [the effective date of this act] contains no more than 12 units and is not subject to any development right, it is subject only to Sections 1-105, 1-106, and 1-107 unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of Section 1-206, in which case, all the sections enumerated in Section 1-204(a) apply to that cooperative or planned community.

Comment

Recognizing that pre-Act cooperatives or planned communities of fewer than 12 units ought not to be subject to more rigorous requirements than small cooperatives or planned communities created under the Act, this section provides that only the same sections applicable to small new cooperatives or planned communities will apply to small pre-Act cooperatives and planned communities, unless the declaration of a small pre-Act cooperative or planned community is amended to take advantage of the amendment provisions of Section 1-206. If such an amendment is made pursuant to Section 1-206, the small pre-Act cooperative or planned community would be

subject to all of the provisions applicable to large pre-Act cooperatives and planned communities, and further elections under Section 1-206 would then be possible.

SECTION 1-206. AMENDMENTS TO GOVERNING INSTRUMENTS.

(a) The declaration, bylaws, or plats and plans of any common interest community created before [the effective date of this act] may be amended to achieve any result permitted by this [act], regardless of what applicable law provided before this [act] was adopted.

(b) Except as otherwise provided in Section 2-117(i) and (j), an amendment to the declaration, bylaws, or plats and plans authorized by this section must be adopted in conformity with any procedures and requirements for amending the instruments specified by those instruments or, if there are none, in conformity with the amendment procedures of this [act]. If an amendment grants to a person a right, power, or privilege permitted by this [act], any correlative obligation, liability, or restriction in this [act] also applies to the person.

Comment

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

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

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

3. This section does not address the issue of contract rights of unit purchasers which may be affected by amendments under the new Act. Whether an amendment is effective against unit

owners who purchased their units prior to the effective date of the Act and prior, therefore, to the amendment in question is controlled by the contract and constitutional law of the State.

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

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

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

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

5. In place of the words "declaration, bylaws, and plats and plans," at the end of this

section, each State should insert the appropriate terminology for those documents under the present state law, e.g., "master deed, rules and regulations," etc.

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

7. The 1994 changes are not intended to alter the substantive rules contained in the original section. However, in light of experience in several state legislatures, these changes should make clearer the intent of the original section.

8. The 2008 changes to subsection (b) are important exceptions to the general rule that amendments to existing declarations and bylaws must be adopted in conformity with the procedures for amendments contained in those documents. Any effort to change by statute the amendment provisions of existing documents confronts the same constitutional issues discussed in the comments to Section 1-204 by the "impairment of contract" clause of the United States Constitution; similar provisions often appear in state constitutions.

At the same time, lawyers in the field have long recognized that the amendment process can be fatally impeded by provisions commonly found in the declarations of existing communities. Two of the most significant are requirements that amendments cannot be effective unless approved by a specified number of unit lenders, or unless approved by very large and often unrealistic majorities of unit owners. Recognizing this issue, Connecticut approved amendments to Connecticut's version of Section 2-117(i) and (j) in 1995 which are very similar to those appearing here; **see** Connecticut Public Act 95-187. Practice under those amendments demonstrates the significant value these relaxed procedures add in accomplishing desired amendments in pre-act declarations.

SECTION 1-207. APPLICABILITY TO NONRESIDENTIAL AND MIXED-USE COMMON INTEREST COMMUNITIES.

(a) Except as otherwise provided in subsection (d), this section applies only to a common interest community in which all units are restricted exclusively to nonresidential purposes.

(b) A nonresidential common interest community is not subject to this [act] except to the extent the declaration provides that:

(1) this entire [act] applies to the community;

(2) [Articles] 1 and 2 apply to the community; or

(3) in the case of a planned community or a cooperative, only Sections 1-105,

1-106, and 1-107apply to the community.

(c) If this entire [act] applies to a nonresidential common interest community, the declaration may also require, subject to Section 1-112, that:

(1) notwithstanding Section 3-105, any management, maintenance, operations, or employment contract, lease of recreational or parking areas or facilities, and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and

(2) notwithstanding Section 1-104, purchasers of units must execute proxies, powers of attorney, or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.

(d) A common interest community that contains units restricted exclusively to nonresidential purposes and other units that may be used for residential purposes is not subject to this [act] unless the units that may be used for residential purposes would comprise a common interest community that would be subject to this [act] in the absence of the nonresidential units or the declaration provides that this [act] applies as provided in subsection (b) or (c).

Comment

1. The 1994 amendments to this section permit all nonresidential common interest communities to "opt out" of the Act; the original section was limited to planned communities.

However, the 2008 amendment to subsection (b)(3) now precludes the possibility that the declaration for a non-residential project organized as a condominium may provide that only Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations and Building Codes), and 1-107 (Eminent Domain) apply to the community. The judgment of the drafters was that, by definition, a condominium was a creature of statute and it was therefore statutorily improper to suggest that a statutorily created form of ownership could exist without the other provisions of the statute also applying to it.

However, except for mixed use projects, the revised section continues to be restricted to common interest communities which contain only nonresidential units. The term "residential purposes" is defined and discussed in detail in Section 1-103(27) and its Comments.

In addition, the revised section offers the declarant of a nonresidential common interest community significantly more flexibility than was allowed in the original section. This change responds to those concerns which commentators have identified as important to developers of commercial common interest communities.

The default rule is that the Act does not apply at all to a nonresidential common interest community.

However, the declarant may want the Act to apply in at least some circumstances. Therefore, subsection (c) (b) provides a mechanism by which the declarant may elect simply to have the Act's rules on eminent domain, separate taxation, and applicability of local ordinances apply to the project. These three sections all establish default rules which are likely to be desirable from both the declarant's and future owners' perspectives.

The 2008 amendment to subsection (b) of this section increases the flexibility of document drafters in non-residential projects. Previously, the drafter was limited to 3 choices: (i) applying the default rule, that is, none of the Act applies, which would require a very substantial drafting effort to address all the issues covered by the statute; (ii) the entire Act applies, which brings the consumer protection complexities of Articles 3 and 4 of the Act, even with the drafting exceptions permitted by subsection (c), or (iii) only 3 sections of the Act apply, which resolve important issues of other state statutes but are otherwise insignificant in the drafting process.

With the new option contained in (b)(2), the drafter has an additional choice, and that is to apply only Articles 1 and 2 of the Act to the non-residential project. By electing this option, the document drafter can take advantage of the provisions validating legal structures of the common interest community, and thus allow shorter, clearer and more certain documents for non-residential projects than practice has permitted under the existing Act.

2. Finally, a declarant may find the full range of the Act to be a desirable outcome, particularly in light of those many sections which permit waiver or variation by agreement. Those sections already permitting waiver are detailed in the Official Comments to Section 1-104.

However, even in that case, the revised section provides two additional major enhancements to flexibility.

First, the section contemplates that the declaration may provide that the entire Act applies but that the declarant may require that the association must continue certain contracts and leases in place after turnover, even though such contracts would otherwise be subject to cancellation by the Association under Section 3-105.

Second, the section allows the declarant to use proxies, powers of attorney, or other devices to accomplish other results which would be prohibited in the case of residential common interest communities. The sole limitation in both instances is the rule of unconscionability in Section 1-112.

3. Subsection (d) addresses the Act's applicability to mixed use projects. The default rule is nonapplicability unless the definition of a common interest community would be met "in the absence of the nonresidential units." Thus, if the "residential" units and their obligations under the

declaration did not satisfy the definitional threshold in Section 1-103(7) – basically, a payment obligation on the unit extending by covenant to "non-unit" expenses – the Act would not apply.

SECTION 1-208. APPLICABILITY TO OUT-OF-STATE COMMON INTEREST COMMUNITIES. This [act] does not apply to a common interest community located outside this state, but Sections 4-102 and 4-103 and, to the extent applicable, Sections 4-104 through 4-106, apply to a contract for the disposition of a unit in that common interest community signed in this state by any party unless exempt under Section 4-101(b) [and the agency regulation provisions under [Article] 5 apply to any offering thereof in this state].

Comment

This section reflects the fact that there are practical as well as constitutional limits regarding the extent to which a State should or may extend its jurisdiction to out of state transactions. A State may, of course, properly exercise its authority to protect its citizens from false or misleading information regarding common interest communities located in other States but sold in that State. However, where sales contracts are executed wholly outside the enacting State and relate to common interest communities located outside the State, it seems more appropriate for the courts of the jurisdiction(s) in which the common interest community is located and where the transaction occurs to have jurisdiction over the transaction.

SECTION 1-209. OTHER EXEMPT REAL ESTATE ARRANGEMENTS.

(a) An arrangement between the associations for two or more common interest communities to share the costs of real estate taxes, insurance premiums, services, maintenance or improvements of real estate, or other activities specified in their arrangement or declarations does not create a separate common interest community.

(b) An arrangement between an association and the owner of real estate that is not part of a common interest community to share the costs of real estate taxes, insurance premiums, services, maintenance or improvements of real estate, or other activities specified in their arrangement does not create a separate common interest community. However, assessments against the units in the common interest community required by the arrangement must be included in the periodic budget

for the common interest community, and the arrangement must be disclosed in all public offering statements and resale certificates required by this [act].

Comment

This section, adopted in 2008, addresses once again the scope of the Act. It should be considered in connection with the revised definition of "Common Interest Community". The sub-sections address two separate aspects of this issue:

- Whether contractual arrangements for cost sharing between two or more common interest communities require creation of a third separate common interest community; and

- Whether contractual arrangements for cost sharing between an association and an owner of real estate located outside the common interest community's boundaries require creation of a separate common interest community.

The following analysis may help frame the issues.

First, there appear to be numerous situations in which a declaration of easements or a covenant to share costs would suffice to establish the relationship between two parcels without the need to establish another unit owners association to "manage" that relationship. Also, the sharing is not always a matter of shared use -- it might be a shared concern for maintenance of public rights-of-way through a community, or shared benefit of a roving security patrol, or sharing of costs of street lights on thoroughfares.

Here are examples of common situations:

1) A homeowners association maintains the entry features, median and right-ofway landscaping, and sidewalks along a public street that also serves a commercial parcel (e.g., hotel or country club). The developer wants the hotel or country club to be obligated to pay a share of the costs that the association incurs in performing this maintenance, so it records a declaration on the club or hotel parcel with a covenant obligating the club/hotel to share costs incurred by the association in performing this responsibility and setting out a formula for computing its share. If both parties are agreeable, no purpose is served by another association.

2) Same situation except that the hotel is performing the maintenance instead of the association. The association is obligated under the covenant to share the costs to pay its share and a formula is set out in the covenant for computing the association's share, which it then includes in its common expense budget and collects as part of its regular assessment, and pays to the hotel. There is no need here for another association in which the property owners and hotel are members, with organizational documents, contracts, meetings, etc. The hotel doesn't want to be subject to membership in an association controlled by other property owners and the existing association can adequately represent the interest of its members in dealing with the hotel.

3) Assume a vertical subdivision with a commercial parcel on the ground floor and a 15-story residential condominium above it. There is a recorded instrument creating reciprocal

easements, obligating the condominium association to insure the entire building, among other things, and obligating the commercial owner to share certain costs incurred by the condominium association in accordance with a formula set out in the recorded instrument. Again, if the parties accept this arrangement, no purpose is served by mandating creation of another association.

4) Four residential condominium projects share a common road. The first association to be created is responsible for maintaining the road. Each of the other three, at the time it is created, is made subject to a recorded covenant to share cost requiring it to pay 1/4 of the cost that the first association incurs in maintaining the road. Again, there is little benefit conferred in mandating creation of a master association to own and maintain the road.

Subsection (a) makes clear that in the case of arrangements between associations, a separate association would not be required in any of the foregoing instances.

However, the drafters did not intend that the section result in an arrangement where the unit owners are left without a remedy in those instances where, for example, the sharing arrangement appears to unreasonably allocate the costs or other important aspects of the arrangement between the parties.

Cost, of course, would be only one concern of unit owners and their associations arising out of an agreement to share in the use of and expenses for other land. The drafters are aware of situations in which developers have included amenities, such as clubhouses, swimming pools, tennis courts, as well as access roads, in one community and then grant to a second community the right to use the facilities together with the obligation to pay a pro rata share of the cost of operation. The decisions concerning the operation and maintenance of the facilities, however, remain with the first community. Such arrangements have the potential to breed frustration, acrimony, and abuse.

One of the examples above suggests that a residential association and a commercial venture such as a hotel share certain common facilities and expenses and that the hotel might defer to the residential association for the operation of these amenities. This may not always be realistic. Since the hotel developer, if it is not the declarant itself, usually has a seat at the table while the overall structure of the community is being negotiated, while the individual unit owners do not, the developer of the hotel may seek to negotiate a deal best suited to its needs, perhaps to the detriment of the unit owners. Whether or not the deal as it is finally structured contains some semblance of a "reasonable" formula for cost sharing, the other, non-financial terms of the arrangement may vest control, decision making, etc., including the level of maintenance desired, solely with the hotel.

In several provisions, the Act does offer remedies for such circumstances, and those provisions would apply here with equal force. By way of example, if the arrangement were created for purposes of avoiding the limitations of the Act, if the organizers of the arrangement had not acted in good faith, or if the allocated interests between the associations were unconscionable, the mandates of sections 1-104, 1-108 and 1-112 would apply.

In the case of arrangements between associations and third parties other than associations, sub-section (b) avoids the need for a separate unit owner association so long as the costs to be borne by the unit owners in the existing association are reflected in the periodic budget for the association and are subject to approval by the unit owners.

SECTION 1-210. OTHER EXEMPT COVENANTS. A covenant that requires the owners of separately owned parcels of real estate to share costs or other obligations associated with a party wall, driveway, well, or other similar use does not create a common interest community unless the owners otherwise agree.

Comment

While these various forms of simple shared arrangements might arguably satisfy the definition of "common interest community," there is no policy reason to vary common practice, which is to treat these arrangements as governed exclusively by the agreement of the parties, supplemented by common law. Accordingly, the 2008 amendments expressly exclude these arrangements from the Act.

[ARTICLE] 2

CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES

SECTION 2-101. CREATION OF COMMON INTEREST COMMUNITIES.

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

(b) In a condominium, a declaration, or an amendment to a declaration, adding units may not be recorded unless (i) all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent [registered] engineer, surveyor, or architect [, or (ii) unless the agency has approved the declaration or amendment in the manner prescribed in Section 5-103(b)].

Comment

1. Under subsection (a), a common interest community is created pursuant to this Act only by recording a declaration. As with any instrument affecting real estate, the declaration must be recorded in every recording district in which any portion of the common interest community is located and must be indexed in the manner described in subsection (a). Specific indexing rules are suggested in brackets and should be used in those States where this result would not otherwise occur. For example, the declaration commonly has not been indexed in the grantee's index in the name of the common interest community. Moreover, when multiple persons execute the declaration, the declaration has often been indexed solely in the name of the declarant and not in the name, for example, of lenders and other persons who might have executed the declaration. Because it is important that the names of the association and all persons executing the declaration appear in the index in order to locate all instruments in the land records, that language is not included in brackets.

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

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

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

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

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

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

units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial structural and mechanical completion (or the alternative bonding procedure and other assurances required by Section 5-103) reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

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

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

7. Section 4-120 requires that, before an individual unit is conveyed, the unit must be "substantially completed." "Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A 201, General Conditions of the Contract for Construction (1976 Ed.) at para. 8.1.3, states:

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

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

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

9. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units may ultimately be located have been "structurally" completed, the declarant may create a condominium in which he reserves particular development rights (Section 2-105(a)(8)). In such a project, only the completed units might be treated as units from the outset, and the development rights would be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements, or by subdividing units previously created. The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more phased condominiums under Section 2-105 in projects which were once in fact built in phases, but under a single non-expandable declaration. Experience in the several States where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this Act. Finally, many lenders and developers are increasingly sensitive to the secondary mortgage market requirements, particularly those of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC). Experience indicates that the pre-sale requirements imposed by FNMA and FHLMC frequently dictate that multi-building projects be structured on a phased or expandable basis.

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

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

SECTION 2-102. UNIT BOUNDARIES. Except as provided by the declaration:

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

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

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

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

Comment

1. It is important for title purposes, for purposes of defining maintenance responsibilities, and for other reasons to have a clear guide as to which parts of a common interest community constitute the units and which parts constitute common elements. This section fills the gap left when the declaration merely defines unit boundaries in terms of floors, ceilings, and perimetric walls, and is particularly useful in the case of cooperatives, in which the recording of plats and plans is not required. See Section 2-105(a)(5).

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

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

ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner.

2. The differentiations made clear here, in conjunction with the provisions of Section 3-107, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches, and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of components – such as stoops and pipes – are resolved by Section 3-107, which imposes liability on a unit owner who causes damage to common elements, or under the broader provisions of Section 3-115(c), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that person. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of the common elements.

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

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

SECTION 2-103. CONSTRUCTION AND VALIDITY OF DECLARATION AND BYLAWS.

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

(b) The rule against perpetuities does not apply to defeat any provision of the declaration, bylaws or rules.

(c) If a conflict exists between the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this [act].

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

a substantial failure impairs marketability is not affected by this [act].

Comment

1. Subsection (b) does not totally invalidate the rule against perpetuities as applied to common interest communities. The language does provide that the rule against perpetuities is ineffective as to documents which govern the common interest community during the entire life of the project, regardless how long that should be. With respect to deeds or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

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

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

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

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by Section 2-107. This would be a substantial defect if the assigned interests were unequal, but if all units were assigned identical interests it would be possible to infer that the basis of the allocation was equality – and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a common interest community where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common elements interests unless a different formula were specified pursuant to Section 2-107(c).

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

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

SECTION 2-104. DESCRIPTION OF UNITS. A description of a unit which sets forth the name of the common interest community, the [recording data] for the declaration, the [county] in which the common interest community is located, and the identifying number of the unit, is a legally sufficient description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws.

Comment

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements, so long as the requirements of this section are satisfied, and so long as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

2. The last sentence makes clear that an instrument which does meet those requirements includes all interests appurtenant to the unit. As a result, it will not be necessary under this Act to continue the practice, common in some jurisdictions, of describing in the instrument conveying title to a unit the common element interests, or limited common elements, that are appurtenant to that unit or make reference to surveys or subsequent amendments to declarations.

SECTION 2-105. CONTENTS OF DECLARATION.

(a) The declaration must contain:

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

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

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

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

(5) in a condominium or planned community, a description of the boundaries of

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

(6) a description of any limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-109(b)(10) and, in a planned community, any real estate that is or must become common elements;

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

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

(9) if any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with:

(A) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards; and

(B) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

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

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

(12) any restrictions on alienation of the units, including any restrictions on leasing which exceed the restrictions on leasing units which executive boards may impose pursuant to Section 3-120(d) and on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation, or casualty loss to the unit or to the common interest community, or on termination of the common interest community;

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

(14) any authorization pursuant to which the association may establish and enforce construction and design criteria and aesthetic standards as provided in Sections 3-106 and 3-120; and

(15) all matters required by Sections 2-106, 2-107, 2-108, 2-109, 2-115, 2-116, and 3-103.

(b) The declaration may contain any other matters the declarant considers appropriate, including any restrictions on the uses of a unit or the number or other qualifications of persons who may occupy units.

Comment

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

This Act makes a functional distinction between the declaration and the public offering statement. It only requires the declaration to contain those matters which affect the legal structure or title of the common interest community. This includes the reserved powers of the declarant to

exercise development rights within the common interest community. A narrative description of those rights, however, and the possible consequences flowing from their exercise, are required to be disclosed only in the public offering statement and not in the declaration.

In the case of condominiums and planned communities, plats and plans are made part of the declaration by Section 2-109, and their content may in part provide some of the information required by this section.

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

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

4. Paragraph (a)(4) requires the declarant to state the largest number of units he reserves the right to build. This Act imposes no time limit, measured by an absolute number of years, at the expiration of which the declarant must relinquish control of the association. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a two-year period during which development is not proceeding. See Section 3-103(d). The flexibility afforded by this section may be important to a declarant as he responds to unanticipated future changes in his market.

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

Example: A declarant reserves the right to build 100 units, even though zoning would permit only 75 units on the site, and the declarant actually plans on building only 50 units. As a result of the reservation, the declarant would not loss control of the association under the 75% rule stated in Section 3-103(d)(i) even when all 50 units had been built and sold, because that percentage applies to all potential units, not units actually built. See Section 3-103(d)(i)(1).

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

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

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

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

In the case of many cooperatives, it is possible to satisfy paragraph (a)(5) of this section by merely providing the identifying number of the unit, the size of the unit in square feet or its number of rooms, and its location within a building if it is in a building containing more than one unit. Thus, for example, it would be possible to describe a cooperative unit as follows: "Unit Number 243, consisting of 800 square feet, located on the fourth floor of Building A."

7. Paragraph (a)(6) makes clear that the limited common elements described in Section 2-102(2) and (4) need not be described in the declaration. These limited common elements are typically porches, balconies, patios, or other amenities which may be included in a project. Such improvements are treated by the Act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specifically referred to in the declaration. In the case of all common interest communities, except cooperatives, porches, balconies, and patios must be shown on the plats and plans (see Section 2-109(b)(10)), but other limited common elements described in Section 2-102(2) and (4) need not be shown.

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

9. Paragraph (a)(8) requires that the declaration describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be

exercised. The Act imposes no maximum time limit for the exercise of those rights, and contemplates that those rights may be exercised after the period of declarant control terminates.

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

11. Paragraph (a)(14) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as Section 2-107 on the allocation of allocated interests, will affect all projects. Others, such as Section 2-106 on leasehold common interest communities, will apply only to particular lands of projects.

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

13. The 1994 amendments to subsections (a)(12) and (b) of this section are part of the drafters' efforts to clarify the law of "use and occupancy" restrictions in common interest communities, and make that law more rational.

Specifically, these amendments describe the pattern of what use and occupancy restrictions must appear in the declaration, what amendment procedures must be used to change those use and occupancy restrictions, what discretion the executive board has in enforcing such restrictions, and what protection the Act provides to unit owners, either to be free of regulation inside their units, or to be protected from new restrictions on a once permitted activity.

This is a complex subject, and amendments in several sections of the Act were required.

The amendments begin in Section 2-105. Previously, the Act **required** all use, occupancy, and alienation restrictions to appear in the declaration; see old Section 2-105(a)(12). No amendment to a "use" restriction was allowed, except with unanimous consent; see old Section 2-117(d). The Act was unclear as to whether or not such things as leasing restrictions or pet rules were "use" restrictions requiring unanimous consent.

The 1994 amendment to this section makes made two important changes. First, leasing restrictions which exceed the restrictions allowed by the secondary mortgage market, see Section 3-102(c)(2), still must appear in the declaration. No other use or occupancy restrictions must appear in the declaration, but any such restrictions may so appear. See Section 2-105(b). Presumably, a provision in the declaration pursuant to this subsection (b) could permit the executive board to develop evolving use restrictions, in its discretion.

New subsection (b) also seeks generally to distinguish between "**uses** of a unit" and "the number or qualifications of persons who **occupy** units;" this distinction emphasizes that "occupancy" focuses on characteristics of individual persons while "use" focuses on the purposes to which the space is devoted.

Amendments to other sections bear on these issues in important ways. See, e.g., Section 2-117(d) and (f) and Section 3-102.

14. Subsection (a)(14) was adopted in 2008; it requires that if the unit owners association is to be authorized to establish and enforce construction and design criteria or aesthetic standards, that authority must appear in the declaration. This mandate tracks the requirement that if the declarant is to have that power during the time it is developing the project, the declarant must treat that power as a special declarant right; **see** Section 1-103 (33)(H).

If the association is so empowered, then, pursuant to Section 3-106(a)(4) and (7), the bylaws would have to provide for administration of that program if administration is to be done by any committee or officer other than the executive board. Further, under Section 3-120(c), the association would adopt criteria for consideration of design criteria, and procedures for enforcing them.

Taken together, these requirements are intended to instill a reasonable and transparent process regarding a subject which has been controversial in the common interest community field.

SECTION 2-106. LEASEHOLD COMMON INTEREST COMMUNITIES.

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

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

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

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

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

(5) any right of the unit owners to remove any improvements within a reasonable

time after the expiration or termination of the lease, or a statement that they do not have those rights; and

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

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

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

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

Comment

1. Subsection (a) requires that the lessor of any lease in a condominium or planned community which, upon termination, will terminate the condominium or planned community or reduce its size, must sign the declaration. This requirement insures that the lessor has consented to use of his land as a condominium or planned community. Note that such a signature is not required in the case of a lease in a cooperative. This distinction between the types of common interest communities tracks that made by UCA, UPCA, and MRECA.

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

3. This section sets out requirements concerning leasehold common interest communities which are not typically contained in the laws of most States. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. This section also contains a number of other consumer protection provisions. However, in contrast to the result under some States' condominium laws, neither the unit owners nor the association have a statutory right to renewal of a lease upon termination.

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

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

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

Subsection (b) does not address the issue of whether a unit owner's tenant may cure a default by the unit owner under the unit owner's lease so as to prevent termination of the unit owner's lease.

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

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

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

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

SECTION 2-107. ALLOCATION OF ALLOCATED INTERESTS.

(a) The declaration must allocate to each unit:

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

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

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

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

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

(d) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the

purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class. A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this [act] nor may units constitute a class because they are owned by a declarant.

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

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

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

Comment

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

2. Most existing condominium statutes and cooperative documents require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, or ownership interests in cooperatives, votes in the association and common expense liabilities. Following UCA, UPCA, and MRECA, this Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, a common interest community's applicable allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the value of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests (or ownership interest),

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

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

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

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

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

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

Example: In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners pay a much larger share than their proportion of the total units, the vote of commercial unit owners might be increased so that they exceed the number of votes the residential owners hold. Alternatively, of course, it might be possible to treat

this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

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

Example: Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting only the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units. The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103).

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

10. Questions have arisen concerning the drafters' intent regarding the language in subsection (b), which prohibits the declaration in allocating votes and common expense liabilities among the units, from "discriminating in favor of units owned by the declarant." Specifically, the question is whether this section imposes a special level of scrutiny on the allocation of votes and common expense liability to units that the declarant may own, compared to similar units that are owned by persons who are not declarants.

The answer is that the language means what it says: that is, if the allocated interests would change at the time the declarant sold the unit, then the allocated interests are improper because they discriminate in favor of the declarant's ownership of that unit. However, if the allocation of common expenses and votes is permanent rather than dependent on the owner's identity and one whose formula is identified in the declaration, then the allocation is proper. Subject to the obligations of good faith in Section 1-113 and the prohibition on unconscionable terms in Section 1-112, this would be true even if the effect of the allocation were to create a relative benefit in favor of units that the declarant or its affiliate intended to own for an indefinite period.

Example: A common interest community consists of a high-rise building containing 10 floors of equal size. There are 4 units on each floor except the top floor, where there is only 1 'penthouse' unit. Even though the penthouse unit is four times the size of the units on the 9 other floors, and is clearly more valuable than the other 36 units, the declaration allocates an equal share of the common expenses to all the units, including the penthouse unit. The effect of this allocation is that the penthouse unit bears a 1/37th share of

the common expenses – this is only 25% of the cost on a per square foot basis – of the share borne by each unit owner on a lower floor.

Assume that the declaration properly contains the formula used for the allocation of common expenses among the units and properly discloses the material and unusual circumstance that the penthouse benefits substantially from the formula used to allocate expenses.

The fact that the declarant intends to retain ownership of the penthouse unit and live in that unit for an indefinite period does not mean that the standard contained in section 2-107 (b) has been violated. However, the Act would be violated if the declaration provided that, upon the declarant's sale of the penthouse, the formula for allocating common expenses would be changed to an allocation among all the units based on their relative sizes.

In the example, this appears to yield an unjust result and a court might be invited to consider the extent to which the declarant had acted in bad faith or unconscionably in making such an allocation. Nevertheless, any other rule would simply encourage challenges to any allocation of common expenses, since an argument can always be made that any allocation – whether done on relative size, number of rooms, "value', location within a building, equality or any other basis - inevitably works to the relative disadvantage of some owners compared to others in the same community.

SECTION 2-108. LIMITED COMMON ELEMENTS.

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

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

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

Comment

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

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

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

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

SECTION 2-109. PLATS AND PLANS.

