

To: New Jersey Law Revision Commission

From: John Cannel

Re: Common Interest Ownership

Date: November 9, 2015

M E M O R A N D U M

I. Minor Changes

After discussions with representatives of CAI, minor changes to a few sections seemed indicated. Those sections are set out below with the changes indicated. Comments after each section explain the reason for the changes.

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 and limitations on restraints on alienation do ~~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

The phrase “and limitations on restraints on alienation” in subsection (b) is not in UCIOA; it derives from section 28 of the 2005 bill. In subsection (d), the 2005 bill deletes the second sentence.

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

The deletion recognizes that “recording data” necessarily includes the county in which the community is located.

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,~~ community association regulation on the use, maintenance, repair, replacement, and modification of common elements 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

The change removes the problematic cross reference and substitutes the subjects included in the cross-referenced provisions. The 2005 (section 42) bill provision is substantively similar to this provision but refers to the limits in later sections on unit owners in planned communities on use of common elements for access.

II. Deferred Consideration

There are a few sections on which I specifically deferred consideration with CAI. They are Definitions (Section 1-103) and Applicability (1-201). The definition of "common interest community" is related to the issue of which communities will be controlled by this version of UCIOA. These sections should be before the Commission in December.

III. Sections on Which Consensus Not Achieved Yet

There are some sections where consensus has not yet been achieved. These sections are set out below with comments indicating the issue involved.

While further discussions