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

(b) Each plat must show or project:

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

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

(3) a legally sufficient description of any real estate subject to development rights, labeled to identify the rights applicable to each parcel, but plats and plans need not designate or label which development rights are applicable to each parcel if that information is clearly delineated in the declaration;

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

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

(6) except as otherwise provided in subsection (h), the approximate location and dimensions of any vertical unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

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

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

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

(10) the approximate location and dimensions of any porches, decks, balconies, garages, or patios allocated as limited common elements, and show or contain a narrative description of any other limited common elements; and

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

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

(d) Except as otherwise provided in subsection (h), to the extent not shown or projected on the plats, plans of the units must show or project:

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

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

(3) the approximate location of any units in which the declarant has reserved the right to create additional units or common elements, identified appropriately.

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

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

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

(h) Plats and plans need not show the location and dimensions of the units' boundaries or

their limited common elements if:

(1) the plat shows the location and dimensions of all buildings containing or comprising the units; and

(2) the declaration includes other information that shows or contains a narrative description of the general layout of the units in those buildings and the limited common elements allocated to those units.

Comment

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

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

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

3. Subsection (c) permits, but does not require, the plats to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may control) makes the improvement pursuant to Section 3-102(a)(7). Of course, as to existing unit owners, the improvements which may be made by the declarant and the areas within which they may be made, are limited by his contract with those unit owners. Since this is true, the Declarant may not violate that contract directly – by undertaking improvements for which he reserved no rights – or indirectly by making improvements through the association which he controls or by seeking to amend the declaration in violation of the contract. Moreover, under Section 2-117(d), no amendment to the declaration may create or increase special declarant rights without the unanimous consent of the unit owners.

Within land subject to development rights construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, see Section 4-119(a).

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

5. In detailing the required contents of the plats, two different types of legal description are contemplated. First, in subsection (b)(1), the plat must show at least a general schematic map of the entire project. While this may be by survey, the Act recognizes that a survey may be unduly expensive or impractical in a large project, and accordingly permits a general schematic map of the entire project at the commencement of development. With respect to those portions of the project, however, where no future development may take place, the flexibility of a general schematic map is not permitted by the statute. As development ceases in particular phases, subsection (b)(2) contemplates that the locations and dimensions of that real estate will be identified. As this process continues, all of the real estate originally shown in a general schematic map will have been surveyed, and the location and dimensions of that real estate identified, at the expiration of development rights. In addition, subsection (2) contemplates that existing improvements must be shown within real estate where no further development will take place. This does not include the units which may be within each building, but it does include the external physical dimensions of the buildings themselves. The nature of "existing improvements" required to be surveyed under subsection (2) should be determined by local practices in the particular State.

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

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

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

9. The 1994 amendments to subsections (6), (7), and (10) seek to balance the need for disclosure and certainty in understanding what a unit owner "owns," with the practical limitations of the surveying profession. The balance struck in the 1994 amendments to this section requires that the plat or survey – as a minimum – actually show only the kinds of limited common elements that most people would understand to be an important appurtenance to their units. All other kinds of limited common elements – parking spaces, window boxes, etc., – may be either shown on the survey or simply described in words.

10. New subsection (h) eliminates the need for any unit boundary survey so long as the building location is shown on the project survey and a practical means exists by which the potential purchaser can understand the unit layout and its assigned common elements. This is a common practice in the sale of cooperative units.

11. The 2008 amendment in subsection (c)(3) relieves the declarant from the obligation of identifying each applicable development right in the labeling of those portions of the plats and plans that show land subject to development rights if the actual development rights for each such parcel are "clearly delineated" in the declaration itself. While constituting a marginal reduction in the information shown on the plats and plans, the fact is that in some complexes, the reduced information may make the documents more legible. In any event, the statute continues to require disclosure of this information in the declaration.

SECTION 2-110. EXERCISE OF DEVELOPMENT RIGHTS.

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

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

(c) Whenever a declarant exercises a development right to subdivide or convert a unit

previously created into additional units, common elements, or both:

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

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

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

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

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

Comment

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

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

A typical construction loan mortgage on a portion of a phased condominium or planned community might provide that as soon as that portion of land is added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land and on any buildings containing units built on that land before it was added converts into a mortgage on all of the units

located within that portion, together in the case of a condominium, with their respective common element interests. In the case of a condominium, the common element interest of those units will, of course, extend to the common elements in other sections of the condominium. Therefore, conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interest, as a result of the requirements of Sections 2-107(f) and 2-110(a).

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

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

4. As indicated in the Comments to Section 1-106, the withdrawal of real estate from a common interest community may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider." In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the common interest community.

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

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

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide his two-floor unit into two or more units. He may also wish to reserve a portion of the divided floor as a corridor which will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

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

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

SECTION 2-111. ALTERATIONS OF UNITS. Subject to the provisions of the declaration and other provisions of law, a unit owner:

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

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

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

Comment

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

2. Subsection (3) deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would

permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not impaired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2).

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

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

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

SECTION 2-112. RELOCATION OF UNIT BOUNDARIES.

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

(b) Subject to the provisions of the declaration and other provisions of law, boundaries between units and common elements may be relocated to incorporate common elements within a unit by an amendment to the declaration upon application to the association by the owner of the unit

who proposes to relocate a boundary. Unless the declaration provides otherwise, the amendment may be approved only if persons entitled to cast at least [67] percent of the votes in the association, including [67] percent of the votes allocated to units not owned by the declarant, agree to the action. The amendment may describe any fees or charges payable by the owner of the affected unit in connection with the boundary relocation and the fees and charges are assets of the association. The amendment must be executed by the unit owner of the unit whose boundary is being relocated and by the association, contain words of conveyance between them, and on recordation be indexed in the name of the unit owner and the association as grantor or grantee, as appropriate.

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

Comment

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

2. This section contemplates that upon relocation of the unit boundaries, no reallocation of allocated interests will occur if none is specified in the application. If a reallocation is specified but the executive board deems it unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's findings as unreasonable.

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

4. Experience under the original Act indicates that it does not adequately address the frequently occurring issue of new additions to existing units, which commonly encroach on the common elements. While the use of limited common elements is a possible device to address this question – and while this new subsection does not prohibit use of that device – the drafters believe that new subsection (b), added in the 1994 amendment, offers a more direct means to address this situation.

While this section sets the default rule for such additions, local zoning and other rules would continue to limit its applicability.

This revision provides a mechanism to alter the boundary between a unit and the common elements and sets out a default rule with respect to association action to accomplish that result. In the absence of this rule, Section 2-117(d) mandates that a change in a unit boundary requires unanimous consent of all owners. With this amendment, unanimity is no longer required.

In addition, the Act contemplates that the declaration of a particular project may be drafted or amended in order to address the particular concerns of those unit owners most directly affected by such a relocation as a result of the addition's proximity, or by its aesthetic impact.

Thus, for example, the declaration may state who is entitled to vote and what percentage of unit owners' approval is required. For instance, the declaration may provide for voting only by owners in a particular building or neighborhood, or it may delegate that decision to the executive board on a case by case basis.

An amendment pursuant to this subsection may not, by itself, alter the allocated interests in the community; such a change may be made only pursuant to Section 2-117(d). As a consequence, a fee or charge described in the amendment will likely be in the nature of either a single one-time fee or charge, or a recurring surcharge which is payable in addition to the periodic common expense charge originally set out in the declaration, or both.

> **Example**: The declaration might be amended to state that the owner of a unit with a 100 square foot addition shall, in addition to regularly calculated monthly common charges, pay a monthly fee of $10, increased each year by a percentage equal to the percentage increase in the association budget.

5. If the only common element being incorporated into a unit is a wall separating two adjoining units owned by different owners, the amendment should be made under Section 2-112(a), not (b). However, if one owner owns two adjoining units, the wall may be removed pursuant to Section 2-111 without altering the boundaries, and without the need for any amendment to the declaration.

SECTION 2-113. SUBDIVISION OF UNITS.

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

(b) The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests

formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit or on any other basis the declaration requires.

Comment

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

2. At the same time, situations will often occur where future subdivision is appropriate, and this section permits the declaration to provide for it.

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

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

Alternative A

[SECTION 2-114. EASEMENT FOR ENCROACHMENTS. To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]

Alternative B

[SECTION 2-114. MONUMENTS AS BOUNDARIES. The existing physical boundaries of a unit or the physical boundaries of a unit reconstructed in substantial accordance with the description contained in the original declaration are its legal boundaries, rather than the boundaries derived from the description contained in the original declaration, regardless of vertical or lateral movement of the building or minor variance between those boundaries and the boundaries

derived from the description contained in the original declaration. This section does not relieve a unit owner of liability in case of his willful misconduct or relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]

End of Alternatives

Comment

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

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

SECTION 2-115. USE FOR SALES PURPOSES. A declarant may maintain sales offices, management offices, and models in units or on common elements in the common interest community only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. In a cooperative or condominium, any sales office, management office, or model not designated a unit by the declaration is a common element. If a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the common interest community in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the common interest community. This section is subject to the provisions of other state law and to local ordinances.

Comment

1. This section prescribes the circumstances under which portions of the common interest community – either units or common elements – may be used for sales offices, management offices, or models. The basic requirement is that the declarant must describe his rights to maintain such

offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element uses might include a sales booth in the lobby of a building, or a trailer or temporary building located outside the buildings on the grounds of the property.

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

SECTION 2-116. EASEMENT AND USE RIGHTS.

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

(b) Subject to Sections 3-102(a)(6) and 3-112, the unit owners have an easement in the common elements for access to their units.

(c) Subject to the declaration and rules, the unit owners have a right to use the common elements that are not limited common elements and all real estate that must become common elements for the purposes for which they were intended.

Comment

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

2. The declarant is also required to repair and restore any portion of the common interest community used for the easement granted under this section. See Section 4-119(b).

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

4. Subsection (c), amended in 2008, clarifies the extent to which unit owners may use the common elements in several ways which the drafters believe were previously implicit, but are now explicit.

First, the section previously applied only to planned communities, when the same policies clearly should apply to all forms of common interest communities. The amendment accomplishes that result.

Second, in the prior draft, the owners' right to use was statutorily subject to the association's right to regulate that use under Section 3-102(a)(6), and to the association's right to encumber or sell the common elements under Section 3-112. In contrast, the 2008 amendments make that right to use subject to all provisions of the declaration and rules and, while the statutory references have been deleted, the Act still applies with full force to the common interest community.

Third, the original text made no distinction between the common elements and limited common elements. However, since the very definition of limited common elements precludes the unbridled use of limited common elements, the 2008 amendment makes that outcome explicit.

Finally, the original text suggested that unit owners could use the common elements for "all other purposes", in addition to the purpose of "access" to their units. It is plain, of course, that various common elements - parking lots, roofs, elevators, for example - may not literally be used for "all...purposes" but simply for their intended purposes.

SECTION 2-117. AMENDMENT OF DECLARATION.

(a) Except in cases of amendments that may be executed by a declarant under Section 2-109(f) or 2-110, the association under Section 1-107, 2-106(d), 2-108(c), 2-112(a), or 2-113, or certain unit owners under Section 2-108(b), 2-112(a), 2-113(b), or 2-118(b), and except as limited by subsections (d), (f), (g), and (h), the declaration, including any plats and plans, may be amended only by vote or agreement of unit owners of units to which at least [67] percent of the votes in the association are allocated, unless the declaration specifies a different percentage for all amendments or for specific subjects of amendment. If the declaration requires the approval of another person as a condition of its effectiveness, the amendment is not valid without that approval.

(b) No action to challenge the validity of an amendment adopted by the association

pursuant to this section may be brought more than one year after the amendment is recorded.

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

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

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

(f) An amendment to the declaration may prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons who may occupy units only by vote or agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, unless the declaration specifies that a larger percentage of unit owners must vote or agree to that amendment or that such an amendment may be approved by unit owners of units having at least 80 percent of the votes of a specified group of units that would be affected by the amendment . An amendment approved under this subsection must provide reasonable protection for a use or occupancy permitted at the time the amendment was adopted.

(g) The time limits specified in the declaration pursuant to Section 2-105(a)(8) within which reserved development rights must be exercised may be extended, and additional

development rights may be created, if persons entitled to cast at least 80 percent of the votes in the association, including 80 percent of the votes allocated to units not owned by the declarant, agree to that action. The agreement is effective 30 days after an amendment to the declaration reflecting the terms of the agreement is recorded unless all the persons holding the affected special declarant rights, or security interests in those rights, record a written objection within the 30-day period, in which case the amendment is void, or consent in writing at the time the amendment is recorded, in which case the amendment is effective when recorded.

(h) A provision in the declaration creating special declarant rights that have not expired may not be amended without the consent of the declarant.

(i) If any provision of this [act] or of the declaration requires the consent of a holder of a security interest in a unit as a condition to the effectiveness of an amendment to the declaration, that consent is deemed granted if a refusal to consent in a record is not received by the association within 60 days after the association delivers notice of the proposed amendment to the holder at an address for notice provided by the holder or mails the notice to the holder by certified mail, return receipt requested, at that address. If the holder has not provided to the association an address for notice, the association shall provide notice to the address in the security interest of record. Notwithstanding this section, an amendment to the declaration that affects the priority of a holder's security interest or the ability of that holder to foreclose its security interest may not be adopted without that holder's consent in a record if the declaration requires that consent as a condition to the effectiveness of the amendment.

(j) If the declaration contains a provision requiring that amendments to the declaration may be adopted only by the vote or agreement of unit owners of units to which more than 80 percent of the votes in the association are allocated, the amendment is approved:

(1) if:

(A) unit owners of units to which at least 80 percent of the votes in the association are allocated vote for or agree to the proposed amendment;

(B) no unit owner votes against the proposed amendment; and

(C) notice of the proposed amendment is delivered to the unit owners holding the votes in the association which have not voted or agreed to the proposed amendment and no written objection to the proposed amendment is received by the association within 60 days after the association delivers notice; or

(2) unit owners of units to which at least 80 per cent of the votes in the association are allocated vote for or agree to the proposed amendment but at least one unit owner objects to the proposed amendment and, pursuant to an action brought by the association in [insert appropriate court] against all objecting unit owners, the court finds that the objecting unit owners do not have an interest, different in kind from the interests of the other unit owners, that the voting requirement of the declaration was intended to protect.

Comment

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

In addition to that basic rule, subsection (a) lists the other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board.

The 2008 amendments to subsection (a) significantly ease the ability of the document drafter to vary the process for adoption of amendments to the declaration. Under prior law, all amendments to the declaration - other than the variety of "special" amendments exempted in the introductory clause - required a 67% unit owner vote unless a larger vote was required. This amendment permits the declaration to provide for any percentage unit owner vote – whether smaller or larger - and also allows the declaration to mandate different percentages of votes of different subjects.

Note that subsection (a) permits the amendment to be accomplished "by vote or agreement" of unit owners. The distinction between those two processes is clear, and the "agreement" permitted under Section 2-117(a) could be quite different than, for example, a ballot without a meeting, as permitted in Section 3-110(d). It is the practice in some jurisdictions, particularly in larger common interest communities, to circulate what amount to petitions asking unit owners to "sign off" on proposed amendments, or agreement forms with many counterparts, all of which are deemed to be part of a single agreement. These are useful procedures and would comprise valid forms of "agreement", so long as appropriate safeguards were in place to confirm the validity of the signatures on the "petition" or counterparts.

The 2008 amendment in (a) also allows the declaration to require "another person" to consent to the effectiveness of an amendment, and states that the amendment is not effective without such consent. This amendment reflects an expansion of the concept contained in subsection (i) that various interested parties - lenders, project sponsors, municipalities that might have underwritten a subsidized project - might seek to insure the continued vitality of a project by requiring continued involvement in the project through a compulsory document oversight.

In contrast, the provision is not intended to grant the declarant an indirect means of reserving a veto right over amendments that the declarant found objectionable following the mandated turnover of declarant control of the association in Section 3-103 (d), (e) and (f). Such an attempt to extend control of the project would plainly violate that statute, as well as a range of other provisions of the Act, including Sections 1-104, 1-112, 1-113 and 1-114.

At the same time, the declarant plainly has a legitimate interest in the continued validity of its reserve special declarant rights, and subsection (h) expressly prohibits amendment of any reserved special declarant right before its expiration without the declarant's consent.

2. Section 1-104 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

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

4. The 1994 revision to subsection (d) deletes the prohibition on amendments which restrict the uses of units. Before 1994, Section 2-105(a)(12) required that the declaration specify all restrictions on use, occupancy, and alienation of units. The deleted provision in subsection (d) created the anomaly that unanimous consent was required to amend a use restriction but a lesser number could amend restrictions on occupancy or alienation of a unit.

5. New subsection (f), also adopted in 1994, responds to the growing belief that restrictions on use and occupancy which unit owners would like to impose after the declaration is recorded ought to be adopted only by a super majority and only after providing protection for those whose use or occupancy will be affected by the amendment. For example, a community may seek to prohibit pets after a number of owners have purchased and occupied their units in reliance on the absence of such a restriction. Under this amendment, if the community votes to impose the limitation, it can do so only with the vote of a high percentage of owners and only on such

conditions as reasonably protect the interests of existing pet owners. Whether the amendment "grandfathers" the right of the existing pet to remain or the right of the current owner to have a pet is not determined by the language of the subsection but will depend on the circumstances of each community and its owners.

The 2008 amendment to subsection (f) reflects the practical reality that, in large projects, requiring an 80% vote of all unit owners to change a use restriction in the community may be impossible to secure. For that reason, the amendment allows the declaration to designate the units that might be affected by a change in use amendment, and allows an 80% vote of only that group of units.

6. New subsection (g), adopted in 1994, addresses the possibility that development rights may be about to expire – and thus potentially halt completion of the project – at a time which neither the association nor the unit owners find desirable. This section allows extension of development rights, or creation of new rights, by a vote of the same percentage of unit owners as would be required to sell the common elements in the common interest community.

7. Subsections (i) and (j), adopted in 2008, are adapted from the Connecticut version of this Act, codified as C.G.S. § 47-237. A version of subsections (i) and (j) has proved extremely useful in that state. This draft expands the Connecticut statute by applying those provisions not only to communities created under UCIOA, but to pre-existing communities that now fall partially under the Act, since some of the most difficult mortgagee consent provisions can be found in the documents of older communities. These may arguably have made some sense in the earlier days of development when most unit mortgages were held by local financial institutions concerned that unit owners might routinely adopt irresponsible amendments, and when the lenders whose consent was required were often readily available. Now that most mortgages are held by distant entities unable to respond to requests for needed amendments in a timely way, however, provisions requiring lender approval frequently hinder communities in their efforts to adopt necessary changes to their documents.

SECTION 2-118. TERMINATION OF COMMON INTEREST COMMUNITY.

(a) Except for a taking of all the units by eminent domain, foreclosure against an entire cooperative of a security interest that has priority over the declaration, or in the circumstances described in Section 2-124, a common interest community may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies, and with any other approvals required by the declaration. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses.

(b) An agreement to terminate must be evidenced by the execution of a termination

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

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

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

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in a common interest community, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lien holders as their interests may appear, in accordance with subsections (h), (i), and (j). Unless otherwise specified in the termination agreement, as long as the association holds title

to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of that occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this [act] or the declaration.

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

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

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

(i) In a cooperative, the declaration may provide that all creditors of the association have priority over any interests of unit owners and creditors of unit owners. In that event, following termination, creditors of the association holding liens on the cooperative which were [recorded]

[docketed] [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] before termination may enforce their liens in the same manner as any lien holder, and any other creditor of the association is to be treated as if the creditor had perfected a lien against the cooperative immediately before termination. Unless the declaration provides that all creditors of the association have that priority:

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

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

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

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

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

(6) creditors of the association are not entitled to payment from any unit owner in excess of the amount of the creditor's lien against that unit owner's interest.

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

(1) Except as otherwise provided in paragraph (2), the respective interests of unit owners are the fair market values of their units, allocated interests, and any limited common elements immediately before the termination, as determined by one or more independent appraisers

selected by the association. The decision of the independent appraisers must be distributed to the unit owners and becomes final unless disapproved within 30 days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and its allocated interests by the total fair market values of all the units and their allocated interests.

(2) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests of all unit owners are:

(A) in a condominium, their respective common element interests immediately before the termination;

(B) in a cooperative, their respective ownership interests immediately before the termination; and

(C) in a planned community, their respective common expense liabilities immediately before the termination.

(k) In a condominium or planned community, except as otherwise provided in subsection (l), foreclosure or enforcement of a lien or encumbrance against the entire common interest community does not terminate, of itself, the common interest community, and foreclosure or enforcement of a lien or encumbrance against a portion of the common interest community, other than withdrawable real estate, does not withdraw that portion from the common interest community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate, or against common elements that have been subjected to a security interest by the association under Section 3-112, does not withdraw, of itself, that real estate from the common interest community, but the person taking title thereto may require from the association, upon request, an

amendment excluding the real estate from the common interest community.

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

Comment

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

2. Historically, there were instances, particularly during the 1930's where cooperatives were terminated, often as a result of foreclosure following the association's failure to pay debt service. Those terminations created enormously complex problems for the cooperatives concerned. While few planned communities or condominiums have yet been terminated under present law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes.

For all common interest communities, this Act seeks to deal comprehensively with the problems created by both voluntary and involuntary termination. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common elements and units should be disposed of following termination, both in the case of sale and nonsale of all of the real estate; the circumstance under which sale of units may be imposed on dissenting owners; the powers held by the board of directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire common interest community with respect to the validity of the project; and other matters.

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

owner consent or, more typically, require the consent of a percentage of the lenders before the project may be terminated.

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

5. Subsection (b) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real estate is being accomplished by the agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. The agreement becomes effective only when it is recorded.

6. Subsections (c) and (d) deal with the question of when all the real estate in a planned community or condominium, or the common elements, may be sold without unanimous consent of the unit owners. The sections reach a different result based on the physical configuration of the project.

Subsection (c) states that if a planned community or condominium contains only units having horizontal boundaries – a typical high rise building – the unit owners may be required to sell their units upon termination despite objection. Under subsection (d), however, if the project contains any units which do not have horizontal boundaries then the termination agreement may not force dissenting unit owners to sell their units unless the declaration as originally recorded provides otherwise. The reason for the rule stated in subsection (d) is that owners of units not having horizontal boundaries – single family homes, for example – may wish to terminate the common interest community regime and sell the real estate which they supported with their common charges, but continue to own the homes which they occupy.

Obviously, if all the unit owners consent to the sale of the units, sale of the entire development would be possible.

7. Subsection (e) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on the unit owner approval. This subsection also makes clear that, upon termination, title to the real estate shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this subsection makes clear that, until the association delivers title to the property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real estate regime will not be impaired.

8. Subsection (f) contemplates the possibility that a planned community or condominium might be terminated but the real estate not sold.

Subsections (b) and (g), the parallel provisions to Section 2-117(b) and (d) of MRECA, contemplate the same possibility in the case of cooperatives. Termination without sale is not likely to be the usual case, but might occur if the unit owners plan conversion to another form of common interest community, for example, conversion from a cooperative to a condominium. In the case of a cooperative, title to the real estate upon termination would remain in the name of the association as trustee for the unit owners; see subsection (g). In a condominium or planned community, title to the common elements following termination vests in the unit owners as tenants in common if that real estate is not to be sold, see subsection (f), but until a sale occurs vests in the association if the real estate is to be sold; see subsection (e). In the case of a condominium or planned community which contains only units with horizontal boundaries, these title rules also apply to all the units. (See subsection (f).) In the remaining case, i.e., the case where there are some units with horizontal boundaries and some without horizontal boundaries, the Act provides, in subsection (f), that unit owners become tenants in common of the common elements, but continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in both a high rise building and in single story structures, the unit owners in the high rise building will hold individual title to their unit upon termination, and either the declaration or the termination agreement should address the needs for easements of support and access for the high rise units over the real estate which all the unit owners will own as tenants in common. Undoubtedly, the unit owners will immediately reconstitute themselves as some form of common interest community.

Since, after termination of a cooperative title to the real estate remains in the association, it could record a new declaration corresponding to the new form of common interest community adopted, convey the units to the former unit holders, and then itself continue as the new common interest community's association.

9. Subsections (g), (h), and (i) deal with the very complex calculations and priorities which might result upon termination of a common interest community. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted and unsecured creditors of the association.

Those subsections accord different treatment to these issues, depending upon the type of common interest community involved. The separate approaches continue the distinctive treatment which condominiums, planned communities and cooperatives have received under UCA, UPCA, and MRECA, respectively. Each approach will be discussed and demonstrated in the Comments below.

Termination of Condominiums and Planned Communities

10. Subsection (h) establishes general rules with respect to competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the Act, based on application of an assumed state lien priority rule of "first in time, first in right." In

those instances, particularly involving mechanics' liens, where state law often establishes priorities at variance with that rule, that result is also indicated.

Example 1:

Hypothetical for Examples 1A-1H: A planned community consists of five detached single family homes on five individually owned lots, together with a sixth lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned by the association.

The declaration provides that the Act applies to this development (which would otherwise be exempt as a "small" planned community under Section 1-203). The documents also provide that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent of first mortgage holders before the unit owners may vote to terminate.

The five units were originally sold at equal prices of $50,000. Common expenses in the project are $100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the planned community which were senior to the declaration, and the common elements were deeded to the association free of all liens.

A shopping center developer has offered $380,000 for the purchase of the entire planned community. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The appraisal required by Section 2-118(j) shows that the units are still of equal value.

Example 1A: At the time of termination, the five units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of $50,000.
Unit 2: The owner's first mortgage had an unpaid balance of $40,000.
Unit 3: The owner's first mortgage had an unpaid balance of $25,000.
Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total $20,000.

Under the Act (Section 2-118(g)), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for unit owners and holders of liens on the units as their interests may appear." In these circumstances, the interests of each party in the total value of $400,000 would be as follows:

UNI T #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000

Due 1st					
Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Owners	30,000	40,000	55,000	80,000	80,000

Example 1B: The facts stated in Example 1A remain true. However, at termination, Unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

UNI T #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due Owners	28,000	40,000	55,000	80,000	80,000

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that six months of the unpaid assessments prime the first mortgage pursuant to Section 3-116(b). Thus, if the sales proceeds had been only $50,000 per unit, rather than $80,000, the results with respect to Unit 1 would have been as follows:

Sales Proceeds	$50,000
6-Month Assessment Due Association	$600
Balance	$49,400
Paid to 1st Mortgage Holder	$49,400
Loss to 1st Mortgage Lender	($600)
Loss to Association	($600)

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first six months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of six months' common expense assessments, as they often do for real property taxes.

Example 1C: The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on Lot 6. The association contracts with XYZ Pool Company to build the pool for $100,000. XYZ does not take a security interest in the common elements, as it might have done under Section 3-112; and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and

properly perfects its judgment pursuant to Section 3-111 (Tort and Contract Liability). As provided in Section 3-111, liens resulting from judgments against the association are governed by Section 3-117. At the time of termination, XYZ has not been paid, and its claim amounts to $100,000.

Section 3-117(a) provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a $20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

UNIT	# 1	2	3	4	5
Share of Proceeds Due Association (Priming 1st Mortgage)	80,000 600	80,000 -0-	80,000 -0-	80,000 -0-	80,000 -0-
Due 1st Mortgage Holders (Not Priming 1st Mortgage)	50,000 600	40,000 -0-	25,000 -0-	-0- -0-	-0- -0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Due Owners	8,800	20,000	35,000	60,000	60,000

Example 1D: All facts stated in Example 1C remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire planned community would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to $280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

Example 1E: The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a $50,000 uninsured judgment is entered against the owner of Unit 4, resulting from his personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

UNI T #	1	2	3	4	5
Share of Proceeds Due Association	80,000	80,000	80,000	80,000	80,000
(Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ Personal Lien,	20,000	20,000	20,000	20,000	20,000
Unit 4	-0-	-0-	-0-	50,000	-0-
Due Owners	8,800	20,000	35,000	10,000	60,000

Example 1F: The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against Unit 4 is perfected, the child secures a judgment against the association for $100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

UNI T #	1	2	3	4	5
Share of Proceeds Due Association	80,000	80,000	80,000	80,000	80,000
(Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ Personal Lien,	20,000	20,000	20,000	20,000	20,000
Unit 4	-0-	-0-	-0-	50,000	-0-
Tort Lien	8,800	20,000	20,000	10,000	20,000
Due Owners	-0-	-0-	15,000	-0-	40,000

Note that the child's lien realizes only $78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unmet claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which is the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for $20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at $20,000, even though he could have reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

Example 1G: The facts stated in Example 1F remain true. After the Unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P Paving Company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P $50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not, however, grant the mechanics' lien priority over any liens perfected before work began. P Paving sues on its lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

UNI T #	1	2	3	4	5
Share of Proceeds Due Association (Priming 1st Mortgage)	80,000 600	80,000 -0-	80,000 -0-	80,000 -0-	80,000 -0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	10,000
Tort Lien	-0-	10,000	20,000	-0-	20,000
Due Owners	-0-	-0-	5,000	-0-	30,000

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units are not liable for the balance.

In the example, the common expense lien arises before the P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) six months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

Example 1H: The facts stated in example 1G remain true. Assume Unit 5, before termination, paid its pro rata share of both the P Paving lien and the tort lien. This reduces the P Paving lien to $40,000, and the tort lien to $80,000. Under Section 3-117, this entitles Unit 5 to a

partial release of both claims, and neither P Paving nor the child has a further claim against Unit 5. The interests of the parties are as follows:

UNI T #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	-0-
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	-0-
Tort Lien	-0-	10,000	20,000	-0-	-0-
Due Owners	-0-	-0-	5,000	-0-	80,000

All the results stated above would be the same as to a condominium.

Example 2: The facts stated in example 1G remain true. Assume, however, that, at the outset, Unit 5 was twice as large as the others, sold for $100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In those circumstances, the results on sale are as follows:

UNI T #	1	2	3	4	5
Sale Proceeds	66,666	66,666	66,666	66,666	133,332
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	15,466	16,666	16,666	16,666	33,333
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	13,333	-0-	26,666
Tort Lien	-0-	1,667	16,666	-0-	33,333
Due Owners	-0-	-0-	-0-	-0-	50,000

Note that **all** the liens are allocated in accordance with each unit's common expense liability, since no special provision was made for allocating the costs of the pool, the paving, or the tort claim. Unit 5 probably did not contemplate the size of its exposure; nevertheless, fewer dollars were available to creditors upon termination than in Example 1G.

Example 3: The facts stated in Example 1G remain true, including the fact that Unit 5 was originally sold at the same price ($50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, Unit 5 is now worth $75,000. Three other units have remained at $50,000, while Unit 1 was neglected, and is now worth only $40,000. Common expense liabilities never changed. In this example, the total value of the units is now $265,000. Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1:	(15.09433%)	$ 60,377
Unit 2:	(18.86793%)	$ 75,472
Unit 3:	(18.86793%)	$ 75,472
Unit 4:	(18.86793%)	$ 75,472
Unit 5:	(28.30188%)	$113,207
	100.00000%	$400,000

UNI T #	1	2	3	4	5
Sales Proceeds	60,377	75,472	75,472	75,472	113,207
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	9,177	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	10,000	5,472	10,000
Tort Lien	-0-	5,472	20,000	-0-	20,000
Due Owners	-0-	-0-	472	-0-	63,207

In this example, the equal distribution of common expense liability coupled with the "fair value" distribution of sales proceeds create the greatest losses for the creditors of the association.

11. Subsection (j)(2) is an exception to the "fair market value" rule. It provides that, if appraisal of any condominium unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available, which is the common element interest allocated to each unit.

12. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium or planned community, but, if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium or planned community to be terminated pursuant to subsection (a) of this section.

13. A mortgage or deed of trust on a unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property.

However, such a shift would be deemed to occur even in the absence of express language, pursuant to subsection (f).

Termination of Cooperatives

14. Subsection (i) deals with the very complex calculations and priorities which might result upon termination of a cooperative, in light of the possibility that the association itself might have its own secured creditors, while unit owners and their creditors would seek to enforce their own claims against the proceeds of sale. The Act recognizes, in considering this issue, that there are two competing interests to be resolved. On the one hand, cooperative developers and lenders have traditionally financed cooperatives through loans to the cooperative association secured by one or more blanket mortgages on the cooperative's real estate. Any uniform proposal to reduce the priorities of some or all such mortgages in favor of creditors secured only by interests in some of the units would have a negative effect on that traditional form of financing.

At the same time, it has become increasingly evident that the frequent inability of unit owners to readily resell their units may be traced in part to the reluctance of spot lenders to place mortgages on individual units which may always be subordinate to the claims of the association's secured creditors, even when those associations creditors obtain their security interest at a date later than the date of the spot loan. As a result, the Conference was urged to draft the Act in a manner which would enhance the financing of individual units.

This section became the focal point for much of that debate. In resolving it, the Act takes a middle approach, by providing the declarant an election among priority systems.

Subsection (i) permits the declarant to include in the declaration a provision that all the association's creditors, upon termination, will have priority over all the interests of unit owners and their creditors. If the declaration does so provide, the association's creditors would enforce their liens in their normal priority, while unsecured creditors of the association would be treated as if they had perfected their liens immediately prior to termination. Only when all of the association's creditors had been satisfied would the unit owners and their creditors be entitled to participate in the proceeds of sale. Such a result, while significantly different from the result flowing under UCA or UPCA, is a recognition of the fundamental differences between the financing of condominiums and cooperatives. Such a provision would likely maximize the ability of the cooperative to secure initial and subsequent blanket financing, while tending to discourage spot loans for units. Alternatively, subsection (i) contemplates that the declarant may wish to enhance the financeability of units while insuring that the initial blanket financing of a cooperative will not be jeopardized. Accordingly, it provides that, in the absence of a provision in the declaration which grants senior priority to the association's creditors, the liens of all creditors with an interest in the cooperative's property would be fractionalized upon termination, and would constitute a lien against each unit proportionate to that unit's common expense liability. No lien would lie against the cooperative's real estate as a whole, but a senior blanket mortgage, for example, would constitute a first lien against every unit in proportion to the common expense liabilities of the various units.

15. In the case of fractionalized liens, a particularly complex series of creditors' rights questions arise upon termination. Those questions involve competing claims of holders of first security interests on individual units, the secured and unsecured creditors of individual unit owners, as well as blanket mortgagees and judgment creditors of the association. The second part of

subsection (i) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those claims. In considering his problem, in the analogous context of condominiums and planned communities, which mandate fractionalized liens upon termination, Comment 10 above includes examples of how these competing claims might be resolved. If all creditors of the association have priority over all creditors of unit owners, of course, the examples set out in Comment 10 have to be adjusted appropriately.

Other Provisions

16. Subsection (j) describes the method by which the interests of proprietary lessees are to be calculated, and adopts an appraisal procedure for allocation of the sales proceeds in all three forms of ownership.

It departs significantly from the usual result under most condominium acts. Under those acts the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of the sales proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollars actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination agreement is approved, so that unit owners may understand the likely financial consequences of the termination. If an initial appraisal made pursuant to subsection (j) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

17. With respect to the association's role as trustee under subsection (g), see Section 3-119.

18. "Foreclosure" in subsection (k) includes deeds in lieu of foreclosure, and "liens" includes tax and other liens on real estate which may be converted or withdrawn from the project.

19. The termination agreement should adopt or contain any restrictions, covenants, and other provisions for the governance and operation of the property formerly constituting the common interest community which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a common interest community which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the State governing tenancies in common would apply.

20. Subsection (l) recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium or planned community declaration was recorded. Recordation of the declaration should not constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium or planned community documents. For that reason, this section permits the nonconsenting prior lienholder upon foreclosure to exclude the real estate subject to his lien from the condominium or planned community.

21. The 1994 amendment to subsection (k) clarifies the effect of foreclosure of a security interest in common elements which the association may have granted under Section 3-112.

SECTION 2-119. RIGHTS OF SECURED LENDERS.

(a) The declaration may require that all or a specified number or percentage of the lenders who hold security interests encumbering the units or who have extended credit to the association approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board, or (ii) prevent the association or the executive board from commencing, intervening in, or settling any litigation or proceeding, or (iii) prevent any insurance trustee or the association from receiving and distributing any insurance proceeds except pursuant to Section 3-113.

(b) A lender who has extended credit to an association secured by an assignment of income (Section 3-102(14)) or an encumbrance on the common elements (Section 3-112) may enforce its security agreement in accordance with its terms, subject to the requirements of this [act] and other law. Requirements that the association must deposit its periodic common charges before default with the lender to which the association's income has been assigned, or increase its common charges at the lender's direction by amounts reasonably necessary to amortize the loan in accordance with its terms, do not violate the prohibitions on lender approval contained in subsection (a).

Comment

1. In a number of instances, particularly sale or encumbrances of common elements, or termination of a planned community, a lender's security may be dramatically affected by acts of the association. For that reason this section permits the declaration to provide that lender ratification of specified actions of the association is a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would

order appointment of a receiver for an association. While this would be possible in a court proceeding, the Act prohibits private contractual granting of such a power.

4. Since it may well be that the association might find itself involved in litigation which would be adverse to the interests of the lender or the declarant, it is inappropriate for a secured party to be able to control the course of litigation in the absence of the consent of the other parties. In an appropriate case, of course, where the lenders' interests are affected, a lender might seek to intervene as a party.

5. Section 3-113 specifies the distribution of insurance proceeds. In particular, it prevents distribution of those proceeds to lenders until the intended purpose of the insurance has been met. For that reason, under this section the declaration may not provide the lender a right to receive insurance proceeds in any manner except the manner provided in Section 3-113.

6. In addition to the provisions of the declaration, the provisions of individual deeds to units may require that unit owner to secure his lender's consent before taking particular actions.

7. The delegation of consent powers to the lenders may, of course, be limited to particular kinds or classes of lenders – such as holders of first security interests – and may also establish eligibility criteria. Such criteria may include, for example, notice requirements. It is possible, for example, to require that only those lenders who notify the association may have consent powers, or be for a specified period of time – say, during the period of declarant control.

8. The 1994 changes in subsections (a) and (b) are designed to resolve issues which lenders to associations have raised regarding their authority to require approval of association activities as conditions of the effectiveness of those actions, and to include otherwise standard lending requirements in their loan documents.

SECTION 2-120. MASTER ASSOCIATIONS.

(a) If the declaration provides that any of the powers described in Section 3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation [or unincorporated association] that exercises those or other powers on behalf of one or more common interest communities or for the benefit of the unit owners of one or more common interest communities, all provisions of this [act] applicable to unit owners' associations apply to any such corporation [or unincorporated association], except as modified by this section.

(b) Unless it is acting in the capacity of an association described in Section 3-101, a master association may exercise the powers set forth in Section 3-102(a)(2) only to the extent expressly permitted in the declarations of common interest communities which are part of the master

association or expressly described in the delegations of power from those common interest communities to the master association.

(c) If the declaration of any common interest community provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(d) The rights and responsibilities of unit owners with respect to the unit owners' association set forth in Sections 3-103, 3-108, 3-109, 3-110, and 3-112 apply in the conduct of the affairs of a master association only to persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this [act].

(e) Even if a master association is also an association described in Section 3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each common interest community, the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

(1) All unit owners of all common interest communities subject to the master association may elect all members of the master association's executive board.

(2) All members of the executive boards of all common interest communities subject to the master association may elect all members of the master association's executive board.

(3) All unit owners of each common interest community subject to the master association may elect specified members of the master association's executive board.

(4) All members of the executive board of each common interest community subject to the master association may elect specified members of the master association's executive board.

Comment

1. This section adopts the approach uniformly adopted by UCA, UPCA, and MRECA.

2. It is common in large or multi-phased condominiums or planned communities, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller projects. While it is expected that this phenomenon will be less necessary under this Act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue.

3. Subsection (a) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association if the declaration for the common interest community permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several common interest communities may amend their declarations in similar fashion to provide for this power. Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act, which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

4. Subsection (b) limits the ability of a master association to exercise the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more common interest communities. In those cases where it is not so acting, however, the only powers of the unit owners' association which the master association may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of Section 3-102 that all of the powers described in that section may be exercised unless limited by the declaration.

5. Subsection (c) clarifies the liability of the members of the executive board of a unit owners' association when the common interest community for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (c) makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (a), that liability lies with the members of the master association.

6. Subsection (d) addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (d) provide certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the common interest community subject to the master board. For that reason, the rights of notice, voting, and other rights enumerated in the Act are available only to the persons who actually elect the board.

7. Subsection (e) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at-large election is reasonable. For that reason, subsection (e) provides that, after the period of declarant control has terminated, there may be four ways of electing the master association board. Those four ways are: (1) at-large election of the master board among all the common interest communities subject to the master association, (2) at-large election of the master board only among the members of the executive boards of all common interest communities subject to the master association, (3) each common interest community might have designated positions on the master board, and those spaces could be filled by an at-large election among all the members of each common interest community, or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each common interest community. It would only be in the case of an at-large election of the master board among all common interest communities that subsection (d) would have no relevance.

SECTION 2-121. MERGER OR CONSOLIDATION OF COMMON INTEREST COMMUNITIES.

(a) Any two or more common interest communities of the same form of ownership, by agreement of the unit owners as provided in subsection (b), may be merged or consolidated into a single common interest community. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant common interest community is the legal successor, for all purposes, of all of the pre-existing common interest communities, and the operations and activities of all associations of the pre-existing common interest communities are merged or consolidated into a single association that holds all powers, rights, obligations, assets, and liabilities of all pre-existing associations.

(b) An agreement of two or more common interest communities to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded, and certified by the president of the association of each of the pre-existing common interest communities following approval by owners of units to which are allocated the percentage of votes in each common interest community required to terminate that common interest community. The agreement must be recorded in every [county] in which a portion of the common interest community is located and is not effective until recorded.

(c) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant common interest community either (i) by stating the reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall allocated interests of the new common interest community which are allocated to all of the units comprising each of the pre-existing common interest communities, and providing that the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing common interest community must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing common interest community.

Comment

1. There may be circumstances where common interest communities may wish to merge or consolidate their activities by the creation of a single common interest community; this section provides for that possibility.

Subsection (a) makes it clear that a merger or consolidation may occur by the same vote of the unit owners necessary to terminate the common interest community. If two or more common interest communities are merged or consolidated, the resulting common interest community is for all purposes the legal successor of the pre-existing common interest community, with a single association for all purposes. In the event common interest communities did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to Section 2-120.

2. Under subsection (b), the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (c) does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (c) may be included. The important point that subsection (c) makes is that the reallocation of the allocated interests must be carefully stated.

Subsection (c) states two alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of allocated interests to each unit, or by stating the formulas by which those interests may be allocated to each unit in all of the preexisting common interest communities. Alternatively, the merger or consolidation agreement may state the percentage of overall allocated interests allocated to "all of the units comprising each of the pre-existing common interest communities." The agreement might then also provide that the position of the percentage allocated to each unit from along the shares allocated to each common interests community will be equal to the percentage of allocated interests allocated to that unit by

the declaration of the pre-existing common interest community. An example of how this alternative formulation would operate may be useful.

Example: Assume that two adjoining planned communities wish to merge their activities into one planned community. Assume that the first planned community consists of 10 one-bedroom units, with an annual budget of $10,000. Assume further that each of the units, being identical, has an equal common expense liability of 10% and one vote per unit.

The second planned community consists of 40 units, with 20 two-bedroom units and 20 three-bedroom units. The budget of the second planned community consists of $70,000 per year. Each of the two-bedroom units has been allocated a 2% common expense liability, while each of the three-bedroom units has been allocated a 3% common expense liability. Finally, each of the units in the second planned community also has an equal vote.

There is no provision in the Act which mandates a particular allocation among planned communities one and two as to either common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii), to state "the percentage of overall common expense liabilities and votes in the new association" as follows: as to common expense liabilities, they might allocate 12.5% of the common expense liabilities in the merged project to planned community 1, and 87.5% thereof to planned community 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part on the pre-existing planned community must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing planned community" as required by subsection (c), each unit in planned community one would then have allocated to it 1.25% of the common expense liabilities in the new planned community. It happens that 1.25% of the common expenses of a merged planned community which has a budget of $80,000 equals $1,000.

Under the same rationale, if each of the two-bedroom units in the second planned community, to which were formerly allocated 2% of the common expense liabilities, now has allocated 2% of the 87.5% allocated to the second planned community, each of those units would then have allocated to it 1.75% of the common expense liabilities of the new planned community. 1.75% of $80,000 is $1,400. Similarly, each of the three-bedroom units would then have allocated to it 2.625% of the common expense liabilities in the merged planned community. That percentage of the common expense liabilities of $80,000 would yield an annual cost of $2,100, the same cost as previously obtained in planned community 2.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both planned communities, this would have the effect of giving 20% of the votes to planned community 1, even though planned community one had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the expectations of the unit owners in both planned communities. Alternatively, planned community one might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second planned community, then each of the unit owners in planned community two would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to paragraph (c)(i) rather than (c)(ii). The same result would be reached in a merger of planned communities or cooperatives.

SECTION 2-122. ADDITION OF UNSPECIFIED REAL ESTATE. In a planned community, if the right is originally reserved in the declaration, the declarant in addition to any other development right, may amend the declaration at any time during as many years as are specified in the declaration for adding additional real estate to the planned community without describing the location of that real estate in the original declaration; but, the amount of real estate added to the planned community pursuant to this section may not exceed 10 percent of the real estate described in Section 2-105(a)(3) and the declarant may not in any event increase the number of units in the planned community beyond the number stated in the original declaration pursuant to Section 2-105(a)(5).

Comment

In assembling land for large "new town" planned communities, developers have from time to time been unable to secure small parcels of real estate within the outer boundaries of the development at the time the original covenants for the development were recorded. Subsequently, however, for a variety of reasons, those parcels may become available and would logically form a part of the overall development. As a matter of policy, there is no reason to prohibit the amendment of the declaration to permit the addition of that land to the development, so long as that addition does not substantially increase the potential common expenses of the unit owners, nor the density of the project as originally project by the declarant in his public offering statement.

This section was designed to address this relatively unusual problem. It permits the declarant to add those after-acquired parcels of real estate to the development. This power is available only if the declarant makes clear in his original declaration that this development right has been reserved. The section also requires the declarant to impose his own time limit on the period during which this development right may be exercised. To foreclose the possibility of an increase in the density of the project beyond that which was originally contemplated, the section also prohibits the declarant from increasing the number of units in the planned community beyond the number originally stated in the declaration. Finally, to impose a reasonable limitation on the amount of new land that may be added, the amount of real estate added to the planned community pursuant to this section may not exceed 10% of the real estate originally subjected to the declaration.

SECTION 2-123. MASTER PLANNED COMMUNITIES.

(a) The declaration for a common interest community may state that it is a master planned community if the declarant has reserved the development right to create at least [500] units that may be used for residential purposes, and at the time of the reservation that declarant owns or controls more than [500] acres on which the units may be built.

(b) If the requirements of subsection (a) are satisfied, the declaration for the master planned community need not state a maximum number of units and need not contain any of the information required by Section 2-105(a)(3) through (14) until the declaration is amended under subsection (c).

(c) When each unit in a master planned community is conveyed to a purchaser, the declaration must contain:

(1) a sufficient legal description of the unit and all portions of the master planned community in which any other units have been conveyed to a purchaser; and

(2) all the information required by Section 2-105(a)(3) through (14) with respect to that real estate.

(d) The only real estate in a master planned community subject to this [act] are units that have been declared or which are being offered for sale and any other real estate described pursuant to subsection (c). Other real estate that is or may become part of the master planned community is only subject to other law and to any other restrictions and limitations that appear of record.

(e) If the public offering statement conspicuously identifies the fact that the community is a master planned community, the disclosure requirements contained in [Article] 4 apply only with respect to units that have been declared or are being offered for sale in connection with the public offering statement and to the real estate described pursuant to subsection (c).

(f) Limitations in this [act] on the addition of unspecified real estate do not apply to a

master planned community.

(g) The period of declarant control of the association for a master planned community terminates in accordance with any conditions specified in the declaration or otherwise at the time the declarant, in a recorded instrument and after giving notice in a record to all the unit owners, voluntarily surrenders all rights to control the activities of the association.

Comment

Section 2-123 was adopted in 1994 in response to concerns expressed from the development community. Developers' counsel asserted that the Act's constraints on the development process were not realistic in very large communities. First, they argued, the size and time parameters suggested in Section 2-105 were illusory in large projects. Those self imposed limits presumably have value in smaller projects, where buyers might reasonably expect an end to the development process in the vicinity of their homes and where the limits could therefore form part of the basis for the bargain between buyer and seller. However, those limits could not serve that purpose in very large projects. There, development might reasonably be expected to continue for decades, and the ultimate number of units could simply not be projected with any degree of certainty at the outset of the project. Furthermore, while a developer could impose purely artificial limits to satisfy the legal requirements of the Act – say, a 1000 year development period and a one million unit density cap – such statements could not possibly give comfort or certainty to any buyer, and would create a certain tone of cynicism if they became routinely used.

Other constraints on the development process – such as the period of declarant control of the association – seemed equally difficult to justify in the abstract, once the drafters assumed a sufficiently large project of the sort currently being developed throughout the United States. The drafters adopted the "500 units/500 acres" standard as an objective cut off point after ample evidence suggested that developers of smaller projects could readily satisfy the Act's existing requirements for documentation.

The drafters accordingly determined that the appropriate concept was to view the development process from the perspective of potential buyers of the units being offered for sale at any time in a large project. At that point, the developer should be required to describe what units and common elements were subject to the Act, and how the various relationships which the Act imposes exist at that time with respect to the submitted real estate.

The drafters also expect that the common law doctrines of good faith and unconscionability will continue to be applied by the courts in appropriate circumstances to impose subjective limitations on developer practices. See, e.g., Barclay v. Deveau, 384 Mass. 676 (1981) holding that a declarant must surrender control of the association to the unit owners after a reasonable time.

SECTION 2-124. TERMINATION FOLLOWING CATASTROPHE. If substantially all the units in a common interest community have been destroyed or are uninhabitable and the available methods for giving notice under Section 3-121 of a meeting of unit owners to consider termination under Section 2-118 will not likely result in receipt of the notice, the executive board or any other interested person may commence an action in [insert appropriate court] seeking to terminate the common interest community. During the pendency of the action, the court may issue whatever orders it considers appropriate, including appointment of a receiver. After a hearing, the court may terminate the common interest community or reduce its size and may issue any other order the court considers to be in the best interest of the unit owners and persons holding an interest in the common interest community.

Comment

This section, adopted in 2008, is broadly based on a Florida statute that was adopted as the result of several condominium projects that could not be rebuilt following storm damage. See Fla. Stat. Ann. Section 718.117(4), (5). In those cases, termination was appropriate, but it proved impossible to secure the needed unit owner vote to terminate the project.

In such circumstances, the section permits "any interested" person to petition the court for an order terminating the common interest community or reducing its size. Recognizing that the statute cannot contemplate every possible eventuality, the section grants the court powers to issue whatever temporary orders the court deems "appropriate," including the power to appoint a receiver. Further, after a hearing, the court is empowered to "issue any other order the court considers to be in the best interest of the unit owners and persons holding an interest in the common interest community."

[ARTICLE] 3

MANAGEMENT OF THE COMMON INTEREST COMMUNITY

SECTION 3-101. ORGANIZATION OF UNIT OWNERS ASSOCIATION. A unit owners association must be organized no later than the date the first unit in the common interest community is conveyed. The membership of the association at all times consists exclusively of all unit owners or, following termination of the common interest community, of all former unit owners entitled to distributions of proceeds under Section 2-118 or their heirs, successors, or assigns. The association must have an executive board. The association must be organized as a profit or nonprofit corporation, trust, limited liability company, partnership, [unincorporated association,] or any other form of organization authorized by the law of this state.

Comment

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the common interest community even during a period of declarant control reserved pursuant to Section 3-103(d).

2. The bracketed language preserves the flexibility existing in practically all States today to organize the association of a condominium, cooperative or planned community as a profit or nonprofit corporation, trust or partnership. Most associations are either corporations or unincorporated associations, but occasionally developers or their lawyers have found trust or partnership forms valuable. Although at least one State (Georgia) requires the organization of a condominium association in corporate form, it is not desirable to mandate this result in a uniform act. If a State wishes to mandate incorporation, it should delete the bracketed language.

3. Regardless of the form in which the Association is organized, the Act restricts membership in the association to those persons who are 'unit owners' as that term is defined in Section 1-103 (32). This rule should be considered together with three other provisions of the Act: (i) the requirement in Section 2-101 (b) that at least in a condominium, a unit may not be 'created' until the structural components and mechanical systems of that unit - to the extent the unit is intended to contain such components and systems - will be such are completed; (ii) the requirement in Section 2-107 (b) that the declaration must allocate votes and a share of the common expense liabilities to each unit pursuant to formulas that do not discriminate in favor of units owned by the declarant; and (iii) the restriction in Section 2-117 (d) that the allocations of votes and common expense liabilities to the units may not be amended except by unanimous consent of all the unit owners.

Taken together, these sections seek to avoid the potential for either intentional declarant overreaching – by, for example, allocating more votes to units the declarant owns in order to extend control of the association beyond the timeframes allowed under the Act in Section 3-103(d) - or inadvertent uncertainty in failed projects as a result of allocating votes and common expense liabilities to 'ghost' or 'paper' units that are never built. Rather, the philosophy of the Act is to make certain that only persons with an actual economic interest in a 'real' unit will have a vote in the affairs of the association and that the patterns for voting and allocating the relative costs of maintaining the community's property will not be subject to developer abuse.

4. This does not mean that the declarant should not or cannot participate in the activities of the association. First, it is clear under Section 2-110 (a) that the declarant is the initial owner of every unit when it is created. Accordingly, until every unit is sold, the declarant is a 'unit owner' and has the same rights to participate in its capacity as a unit owner as would any other person who owned that same unit. Further, even if the declarant temporarily ceased being a unit owner, its representative could still attend unit owner meetings and have access to the association's records so long as the declarant held any development right, if it reserved those special declarant rights. **See** §1-103(33).

5. In addition, the Act recognizes the unique role of the declarant during the development phase, and the expectations of the declarant's lenders that the development can be constructed in accordance with the plans, free from the risks of interference by other unit owners and the association. Accordingly, the Act includes the important concepts of "Development Rights" [Section 1-103 (14)] and 'Special Declarant Rights" [Section 1-103 (29)]. Among the significant special declarant rights is the right to control the owners association during the time reasonably necessary to control the project and sell the units. **See, e.g.**, Investors Ltd. Of Sun Valley v. Sun Mountain Condos., Phase I, Inc. Homeowners Ass'n, 106 Idaho 855, 683 P.2d 891 (1984), Barclay v. Deveau, 415 N.E.2d 239 (Mass. Ct. App. 1981), vacated, 384 Mass. 676, 429 N.E. 2d. 323 (1981). Taken together with the substantive provisions of the Act governing those concepts, the Act makes clear both that the developer will be meaningfully engaged in every aspect of the Association's and the projects activities during the time when development is underway, and that the unit owners themselves will be free of the developer's control at an appropriate time.

This section allows the document drafter to select any form of legal organization permitted under state law for the Unit Owners Association; this Act then supplements the requirements of those 'entity' statutes by a number of requirements unique to unit owner associations. Notwithstanding this permitted flexibility, experience under both this Act, most non-UCIOA condominium statutes and most planned communities created at common law indicates that nearly all unit owner associations are organized as non-stock corporations under the States' non-stock corporation acts.

In the rare case where the association may be organized as another form of legal entity, such as a limited liability company, the drafter will be required to address the differences between this Act and the requirements of the State's LLC statute. In the limited liability company context, it may well be that the 'bylaws' mandated by this Act will in fact be part either of the declaration or the management agreement required by the LLC statute. So long as the mandated content in Section 3-106 appears in whatever document the drafter chooses, the requirements of this Act will have been satisfied.

SECTION 3-102. POWERS AND DUTIES OF UNIT OWNERS ASSOCIATION.

(a) Except as otherwise provided in subsection (b) and other provisions of this [act], the association

(1) shall adopt and may amend bylaws and may adopt and amend rules;

(2) shall adopt and may amend budgets under Section 3-123, may collect assessments for common expenses from unit owners, and may invest funds of the association;

(3) may hire and discharge managing agents and other employees, agents, and independent contractors;

(4) may institute, defend, or intervene in litigation or in arbitration, mediation, or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community, subject to Section 3-124;

(5) may make contracts and incur liabilities;

(6) may regulate the use, maintenance, repair, replacement, and modification of common elements;

(7) may cause additional improvements to be made as a part of the common elements;

(8) may acquire, hold, encumber, and convey in its own name any right, title, or interest to real estate or personal property, but:

(A) common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to Section 3-112; and

(B) part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to Section 3-112;

(9) may grant easements, leases, licenses, and concessions through or over the common elements;

(10) may impose and receive any payments, fees, or charges for:

(A) the use, rental, or operation of the common elements, other than limited common elements described in Section 2-102(2) and (4); and

(B) services provided to unit owners;

(11) may impose charges for late payment of assessments and, after notice and an opportunity to be heard, may impose reasonable fines for violations of the declaration, bylaws, and rules of the association;

(12) may impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments;

(13) may provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance;

(14) except to the extent limited by the declaration, may assign its right to future income, including the right to receive assessments;

(15) may exercise any other powers conferred by the declaration or bylaws;

(16) may exercise all other powers that may be exercised in this state by organizations of the same type as the association;

(17) may exercise any other powers necessary and proper for the governance and operation of the association;

(18) may require that disputes between the association and unit owners or between two or more unit owners regarding the common interest community be submitted to nonbinding alternative dispute resolution as a prerequisite to commencement of a judicial proceeding; and

(19) may suspend any right or privilege of a unit owner that fails to pay an assessment, but may not:

(A) deny a unit owner or other occupant access to the owner's unit;

(B) suspend a unit owner's right to vote;

(C) prevent a unit owner from seeking election as a director or officer of the association; or

(D) withhold services provided to a unit or a unit owner by the association if the effect of withholding the service would be to endanger the health, safety, or property of any person.

(b) The declaration may not limit the power of the association beyond the limit authorized in subsection (a)(18) to:

(1) deal with the declarant if the limit is more restrictive than the limit imposed on the power of the association to deal with other persons; or

(2) institute litigation or an arbitration, mediation, or administrative proceeding against any person, subject to the following:

(A) the association shall comply with Section 3-124, if applicable, before instituting any proceeding described in Section 3-124 (a) in connection with construction defects; and

(B) the executive board promptly shall provide notice to the unit owners of any legal proceeding in which the association is a party other than proceedings involving enforcement of rules or to recover unpaid assessments or other sums due the association.

(c) If a tenant of a unit owner violates the declaration, bylaws, or rules of the association, in addition to exercising any of its powers against the unit owner, the association may:

(1) exercise directly against the tenant the powers described in subsection (a)(11);

(2) after giving notice to the tenant and the unit owner and an opportunity to be heard, levy reasonable fines against the tenant for the violation; and

(3) enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease or which the association could lawfully have exercised directly against the unit owner, or both.

(d) The rights referred to in subsection (c)(3) may be exercised only if the tenant or unit owner fails to cure the violation within 10 days after the association notifies the tenant and unit owner of that violation.

(e) Unless a lease otherwise provides, this section does not:

(1) affect rights that the unit owner has to enforce the lease or that the association has under other law; or

(2) permit the association to enforce a lease to which it is not a party in the absence of a violation of the declaration, bylaws, or rules.

(f) The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commencing an action for a violation of the declaration, bylaws, and rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

(1) the association's legal position does not justify taking any or further enforcement action;

(2) the covenant, restriction, or rule being enforced is, or is likely to be construed as, inconsistent with law;

(3) although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or

(4) it is not in the association's best interests to pursue an enforcement action.

(g) The executive board's decision under subsection (f) not to pursue enforcement under

one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

(h) The executive board shall establish a reasonable method for unit owners to communicate among themselves and with the executive board on matters concerning the association.

Comment

1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the State. If a State wishes to permit the association to be unincorporated and the law of the State is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-106.

3. This Act makes clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that a condominium association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph (8) refers to the power granted by Section 3-112, upon a vote of the requisite number of unit owners, to sell or encumber common elements in a condominium or planned community or to sell part or encumber all or part of a cooperative without a termination of the common interest community. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners.

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the common interest community. These powers are intended to be in addition to any rights which the association may have under other law.

Under the Act, fines levied by the Association must be "reasonable" and may be imposed only after notice and an opportunity for a hearing. Moreover, in an effort to minimize potential

abuse of the association's powers, the 2008 amendments to the Act bar any foreclosure of a unit if the only sums due are fines and related charges; see § 3-115(p). However, the Act does not codify the precise dollar amount of late charges or fines, or detail the standards for conduct of a hearing. Thus, the Act does not follow the enactments of States such as North Carolina which impose a default cap on the amount of late fees; see North Carolina 2005 Session Law 2005-422, § 47F-3-102, and detailed default provisions regarding the conduct of the hearing; Id., at § 47F-3-107.1.

6. Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration – for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

The 2008 amendments to Section 3-102 (a) (14) reverse the presumption in the 1994 Act as to whether the association may pledge its common expense assessments as security for a loan. Previously, the Act provided that the Association could only do so "to the extent the declaration expressly so provides." Because many declarations do not so provide, the Act as drafted forced the Association to amend its declaration in order to borrow funds, since lenders will commonly require a pledge of the income stream as a condition to extending credit to the Association.

The increasing use of this important financing technique and the extraordinarily low default rate on such loans across the country caused the drafters to empower the Association to borrow funds with a pledge of its income stream, subject only to the restrictions appearing in the declaration. Moreover, under Section 1-204, this section automatically applies to common interest communities created under prior law.

It may be appropriate for the declaration to include some restrictions on such borrowing, such as a requirement that the proposal to borrow funds be put to a vote of the unit owners before the loan is closed. However, while some commentators urged that the Act require a majority vote of unit owners before the Association borrows any funds, the drafters sought again to avoid a fixed rule that may be inappropriate in some communities, and instead chose to defer such decision-making to the drafters of each community's declaration or to the discretion of the executive board, or the unit owners, in a particular case.

7. If the association is incorporated, it may, pursuant to paragraph (16), exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (16), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-108.

8. The 1994 amendment to this section provides important new statutory authority to an association, but also states limits on the association's power.

9. New subsections (c), (d), and (e), and (f) enable the association to enforce directly against a tenant or other occupant of a leased unit all the powers which either the statutes or the project documents provide against that person. The section also provides the association all the powers the owner itself would have under the lease against the tenant, so long as the violation of the lease also violates the project documents. Finally, subsection (d) permits the association, landlord, and tenant to contract in the lease itself for powers beyond those granted by the statute.

10. New Thus, subsection (a)(18) permits the association to impose mandatory nonbinding arbitration or other non-judicial procedures to resolve disputes in the development before litigation commences. The drafters believe that non-judicial dispute resolution should be available to parties as an economical and efficient form of alternative dispute resolution.

11. The 2008 amendments, in Section 3-120, significantly expand the association's rulemaking authority. In order to consolidate all of the Act's provisions on rules in one section, former sub-section (c) of section 3-102 has been relocated to new Section 3-120(f).

12. While Section 3-102(a) (2) was amended in 2008 to expressly enable the association to "invest funds of the association," the drafters concluded that the investment standards contained in Uniform Prudent Investor Act and similar statutes should not apply to the association's investment of reserves or other funds of the association.

Anecdotal evidence suggests that the reserves of most common interest community associations, as a matter of practice, are invested in cash or near-cash (i.e., short term bond fund) equivalents.

The UPIA by its terms applies to trust investing. It is the nearly universal practice for associations to be organized as non-stock corporations or – occasionally – other forms of business entities but rarely as trusts. In these cases, the business judgment rule rather than the prudence norm of trust law applies.

Beyond that, however, and regardless of the form of organization, the drafters concluded that it ought not make special provision for association investments in this Act because actual or contingent liquidity needs will predominate in most circumstances affecting the association. Unlike a family trust, an association board is not meant to be making long-term investment decisions for capital growth; accordingly, most such investing is appropriately done in interest-bearing cash equivalents.

Finally, because the subject has not been problematic in practice, the drafters saw no need to make special provision for it. Of course, subject to the business judgment rule, in those unusual cases where long term capital growth might be appropriate, UCIOA would not bar a board's decision to invest the reserves in suitable vehicles designed to achieve that goal.

13. The 2008 amendments to Section 3-102 (a)(19) of the Act allow the executive board to "suspend and right or privilege of a unit owner that fails to pay an assessment"; this is similar to statutes in other States; compare, e.g., North Carolina § 47F-3-102 (11). However, unlike other States, Section 3-102 (a)(19) specifically precludes suspending the right to vote or the right to run for an association office if a unit owner has not paid her assessments.

14. Subsection (b) was amended in 2008 to focus on the extent to which a declarant may insert provisions into a declaration designed to impede the association's future flexibility and discretion in managing its affairs. The amended text preserves the basic rule in the earlier Act that prevents the declarant from imposing unique limits on the association's power to deal with the declarant.

The amended section cross references new Section 3-124, which imposes a "cooling off" period before an association may commence coercive proceedings against a declarant arising out of the project's construction. Consistent with the overarching goal in the 2008 amendments to re-balance the association's relationship with individual unit owners, the amended section requires that unit owners be notified of all significant legal proceedings to which the association is a party.

15. New subsection (f) addresses the important question of whether the Association may "selectively enforce" its rules or whether it is obliged to enforce the rules to the letter in every instance, at the risk of being found by a court to have failed to meet its fiduciary duties, or to have waived its right to enforce the rules in some future instance as a consequence of its failure to enforce the rules in this instance.

In evaluating the alternative outcomes here, the extreme positions are clear. On the one hand, one could assert that the Board's obligation is to strictly enforce or attempt to enforce every alleged breach of the rules, so that the board can never be accused of selective enforcement, favoritism, breach of duty, or waiver.

Alternatively, the board could be held free of any obligation to enforce at any time, without in any way constraining its ability to enforce the same rules at a later time against the same or different persons in those cases where the board decided it would do so.

In the middle is a rule of law that would guide the Board's exercise of discretion. There are a number of theoretical standards that might guide the Board's discretion; they include: (i) the 'business judgment rule'; (ii) arbitrary and capricious; (iii) reasonableness; (iv) bad faith; (v) discriminatory or other improper purposes; (vi) "best interests of the association"; (vii) "good cause"; or (viii) perhaps the Latin maxim "De minimus non curat lex"- the notion that "the law does not care about insignificant matters."

There have also been legislative proposals in various states in response to the issue of discretionary rules enforcement, although there does not appear to be a consensus position. Several of those proposals were considered by the drafters.

The text in subsection (f) represents a middle position to guide an Executive Board as it considers whether or how to enforce a particular rule. The text identifies those circumstances where the Board might conclude, in any given case, not to enforce the rules as they have been drafted. These criteria are premised, of course, in all instances on the recognition that the decision-making process of the Executive Board is subject to the "Business Judgment Rule"; see Comments to Section 3-103.

In those circumstances where the Board declines to enforce a rule, nothing in this Act precludes an individual unit owner from seeking independently to enforce the rules in a particular

instance pursuant to Section 4-117. Alternatively, the unit owner could seek to require enforcement of the rule by the Executive Board for a breach of its duty; such a suit would be measured by the extent the board had abused its discretion under subsection (f).

16. While subsection (f) deals with the executive board's discretion in enforcing its rules in any single instance, sub-section (g) states the basic principle that the board's decision in one instance is not binding in another future instance, under another set of circumstances. At the same time, the subsection emphasizes that the Board may not act in an arbitrary or capricious fashion.

As with every provision of this Act, Section 1-108 makes clear that "principles of law and equity...supplement the provisions of this Act, except to the extent inconsistent with this Act". In the case of 3-102(g), it is clear that other principles of law and equity, including the law of waiver and course of performance, would supplement this section. Such principles have been often been applied by courts in appropriate circumstances as they consider the extent to which an absence of enforcement over time has modified recorded covenants affecting real estate, and this Act does not modify those principles, except as stated in (g).

SECTION 3-103. EXECUTIVE BOARD MEMBERS AND OFFICERS.

(a) Except as otherwise provided in the declaration, the bylaws, subsection (b), or other provisions of this [act], the executive board acts on behalf of the association. In the performance of their duties, officers and members of the executive board appointed by the declarant shall exercise the degree of care and loyalty to the association required of a trustee. Officers and members of the executive board not appointed by the declarant shall exercise the degree of care and loyalty to the association required of an officer or director of a corporation organized, and are subject to the conflict of interest rules governing directors and officers, under [insert reference to state nonprofit corporation law]. The standards of care and loyalty described in this section apply regardless of the form in which the association is organized.

(b) The executive board may not:

(1) amend the declaration except as provided in Section 2-117;

(2) amend the bylaws;

(3) terminate the common interest community;

(4) elect members of the executive board but may fill vacancies in its membership

for the unexpired portion of any term or, if earlier, until the next regularly scheduled election of executive board members; or

(5) determine the qualifications, powers, duties, or terms of office of executive board members.

(c) The executive board shall adopt budgets as provided in Section 3-123.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before the period ends. In that event, the declarant may require during the remainder of the period that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective. Regardless of the period provided in the declaration, and except as provided in Section 2-123(g), a period of declarant control terminates no later than the earliest of:

(1) [60] days after conveyance of [three-fourths] of the units that may be created to unit owners other than a declarant;

(2) two years after all declarants have ceased to offer units for sale in the ordinary course of business;

(3) two years after any right to add new units was last exercised; or

(4) the day the declarant, after giving notice in a record to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association.

(e) Not later than 60 days after conveyance of [one-fourth] of the units that may be created to unit owners other than a declarant, at least one member and not less than 25 percent of the members of the executive board must be elected by unit owners other than the declarant. Not later

than 60 days after conveyance of [one-half] of the units that may be created to unit owners other than a declarant, not less than [one-third] of the members of the executive board must be elected by unit owners other than the declarant.

(f) Except as otherwise provided in Section 2-120(e), not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom must be unit owners. Unless the declaration provides for the election of officers by the unit owners, the executive board shall elect the officers. The executive board members and officers shall take office upon election or appointment.

(g) A declaration may provide for the appointment of specified positions on the executive board by persons other than the declarant during or after the period of declarant control. It also may provide a method for filling vacancies in those positions, other than by election by the unit owners. However, after the period of declarant control, appointed members:

(1) may not comprise more than [one third] of the board; and

(2) have no greater authority than any other member of the board.

Comment

1. Subsection (a) makes members of the executive board appointed by the declarant liable as trustees of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

2. Subsections (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

3. Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It

might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

4. Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

5. The 1994 amendment to subsection (a) is intended to conform the Act to expectations of owners, members of executive boards, and courts. The duty owed by an elected member of an executive board ought to parallel the standard imposed on directors of non-profit corporations. The original text set out a lesser standard. By making reference to the non-profit corporate model, members will also obtain the benefits of the business judgment rule, now commonly applied by courts in the non-profit context; see, for example, Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530 (1990).

Comment 5 was expanded in 2008, because of the importance of this issue. The Act continues to rely on the Business Judgment Rule as the basis for evaluating the actions of the Board. "As long as directors of a corporation decide matters rationally, honestly, and without a disabling conflict of interest, the decision will not be reviewed by the courts." Atkins v. Hibernia Corp., 182 F3d 320, 324, (5 th cir. 1999) quoted in Block, Barton & Radin, The Business Judgment Rule, (5th ed. 1998) in 2002 Supp. Page 6.

> The business judgment rule is a tool of judicial review, not a standard of conduct. The rule (1) shields directors from liability and protects decisions made by directors when The rule's elements – a business decision, disinterestedness, and independence, due care, good faith and no abuse of discretion – are present and a challenged decision does not constitute fraud, illegality, ultra-vires conduct or waste, and (2) creates a presumption that directors have acted in accordance with each of the elements of the rule.
>
> [Block et al at page 110.] In its 2007 decision, the Supreme Court of New Jersey confirmed the continuing vitality of the business judgment rule as the basis for evaluating the activities of the executive board of a unit owners association. See Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association, 192 N.J. 344; 929 A.2d 1060 (2007); the decision is expected to be widely followed.

The change from "fiduciary" to "trustee" as the standard of care for declarant-appointed directors makes the standard of care more precise. The law contemplates many forms of fiduciary relationships; among them, the trustee's duty is the highest.

6. Subsection (d) has been amended in the 1994 amendment to add a new fourth category regarding voluntary relinquishment of retained rights to control any aspect of the affairs of the association. This category frequently has been written into declarations under the Act. The amendment incorporates this practice and is important in order to track the time when statutes of limitation involving the declarant begin to run. See Section 3-111.

7. Subsection (g), adopted in 2008, is designed to accommodate the possibility, especially in senior living projects and in subsidized "first time home buyer" complexes, that it may assist the long term viability of the project if a non-controlling percentage of the directors – appointed by persons other than unit owners – could provide independent outside expertise to the Board, even if those directors are not directly responsive to the owners themselves. As drafted, the new provision contains safeguards intended to adequately guard against the potential for abuse by the original declarant or outside lenders. Such directors could sit only if the declaration provided for such an outcome.

New subsection (g) must be read in conjunction with subsection (a), which emphasizes that the duty of care and loyalty of all directors is to the association and not to the appointing authority. This clear statement of duty should ameliorate the concerns of undue influence that may flow from potential conflicting interests from "outside" directors.

As with any provision of the declaration, this provision for 'outside directors' could be removed from the declaration by the vote or agreement of unit owners holding 67% of the voting power in the association, or any other number or percentage required for amendment contained in the declaration. The potential for amendment provides an alternative form of protection against the possibility that if the unit owners conclude that the "outside" directorships are detrimental to unit owners, the owners can rid themselves of the system. However, as provided in Section 2-117(a), the unit owners' ability to enact such an amendment may be subject to approval of the amendment by another person.

8. The transition process in which control of the unit owners association passes from declarant control to unit owner control is one that frequently leads to disagreements between the declarant and the unit owners who may be disgruntled about a range of matters: construction quality, management of the association and its funds, allegations of unfulfilled representations, or other matters. The subject has been addressed in a number of treatises; see, e.g., Hyatt, Condominium and Homeowner Association Practice: Community Association Law , Chap. 13, Declarant Control of Association: Transition, at 251 (3d ed. 2000).

The original Act and some of the 2008 amendments seek to address various aspects of the transition process. For example, new Section 3-124 imposes a "cooling off" period before the association may commence litigation against the declarant and those in its employ concerning construction defects, while existing Section 3-105 allows the unit owners association, after transition occurs, to terminate contracts entered into by the declarant on the association's behalf while the declarant controls the association.

Some States, in adopting this Act, have included amendments that expand the obligations of declarants during the time they control the association and at the time of transition. See, e.g., Conn. Gen. Stat. 47-245 (h) and (i) [the cognate provision to UCIOA § 3-103] which requires that, first, during the period of declarant control, the declarant must regularly provide the unit owners with a current financial statement of the association; and, second, within 30 days after turnover of control, the declarant must also deliver to the association all property of the unit owners and of the association held or controlled by the declarant.

SECTION 3-104. TRANSFER OF SPECIAL DECLARANT RIGHTS.

(a) A special declarant right (Section 1-103(29)) created or reserved under this [act] may be transferred only by an instrument evidencing the transfer recorded in every [county] in which any portion of the common interest community is located. The instrument is not effective unless executed by the transferee.

(b) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this [act]. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.

(2) If a successor to any special declarant right is an affiliate of a declarant (Section 1-103(1)), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the common interest community.

(3) If a transferor retains any special declarant rights, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this [act] or by the declaration relating to the retained special declarant rights and arising after the transfer.

(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or

receivership proceedings, of any units owned by a declarant or real estate in a common interest community subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that property held by that declarant, or only to any rights reserved in the declaration pursuant to Section 2-115 and held by that declarant to maintain models, sales offices, and signs. The judgment or instrument conveying title must provide for transfer of only the special declarant rights requested.

(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of all interests in a common interest community owned by a declarant:

(1) the declarant ceases to have any special declarant rights, and

(2) the period of declarant control (Section 3-103(d)) terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

(e) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:

(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by this [act] or by the declaration.

(2) A successor to any special declarant right, other than a successor described in paragraph (3) or (4) or a successor who is an affiliate of a declarant, is subject to the obligations and liabilities imposed by this [act] or the declaration:

(i) on a declarant which relate to the successor's exercise or nonexercise of special declarant rights; or

(ii) on his transferor, other than:

(A) misrepresentations by any previous declarant;

(B) warranty obligations on improvements made by any previous declarant, or made before the common interest community was created;

(C) breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or

(D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (Section 2-115), may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement [,] and any liability arising as a result thereof [, and obligations under [Article] 5].

(4) A successor to all special declarant rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the executive board in accordance with Section 3-103(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, the successor declarant is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under Section 3-103(d).

(f) Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under

this [act] or the declaration.

Comment

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a common interest community. There are two parts to the problem. First, what obligations and liabilities to unit owners (both existing and future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the community, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor over whom he has no control. Similarly, the section absolves a nonaffiliated transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (e.g., a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a project to a successor without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

A declarant may wish to transfer special declarant rights as a part of his transfer to another person of units already constructed in a cooperative. If the declaration has specified that units are personal property, the transfer of the units themselves will be personal property transfers not subject to the real estate recording act. However, under subsection (a), if special declarant rights are to be transferred, that transfer must be evidenced by an instrument recorded in every county in which the cooperative lies. The intent of that provision is that the recording be in the land records and identify the real estate involved so that a title examination relating to the land in the cooperative would reveal the transfer of the special declarant right.

In a common interest community, a mortgage recorded prior to the recordation of the declaration would have priority over any rights of declarants or unit owners arising under the declaration. However, under Section 2-118(k) and (l), foreclosure of such a mortgage does not automatically terminate the effectiveness of a **condominium** or **planned community** declaration;

the declaration becomes ineffective as to the land covered by the prior mortgage only if the purchaser at the foreclosure sale records an instrument excluding the real estate from the condominium or planned community. If the purchaser on the foreclosure of the prior mortgage elects to have the real estate remain in the condominium or planned community, it becomes a successor declarant subject to the general rules of this section, including those applicable to persons who acquire special declarant rights by virtue of foreclosure sales (subsection c).

However, under the Act, foreclosure of a mortgage which is prior to a **cooperative** declaration automatically removes the real estate from the cooperative since there is nothing in the Act which would change the ordinary rule that the foreclosure of a mortgage which is prior to any restrictive covenants or easements results in a transfer free of those "junior interests." (See Section 2-118(k) and (l).)

Therefore, in the absence of some contractual arrangement between the mortgagee and the association under which the buyer at the foreclosure sale has a right to reconvey the property to the association, the purchaser at the foreclosure sale could not succeed to any development rights of the declarant since the property would be removed from the cooperative by the foreclosure sale itself. However, there is nothing in the act which would preclude the developer from having the association contractually obligate itself to retake title to foreclosed property on specified terms. If the underlying mortgage is of the entire cooperative property, there would probably be no advantage in such an arrangement since the foreclosing mortgagee with the entire project could set up his own cooperative association and undertake new marketing efforts without regard to the obligations and liabilities of the prior cooperative association. If, on the other hand, the mortgage is on only a portion of the cooperative project there may be distinct advantage in giving the purchaser at the foreclosure sale the power to reconvey the property to the association and having the purchaser become owner of the units which would exist or could be created in the property. In such a case, the position of the mortgagee would be essentially the same as that of a declarant who acquires the special declarant right to add additional land to the cooperative.

If the developer, while in control of the cooperative association, has had the cooperative association grant a mortgage in its real estate and has subordinated the declaration to the mortgage, the situation is the same as that just described: on foreclosure, that real estate would no longer be a part of the cooperative. Again, in the ordinary case no special declarant rights could pass to the purchaser at the foreclosure sale since he would not have any real estate in the cooperative. If, however, the association is obligated to accept a reconveyance of the real estate which has been foreclosed the purchaser at the foreclosure sale would have special declarant rights as just described.

If the declarant in a cooperative has given a mortgage or security interest in his own special declarant rights or in his unsold units, purchasers at the foreclosure sale would acquire rights as to property still in the cooperative and would therefore be able to succeed to the declarant's special declarant rights.

4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing and future) for all obligations and liabilities, including warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in Section 1-103(1)), the transferor remains subject to all liabilities specified in

paragraph (1) of subsection (b) and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (e). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor by foreclosure or conveyance in lieu of foreclosure) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which relate to the rights he holds. Such a transferee also is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (e)(2)(ii). For example, because of the exclusions in (e)(2)(ii), a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however to complete improvements which the developer is obligated to complete under Section 4-119.

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (e) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (i.e., persons whose sole interest in the project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a security interest or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of **all** units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights then, under subsection (d), those special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described, or by a conveyance in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (e), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who holds special declarant rights solely for transfer is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing lender who opts to bid in and obtain the

Case No. 69399 c/w 70478

IN THE SUPREME COURT OF NEVADA

FREDERIC AND BARBARA ROSENBERG LIVING TRUST,
Appellant/Cross-Respondent,

vs.

MACDONALD HIGHLANDS REALTY, LLC, a Nevada Limited Liability Company; MICHAEL DOIRON, an Individual; and FHP VENTURES, a Nevada Limited Partnership,
Respondent/Cross-Appellants.

FREDERIC AND BARBARA ROSENBERG LIVING TRUST,
Appellant,

vs.

SHAHIN SHANE MALEK,
Respondent.

Electronically Filed
Oct 12 2016 01:01 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable KENNETH CORY, District Judge
District Court Case No. District Court Case No. A-13-689113-C

JOINT APPENDIX VOLUME 10

Respectfully submitted by:

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12	43	8/13/15	Proposed Order, Findings of Fact and Conclusions of Law, and Judgement on Shahin Shane Malek's Motion for Summary Judgment	JA_2457
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7	31	5/12/15	Reply to Opposition to Malek's Motion for Summary Judgment	JA_1517
12	39	6/29/15	Reply to Opposition to Motion to Amend Complaint to Conform on Evidence	JA_2413

12	40	6/29/15	Reply to Shahin Shane Malek's Opposition to Motion to Amend Complaint to Conform to Evidence	JA_2423
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1	3	10/24/13	Affidavit of Service - Shahin Shane Malek	JA_0025
1	4	10/24/13	Affidavit of Service - Real Properties Management Group, Inc.	JA_0028
1	5	10/29/13	Affidavit of Service - Michael Doiron	JA_0031
1	6	12/30/13	Bank of America N. A.'s Answer to Plaintiff's Complaint	JA_0034
1	7	1/10/14	Order Granting in Part DRFH Ventures, LLC; Dragonridge Golf Club, Inc. and MacDonald Properties, LTD.	JA_0052
1	8	1/13/14	Notice of Entry of Order Dismissing Dragonridge Golf Club, Inc. and MacDonald Properties, LTD.	JA_0055
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14	66	10/22/15	Transcript Re: Shahin Shane Malek's Motion for Attorney's Fees and Costs; MacDonald Highlands Realty, LLC, and FHP Ventures Motion for Attorney's Fees and Costs; Motion to Re-Tax and Settle Memorandum of Costs and Disbursements	JA_2994
14	67	12/1/15	Recorders Transcript Re: Shahin Shane Malek's Motion for Attorney's Fees and Costs	JA_3048

Exterior materials samples must be presented within a three-ring binder, clearly marked with Builder's name, filing date, and Lot number. All samples must be identified with manufacturer's names, color and number, and manufacturer cut-sheets for ***ALL*** exterior materials (i.e., windows, glass block, skylights, roof top windows, Solatubes®, solar panels, flat roof surface material & color, railings, wrought iron gates, doors (typical), front doors, patio doors, garage doors, landscape lighting, exterior wall-mounted light fixtures, exterior recessed light fixtures; driveway, walkway, terrace, balcony and patio materials & colors; address identification device, etc.) *are required* within the schematic plan submittal package.

Color Blocking Exhibits for all elevations *are required* with the schematic plan submittal package. Please be advised renderings are not required; the Design Review Committee requires exhibits identifying the application of all proposed colors and materials. This can be accomplished in many ways, for example, call outs on elevations or color-coded elevations.

Floor Plan(s)

Roof Plan

Electrical Load Calculations accompanied by Mechanical, Plumbing and Electrical plans

Nevada Power Company approval letter (if applicable)

City of Henderson Variance Approval (if applicable)

Landscaping: A conceptual landscape Plan should indicate:

- Square footage of Landscape Area in Front, Side, and Rear Yards
- Location and species of existing vegetation
- Conceptual landscaping design
- Identify all paving and plant materials
- Identify locations for all landscape light fixtures proposed

6.1.6 Final Plan Review

The final plans shall graphically and in a written text verbally indicate the following items, indicating all approved elements shown in the Schematic Site Plan:

- One (1) complete set of plans drawn to scale and fully dimensioned
- One (1) each of all drawings **reduced to 8½ x 11" format**
- Remaining Materials Sample Binder Selections and Manufacturer Cut Sheets (where applicable)
- Modified Color Blocking Exhibits (where applicable)
- Revised Mechanical, Plumbing and Electrical Plans (where applicable)

- Revised Irrigation and Landscape Plans (where applicable)

- Pre-Construction/Pre-Approval Requirements, including a proposed construction schedule, construction deposit and pre-construction conference appointment

- An AutoCAD disk with the building perimeter and grades of the finalized site plan

- Massing Model: On *hillside* lots, a simple massing model is required to three-dimensionally demonstrate how the Building relates to the Lot or Parcel and adjacent properties. The massing model requirement should be verified by each owner with the Design Review Committee.

- Such other reasonable information as may be required by the Design Review Committee.

6.1.7 Revisions

Any changes to the approved plans before, during, or after the construction of an Improvement must first be submitted to the Design Review Committee for approval. All submittals shall be accompanied by a cover letter, letter of transmittal or a copy of the Design Review Committee's "Application for an Alternation and/or Modification to an Existing Structure or Lot" describing the revisions proposed.

6.1.8 Resubmittal of Plans

In the event of any disapproval by the Design Review Committee of either a preliminary or a final submission, a resubmission of plans should follow the same procedure as an original submittal. An additional Design Review Fee shall accompany each such resubmission as required by the Design Review Committee.

6.1.9 Working Drawings and Construction Specifications

Prior to plan approval, a Pre-Construction Conference *is required* for final plan approval by the Design Review Committee. The Lot Owner or a designated representative for the Lot Owner shall schedule an appointment with a MacDonald Highlands representative to discuss forthcoming construction activities on the Lot, prior to the issuance of the Design Review Committee approval letter to the City of Henderson. As a reminder, all approvals must be obtained from the Design Review Committee prior to submittal to the City of Henderson. The requirement to schedule a Pre-Construction Conference does not constitute plan approval by the Design Review Committee.

Upon Final Plan approval from the Design Review Committee, the Owner will be responsible for submitting their Site Plan drawings, Construction Working Plans, and specifications to the appropriate City of Henderson Departments, Commissions, and Council (if required) for their review and approval as to conform with the City Zoning Ordinance, and local and State Building Safety Codes and in accordance with their review process. Upon approval of the Plan and specifications by the City, a construction permit should be issued.

Original construction working plans must be submitted to the Design Review Committee so that they may be stamped as approved by the Design Review Committee prior to any submittals to the City of Henderson. Any drawings submitted to The City of Henderson without this approval stamp will be rejected.

6.1.10 Work in Progress

The Design Review Committee may inspect all work in progress and give notice of non-compliance. Absence of such inspection and notification during the construction period does not constitute either approval of the Design Review Committee with work in progress or compliance with these Design Development Guidelines and Standards or the Declaration.

Construction documentation required of each Lot Owner, Developer and/or Builder is as follows:

i. **PRIOR TO** pouring the slab the builder or owner must submit a wet stamped letter from a Nevada registered land surveyor attesting that the main level slab form elevations match the elevations submitted. If the owner does not comply the Developer will have it performed and deduct the cost from the construction deposit.

ii. **AFTER** the main level slab is poured, the owner or builder must submit a 8.5" x 11" plot plan "as-built" of the home showing actual distances from corners to property lines in tenths of a foot and wet stamped by a Nevada registered land surveyor. If the owner does not comply the Developer will have it performed and deduct the cost from the construction deposit.

iii. **AFTER** top-out, the builder or owner must submit a wet stamped letter from a Nevada registered land surveyor ~~stating the vertical difference between the highest roof peak and the top of curb at the center of the lot~~ certifying the highest roof peak elevation. If the owner does not comply the Developer will have it performed and deduct the cost from the construction deposit.

6.1.11 Completed Work

Upon completion of any Residence, Building, Structure, or other Improvement for which final approval was given by the Design Review Committee, the Owner shall be given written notice of completion by the Design Review Committee.

Within such reasonable time as the Design Review Committee may determine, but in no case exceeding ten (10) days from receipt of such written notice of completion from the Owner, or the Owner's duly authorized representative, it may inspect the Residence, Building, Structure, and/or Improvements. If it is found that such work was not done in strict compliance with the final plan approved by the Design Review Committee, it shall notify the Owner in writing of such non-compliance within five (5) days after the inspection, specifying in reasonable detail the particulars of non-compliance, and shall require the Owner to remedy the same.

6.1.12 Right of Waiver

The Design Review Committee reserves the right to waive or vary any of the procedures or standards set forth herein at its discretion, for good cause shown.

6.1.13 Commencement of Construction

Upon receipt of approval from the Design Review Committee, the Owner shall, as soon as practicable, satisfy all conditions thereof, if any, and diligently proceed with the commencement and completion of all construction, reconstruction, refinishing, alterations, and excavations pursuant to the approved plans, in accordance with the requirements of the Declaration of Covenants, Conditions, and Restrictions.

6.1.14 Design Review Committee Fees

The following fees and deposits are hereby established by the Design Review Committee. The fees and deposits may be changed from time to time without notice:

- The Owners will be charged a processing fee for each plan submittal to be established by the Design Review Committee.

- Buyers requesting a meeting with the Design Review Committee prior to close of escrow on a Lot will be required to pay a fee of $250 per meeting request, payable to the *Foothills Partners* at the time of the meeting. Upon close of escrow and at the time of the PreDesign Conference, pre-escrow design meeting fees will be credited to the Lot Owner. However, if the Buyer cancels escrow, pre-escrow design meeting fees are non-refundable.

- Effective April 2004 a non-refundable fee of $1,500.00 for graded lots and $2,500.00 for natural lots, made payable to the *Foothills Partners*, is required ***in advance*** of a Lot Owner's PreDesign Conference.
- If a Lot Owner and/or his/her designated representative is unable to attend their PreDesign Conference, they must notify the DRC seventy-two (72) *business* hours in advance of the PreDesign Conference, otherwise a $250.00 Cancellation Fee will be assessed and said fee must be paid **in advance** of rescheduling their PreDesign Conference for another date, [effective April 2004].
- Significant Modification to an Existing Design: a non-refundable fee of $1,500.00, payable to the *Foothills Partners,* is due upon submittal of the revised plan(s) [effective April 2004].
- Multi-Plan Submittal: a non-refundable review fee of $1,500.00 per plan, payable to the *Foothills Partners,* is required to process the Schematic Plan Design Packages [effective April 2004].
- The Owner or the Contractor shall provide a cash deposit in the amount of $5,000.00 payable to the ***Foothills Partners*** at the time of submittal for final design approval. This deposit will be fully refunded without interest upon completion of all Improvements, including landscaping and acceptance by the Design Review Committee, provided there is no damage caused by the Owner or his contractor to any public or private Improvements, common areas, or other Lots or Parcels within the community. Any such damage will require repair by the Owner at the Owner's expense. Failure to do so will cause MacDonald Highlands Master Association to perform such services and charge applicant for said work.

The Design Review Committee must be notified by the Owner at the time of initial movement of equipment on the site prior to commencement of work on the site. The Owner must notify the Design Review Committee of completion of the project and apply for a refund of the deposit.

6.2 MERCHANT-BUILT RESIDENTIAL DEVELOPMENT PROCEDURES

6.2.1 Submission of Plans

Plans and specifications shall be submitted to the Design Review Committee in accordance with the following submittal and review procedures.

6.2.2 Review of Plans

The Design Review Committee shall conduct reviews of plans during PreDesign Conferences only. Owners, Architects, or Builders shall have the right to attend any PreDesign Conference of the Design Review Committee. To assure a thorough and complete review, Schematic and Final plan submittals will be reviewed by the Committee and/or their representatives outside of any Committee meetings. The Design Review Committee will respond in writing within fifteen (15) working days after the review (but not later than thirty (30) days after a submittal is completed), provided that the plans are in accordance with the requirements outlined. Any responses an Owner may wish to make in reference to issues contained in the Design Review Committee's notice following review of submitted plans must be addressed to the Design Review Committee in writing. In addition, all approvals as required by the City of Henderson must be obtained after the Design Review Committee-approval and prior to the commencement of construction.

6.2.3 PreDesign Conference

After the close of a lot or parcel, and prior to completing a Building design, it is ***mandatory*** that the Owner and/or his professional consultants meet with the Design Review Committee to review the Design Guidelines and Standards and the Owner's proposed design.

At this meeting, the Owner will be expected to outline the project to the Design Review Committee in terms of its land use, building size (i.e., site plan), building mass arrangements (i.e., exterior elevations), type of project, materials, and proposed construction schedule. Should the Design Review Committee deem it necessary, subsequent PreDesign Conferences may be required.

Effective April 2004 a non-refundable fee of $1,500.00 for graded lots and $2,500.00 for natural lots, made payable to the *Foothills Partners*, is required ***in advance*** of a Lot Owner's PreDesign Conference. Multi-Plan Submittals require a non-refundable review fee of $1,500.00 per plan, payable to the *Foothills Partners*.

If a Lot Owner and/or his/her designated representative is unable to attend their PreDesign Conference, they must notify the DRC seventy-two (72) *business* hours in advance of the PreDesign Conference, otherwise a $250.00 Cancellation Fee will be assessed and said fee must be paid in advance of rescheduling their PreDesign Conference for another date [effective April 2004].

6.2.4 Concept Plan Review

The Concept Plan Review allows the applicant the opportunity to introduce his concepts for the design, character, and extent of development of the subject site to the Design Review Committee. The Design Review Committee and the Developer can discuss the proposed project and concepts in relation to their applicability to MacDonald Highlands' Community Design Standards. The purpose of the Concept Plan Review is to give the applicant and the Design Review Committee the opportunity to exchange ideas and to provide the applicant with a direction with which to proceed.

The submittal package for the Concept Plan Review should include the following items as a minimum:

- One 24" x 36" blueline copy of the Site Plan drawn to scale and with dimensions.

- One 8-1/2" x 11" clear film transparency of the Site Plan. Note: Clear film transparencies shall have black continuous lines and legible notes, and dimensions, which provide a crisp, clean copy when duplicating.

- The Site Plan should include the following information as a minimum:

  - Vicinity map.
  - North arrow and scale (NLT 1" = 60').
  - Gross area, number of lots/units, lot size, density.
  - Parcel description.

- Name, address, and telephone number of owner, engineer, architect, land planner, and applicant.

    - Proposed lots, buildings, structures, improvements.
    - Samples must be presented within a three-ring binder, clearly marked with Builder's name, filing date, and Parcel number. All samples must be identified with manufacturer's names, color and number, and manufacturer cut-sheets for ***ALL*** exterior materials (i.e., windows, glass block, skylights, roof top windows, Solatubes®, solar panels, flat roof surface material & color, railings, wrought iron gates, doors (typical), front doors, patio doors, garage doors, landscape lighting, exterior wall-mounted light fixtures, exterior recessed lighting; driveway, walkway, terrace, balcony and patio materials & colors; address identification device, etc.) *are required* within the concept plan review submittal package.

- Buildings: Elevations of Buildings from all sides at an appropriate scale sufficient to clearly indicate the design concepts, placements, and massing of buildings.
- Gross and net Building square footage.
- Heights of all Improvements.
- Number of levels or floors.
- Windows, doors, balconies, and other structural openings.
- Existing topography.
- Proposed grades and elevations.
- Adjacent property, structures, improvements, landscaping, to a minimum distance of 25 feet beyond the subject site property lines.

- Amenities, open space, landscape areas, entries and features, lighting, and proposed signage features and location.
- Setbacks (Front, Side, and Rear Yards).
- Walls.
- Proposed parking areas and number of spaces.
- Drainage facilities.
- Trash collection/container locations.
- Service and delivery locations and travel routes.
- Driveways, curb cuts.
- Utilities plan.
    - Location of plant, equipment, and storage buildings and rooms.
    - Proposed fire lanes.

- Floor Plan(s)

- Roof Plan(s)

- Color Blocking Exhibits for all elevations *are required* with the schematic plan submittal package. Please be advised renderings are not required; the Design Review Committee requires exhibits identifying the application of all proposed colors and materials. This can be accomplished in many ways, for example, call outs on elevations or color-coded elevations.

- Proposed product floor plans and elevations.

- Landscaping concepts/treatments with proposed planting palette and landscape lighting and fixtures

- Edge treatment concepts between the project and adjacent properties.

6.2.5 Grading Plan Review

The purpose of the Grading Plan Review is to insure that the grading concepts for the proposed project are consistent with MacDonald Highlands' Community Development Standards and that the end result will be compatible with adjacent property, improvements, hillsides, open space, homes, developments, etc.

The submittal package for the Grading Plan Review should include the following items as a minimum:

- One 24" x 36" blueline copy of the proposed Grading Plan drawn to scale and with dimensions

- The Grading Plan should include the following information as a minimum:

    - Existing topography.
    - Proposed grades and elevations.
    - All retaining walls, structures, devices, or concepts and their heights (top-of-wall and bottom-of-footing).
    - Natural slopes.
    - Manufactured slopes or scarps.
    - Drainage swales, improvements, facilities.
    - Impact on adjacent property, improvements, structures, open space, etc. to a distance of 25 feet beyond the subject site's property lines.
    - Soils report.
    - Drainage study.

6.2.6 Tentative Map Review

The purpose of the Tentative Map Review is to insure that the tentative map that will be submitted to the City of Henderson is in compliance with approvals and conditions resulting from the previous reviews of the Concept Plan and the Grading Plan.

The submittal package to the Design Review Committee for the Tentative Map Review should be the same as will be submitted to the City of Henderson, including:

- An approximate time schedule indicating starting and completion dates of construction, utility hook-up, completion of landscaping work, and anticipated occupancy Date.

- Location, size, finished floor elevation of Building(s).

- Existing and proposed contours.

- Right-of-Way Lines of existing and proposed Streets and sidewalks immediately adjoining and within the proposed Lot or Parcel, and the names of all proposed Streets.

- All exterior elevations with both existing and proposed grades shown.

- Finalized Material Sample Binder Selections and Manufacturer Cut Sheets (where applicable)

- Modified Color Blocking Exhibits (where applicable)

- Location, dimension, and proposed use of all paved areas and driveways.
- Location of fire hydrants.
- Location of on-site utility and mechanical equipment such as transformers, solar panels, air conditioning, electrical equipment, water meters, etc.
- Location of all Building entrances.
- Water supply plan.
- A grading plan showing existing and finished grades and proposed methods of handling storm runoff from roof and paved areas.
- Lighting Plan, including catalogue cuts and mounting devices for all exterior fixtures (submit samples of all fixtures to be utilized).
- Signage Plan, with detailed drawings showing the proposed design of all exterior Signs, including:
    - All Sign copy.
    - True Sign colors including lettering and background materials (submit samples).
    - Dimensions of Sign.
    - Sign materials.
    - Method of illumination.
    - Sign mounting methods.
    - Sign area (square feet).
    - Location on Lot, Parcel, or Building (scaled drawing).
    - Letter style.

- Landscape Plan showing square footage, location, size, quantity, type of all trees and vegetation, and turf and indicating:

    - Grading plan, including berms and swales.
    - Irrigation plan.
    - Screening, walls, fences.
    - Outdoor eating areas.
    - Recreation areas.
    - Water features.
    - Pedestrian paths.
    - Art.
    - Hardscape.
    - Foundations.
    - Furniture/Fixtures
    - Landscape Lighting/Fixtures

- Such other reasonable information as may be required by the Design Review Committee.

6.2.7 Final Map Review

The purpose of the Final Map Review is to insure that the Final Map that will be submitted to the City of Henderson for approval and recordation is in compliance with previous approvals for the subject site granted by the Design Review Committee.

The submittal package to the Design Review Committee for the Final Map Review should be the same as will be submitted to the City of Henderson.

6.2.8 Improvement Plan Review

The purpose of the Improvement Plan Review is to insure that those concepts presented and approved through the Concept Plan Review, Grading Plan Review, and Tentative Map Review are incorporated into the engineering plans for the subject site.

The submittal package for the Improvement Plan Review should be one set of the proposed improvement plans.

6.2.9 Revisions

Any changes to the approved plans before, during, or after the construction of an Improvement must first be submitted to the Design Review Committee for approval. All submittals shall be accompanied by a cover letter, letter of transmittal or a copy of the Design Review Committee's "Application for an Alternation and/or Modification to an Existing Structure or Lot" describing the revisions proposed.

6.2.10 Resubmittal of Plans

In the event of any disapproval by the Design Review Committee of either a preliminary or a final submission, a resubmission of plans should follow the same procedure as an original submittal. An additional Design Review Fee shall accompany each such resubmission as required by the Design Review Committee.

6.2.11 Working Drawings and Construction Specifications

Prior to plan approval, a Pre-Construction Conference *is required* for final plan approval by the Design Review Committee. The Lot Owner or a designated representative for the Lot Owner shall schedule an appointment with a MacDonald Highlands representative to discuss forthcoming construction activities on the Lot, prior to the issuance of the Design Review Committee approval letter to the City of Henderson. As a reminder, all approvals must be obtained from the Design Review Committee prior to submittal to the City of Henderson. The requirement to schedule a Pre-Construction Conference does not constitute plan approval by the Design Review Committee.

Upon Final Plan approval from the Design Review Committee, the Owner will be responsible for submitting their Site Plan drawings, Construction Working Plans, and specifications to the appropriate City of Henderson Departments, Commissions, and Council (if required) for their review and approval as to conform with the City Zoning Ordinance, and local and State Building Safety Codes and in accordance with their review process. Upon approval of the Plan and specifications by the City, a construction permit should be issued.

Original construction working plans must be submitted to the Design Review Committee so that they may be stamped as approved by the Design Review Committee prior to any submittals to the City of Henderson. Any drawings submitted to The City of Henderson without this approval stamp will be rejected.

6.2.12 Work in Progress

The Design Review Committee may inspect all work in progress and give notice of non-compliance. Absence of such inspection and notification during the construction period does not constitute either approval of the Design Review Committee with work in progress or compliance with these Design Development Guidelines and Standards or the Declaration.

6.2.13 Completed Work

Upon completion of any Residence, Building, Structure, or other Improvement for which final approval was given by the Design Review Committee, the Owner shall be given written notice of completion by the Design Review Committee.

Within such reasonable time as the Design Review Committee may determine, but in no case exceeding ten (10) days from receipt of such written notice of completion from the Owner, or the Owner's duly authorized representative, it may inspect the Residence, Building, Structure, and/or Improvements. If it is found that such work was not done in strict compliance with the final plan approved by the Design Review Committee, it shall notify the Owner in writing of such non-compliance within five (5) days after the inspection, specifying in reasonable detail the particulars of non-compliance, and shall require the Owner to remedy the same.

6.2.14 Right of Waiver

The Design Review Committee reserves the right to waive or vary any of the procedures or standards set forth herein at its discretion, for good cause shown.

6.2.15 Commencement of Construction

Upon receipt of approval from the Design Review Committee, the Owner shall, as soon as practicable, satisfy all conditions thereof, if any, and diligently proceed with the commencement and completion of all construction, reconstruction, refinishing, alterations, and excavations pursuant to the approved plans, in accordance with the requirements of the Declaration of Covenants, Conditions, and Restrictions.

6.2.16 Design Review Committee Fees

The following fees and deposits are hereby established by the Design Review Committee. The fees and deposits may be changed from time to time without notice:

- The Owners will be charged a processing fee for each plan submittal to be established by the Design Review Committee.

- Buyers requesting a meeting with the Design Review Committee prior to close of escrow on a Lot will be required to pay a fee of $250 per meeting request, payable to the *Foothills Partners* at the time of the meeting. Upon close of escrow and at the time of the PreDesign Conference, pre-escrow design meeting fees will be credited to the Lot Owner. However, if the

Buyer cancels escrow, pre-escrow design meeting fees are non-refundable.

- Effective April 2004 a non-refundable fee of $1,500.00 for graded lots and $2,500.00 for natural lots, made payable to the *Foothills Partners*, is required ***in advance*** of a Lot Owner's PreDesign Conference.

- If a Lot Owner and/or his/her designated representative is unable to attend their PreDesign Conference, they must notify the DRC seventy-two (72) *business* hours in advance of the PreDesign Conference, otherwise a $250.00 Cancellation Fee will be assessed and said fee must be paid **in advance** of rescheduling their PreDesign Conference for another date [effective April 2004].

- Significant Modification to an Existing Design: a non-refundable fee of $1,500.00, payable to the *Foothills Partners,* is due upon submittal of the revised plan(s) [effective April 2004].

- Multi-Plan Submittal: a non-refundable review fee of $1,500.00 per plan, payable to the *Foothills Partners,* is required to process the Schematic Plan Design Packages [effective April 2004].

- The Owner or the Contractor shall provide a cash deposit in the amount of $5,000.00 payable to the ***Foothills Partners*** at the time of submittal for final design approval. This deposit will be fully refunded without interest upon completion of all Improvements, including landscaping and acceptance by the Design Review Committee, provided there is no damage caused by the Owner or his contractor to any public or private

Improvements, common areas, or other Lots or Parcels within the community. Any such damage will require repair by the Owner at the Owner's expense. Failure to do so will cause MacDonald Highlands Master Association to perform such services and charge applicant for said work.

The Design Review Committee must be notified by the Owner at the time of initial movement of equipment on the site prior to commencement of work on the site. The Owner must notify the Design Review Committee of completion of the project and apply for a refund of the deposit.

6.3 PROCEDURES FOR COMMERCIAL/RESORT DEVELOPMENTS

6.3.1 Submission of Plans

Plans and specifications shall be submitted to the Design Review Committee in accordance with the following submittal and review procedures.

6.3.2 Review of Plans

The Design Review Committee shall conduct reviews of plans during PreDesign Conferences only. Owners, Architects, or Builders shall have the right to attend any PreDesign Conference of the Design Review Committee. To assure a thorough and complete review, Schematic and Final plan submittals will be reviewed by the Committee and/or their representatives outside of any Committee meetings. The Design Review Committee will respond in writing within fifteen (15) working days after the review (but not later than thirty (30) days after a submittal is completed), provided that the plans are in accordance with the requirements outlined. Results of reviews will not be discussed over the telephone by members of the Design Review Committee with an Owner, or his Architect or Builder. Any responses an Owner may wish to make in reference to issues contained in the Design Review Committee's notice following review of submitted plans must be addressed to the Design Review Committee in writing. In addition, all approvals as required by the City of Henderson must be obtained after the Design Review Committee-approval and prior to the commencement of construction.

6.3.3. PreDesign Conference

After the close of a lot or parcel, and prior to completing a Building design, it is ***mandatory*** that the Owner and/or his professional consultants meet with the Design Review Committee to review the Design Guidelines and Standards and the Owner's proposed design.

At this meeting, the Owner will be expected to outline the project to the Design Review Committee in terms of its land use, Building size (i.e., site plan), Building mass arrangements (i.e., exterior elevations), type of project, materials, and proposed construction schedule. Should the Design Review Committee deem it necessary, subsequent PreDesign Conferences may be required.

Effective April 2004 a non-refundable fee of $1,500.00 for graded lots and $2,500.00 for natural lots, made payable to the *Foothills Partners*, is required ***in advance*** of a Lot Owner's PreDesign Conference. Multi-Plan Submittals require a non-refundable review fee of $1,500.00 per plan, payable to the *Foothills Partners.*

If a Lot Owner and/or his/her designated representative is unable to attend their PreDesign Conference, they must notify the DRC seventy-two (72) *business* hours in advance of the PreDesign Conference, otherwise a $250.00 Cancellation Fee will be assessed and said fee must be paid **in advance** of rescheduling their PreDesign Conference for another date [effective April 2004].

6.3.4 Preliminary Site Plan Review

The Preliminary Site Plan Review allows the applicant the opportunity to introduce his concepts for the design, character, and extent of development of the subject site to the Design Review Committee. The Design Review Committee and the developer can discuss the proposed project and concepts in relation to their applicability to MacDonald Highlands' Community Design Standards. The purpose of the Community Design Standards is to give the applicant and the Design Review Committee the opportunity to exchange ideas and to provide the applicant with a direction with which to proceed.

The submittal package for the Preliminary Site Plan Review should include the following items as a minimum:

- One 24" x 36" blueline copy of a Preliminary Site Plan drawn to scale and with dimensions.
    - Vicinity map.
    - North arrow and scale (NLT 1" = 60').
    - Gross area, number of lots/units, lot size, density.
    - Parcel description.
    - Name, address, and telephone number of owner, engineer, architect, land planner, and applicant.
    - Adjacent property, structures, improvements, landscaping, to a minimum distance of 25 feet beyond the property lines of the subject site.
    - Amenities, open space, landscape areas, entries and features, and proposed signage features and location.
    - Setbacks (front, side, rear).
    - Drainage facilities.

- Location of plant, equipment, and storage buildings and rooms.
- Proposed fire lanes.
- Landscaping concepts/treatments with proposed planting palette.
- Edge treatment concepts between commercial/resort property and adjacent property.
- Floor Area Ratio.

- Proposed product floor plans and elevations.

- Site coverage ratio (defined as the Building ground contact area divided by the total gross Lot or Parcel area).

- Location of all other Improvements, walls, outside storage areas.

- Alleys, adjacent Streets with all existing/future Rights-Of-Ways, curb, and Property Line.

- Driveways, curb cuts.

- Configuration of parking and vehicular circulation including employee, handicapped and visitor parking.

- Dimensions for Parking Stalls, Parking Aisles, and landscaped Islands.

- Total parking provided.

- Calculation demonstrating total parking required.

- Truck service and loading areas, including proposed screening.
- Refuse enclosure areas, including proposed screening for other than single family residential.
- Existing topography.
- Conceptual grading (proposed grades and elevations), drainage, lighting, and utilities Plan.
- Buildings: Elevations of Buildings from all sides at an appropriate scale sufficient to clearly indicate the design concepts, placement, and massing of buildings. The following Improvement details shall also be provided:
    - Scale not less than 1/4" = 1'.
    - Gross and net Building square footage.
    - Heights of all Improvements.
    - Number of levels or floors.
    - Windows, doors, balconies, and other structural openings.
    - Existing and proposed grade lines.
    - Samples must be presented within a three-ring binder, clearly marked with Builder's name, filing date, and Parcel number. All samples must be identified with manufacturer's names, color and number, and manufacturer cut-sheets for ***ALL*** exterior materials (i.e., windows, glass block, skylights, roof top windows, Solatubes®, solar panels, flat roof surface material & color, railings, wrought iron gates, doors (typical), front doors, patio doors, garage doors, landscape lighting, exterior wall-mounted light fixtures, exterior recessed lighting; driveway, walkway, terrace,

balcony and patio materials & colors; address identification device, etc.) *are required* within the preliminary site plan submittal package.

- Floor Plan(s)

- Roof Plan

- Color Blocking Exhibits for all elevations *are required* with the schematic plan submittal package. Please be advised renderings are not required; the Design Review Committee requires exhibits identifying the application of all proposed colors and materials. This can be accomplished in many ways, for example, call outs on elevations or color-coded elevations.

- Signs: Exterior Signs Plan showing proposed location of all Building-mounted Signs, directional Signs, information Signs, and ground-mounted Signs.

- Landscaping: A conceptual landscape Plan should indicate:

    - Square footage of Landscape Area in Front, Side, and Rear Yards.
    - Square footage of Landscape Area in Parking Area for Non-Residential Buildings.
    - Location and species of existing vegetation.
    - Conceptual landscape design.
    - Landscape lighting / fixtures

6.3.5 Grading Plan Review

The purpose of the Grading Plan Review is to insure that the grading concepts for the proposed project are consistent with MacDonald Highlands' Community Development Standards and that the end result will be compatible with adjacent property, improvements, hillsides, open space, homes, developments, etc.

The submittal package for the Grading Plan Review should include the following items as a minimum:

- One 24" x 36" blueline copy of the proposed Grading Plan drawn to scale and with dimensions.
- The Grading Plan should include the following information as a minimum:
    - Existing topography.
    - Proposed grades and elevations
    - All retaining walls, structures, devices, or concepts and their heights (top-of-wall and bottom-of-footing).
    - Natural slopes.
    - Manufactured slopes or scarps.
    - Drainage swales, improvements, facilities.
    - Impact on adjacent property, improvements, structures, open space, etc., to a distance of 25 feet beyond the subject site's property lines.
- Soils report.
- Drainage study.

6.3.6 Tentative Commercial Subdivision Map Review

The purpose of the Tentative Commercial Subdivision Map Review is to insure that if a tentative map is submitted to the City of Henderson, it is in compliance with approvals and conditions resulting from the previous reviews of the Concept Plan and the Grading Plan.

The submittal package to the Design Review Committee for the Tentative Map Review should be the same as will be submitted to the City of Henderson.

6.3.7 Final Site Plan Review

The Final Site Plan Review allows the applicant to present the entire project exactly as it is intended to be constructed to the Design Review Committee for review. The purpose of this review is to insure that the project as submitted for the Final Site Plan Review is in compliance with previous reviews and approvals and is in compliance with MacDonald Highlands' Community Development Standards before the applicant goes forward with final maps or final improvement plans.

The submittal package to the Design Review Committee for the Final Site Plan Review should include all of the items that were required for the Preliminary Site Plan except that they should be shown on the Final Site Plan in the exact shape, size, and location they are to be constructed with detailed dimensions. In addition to the above the Final Site Plan will also include the following:

The site plan will state the project area, building square footage, amount of building coverage, amount of parking spaces, and amount of landscaped area.

- Detailed landscaping plans showing planting materials, types, and locations, and landscape lighting and fixtures.

- An approximate time schedule indicating starting and completion dates of construction, utility hook-up, completion of landscaping work and anticipated occupancy Date.

- Location, size, finished floor elevation of Building(s).

- Existing and proposed contours.

- Finalized Material Sample Binder Selections and Manufacturer Cut Sheets (where applicable)

- Modified Color Blocking Exhibits (where applicable)

- Right-of-Way Lines of existing and proposed Streets and sidewalks immediately adjoining and within the proposed Lot or parcel, and the names of all proposed Streets.

- All exterior elevations with both existing and proposed grades shown.

- Location of curb cuts for Lots or Parcels.

- Location of all curb cuts of adjacent Lots or Parcels.

- Location, dimension, and proposed use of all paved areas, and Driveways.

- Information for fire department, indicating type of roof construction and where sprinklers and smoke detectors are to be provided.

- Location of fire hydrants.

- Location of on-site utility and mechanical equipment such as transformers, solar panels, air conditioning, satellite dishes, electrical equipment, water meters, etc.

- Location of all Building entrances.

- Water supply plan.

- Sewage load estimate and disposal plan.

- A grading plan showing existing and finished Grades and proposed methods of handling storm runoff from roof and paved areas.

- Storm drainage calculations by a person licensed to design a storm drainage system.

- Lighting Plan, including catalogue cuts and mounting devices for all exterior fixtures (submit samples of all fixtures to be utilized).

- A report detailing the operation relative to environmental questions of noise, odor, glare, vibration, smoke, dust, ashes, radiation, hazardous or noxious wastes, and any other factors requested by the Declaration or Design Development Guidelines and Standards.

- Signage Plan, with detailed drawings showing the proposed design of all exterior Signs, including:
    - All Sign copy.
    - True Sign colors including lettering and background materials (submit samples).
    - Dimensions of Sign.
    - Sign materials.
    - Method of illumination.
    - Sign mounting methods.
    - Sign area (square feet).
    - Location on Lot, Parcel, or Building (scaled drawing).
    - Letter style.

- Landscape Plan showing square footage, location, size, quantity, type of all trees and vegetation, and turf and indicating:
    - Grading plan, including berms and swales.
    - Irrigation plan.
    - Screening, walls, fences.
    - Outdoor eating areas.
    - Recreation areas.
    - Water features.
    - Pedestrian paths.
    - Art.
    - Hardscape.
    - Foundations.
    - Furniture/Fixtures.
    - Landscape Lighting/Fixtures

- Such other reasonable information as may be required by the Design Review Committee.

6.3.8 Final Commercial Subdivision Map Review

The purpose of the Final Commercial Subdivision Map Review is to insure that if a Final Map is submitted to the City of Henderson for approval and recordation, it is in compliance with previous approvals for the subject site granted by the Design Review Committee.

The submittal package to the Design Review Committee for the Final Map Review should be the same as will be submitted to the City of Henderson.

6.3.9 Improvement Plan Review

The purpose of the Improvement Plan Review is to insure that those concepts presented and approved through the Concept Plan Review, Grading Plan Review, Tentative Map Review, and Final Site Plan Review are incorporated into the engineering plans for the subject site.

The submittal package for the Improvement Plan Review should be one set of the proposed improvement plans.

6.3.10 Revisions

Any changes to the approved plans before, during, or after the construction of an Improvement must first be submitted to the Design Review Committee for approval. All submittals shall be accompanied by a cover letter, letter of transmittal or a copy of the Design Review Committee's "Application for an Alternation and/or Modification to an Existing Structure or Lot" describing the revisions proposed.

6.3.11 Resubmittal of Plans

In the event of any disapproval by the Design Review Committee of either a preliminary or a final submission, a resubmission of plans should follow the same procedure as an original submittal. An additional Design Review Fee shall accompany each such resubmission as required by the Design Review Committee.

6.3.12 Working Drawings and Construction Specifications

Prior to plan approval, a Pre-Construction Conference *is required* for final plan approval by the Design Review Committee. The Lot Owner or a designated representative for the Lot Owner shall schedule an appointment with a MacDonald Highlands representative to discuss forthcoming construction activities on the Lot, prior to the issuance of the Design Review Committee approval letter to the City of Henderson. As a reminder, all approvals must be obtained from the Design Review Committee prior to submittal to the City of Henderson. The requirement to schedule a Pre-Construction Conference does not constitute plan approval by the Design Review Committee.

Upon Final Plan approval from the Design Review Committee, the Owner will be responsible for submitting their Site Plan drawings, Construction Working Plans, and specifications to the appropriate City of Henderson Departments, Commissions, and Council (if required) for their review and approval as to conform with the City Zoning Ordinance, and local and State Building Safety Codes and in accordance with their review process. Upon approval of the Plan and specifications by the City, a construction permit should be issued.

Original construction working plans must be submitted to the Design Review Committee so that they may be stamped as approved by the Design Review Committee prior to any submittals to the City of Henderson. Any drawings submitted to The City of Henderson without this approval stamp will be rejected.

6.3.13 Work in Progress

The Design Review Committee may inspect all work in progress and give notice of non-compliance. Absence of such inspection and notification during the construction period does not constitute either approval of the Design Review Committee with work in progress or compliance with these Design Development Guidelines and Standards or the Declaration.

6.3.14 Completed Work

Upon completion of any Residence, Building, Structure, or other Improvement for which final approval was given by the Design Review Committee, the Owner shall be given written notice of completion by the Design Review Committee.

Within such reasonable time as the Design Review Committee may determine, but in no case exceeding ten (10) days from receipt of such written notice of completion from the Owner, or the Owner's duly authorized representative, it may inspect the Residence, Building, Structure, and/or Improvements. If it is found that such work was not done in strict compliance with the final plan approved by the Design Review Committee, it shall notify the Owner in writing of such non-compliance within five

(5) days after the inspection, specifying in reasonable detail the particulars of non-compliance, and shall require the Owner to remedy the same.

6.3.15 Right of Waiver

The Design Review Committee reserves the right to waive or vary any of the procedures or standards set forth herein at its discretion, for good cause shown.

6.3.16 Commencement of Construction

Upon receipt of approval from the Design Review Committee, the Owner shall, as soon as practicable, satisfy all conditions thereof, if any, and diligently proceed with the commencement and completion of all construction, reconstruction, refinishing, alterations, and excavations pursuant to the approved plans, in accordance with the requirements of the Declaration of Covenants, Conditions, and Restrictions.

6.3.17 Design Review Committee Fees

The following fees and deposits are hereby established by the Design Review Committee. The fees and deposits may be changed from time to time without notice:

- The Owners will be charged a processing fee for each plan submittal to be established by the Design Review Committee.

- Buyers requesting a meeting with the Design Review Committee prior to close of escrow on a Lot will be required to pay a fee of $250 per meeting request, payable to the *Foothills Partners* at the time of the

meeting. Upon close of escrow and at the time of the PreDesign Conference, pre-escrow design meeting fees will be credited to the Lot Owner. However, if the Buyer cancels escrow, pre-escrow design meeting fees are non-refundable.

- Effective April 2004 a non-refundable fee of $1,500.00 for graded lots and $2,500.00 for natural lots, made payable to the *Foothills Partners,* is required ***in advance*** of a Lot Owner's PreDesign Conference.

- If a Lot Owner and/or his/her designated representative is unable to attend their PreDesign Conference, they must notify the DRC seventy-two (72) *business* hours in advance of the PreDesign Conference, otherwise a $250.00 Cancellation Fee will be assessed and said fee must be paid **in advance** of rescheduling their PreDesign Conference for another date [effective April 2004].

- Significant Modification to an Existing Design: a non-refundable fee of $1,500.00, payable to the *Foothills Partners,* is due upon submittal of the revised plan(s) [effective April 2004].

- Multi-Plan Submittal: a non-refundable review fee of $1,500.00 per plan, payable to the *Foothills Partners,* is required to process the Schematic Plan Design Packages [effective April 2004].

- The Owner or the Contractor shall provide a cash deposit in the amount of $5,000.00 payable to the ***Foothills Partners*** at the time of submittal for final design approval. This deposit will be fully refunded without interest upon completion of all Improvements,

including landscaping and acceptance by the Design Review Committee, provided there is no damage caused by the Owner or his contractor to any public or private Improvements, common areas, or other Lots or Parcels within the community. Any such damage will require repair by the Owner at the Owner's expense. Failure to do so will cause MacDonald Highlands Master Association to perform such services and charge applicant for said work.

The Design Review Committee must be notified by the Owner at the time of initial movement of equipment on the site prior to commencement of work on the site. The Owner must notify the Design Review Committee of completion of the project and apply for a refund of the deposit.

6.4 DESIGN REVIEW COMMITTEE

The Design Review Committee shall consist of a minimum of three members to a maximum of five members total. Each of said persons shall hold his/her office until such time as he/she has resigned or been removed or his/her successor has been appointed as set forth herein or in the Declaration.

6.4.1 Appointment of Members

Except as herein below provided, the right from time to time to appoint and remove all members of the Design Review Committee shall be, and is hereby, reserved to and vested solely in Declarant.

The right from time to time to appoint and remove members of the Design Review Committee shall be reserved to and vested in the Association as follows:

From and after January 1, 1998, the Association shall have the right to appoint and remove one member of the Design Review Committee.

From and after January 1, 1999, the Association shall have the right to appoint and remove two members of the Design Review Committee.

From and after January 1, 2004, the Association shall have the right to appoint and remove all members of the Design Review Committee;

Provided, however, that if Declarant fails to exercise its rights of appointment as herein above provided or records an instrument waiving such rights, the Association shall thereupon and thereafter have the right to appoint and remove all members of the Design Review Committee.

6.4.2 Resignation of Members

Any member of the Design Review Committee may at any time resign from the Design Review Committee upon written notice delivered to Declarant or to the Association, whichever then has the right to appoint and remove members.

6.4.3 Duties

It shall be the duty of the Design Review Committee to consider and act upon such proposals or plans from time to time submitted to it pursuant to the Design Guidelines, to perform such other duties from time to time delegated to it by the Declaration or the Association, and to amend the Design Guidelines when, and in the manner, deemed appropriate or necessary by the Design Review Committee.

6.4.4 Meetings

The Design Review Committee shall meet from time to time as necessary to properly perform its duties hereunder. The vote or written consent of a majority of the members shall constitute an act by the Design Review Committee unless the unanimous decision of its members is otherwise required by the Declaration or these Design Guidelines. The Design Review Committee shall keep and maintain a record of all action from time to time taken by the Design Review Committee at such meetings or otherwise.

Effective ***April 2002***, the MacDonald Highlands Design Review Committee ("Design Review Committee") will meet *biweekly* to review approval applications and to conduct prescheduled PreDesign Conferences with Lot Owners. The Design Review Committee shall conduct

reviews of plans during prearranged PreDesign Conferences *only*. However, to assure a thorough and complete review, schematic, final and subsequent plan submittals will continue to be reviewed *administratively* by the Design Review Committee outside the biweekly Design Review Committee meeting.

6.4.5 Design Review Architectural Representation

The DRC anticipates employing the services of an Architect or Designer to review submitted plans for conformance to the Design Guidelines. From time to time during the design review process, an Owner and/or his representative may meet or communicate informally with the DRC representative. While it is the intent of these informal meetings to provide direction to the Owner, any comments or suggestions made are done solely to provide direction and they do not represent any official approval or disapproval by the DRC.

6.4.6 Compensation

Unless authorized by the Association, the members of the Design Review Committee shall not receive any compensation for services rendered. All members shall be entitled to reimbursement for reasonable expenses incurred by them in connection with the performance of any Design Review Committee function or duty. Professional consultants retained by the Design Review Committee shall be paid such compensation as the Design Review Committee determines.

6.4.7 Amendment of Design Guidelines

The Design Review Committee may, from time to time and in its sole discretion, adopt, amend, and repeal by unanimous vote, rules, and regulations to be incorporated into, or amendments of the Design Guidelines, which, among other things, interpret, supplement, or implement the provisions of the Design Guidelines. All such rules and regulations or amendments, as they may from time to time be adopted, amended, or repealed, shall be appended to and made a part of the Design Guidelines and shall thereupon have the same force and effect as if they were set forth in and were a part of the Declaration. ***Each Owner is responsible for obtaining from the Design Review Committee a copy of the most recently revised Design Guidelines before commencing on any improvements to the Owner's Lot***.

Minor amendments, administrative in nature, may be made by the Design Review Committee and may be approved administratively *by the City of Henderson* (Development Code/Henderson, Nevada, Section 19.2.7.D.2). Policy changes may be made unilaterally by the Design Review Committee with notification to City of Henderson staff.

Changes of a substantial nature may be recommended by the Design Review Committee for consideration by the Declarant and/or Board of Directors of the Association. Any request for substantial amendments that increases the number of dwelling units, decreases the amount of common open space, alters a road pattern, changes the type structures, increases the size of proposed structures to be constructed or requests new waivers of code requirements *shall be approved by the City of Henderson* (Development Code/Henderson, Nevada, Section 19.2.7.D.1).

6.4.8 Non-Liability

Neither the Design Review Committee nor any member thereof shall be liable to the Association or to any owner or other Person for any damage, loss, or prejudice suffered or claimed on account of (a) the approval or disapproval of any plans, drawings, and specifications, whether or not defective, (b) the construction or performance of any work, whether or not pursuant to approved plans, drawings, and specifications, (c) the development, or manner of development of any property within MacDonald Highlands, or (d) the execution and filing of an estoppel certificate whether or not the facts therein are correct; provided, however, that such member has, with the actual knowledge possessed by him, acted in good faith. Without in any way limiting the generality of the foregoing, the Design Review Committee, or any member thereof, may, but is not required to, consult with or hear the Association or any Owner or other Person with respect to any plans, drawings, or specification, or any other proposal submitted to the Design Review Committee.

6.4.9 Non-Liability of the Design Review Committee and Declarant

Neither the Design Review Committee, any member thereof, nor the Declarant or their respective successors or assigns shall be liable in damages to anyone submitting plans to them for approval, or to any Owner or other Person by reason of mistake in judgment, negligence, or nonfeasance arising out of or in connection with the approval or disapproval or failure to approve any plans and specifications. *Every Owner or other Person who submits plans to the Design Review Committee for approval agrees, by submission of such plans and specifications, that he will not bring any action or suit*

against the Design Review Committee, any member thereof, or Declarant to recover damages. Approval by the Design Review Committee, any member thereof, or the Declarant shall not be deemed to be a representation or warranty that the Owner's plans or specifications or the actual construction of a Residence or other Improvement comply with applicable governmental ordinances or regulations, including but not limited to zoning ordinances and local building codes. It shall be the sole responsibility of the Owner or other Person submitting plans to the Design Review Committee or performing any construction to comply therewith.

6.4.10 Enforcement

These Design Guidelines may be enforced by the Design Review Committee, the Association, or Declarant as provided herein or in the Declaration.

6.4.11 Severability

If any provision of these Design Guidelines, or any section, clause, sentence, phrase or work, or application thereof in any circumstance, is held invalid, the validity of the remainder of these Design Guidelines, and of the application of any such provision, section, sentence, clause, phrase or work in any other circumstance, shall not be affected thereby, and the remainder of these Design Guidelines shall be construed as if such invalid part were never included therein.

6.5 CONSTRUCTION CONTROL

In order to assure that the natural desert landscape of each Lot is not damaged during any construction activities, the following construction regulations shall be enforced during the construction period. These regulations shall be made a part of the construction contract document specifications for each Residence or other Improvements on a Lot and all Builders, Owners, and other Persons shall be bound by these regulations. Any violation by a Builder shall be deemed to be a violation by the Owner of the Lot.

6.5.1 Pre-Construction Conference: Prior to Design Review Committee-plan approval for plans check submittal to the City of Henderson, the Builder must meet with a representative of the Design Review Committee to review construction procedures and coordinate his activities in MacDonald Highlands.

6.5.2 Construction Conditions

Prior to the commencement of any construction activity on a Lot, the Owner and Builder shall provide a detailed plan as to the manner in which conditions will be protected, and the areas in which all construction activity will be confined to, including, but not limited to: size and location for construction material storage, limits of excavation, drive areas, parking, chemical toilet location, temporary Structures, if any, dumpsters, storage of debris, fire extinguisher, utility trenching, and Dust Control sign. All construction activities, materials, and equipment must be kept in the cleanest of conditions and in a manner appropriate to the overall integrity of MacDonald Highlands.

6.5.3 Commencement of Construction

Upon written receipt of final approval from the Design Review Committee, and having satisfied the City of Henderson, Nevada review process, the Owner shall post a completion bond, construction loan documentation or other Design Review Committee-approved guarantee providing sufficient coverage to finish the exterior appearance of the home including exterior building and site Improvements.

The Owner shall satisfy conditions and commence the construction of any work pursuant to the approved plans within one year from the date of such approval. If the Owner fails to begin construction within this time period, any approval given shall be deemed revoked unless, upon the written request of the Owner made to the Design Review Committee prior to the expiration of said twelve-month period and upon a finding by the Design Review Committee that there has been no change in circumstances, the time for such commencement is extended in writing by the Design Review Committee.

It will be considered that construction has commenced once a City permit has been issued and the Lot has been disturbed. Construction must proceed in a continuous manner through the completion of the Residence. If construction ceases for a period greater than 45 days, the Design Review Committee may require that either construction immediately resumes or the Lot is returned to its pre-existing condition. The Builder's Deposit may be forfeited if either alternative is not achieved within 45 days of written notice to the Owner by the Design Review Committee.

The Owner shall, in any event, complete construction of any Improvement on his Lot within eighteen (18) months after commencing construction thereof, except and for so long as such completion is rendered impossible or would result in great hardship to the Owner due to labor strikes, fires, national emergencies or natural calamities.

If the Owner fails to comply with this schedule, the Design Review Committee shall have the right (but no obligation) to either have the exterior of the Improvement completed in accordance with the approved plans or remove the Improvements, with all expenses incurred to be reimbursed to the Design Review Committee by the Owner.

6.5.4 Inspection of Work in Progress

The Design Review Committee may inspect all work in progress and give notice of noncompliance. Absence of such inspection or notification during the construction period does not constitute an approval by the Design Review Committee of work in process or compliance with these Design Guidelines.

Construction documentation required of each Lot Owner, Developer and/or Builder is as follows:

i. **PRIOR TO** pouring the slab the builder or owner must submit a wet stamped letter from a Nevada registered land surveyor attesting that the main level slab form elevations match the elevations submitted. If the owner does not comply the Developer will have it performed and deduct the cost from the construction deposit.

ii. AFTER the main level slab is poured, the owner or builder must submit an 8.5" x 11" plot plan "as-built" of the home showing actual distances from corners to property lines in tenths of a foot and wet stamped by a Nevada registered land surveyor. If the owner does not comply the Developer will have it performed and deduct the cost from the construction deposit.

iii. AFTER top-out, the builder or owner must submit a wet stamped letter from a Nevada registered land surveyor ~~stating the vertical difference between the highest roof peak and the top of curb at the center of the lot~~ certifying the highest roof peak elevation. If the owner does not comply the Developer will have it performed and deduct the cost from the construction deposit.

Of course, pertinent grading and building construction inspections by the City of Henderson are required to confirm U.B.C. and City of Henderson zoning, ordinance and building standards.

6.5.5 Temporary Construction Fencing

The main concept of MacDonald Highlands is to preserve the natural characteristics of the terrain during the development of the community. In order to accomplish this, it is necessary for us to adopt grading criteria, which limits the amount of discretionary grading that can be performed.

Any grading and all associated disturbances of the natural desert done for the purpose of constructing an individual residence on a lot or for the purpose of making improvements to an existing residence will be confined within the area designated as the Building Envelope for

that particular lot. Therefore, the Owner shall stake all property lines and install a temporary construction fence along the property lines of a Graded Lot or along the Building Envelope on a Natural Lot before going vertical or framing begins so that all construction activity remains within the building limits of the lot. Lots along the golf course require temporary construction fencing along the property lines adjacent to the course **prior to** occupying the lot (i.e., grading operations). Temporary construction fencing must remain onsite until the completion of all permanent property line fences and/or walls and landscape installation.

6.5.6 Subsequent Changes

Additional construction or other Improvements to a Residence or Lot, or changes during construction or after completion of an approved structure, must be submitted to the Design Review Committee for approval prior to making changes or additions. All submittals shall be accompanied by a cover letter, letter of transmittal or a copy of the Design Review Committee's "Application for an Alternation and/or Modification to an Existing Structure or Lot" describing the revisions proposed.

6.5.7 Final Inspection of the Improvements

Upon completion of any Residence or other Improvement, and prior to occupancy, the Owner shall give written notice of completion (See Exhibit C—Application for Project Completion Review) to the Design Review Committee. Within 10 days of such notification, a representative of the Design Review Committee may inspect the Residence or other Improvements for compliance. If all Improvements comply with these Design Guidelines, the Design Review

Committee will issue a written approval to the Owner, constituting a final release of the Improvements by the Design Review Committee, said release to be issued within 10 days of the final inspection. If it is found that the work was not done in strict compliance with the approved plans or any portion of these Design Guidelines, the Design Review Committee may issue a written notice of noncompliance to the Owner, specifying the particulars of noncompliance, said notice to be issued within 10 days of the final inspection. The Owner shall have 30 days from the date of notice of noncompliance within which to remedy the noncompliance portions of his Improvement. The Owner may request additional time; however, the maximum extension permitted is sixty (60) days from the date of the initial inspection. ~~However~~, if an extension is not granted, and the Owner has failed to remedy the noncompliance, the Design Review Committee may take action to remove, at the Owner's cost, the non-complying Improvements as provided for in these Design Guidelines, including, without limitation, injunctive relief or the imposition of a fine.

If, after receipt of written notice of completion from the Owner, the Design Review Committee fails to notify the Owner of any failure to comply within 60 days following the Design Review Committee's inspection, the Improvements shall be deemed in accordance with the final plan. If a notice of approval is made by the Design Review Committee, any unused portion of the builder deposit will be refunded within thirty (30) days after approval.

6.5.8 Occupational Safety and Health Act (OSHA) Compliance: All applicable OSHA regulations and guidelines must be strictly observed at all times.

6.5.9 Construction Trailers, Portable Field Offices, Etc.: ~~Effective December 2005~~, small ~~8' x 10'~~ trailers are permitted (mini-mobiles are preferred) and must be located behind the temporary construction fencing; only one (1) trailer per construction site is allowed. Larger-size trailers may be considered on a case-by-case basis by the Design Review Committee and are subject to approval by the Design Review Committee prior to delivery and jobsite placement.

6.5.10 Storage Containers: one (1) roll-off type storage container is permitted per jobsite and must be located behind the temporary construction fencing. Storage containers must be removed within fifteen (15) days after the Certificate of Occupancy is issued by the City of Henderson, Nevada.

6.5.11 Debris and Trash Removal: a covered dumpster is required before going vertical or framing begins and must remain onsite throughout the construction of the residence and installation of all site improvements, including landscaping. **Manmade enclosures, cages and onsite trash piles are not allowed!** Dumpsters must be covered during non-working hours. Extra precaution must be taken when a dumpster is placed in the roadway. Orange safety cones shall surround the dumpsters at a safe distance to caution pedestrians and oncoming vehicular traffic of the unexpected obstacle in the roadway ahead.

Owners and Builders shall clean up all trash and debris on the construction site at the end of each day and roadways shall remain clear and free of materials and debris at all times. Trash and debris shall be removed from each construction site at least once a week to a dumping site located off the project. Lightweight material, packaging,

and other items shall be placed in a covered dumpster to prevent wind from blowing such materials off the construction site. Owners and Builders are prohibited from dumping, burying, or burning trash anywhere on the Lot or in MacDonald Highlands. During the construction period, each construction site shall be kept neat and shall be properly policed to prevent it from becoming a public eyesore, or affecting other Lots and any open space. Any clean-up costs incurred by the Design Review Committee or the Association in enforcing these requirements will be billed to the Owner. Dirt, mud, or debris resulting from activity on each construction site shall be promptly removed from public or private roads, open spaces, and driveways or other portions of MacDonald Highlands.

As standard practice, and in efforts to maintain a professional, quality controlled environment within MacDonald Highlands, all construction sites and roadways will be cleaned on every Friday afternoon by the Owner/Builder. Failure to clean the construction site and surrounding roadway(s) weekly may result in an expense to the Owner/Builder. Violators will be notified in writing, via facsimile and registered mail, and required to rectify the situation within a specified timeframe. Each Owner/Builder shall control his/her contractors and the actions of said contractors. All liability for violations of the Design Guidelines caused by a subcontractor(s) shall rest with the Owner/Builder. If an Owner/Builder fails to comply within this time period, the Design Review Committee may enter the Lot and correct the violation at the Owner/Builder's expense. Any such expense shall be secured by applying a back-charge to Owner/Builder's construction deposit. Should the construction deposit be depleted for excessive infringements, the Declarant has the

right to place a ***lien*** upon the Lot enforceable in accordance with the Declaration.

On each construction site, the Builder must designate a wash-out area within the Lot for contractors and suppliers to clean their equipment. The cleaning of equipment must occur, and cleaning effluent must remain, within that specified area. Equipment cleaned in any area other than the designated area will result in the Design Review Committee imposing a fine or retaining the Builder's construction deposit to repair any damages resulting from such equipment cleaning in improper areas.

6.5.12 Sanitary Facilities: Each Owner and Builder shall be responsible for providing adequate sanitary facilities for his/her construction workers. Portable toilets or similar temporary toilet facilities shall be located on the site itself or outside the temporary construction fencing, behind the curb. All sanitary facilities must be anchored or secured to prevent turn over; **this is an environmental safety issue.**

6.5.13 Vehicles and Parking Areas: Construction crews will not park on, or otherwise use, other Lots or any open space. Because of City of Henderson Fire Code, on-street parking is limited to one side of the street only. The approved street parking is limited to the southside and the eastside of the street only *(per MacDonald Highlands Master Association Rules and Regulations adopted July 10, 2002).* All vehicles will be parked so as not to inhibit traffic, and within the designated areas so as not to damage the natural landscape.

6.5.14 Staging Areas

Effective May 2002 all construction activity, including all improvements, location of material storage, debris, dumpsters and temporary facilities are to be contained

within the limits of the Lot under construction; no exceptions.

If a private agreement is made between neighboring lot owners, the lot owners must advise the DRC, *in writing*, of said agreement. The lot owner requesting the use of another lot for staging will be required to install temporary construction fencing on the staging lot, as well as his/her lot under construction.

6.5.15 Conservation of Landscaping Materials: Owners and Builders are advised of the fact that the Lots and open spaces contain valuable native plants and other natural landscaping materials that should be absolutely protected during construction, including topsoil, rock outcroppings and boulders, and plant materials.

Materials that cannot be removed should be marked and protected by flagging, fencing, or barriers. The Design Review Committee shall have the right to flag major terrain features or plants that are to be fenced off for protection. Any trees or branches removed during construction must be promptly cleaned up and removed immediately from the construction site.

6.5.16 Excavation Materials: Excess excavation and any spoil materials must be hauled away from MacDonald Highlands to a legitimate disposal site. Dumping of excess or spoil materials within the MacDonald Highlands community shall result in a fine and an assessment for the proper disposal site. Stockpiling of excavation and spoil materials, when permitted by the Design Review Committee, requires a dust control permit, issued by the Clark County-Department of Air Quality Management.

6.5.17 **Blasting**: If any blasting is to occur, the Design Review Committee must be informed far enough in advance to allow it to make such investigation as it deems appropriate to confirm that all appropriate measures, including protective actions, have been taken prior to the blasting. No blasting or impact digging causing seismic vibrations may be undertaken without the approval of the Design Review Committee. Applicable governmental regulations should also be reviewed prior to any blasting activity.

6.5.18 **Restoration or Repair of Other Property Damaged:** Damage and scarring to other property, including, but not limited to, open space, other Lots, roads, driveways, and/or other Improvements will not be permitted. If any such damage occurs, it must be repaired and/or restored promptly at the expense of the Person causing the damage or the Owner of the Lot within sixty (60) days. Upon completion of construction, each Owner and Builder shall clean his construction site and repair all property which was damaged, including but not limited to restoring grades, planting shrubs and trees as approved or required by the Design Review Committee, and repair of streets, driveways, pathways, drains, culverts, ditches, signs, lighting, and fencing.

6.5.19 **Miscellaneous and General Practices:** All Owners will be absolutely responsible for the conduct and behavior of their agents, representatives, Builders, contractors, and subcontractors on MacDonald Highlands. The following practices are prohibited on MacDonald Highlands:

- Changing oil on any vehicle or equipment anywhere within MacDonald Highlands.

- Allowing concrete suppliers and contractors to clean their equipment on the site other than the Owner/Builder's lot.

- With the exception of the Building Envelope, removing any rocks, plant material, topsoil, or similar items from any property of others within MacDonald Highlands, including construction sites, unless it is from the site under construction and only then with prior approval from the Design Review Committee.

- Carrying any type of firearms within MacDonald Highlands.

- Using disposal methods or units other than those approved by the Design Review Committee.

- Careless disposition of cigarettes and other flammable material. At least one 10-pound ABC-rated dry chemical fire extinguisher shall be present and available in a conspicuous place on the construction site at all times.

- Careless treatment or removal of any desert plant materials not previously approved by the Design Review Committee.

- Use or transit over the golf course area.

- Consumption of alcoholic beverages within MacDonald Highlands.

- No pets, particularly dogs, may be brought onto any site under construction. No pets will be allowed to roam at will throughout MacDonald Highlands. In the event of any violation hereof, the Design Review Committee, the Association, or Declarant shall have the right to contact the City of Henderson or Clark County authorities to

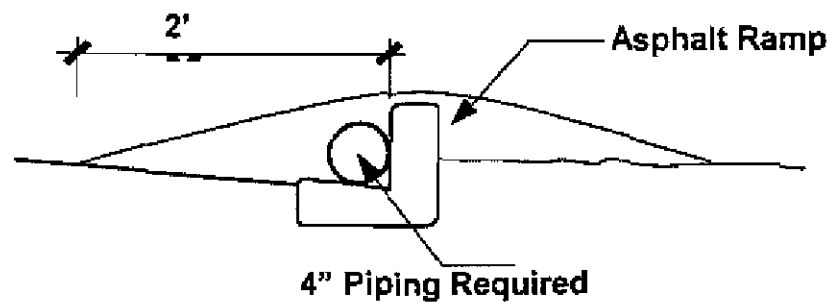
impound the pets, or to refuse to permit such Builder or subcontractor to continue work on MacDonald Highlands property, or to take such other action as may be permitted by law, the Design Guidelines, or the Declaration.

- Catering trucks will not be permitted. Also, trash generated from construction practices must be contained and disposed of properly in covered trash receptacles.

- Music is limited to the interior of a residence and, in no case, may intrude on the privacy of the community.

6.5.20 Construction Area Plan: Prior to the commencement of any construction activity on a Lot, the Owner and Builder shall provide a detailed plan as to the manner in which the natural desert will be protected, and the areas to which all construction activity will be confined to, including: size and location for construction material storage, limits of excavation, drive areas, parking, chemical toilet location, temporary structures, if any, dumpsters, storage of debris, fire extinguisher, utility trenching, and Dust Control signage. This plan should identify the methods for protection, such as fencing, flagging, rope, barricades, or other means, to be set up prior to commencement of construction.

6.5.21 Construction Access: The only approved construction access during the time a Residence or other Improvements are being built will be over the approved driveway for the Lot unless the Design Review Committee approves an alternative access point. If the construction activity crosses an existing curb and gutter, an asphalt ramp with a 4-inch sleeve for drainage must be installed prior to use. The ramp shall not extend more than 2 feet from the curb face into the roadway.



Construction Access Detail
N.T.S.

6.5.22 Dust and Noise: The Contractor shall be responsible for controlling dust and noise from the construction site in compliance with applicable government regulations and MacDonald Highlands grading standards. Lot Owners/ Contractors are required to obtain the necessary Dust Control permit from the Clark County Health District. Stockpiling of excavation and spoil materials, when permitted by the Design Review Committee, requires a dust control permit, issued by the Clark County-Department of Air Quality Management.

6.5.23 Signage: Dust Control signs are required for a Lot or Parcel greater than .25-acres and are to be constructed per Clark County-Department of Air Quality Management specifications. Builder signs and/or any other form of construction signage may **not** be attached to dust control signs. No other signage, including but not limited to marketing signs, "For Sale" signs, construction signs, contractor/sub-contractor signs, etc., is permitted in the community.

6.5.24 Daily Operation: Daily working hours for each construction site shall be between the hours of 6:00AM and 6:00PM, Monday through Friday, and between 9:00AM and 5:00PM on Saturday. Construction or maintenance activity is not permitted on Sundays and designated holidays without written approval from the Master Homeowners Association.

All construction-related entry and exits to the project and/or individual construction jobsites are to be through the Stephanie Street gate only.

Construction equipment will <u>not</u> be permitted on the property after hours. If construction activities proceed beyond standard daily operation hours, the equipment ***<u>will be required to remain onsite</u>*** until the Stephanie Street construction gate is reopened in the morning. ***<u>NO CONSTRUCTION TRAFFIC WILL BE PERMITTED TO EXIT THROUGH THE MAIN GATE</u>***.

6.5.25 Enforcement: If an Owner, Builder or Developer violates any construction control provision contained in Section 6.5 of these Design Guidelines, the Owner, Builder or Developer will be notified, in writing, via facsimile and/or certified mail, of such violation and the Owner, Builder or Developer shall be required to remedy the violation within a specified timeframe established by the Declarant.

If an Owner, Builder or Developer fails to remedy the violation within the established timeframe, the Declarant may take action to rectify the violation itself and reimburse itself for the cost associated with the effort by deducting the incurred costs from the Owner's, Builder's or Developer's construction deposit, as provided for in these Design Guidelines, including, without limitation, injunctive relief and/or the imposition of a fine. If the Owner's, Builder's or Developer's construction deposit is depleted by incurred costs, the Declarant has the right to place a lien upon the property and deny future access to the jobsite until all uncollected fees, costs and fines are paid and the jobsite is brought into full compliance.

Exhibit A - Application for Schematic Plan Review

MACDONALD HIGHLANDS

Design Review Committee

Date _____ Lot #_____

Owner _____

Address _____

Phone _____

Signature _____

Design professional _____

Address _____

Phone _____

Builder _____

Address _____

Phone _____

This application will be considered complete only if all the documents and submittals, as set forth in the Design Guidelines are included. One (1) set of all documents is required.

For Reviewer Use Only:

Submittal date _____

Review date _____

Notice To Owner:

Following your Preliminary Submittal, the DRC:

☐ Approves your Preliminary Plan

☐ Approves your Preliminary Plan, with the following conditions:

_____

_____

_____

☐ Disapproves your Preliminary Plan for the following reasons and requires a revised submittal:

_____

_____

_____

Signed _____

Note: Approval and compliance with conditions is a pre-condition to filing an application for Final Submittal.

Rev. March 2004

MACDONALD
HIGHLANDS

SCHEMATIC PLAN REVIEW CHECKLIST

The Schematic Plan submittal is required to give an indication of the design, character and extent of the proposed immediate development. The Schematic Plan is to be submitted and approved prior to Final Plan submittal. Please refer to Section 6 of the Design Guidelines for detailed instructions.

- o One (1) complete set of plans drawn to scale and fully dimensions
- o One (1) each of ALL drawings **reduced to 8½ x 11" format**
- o General:
  - o Owner's name, address and telephone number
  - o Name, address and telephone number of the firm(s) preparing the plans
  - o Lot designation
  - o Scale
  - o North arrow
  - o Date plans were completed/updated
  - o Legal description of gross lot area; and
  - o Date of submission.
- o Site or Subdivision Plan:
  - o Scale: Site Plan not less than 1" = 20'; Subdivision Plat, when applicable, not less than 1" = 100'
  - o Survey prepared by a licensed surveyor or civil engineer
  - o Existing and proposed grade lines
  - o Square footage of lot, building, parking lot/drives and landscape/open space areas
  - o Site coverage ratio
  - o Front, side and rear yard setback lines
  - o Location of all other improvement walls, outside storage areas
  - o Alleys, adjacent streets, with all existing/ future rights-of-ways, curb, property line
  - o Driveways and curb cuts
  - o Total parking provided
  - o Conceptual grading, drainage, lighting and utilities plan
- o Lot Cross Sections— if applicable (reference Exhibit "V" of the Design Guidelines)
- o Buildings:
  - o Elevations of buildings from all sides
  - o Gross and net building square footage
  - o Heights of all improvements
  - o Number of levels or floors
  - o Windows, doors, balconies and other structural openings

Continued...

- Exterior Materials Samples presented **within a three-ring binder** indicating all exterior materials, textures and colors…including windows, glass block, skylights, roof top windows, Solatubes®, solar panels, flat roof surface material & color, railings, wrought iron gates, doors, front doors, patio doors, garage doors, landscape light fixtures, exterior wall-mounted light fixtures, exterior recessed light fixtures; driveway, walkway, terrace, balcony and patio materials & colors; address identification device, etc.

- Color Blocking Exhibits (i.e., four-sided colored elevations of each building)…please be advised renderings are <u>not</u> required; the DRC requires exhibits identifying the application of all proposed colors and materials.

- Floor Plan(s)

- Roof Plan

- Mechanical, Plumbing and Electrical Plans (including Electrical Load Calculations)

- Nevada Power Company Approval Letter (if applicable)

- City of Henderson Variance Approval (if applicable)

- Landscaping:
  - Square footage of landscape area in front, side and rear yards
  - Location and species of existing vegetation
  - Conceptual landscape design
  - Identify all paving and plant materials
  - Identify locations for all landscape light fixtures proposed

NOTE: per <u>Section 6.1.2—Review of Plans</u> *of the MacDonald Highlands community design guidelines*, to assure a thorough and complete review, schematic and final plan submittals will be reviewed by the Committee and/or their representatives *outside* of any committee meetings. The DRC will respond in writing to a submittal no later than fifteen (15) working days after receipt of a review package, but no later than thirty (30) working days after a submittal is complete, provided the plans meet the requirements of the design guidelines. Members of the DRC will not discuss results of the reviews over the telephone with any owner or their representatives. Furthermore, **all approvals as required by the City of Henderson must be obtained <u>AFTER</u> DRC-approval and prior to the commencement of construction.**

1730 West Horizon Ridge Parkway, Suite 100
Henderson, Nevada 89012
702.458.0001 • Fax 702.458-5570
www.macdonaldhighlands.com

Exhibit B - Application for Final Plan Review

MACDONALD HIGHLANDS

Design Review Committee

Date _____ Lot #_____

Owner _____

Address _____

Phone _____

Signature _____

Design professional _____

Address_____

Phone _____

Builder

Address_____

Phone _____

This application will be considered complete only if all the documents and submittals as set forth in the Design Guidelines are included. One (1) set of all documents is required.

For Reviewer Use Only:

Submittal date _____

Review date _____

Notice To Owner:

Following your Final Submittal, the DRC:

☐ Approves your Final Submittal

☐ Approves your Final Submittal, with the following conditions:

_____

_____

_____

☐ Disapproves your Final Submittal for the following reasons and requires a revised submittal:

_____

_____

_____

Signed _____

Note: Building Permits must be obtained from the local Governing Authority and copies filed with the DRC prior to commencement of construction. An Application of Project Completion Review must be filed with the DRC prior to occupancy.

MACDONALD
HIGHLANDS

FINAL PLAN REVIEW CHECKLIST

Final Plans are to be submitted and approved by the Design Review Committee (DRC) ***BEFORE*** submittal to the City of Henderson. Please note approval of the schematic plan package to proceed to final plan preparation and DRC-submittal *DOES NOT CONSTITUTE FINAL PLAN APPROVAL BY THE DRC.* Please refer to Section 6 of the Design Guidelines for detailed instructions.

- One (1) complete set of plans drawn to scale and fully dimensioned–all comments from the previous schematic plan submittal are to be fully addressed
- One (1) each of **ALL** drawings **reduced to 8½ x 11" format**
- Remaining Materials Sample Selections and Manufacturer Cut-Sheets – where applicable
- Modified Color Blocking Exhibits – where applicable
- Revised Mechanical, Plumbing and Electrical Plans – where applicable
- Revised Irrigation and Landscaping Plans – where applicable
- Pre-Construction/Pre-Approval Requirements, i.e., proposed construction schedule, construction deposit and pre-construction conference appointment
- AutoCAD disk with the building perimeter and grades of the finalized site plan
- Massing Model (upon DRC request) – a simple massing model may be required to three-dimensionally demonstrate how the building relates to the lot and adjacent properties – where applicable

NOTE: per Section 6.1.2—Review of Plans *of the MacDonald Highlands community design guidelines*, to assure a thorough and complete review, schematic and final plan submittals will be reviewed by the Committee and/or their representatives *outside* of any committee meetings. The DRC will respond in writing to a submittal no later than fifteen (15) working days after receipt of a review package, but no later than thirty (30) working days after a submittal is complete, provided the plans meet the requirements of the design guidelines. Members of the DRC will not discuss results of the reviews over the telephone with any owner or their representatives. Furthermore, **all approvals as required by the City of Henderson must be obtained AFTER DRC-approval and prior to the commencement of construction.**

Revised December 2005

1730 West Horizon Ridge Parkway, Suite 100
Henderson, Nevada 89012
702.458.0001 • Fax 702.458-5570
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MACDONALD
HIGHLANDS

Design Review Committee

Exhibit C - Application for Project Completion Review

Date _____ Unit #_____

Requested by _____ Phone _____

Owner _____ Phone _____

Design professional _____ Phone _____

Contractor _____ Phone _____

Date of final inspection _____

NOTICE TO OWNER:

Following your request for Project Completion Review, the DRC finds that your final building and site construction:

☐ Conforms—based on the recent inspection of the property, all improvements were constructed and accepted according to the plans and specifications approved by the MacDonald Highlands Design Review Committee. As the Owner/Developer has successfully addressed all remaining construction requirements pertaining to his/her Sales Contract, development of the Lot is ***complete*** and ***approved*** by the DRC as of this date. This authorized exhibit serves a full and final acceptance and release of the aforementioned project.

☐ Does not conform to the plans and specifications approved in your final submittal. The following corrections/ additions are required: _____

_____

Signed _____ Date _____

* * * * * *

AS A REMINDER, if any design changes or modifications are made to the exterior of the residence or any element onsite in the future, such revisions must first be submitted to the *MacDonald Highlands Master Homeowners Association* for approval. Furthermore, no materials or improvements are to be installed or constructed without HOA approval. If any materials or improvements are found to be in violation or not consistent with the requirements of the Design Guidelines and CC&Rs, the Owner/Developer will be held liable and will be required to remove/rectify the item(s) at his/her expense.

Revised 11/02

1730 West Horizon Ridge Parkway, Suite 100
Henderson, Nevada 89012
702.458.0001 • Fax 702.458-5570
www.macdonaldhighlands.com

DESIGN REVIEW COMMITTEE
Application for an Alteration and/or Modification to an Existing Structure or Lot

MACDONALD HIGHLANDS

DESIGN REVIEW COMMITTEE

1730 W. Horizon Ridge Pkwy
Suite 100
Henderson, Nevada 89012
Attention: Paula Gibson
(702) 458-0001 Phone
(702) 458-5570 Facsimile

Date _____ Lot #_____ Subdivision _____

Owner _____

Mailing Address _____

Phone _____

Signature _____

Design professional _____

Address_____

Phone _____

Builder_____

Address_____

Phone _____

SUBMITTAL DESCRIPTION: _____

_____

_____

This application will be considered complete only if all the documents and submittals, as set forth in the Design Guidelines are included.

For Reviewer Use Only:

Submittal date _____

Review date _____

Notice To Owner:

Following your Preliminary Submittal, the DRC:

☐ Approves your Preliminary Plan

☐ Approves your Preliminary Plan, with the following conditions:

_____

_____

_____

☐ Disapproves your Preliminary Plan for the following reasons and requires a revised submittal:

_____

_____

_____

Signed _____

Revised December 2005

MACDONALD
HIGHLANDS

MEMORANDUM

TO: All Lot Owners, Developers, Builders and Contractors

SUBJECT: MacDonald Highlands Construction Regulations

DATE: *Updated* December 1, 2005

The following list of items is just a summarized list of our Construction Regulations. Its purposes were a summary of the regulations that we could hand out to field superintendents and foremen on the project site. As you are aware, the manual given to you at the time of purchase is two inches thick and has been lost or misplaced, and may have never gotten to the site as required. This Memorandum is intended for reference only and does not imply that you are in violation of the rules. Please check your construction site and see if you are complying. If you have not started you dream home, just make sure your contractor is aware of these requirements before starting.

1. Prior to pouring the main level slab, a wet-stamp Elevation Certification from a Nevada registered land surveyor is required before going vertical.
2. After the main level slab is poured, a wet-stamp "as-built" plot plan from a Nevada registered land surveyor is required.
3. After top-out, a wet-stamp Height Elevation Certification from a Nevada registered land surveyor is required.
4. A construction fence is required before going vertical or framing begins.
5. One (1) 8' x 20' (maximum) construction trailer and one (1) roll-off type storage container are allowed per jobsite and must be located behind the temporary construction fencing.
6. A ***COVERED*** dumpster is required on all construction sites and maybe located in the street in front of the lot. Streets are to remain clear and free of debris at all times and construction debris is required to be cleaned up daily; all trash materials must be placed in the dumpster. Dumpsters must be covered during non-working hours—***cages and onsite trash piles are not allowed***.
7. Portable toilets are required and may be located outside construction fencing and behind the curb. All portable toilets must be anchored or secured to prevent turn over; this is an environmental issue.
8. Parking is allowed on the street but only one side or the other, not both. Therefore, you must coordinate parking with other builders on the street to insure everyone is on the same side of the street. This is a Fire Department requirement as well.
9. There is no parking, staging or storage on other lots, without the owner of that lot's consent. If consent is given, all rules that apply to your lot will also apply to the lot or lots that you may use for staging (including temporary construction fencing).
10. A Health District Dust Control Permit Sign is required for a lot greater then .25 acres. ***No other signs are permitted***.
11. Working hours are 6AM-6PM, Monday through Friday, and between 9AM-5PM on Saturday, with no work on Sundays or holidays.
12. All entry and exits to the project are to be through the Stephanie Street construction gate. Be sure your crews leave early enough to exit through the Stephanie gate.

Additional copies of the MacDonald Highlands Design Guidelines are available for purchase via the MacDonald Highlands Sales Office, Suite #100 at a cost of $200 per copy, or you may come to our offices and review the full Design Guidelines as needed.

1730 West Horizon Ridge Parkway
Henderson, Nevada 89012
702.458.0001 • Fax 702.458-5570

7.0 HILLSIDE DESIGN GUIDELINES

7.1 INTRODUCTION

This chapter of the MacDonald Highlands' Design Guidelines provides standards and specifications for those developments that are situated in hillside areas. These standards have been developed in cooperation with the City of Henderson for the purpose of insuring that the necessary services can be provided to residents in these areas while protecting the special characteristics of the hillsides. All development in the hillside areas shall comply with these development standards and criteria.

7.2 PURPOSE

These guidelines provide for specific standards for the development of hillsides by minimizing soil disturbance, protecting visual assets, and preserving the City's natural character. Hillside areas shall include all parcels or site-planning areas which contain slopes of ten percent (10%) or greater and serve to protect major outcrops, prominent knolls, major ridgelines and peaks, and other significant habitats. The Hillside Design Guidelines will establish requirements to assure compatibility with the various slope conditions in the hillside areas and will insure sensitive development, which reinforce the unique character of the City's hillsides.

7.3 DEFINITIONS

"**Buildable Area**" is that portion of the platted lot, excluding the required setbacks as established by the base zoning district and all designated undevelopable area or open space area.

"**Contour**" means a line drawn on a plan, which connects all points of equal elevation.

"**Contour Grading**" is a grading concept designed to result in earth forms that resemble natural terrain characteristics.

"**Cut and Fill**" is the excavating of earth material in one location and the depositing of it in an adjacent location.

"**Hillside**" means a parcel of land with an average rise and fall of ten percent (10%) or more.

"**Hilltop**" means the highest elevation at the crest of a hill.

"**Grading**" is the movement of earth for individual building foundations, driveways, local roads, and utility excavation that conforms closely to natural contours.

"**Level Building Site**" is that portion contained within the dimensioned buildable area to accommodate the main structure, required off-street parking, accessory structures, and drainage resulting from said improvements.

"**Mass Grading**" is the movement of large quantities of earth over large areas. Disruption of the on-site surface terrain is common.

"**Natural Drainage**" is water, which flows by gravity in channels by the surface topography of the earth prior to changes made by the efforts of man.

"**Natural Slope**" means a slope that is not man-made.

"**Ridge**" means an elongated crest or series of crests of a hill.

"**Scarring**" means a visible cut in a hillside or ridge in which earth has been removed or disturbed.

"**Slope**" is expressed as a ratio or percentage of the vertical distance (rise), or change in elevation, to the horizontal distance (run). The percent of any given slope is determined by dividing the rise by the run, multiplied by 100.

"**Transition Slope**" is a slope contained wholly within the building area used to transition from the grade of the level building site to the natural or engineered finished grade of the yard area.

7.4 HILLSIDE CLASSIFICATION TYPES

Flat land slopes from zero to less than ten percent (10%) pose no major restriction in terms of hillside development. Hillside development classifications are determined to identify landform types as follows:

7.4.1 Hillsides: Slopes of 10 to 15 percent where roads shall be generally parallel to contours are classified as hillsides. In addition, building sites are to be oriented parallel to slopes.

7.4.2 Steep Hillside: Steep Hillsides are classified as slopes of 16 to 30 percent. Such slopes are somewhat limited in terms of access and the ability to grade level building sites. View opportunities and visual prominence shall be recognized.

7.4.3 Mountainous: Mountainous slopes are those slopes of 31 to 50 percent. Graded pads using 2:1 slopes will be used, due to streets and building sites being difficult to create.

7.4.4 Rugged Mountain: Slopes of 51 percent or greater describe the Rugged Mountain classification. Development is virtually not feasible without massive grading.

7.5 HILLSIDE DEVELOPMENT STANDARDS

The development standards for hillside areas shall apply to slopes of 10 percent or greater and shall be consistent to the base-zoning district provided that the following requirements shall govern in case of any conflicts.

7.5.1 Design Standards: The form, mass, and profile of the individual building shall be designed to blend with the natural slope and character of the hillsides.

- The preferred orientation of buildings shall be parallel to the natural slope in order to minimize the amount of cut and fill.
- Buildings shall be placed on a site so that the appearance of vertical mass and visual impact shall be reduced.
- The majority of roof slope(s) shall be predominately oriented in the same direction as the natural slope.
- Building materials and color schemes shall blend with the natural landscape. Contrasting color accents shall be kept to a minimum.
- Walls and fences may be used to define a buildable area, but shall not dominate a view and may be subject to the provisions stated in the City's Municipal Code.

7.5.2 Site Standards: No excavation or other earth disturbance of lots in hillside areas shall be permitted prior to the issuance of a grading permit from the City of Henderson.

- The maximum slope ratio for cut or fill slopes shall be 2:1. However, if a geological stability analysis proves that bedding conditions are favorable, steeper slopes may be permitted to minimize cut slopes.

- The angle of any transition slope shall be gradually adjusted to the angle of the natural slope.

- All distributed or graded slopes and exposed surfaces shall be treated with simulated desert varnish, or any other native desert enhancing materials and vegetation that will restore the slope to its natural appearance.

- Lot grading shall be limited to the boundaries of the buildable area, driveways and the usable rear yard area between the building and top or toe of slope.

- If terrace-grading techniques are used, the lot configuration shall have variable undulating slopes to create a natural appearance. Straight uniform lot configurations are prohibited.

7.5.3 Streets, Driveways, and Drainage: Streets, driveways, and drainage channels shall conform to the natural slope.

- Fire apparatus Access Roads shall comply with the provisions of the 1998 Uniform Fire Code, Division II and The City of Henderson Fire Department requirements. These roads include all streets both private and public, fire lanes, alleys, and shall include driveways when any approved route around the exterior of the building is more than 150 feet from a street or fire lane.

- The maximum grades for Fire Apparatus Access Roads shall not exceed 15 percent or as specified in The City of Henderson Hillside Guidelines. The total cumulative length of the access road in excess of 15 percent, but less than 18 percent, shall not exceed 300 linear feet.

- The maximum length of cul-de-sacs or dead-end streets shall be 900 feet with Henderson Fire Department approval. Each cul-de-sac or dead-end street beyond the maximum length shall be approved by City Council.

- Common area private driveways shall serve up to a maximum of five parcels as a method to reduce unnecessary grading, paving, and site disturbance. Driveways serving more than one parcel shall comply with the Fire Department access road requirements.

- Fire hydrants shall be located such that a clear area approximately 3' by 6' shall be centered on the fire hydrant. The 3' dimension shall be aligned with the 4" pumper nozzle cap and the 6' dimension aligned with 2-1/2" hose nozzle caps.

- The minimum private street width for one-way streets from flow line to flow line shall be 20 feet, in which parking is prohibited. The minimum private street width for two-way streets from flow line to flow line shall be 24 feet, in which parking is prohibited. The minimum private street width from flow line to flow line shall be 32 feet, in which parallel parking is permitted on one side. The minimum private street width from flow line to flow line shall be 40 feet, in which parallel parking is permitted on two sides.

- The use of ribbon curb or L-type curb shall be a minimum of 2 feet on each side of a street right-of-way and shall be approved by the Public Works Department.

- Sidewalks will be required on each side of a public street right-of-way.

- "No Parking" signs shall be installed when required by the Fire Department or the Public Works Department.

- Special streets such as split-level streets, dead-end streets, and minor variations from the maximum grade standards are prohibited, unless approved by the City Engineer and the Fire Department.

- Manufactured slopes adjacent to any street or driveway shall be given an appearance that resembles the natural slope and shall be treated with simulated desert varnish.

- Natural drainage features shall be incorporated into a project design to preserve the natural character of the hillsides.

7.6 HILLSIDE DEVELOPMENT APPLICATION

Planning Areas 7, 8B, 14, 16B, 18, 19A, 21, 22, 26, & 27

A development plan in hillside areas shall include the following items in addition to all standard development requirements of the Henderson Municipal Code, except as specified in Section 19.60 of the Henderson Hillside Regulations.

7.6.1 Hillside Development Plan: Upon a tentative map application, the following development plans shall indicate sufficient topographic data that displays the nature of the natural terrain.

- A site plan indicating proposed uses, buildable area, building locations, density, open space, and slope analysis that indicates the percentages of natural slope by land form type as specified in Section 19.60.006 of the Henderson Hillside Regulations.
- A circulation plan indicating traffic flow, pedestrian flow, width of streets, street grades, public or private streets, and parking areas.
- A preliminary grading plan indicating the nature and general extent of the proposed grading.

7.6.2 Hillside Development Reports: Upon a final map application, all geology and hydrology reports shall be compiled by a Nevada Registered Professional Engineer and shall be subject to City Engineer approval.

- A geology report including the surface and subsurface geology of the site, degree of seismic hazard, the effect of geologic conditions on the proposed development, adequacy of sites to be developed, and design criteria to mitigate any identified geologic hazards.

- A drainage report including the hydrologic conditions on the site, nuisance drainage, possible flood indentation and downstream flood hazards. The report shall account for all runoff and debris from tributary areas, include design criteria to mitigate any identified hydrologic hazards, and shall provide consideration for each lot in a proposed hillside development.

- Traffic Study for each sub-development that will be consistent with the master traffic study for MacDonald Highlands and define the participation costs for mitigation measures.

EXHIBIT C

UNIFORM COMMON INTEREST OWNERSHIP ACT
(As Amended in 2014)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SEVENTEENTH YEAR
IN BIG SKY, MONTANA
JULY 18 – 25, 2008

WITH PREFATORY NOTE AND COMMENTS

October 6, 2014

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- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

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- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

DRAFTING COMMITTEE ON AMENDMENTS TO UNIFORM COMMON INTEREST OWNERSHIP ACT (2008)

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in amending this Act consists of the following individuals:

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DRAFTING COMMITTEE ON AMENDMENTS TO UNIFORM COMMON INTEREST OWNERSHIP ACT (2014)

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UNIFORM COMMON INTEREST OWNERSHIP ACT

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PREFATORY NOTE TO THE 2008 AMENDMENTS TO THE UNIFORM COMMON INTEREST OWNERSHIP ACT

Introduction The 2008 proposed amendments to the Uniform Common Interest Ownership Act ("UCIOA") are the product of a four year drafting committee effort. In its work, the committee sought primarily to address a range of significant controversies between common interest associations and individual unit owners that have arisen in the years since the Uniform Laws Commission last considered amendments to UCIOA in 1994. To a lesser degree, these amendments also address a range of other matters affecting common interest communities – that is, condominiums, cooperatives, and planned communities – that practitioners have identified throughout the country over the last decade.

Despite the many years of drafting efforts beginning in 1976 with The Uniform Condominium Act, and culminating in the 1994 amendments to UCIOA, it had become increasingly clear by the time the drafting committee was created in 2005 that major tensions remained in the common interest community field that neither UCIOA or any of its constituent Acts – nor most State statutes in this field - adequately addressed. Those tensions principally involved the perception that individual unit owners were often unduly disadvantaged in their dealings with the elected directors and employee/managers of unit owner associations. Even in those few states that had adopted UCIOA more or less intact, and therefore were able to apply the detailed provisions of that Act to association activities, there has been a growing focus, both in the media and in professional conferences, on the intensity of owner/association disputes. State legislators were besieged with lobbying efforts to adopt narrowly focused special interest statutes intended to fix one or another association 'problem'. Even the federal government became involved, enacting a federal statute to insure that associations of every form of common interest community must permit the display of the American flag on units, and another one that enabled individual unit owners to purchase individual cable television systems, notwithstanding widespread prohibitions on such purchases by unit owner associations.

Accordingly, the revised act – so-called "Version 3.0" – has systematically identified those areas where there have been allegations that those who control the decision-making apparatus of associations have either abused the rights of individual unit owners, or suffer from such inadequate legislation that they are unable to adequately assist their owners. The list is considerable and includes at least these matters:

- the statutory powers, duties and limitations of association boards of directors;
- the fiduciary duties of directors;
- the rights of unit owners to participate in association affairs, including meaningful voting protocols;
- limits on proxy collecting, on amendment of bylaws, and speaking at unit owner meetings;
- open meeting requirements on directors' meetings, and limits on the rights of directors to act behind closed doors;

- unit owner access to association records, and to the same materials that directors receive before their meetings;

- a straight forward means of removing directors of the association;

- meaningful, open procedures for adoption and enforcement of rules governing the association's daily activities;

- mandated notice to unit owners of a variety of additional events;

- more open and clear rules of adoption of budgets, subject to unit owner approval.

Further, there has been considerable publicity across the country regarding alleged abuse in the foreclosure process when unit owners fail to pay sums due the association. To address this specific issue, the Act proposes new and considerable restrictions on the foreclosure process as it applies to common interest communities.

In all these respects, the 2008 amendments enhance the considerable protections for unit owners' rights that exist under the existing provisions of UCIOA.

Beyond the unit owner/association issues, the revised Act addresses several other significant issues in the field. Among several subjects detailed below, they include:

- the importance of confirming that the costs of services provided to unit owners by the association will enjoy the benefit of the association's statutory lien;

- considerable discretion for an association to decide whether or not to strictly enforce its rules and governing documents;

- new provisions dealing with termination or restructuring of a project in the face of a natural disaster;

- creation of a 'cooling off' period before an association commences construction litigation against a developer;

- increased mandatory insurance, and other topics.

A summary of all amendments made in 2008 can be found on the website for the Uniform Laws Commission; go to www.uniformlaws.org and follow the links to the Uniform Common Interest Ownership Act.

UNIFORM COMMON INTEREST OWNERSHIP ACT (1994)

PREFATORY NOTE

The Uniform Common Interest Ownership Act ("UCIOA") was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws (the "ULC"). It combined, in a single comprehensive law, prior uniform laws in this area (the Uniform Condominium Act (1980), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981)). By 1994, UCIOA had become the law in at least five States, while the Uniform Condominium Act, or substantially similar laws, exist in 21 States. The Uniform Planned Community Act is the law in one State.

In 1994, the ULC adopted significant amendments to UCIOA. Following an intensive study of UCIOA by the Joint Editorial Board for Real Property Acts,[1] the ULC appointed a Drafting Committee to write the necessary amendments and additions. Changes to UCIOA should result in corresponding changes in these prior laws; consequently, practitioners in approximately half the American jurisdictions need to have a basic understanding of the changes.

The following is a brief summary of the proposed changes:

1. The definition of "common elements" (Section 1-103(4)), which is a very basic concept, has been amended to clarify that (a) the common elements may include easements, including easements for the benefit of unit owners and (b) real estate may be owned or leased by the association and not be subject to the declaration.

2. A fundamental precept of UCIOA is that full and adequate disclosure to purchasers is a viable alternative to governmental registration and supervision. Declarants are bound by representations made in the declaration, by the models or samples they use, and by the public offering statements, and are held to statutory limitations and standards to protect consumers. Among the basic representations made by declarants are those which describe the scope of development rights and their duration. See, Section 2-105(a)(7), (8), (9), and (10).

However, in very large projects, a declarant's ability to predict the future of a project to be built out over a longer period of time is very limited. Changes in market conditions, the economy, and demographics can occur without warning, forcing changes in even the most preliminary of plans. For that reason, a new Section 2-123 has been added. By its terms, if the declaration identifies the community as a "master planned community," reserving the right to create at least 500 units for residential purposes and the declarant owns or controls more than 500 acres on which those units may be built, then much of the information which otherwise must appear in the

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[1] The Joint Editorial Board was created in 1977 by joint agreement of the ULC and the American Bar Association's Section on Real Property, Trusts and Probate Law to assist in the promulgation of Uniform Acts subject to its jurisdiction. Thereafter, the American College of Real Estate Lawyers became a co-sponsor of the JEB.

declaration from the outset is not required until the declaration is amended as units are created. Further, the public offering statement requirements apply only to units being offered or which have been declared. Finally, the provisions of Section 3-103 regarding transition of control of the unit owners association are amended to permit longer declarant control. As a result, additional flexibility is given for "master planned communities," but the declarant continues to be subject to the obligations of good faith and the standards of unconscionability.

3. Section 2-105(a)(12), as originally crafted, required that a declaration must contain "any restrictions (i) on use, occupancy, and alienation of units ... ." Taken literally, if a declaration does not contain any restrictions, none could be imposed by rule or regulation of the association. But compare Section 3-102(a)(1) (an association may adopt "rules and regulations") and Section 3-102(a)(6) (an association may "regulate the use, maintenance, repair, replacement, and modification of common elements").

In considering the implications of this result, the ULC agreed that uses or occupancy of a unit which affect other units or the common elements are appropriate for regulation, and that unit uses or occupancies with no measurable impact on other units or the common elements should be subject to a different approach to regime regulation as detailed in new Section 3-102(c).

For these reasons, Section 2-105 has been amended to (a) permit (rather than mandate) the declaration to contain restrictions on use and occupancy of units and (b) permit the association to adopt rules and regulations of units to prevent uses which violate the declaration, and to adopt reasonable rules and regulations regarding occupancy of or behavior in units insofar as the occupancy or behavior might affect other unit owners. Section 3-102 has been amended to add subsection (c).

4. As originally drafted, only the most basic provisions of UCIOA Section 1-203 applied if a planned community contained no more than 12 units and was not subject to development rights or if the declaration limited the common expense liability to a relatively small amount. Further, if a planned community contained more than 12 units or was subject to development rights, but the declaration limited the common expense liability to a slightly higher amount, no public offering statement was required to be delivered to an original buyer and no resale certificate was required on resale. See UCIOA (1982) Section 4-101(b)(7).

The 1994 Act has deleted Section 4-101(b)(7). An amendment to Section 1-203 expands that provision so that only the very basic provisions of the Act will apply if a planned community is not subject to development rights and either (1) contains no more than 12 units or (2) is of any size so long as the annual average common expense liability, exclusive of optional user fees and insurance premiums paid the association, does not exceed $300 (subject to the adjustment provisions of Section 1-115).

5. UCIOA's thrust in the area of consumer protection is to protect residential purchasers. Revised Section 1-207(a) provides that a common interest community is not subject to UCIOA at all if it contains only units restricted to nonresidential use, unless the developer elects otherwise. Nonetheless, developers of some commercial and industrial regimes might want the UCIOA's benefits, subject to its burdens. Section 1-207 also provides that the declaration may explicitly

opt into UCIOA or only the basic three provisions of Sections 1-105, 1-106, and 1-107, and gives commercial developers greater flexibility.

6. Unlike most laws which, when enacted, contain repealer provisions for laws on the same subject, UCIOA contemplates that pre-existing laws governing common interest communities will remain in effect. Section 1-206 contains provisions allowing "old Act" regimes to come under the provisions of UCIOA and describes the procedures that must be followed. Amendments to the section clarify the original intent of UCIOA in this regard.

7. The role of surveyors and architects may be lessened by amendments to Section 2-109. In some instances, approximations will suffice and, if the declaration contains a narrative description, unit boundaries and common elements need not be shown on plats and plans.

8. Amendments to Section 2-112 permit relocation of boundaries between units and common elements in order to accommodate additions to units.

9. As originally crafted, UCIOA mandated that the declaration set forth a time limit within which reserved development rights and other special declarant rights must be exercised. See UCIOA (1982) Section 2-105(a)(8). UCIOA (1994) has added a provision which will permit the time limit to be extended.

10. Unruly and disruptive tenants have been a significant problem in association administration. Revised Section 3-102 gives rights to associations to enforce the declaration, bylaws, and rules and regulations not only against the unit owner but also the tenant. Associations may now levy fines against tenants and enforce the rights of the unit owner as landlord.

11. UCIOA and its predecessors distinguished between the standards of conduct applicable to executive board members appointed by the declarant and elected by the unit owners. Section 3-103(a). Experience under this Act demonstrates that the stated standards require further clarity. As amended, UCIOA sets out clearer (and more easily understood) standards: members of the executive board appointed by the declarant will be subject to the standard of care applicable to trustees, and members elected by the unit owners will be subject to the degree of care required of a director of a nonprofit corporation, subject to the business judgment rule.

12. Revised Section 3-111 clarifies that no period of limitation regarding an association's claims against the declarant will run against the association, including warranty claims, until the period of declarant control terminates.

However, because a declarant ought not to warrant the common elements for an inordinate period of time (which may be the result if the period of declarant control is substantial), Section 4-116(d) authorizes the declarant to cause an independent committee of the executive board, during the period of declarant control, to evaluate and enforce warrant claims involving the common elements.

This section has also been amended to require that a tort claim based on ownership of common elements be brought against the association, and not against individual unit owners.

13. UCIOA permitted a condominium association or a planned community association to convey or encumber common elements under the restrictions of Section 3-112(a). Subsection (g) stated the general rule that a conveyance or encumbrance would not affect the priority or validity of pre-existing encumbrances. UCIOA (1994) better protects the rights of the holders of those interests.

14. In order to ensure that association rights in bankruptcy are protected, Section 3-116 provides that the association's lien is a statutory lien and makes clear that the lien for unpaid assessments arises, as a matter of law, upon adoption of the statutory amendment for all existing associations and from the creation of the regime for all regimes created after adoption of the amendments.

15. The contents of the resale certificate have been revised. All too often, preparers of these certificates have been unsure about the degree and extent of information required to be provided. The changes make more objective the information to be provided.

The Underlying Concept of UCIOA

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

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

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

[ARTICLE] 1

GENERAL PROVISIONS

[PART] 1

DEFINITIONS AND OTHER GENERAL PROVISIONS

SECTION 1-101. SHORT TITLE. This [act] may be cited as the Uniform Common Interest Ownership Act.

SECTION 1-102. APPLICABILITY. Applicability of this [act] is governed by [Part] 2 of this [article].

SECTION 1-103. DEFINITIONS. In this [act]:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. For purposes of this definition:

(A) a person controls a declarant if the person:

(i) is a general partner, officer, director, or employer of the declarant;

(ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the declarant;

(iii) controls in any manner the election of a majority of the directors of the declarant; or

(iv) has contributed more than 20 percent of the capital of the declarant.

(B) a person is controlled by a declarant if the declarant:

(i) is a general partner, officer, director, or employer of the person;

(ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the person;

(iii) controls in any manner the election of a majority of the directors of the person; or

(iv) has contributed more than 20 percent of the capital of the person; and

(C) control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the following interests allocated to each unit:

(A) in a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association;

(B) in a cooperative, the common expense liability, the ownership interest, and votes in the association; and

(C) in a planned community, the common expense liability and votes in the association.

(3) "Assessment" means the sum attributable to each unit and due to the association pursuant to Section 3-115.

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

(5) "Bylaws" means the instruments, however denominated, that contain the procedures for conduct of the affairs of the association regardless of the form in which the association is organized, including any amendments to the instruments.

(6) "Common elements" means:

(A) in the case of:

(i) a condominium or cooperative, all portions of the common interest community other than the units; and

(ii) a planned community, any real estate within a planned community

which is owned or leased by the association, other than a unit; and

(B) in all common interest communities, any other interests in real estate for the benefit of unit owners which are subject to the declaration.

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

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

(9) "Common interest community" means real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in the declaration. The term does not include an arrangement described in Section 1-209 or 1–210. For purposes of this paragraph, ownership of a unit does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.

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

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

(12) "Cooperative" means a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of the member's ownership

interest in the association to exclusive possession of a unit.

(13) "Dealer" means a person in the business of selling units for the person's own account.

(14) "Declarant" means any person or group of persons acting in concert that:

(A) as part of a common promotional plan, offers to dispose of the interest of the person or group of persons in a unit not previously disposed of; [or]

(B) reserves or succeeds to any special declarant right [; or

(C) applies for registration of a common interest community under [Article] 5].

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

(16) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to:

(A) add real estate 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 estate from a common interest community.

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

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

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

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

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

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

(23) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a common interest community not located in this state, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the common interest community is located.

(24) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. [In the case of a land trust, the term means the beneficiary of the trust rather than the trust or the trustee.]

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

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

(27) "Purchaser" means a person, other than a declarant or a dealer, that by means of a voluntary transfer acquires a legal or equitable interest in a unit other than:

(A) a leasehold interest, including renewal options, of less than 20 years,; or

(B) as security for an obligation.

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

(29) "Record", used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

(31) "Rule" means a policy, guideline, restriction, procedure, or regulation of an association, however denominated, which is not set forth in the declaration or bylaws and which governs the conduct of persons or the use or appearance of property.

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

(33) "Special declarant rights" means rights reserved for the benefit of a declarant to:

(A) complete improvements indicated on plats and plans filed with the declaration or, in a cooperative, to complete improvements described in the public offering statement pursuant

to Section 4-103(a)(2);

(B) exercise any development right;

(C) maintain sales offices, management offices, signs advertising the common interest community, and models;

(D) use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community;

(E) make the common interest community subject to a master association;

(F) merge or consolidate a common interest community with another common interest community of the same form of ownership

(G) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control;

(H) control any construction, design review, or aesthetic standards committee or process;

(I) attend meetings of the unit owners and, except during an executive session, the executive board; and

(J) have access to the records of the association to the same extent as a unit owner.

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

(35) "Unit" means a physical portion of the common interest community designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 2-105(a)(5). If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily

or involuntarily encumbered, or otherwise transferred by a unit owner, the interest in that unit which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit, and the association's interest in that unit is not thereby affected.

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

Comment

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

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

To emphasize this outcome, the introductory language to Section 1-103 was amended in 2008 to delete the phrase "In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and...," leaving only the introductory words "In this Act". These words are deleted simply as surplus statutory text, without an intent to change the effect of the statute. The drafter of a declaration or bylaws is always entitled to use whatever words in lieu of defined terms as the drafter chooses, but this Act will override such a usage when substantive requirement in this Act is avoided in a declaration or in bylaws.

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

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

As a result of this definition, the association may, in some instances, be a declarant. Under the definition of "Affiliate of a declarant," it is possible that 20% of the unit owners may "act in concert" to control the activities of the association. While the mere casting of these votes at an association meeting would not normally constitute "concerted action" by those unit owners, other acts by individual unit owners might constitute such concerted action. The consequences of that result are determined under Section 3-104.

3. Definition (2), "Allocated interests," refers to all of the interests which this Act requires the declaration to allocate to the common interest communities. "Allocated interests" is defined differently with respect to the three forms of Ownership.

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

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

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

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

4. Definition (6), "Common elements" is bifurcated. The Act adopts the UCA and MRECA definition with respect to condominiums or cooperatives. However, the Act adopts UPCA's definition with respect to planned communities.

5. Definitions (6) and (35), treating "Common elements" and "Units," should be examined in light of Section 2-102, which specifies in detail how the differentiation between units and common elements is to be determined in any given common interest community to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration, as long as the boundaries between units and common elements can be ascertained with reasonable certainty. The common elements include by definition all of the real estate in the condominium or cooperative not designated as part of the units.

6. The 1994 amendment to the definition of common elements in Section 1-103(6) addresses and clarifies a real estate arrangement found in some common interest planned communities – that is, easements or other forms of servitudes which benefit the community and which run either to the unit owners association or to all the unit owners in the association. Examples of such interests include access easements to a land locked parcel on which the community is located, easements for shared parking, etc. This easement, as any commonly held interest in real estate, is and should be a common element. In reciprocal easement communities, the easements may be the only common elements.

7. The drafters also seek to distinguish between real estate owned or leased by the unit owners association which is subject to the declaration, and similar real estate which is not subject to the declaration.

In a planned community, if that real estate is subject to the declaration – that is, it is "within the planned community" – it meets the definition of a common element. If that real estate is not within the planned community, title may be held by the association, but it is not a common element unless the declaration is amended in accordance with this Act to incorporate that real estate as part of the real estate subject to the declaration.

Most common interest communities are not likely to experience a need to acquire real estate in addition to the land originally submitted to the declaration. However, it is not difficult to envision cases where that result would be desirable to the unit owners – for example, to acquire additional parking areas or open space. There is no reason to either prohibit the association from securing this result, or to require the formalities of an amendment of the declaration to redefine the boundaries of the common interest community; this would typically require a two-thirds vote of the unit owners under Section 2-117(a).

This distinction will have practical consequences. For example, real estate which is not a common element may be taxed by the local assessor, unless exempt under other state law, notwithstanding the rule in Section 1-104 of the Act that the common elements may not be separately taxed. Further, non-common element real estate may be bought and sold by the association without the need to observe the requirements for conveying or encumbering common elements stated in Section 3-112.

In a condominium, fee title to the common elements is vested in the unit owners, not the unit owners association. Thus, in the condominium, all the real estate subject to the declaration, except the units, is a "portion of the common interest community" and therefore is a common element. Real estate which is not subject to the declaration is neither a unit nor a common element.

However, the desired substantive result discussed above is the same for all forms of common interest communities. Accordingly, the drafters contemplate that the condominium or cooperative association could also acquire title to real estate which is physically located outside the condominium or cooperative boundaries, in its own name, which would not automatically become a common element.

8. Definition (9), "Common interest community," is new to this Act. The term creates one comprehensive definition of those interests governed by the Act. This generic definition, derived from the definition of planned community in UPCA, is used through the Act to refer collectively to

the three particular forms of common interest community: condominiums, cooperatives, and planned communities.

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

The 2008 amendments to the definition of "common interest community" accomplish two main goals.

First, they make clear that the mutual obligations of unit owners - obligations which arise “by virtue of” that ownership - to pay a share of the project's expenses may include a share of services provided to unit owners or other expenses provided either to the common elements or the units. Second, the amended definition makes clear that several common real estate arrangements described in new sections 1-209 and 1-210 are excluded from the definition. Section 1-209 thus resolves the question of whether cost-sharing arrangements between an association and either another association or a 3d party require creation of a new association [they do not]. New section 1-210 also confirms that a variety of simple, traditional arrangements, such as a shared driveway, party wall, or shared well, which some have argued would technically satisfy the definition of “common interest community” in the Act as originally drafted, are not subject to the Act unless the drafter chooses that result.

9. Definition (10), “Condominium” makes clear that, unless the real estate title to the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if title to the common elements is in an association in which each unit owner is a member, the project is not a condominium, but a planned community.

10. Definition (11), “Conversion building,” is important because of the protection which the Act provides in Section 4-112 for tenants of buildings which are being converted into a common interest community. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the cooperative form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

11. Definition (12), “Cooperative,” makes clear that the Act applies only to cooperatives which constitute common interest communities. The common interest community real estate, moreover, must be owned by the association, which, under Section 3-101, may be organized as a profit or non-profit corporation, trust, trustee, partnership, or depending on the option adopted in a particular State, as an unincorporated association. In requiring, as does Section 3-101, that the association consist exclusively of “unit owners” – defined in MRECA as “proprietary lessees” – the definition tracks the usual requirements of cooperative instruments, which exclude from association membership persons who are not owners or proprietary lessees of the units.

The definition also recognizes the fundamental link between association membership and occupancy rights in providing that unit owners who are the members of the association are entitled to exclusive possession of their units under a proprietary lease – see Definition (26) – by virtue of their ownership interests in the assets of the association.

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

12. Definition (13), "Dealer," is a newly defined term in UCIOA. It was not used in any of the three separate Acts. It replaces, in many sections, the words "person in the business of selling (either) real estate (or) cooperative interests for his own account." Use of the term in UCIOA does not change the substantive results in any of the three Acts.

13. Definition (14), "Declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the common interest community, but who are not intended to be charged with the responsibilities imposed on all declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold common interest communities, ground lessors. (Of course, such a person may become a declarant by subsequently succeeding to a Special declarant right.) Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because these units were "previously disposed of" when originally conveyed.

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

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

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

14. Definition (15), "Declaration," is defined as "the instrument, however denominated, that create a common interest community, including any amendments to the instrument." Thus, the term would not only include the traditional condominium declaration with which most practitioners are familiar, or the declaration of covenants, conditions, and restrictions (CC & R's) so common in planned unit developments. It would also include, for example, a series of deeds to units with common mutually beneficial restrictions, or to any other instruments which create the relationship which constitutes a common interest community. If those recorded instruments create that relationship, then those documents constitute a declaration and must contain, for new projects, the information required by Section 2-105.

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

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

15. Definition (16), "Development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized and regulated in the case of condominiums, in an increasing number of jurisdictions, beginning with Virginia in 1974.

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

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

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

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

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

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

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the common interest community from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will expand into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the common interest community from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the common interest community and

devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from the common interest community." The portion of the garage which extends into Parcel B may be left in the common interest community (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

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

16. Definition (17), "Dispose" or "Disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "Purchaser," infra. However, the term includes more than conveyances and would, for example, cover contracts of sale.

17. Definition (20), "Leasehold common interest community," should be distinguished from land which is leased to a common interest community but not subjected to the common interest community regime. A leasehold common interest community means, by definition, real estate which has been subjected to the common interest community form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the common interest community unit or the real estate underlying the unit would be removed from the common interest community if the lease were not exercised or renewed. On the other hand, real estate may not be subjected to common interest community ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

18. In this Act, in contrast to UPCA, Definition (25), "Planned Community," is a residual concept. That is, any common interest community which fails to fall into the category of a condominium or a cooperative is, by definition, a planned community. The definition also indicates that a planned community may have a condominium or cooperative as a constituent element.

19. Definition (26), "proprietary lease," describes that instrument initially executed by a cooperative association with the purchaser of a unit, granting the right of exclusive occupancy of a unit. The term and its significance is more fully treated in the Comments to the definition of "Unit."

20. Definition (27), "Purchaser," includes a person who acquires any interest in a unit, even as a tenant, if the lease including renewal options, entitles him to occupy the premises for more than 20 years. Excluded from the definition, however, are mortgagees, declarants, and dealers. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4-102(c)) and the right to rescind (Section 4-108).

21. Definition (28), "Real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(16) of the Uniform Land Transactions Act.

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

22. The definition of "residential purposes" includes "recreational purposes." This common sense definition is used in order to avoid repeated use of a lengthier defined term, such as "residential or consumer owned recreational purposes."

The Act contemplates that "recreational purposes" would be "consumer owned" recreational purposes commonly marketed for sale to individual owners – uses such as dock spaces for boats, campgrounds, airplane tie downs, etc. By including these kinds of uses within the definition, the Act intends to provide the same consumer protections which it offers to individual residential purchasers – persons who typically buy for their own use – as distinguished from commercial users. Thus, the definition would exclude commercial recreational facilities which are operated as a business or available to the public on a fee for use basis, such as movie theaters, athletic or country clubs, golf courses, and the like.

Further, the definition is not intended to override, and thus perhaps expand on, existing local zoning ordinances which permit only "residential" use.

However, by including these recreational purposes within the defined term "residential purposes," no change in the plain and traditional meaning of the word "residential" is intended. Thus, the drafters recognize that owners of residential units – i.e., a unit which is designed for use as a residential dwelling – may hold those units for investment purposes, or that individual owners may occasionally or regularly rent their units on an individual or rental pool basis. This is a common practice, for example, with residential communities built near ski or ocean resort areas. Rental occupancy does not change the residential character of the common interest community, or the consumer protections that must be offered to purchasers.

23. Definition (32), "Security interest," encompasses any interest in real or personal property which secures payment or performance of an obligation. Thus, for example, regardless of whether or not the units in a cooperative are treated as real or personal property pursuant to Section

1-105(a), a lender's interest in a unit securing the debt is a "security interest." This definition is adapted from Sections 3-102 and 3-103 of the Uniform Land Transactions Act.

24. Definition (33), "Special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a common interest community.

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

The 2008 amendment created three new "special declarant rights" and, like all special declarant rights, they are rights which exist only to the extent they are "reserved for the benefit of a declarant" in the declaration. See § 2-105(a)(8). The most unusual of the 3 is the right to control what is commonly called a design review committee. Under the amended Act, no such committee may exist unless properly authorized in the declaration. See § 2-105(a)(14).

In contrast, the new special declarant rights to attend unit owner meetings and to access records of the association resolve questions that have arisen in practice and that track the reasonable expectations of the parties.

25. Definition (30) (34), "Time share," is based on Section 1-102(14) and (18) of the Model Real Estate Time-Share Act.

When this Act was first promulgated in 1982, such concepts as "time share" and "interval ownership" were relatively new; they were neither fully developed nor generally accepted in the marketplace. Moreover, the nature of the relationship between the various forms of common interest ownership and time fractionalization of real estate was not at all clearly understood.

In these circumstances, the Conference adopted a "minimalist" approach in dealing with the concept of time sharing. To that end, the Act simply defined the term "time share" in Section 1-103 (34) and then required disclosure of any time share provisions in the common interest community; see Section 4-105. Otherwise, this Act did not attempt to regulate time sharing or any of the other forms of interval ownership. That task was left to the Model Real Estate Time Sharing Act.

Experience over the intervening dozen years suggests that this minimalist approach remains appropriate. Without a doubt, the evolving field of interval ownership of both personal and real property poses important issues of public policy. However, this Act does not regulate those substantive issues. Instead, whether or not a particular interval ownership project must comply with this Act depends on whether or not the ownership arrangement meets the definition of a "common interest community." If it does, then the Act would apply in the same degree as it would to any common interest community.

26. Definition (35), "Unit," describes a tangible, physical part of the project rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons, each of whom has the right to occupy the unit for one month does not create 12 new units – there are, rather, 12 owners of the unit. (Under the section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the vote assigned to that unit.)

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

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

27. Definition (36), "Unit owner," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities must be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example,) as long as the seller holds title.

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

In the special case of a cooperative, the declarant is treated as the owner of a unit or "potential unit" to which allocated interests have been allocated, until that unit is conveyed to another.

28. The 2008 amendments create five new definitions: "Assessment" [Section 1-103(3)]; "Bylaws", [Section 1-103(5)], "Common expense liability" [Section 1-103 (7)], "Record" [Section 1-103(29)] and "Rule" [Section 1-103(31)].

By defining the term "assessment" as the "sum attributable to each unit and due to the association pursuant to Section 3–115", the Act ties the term directly to the common expense liability of each unit, and to those sections of the Act where each unit's common expense liability is calculated. It also distinguishes each unit's assessment from the other sums that may be due from a unit owner - such as the sums described in Section 3-116(a) - which are not a part of the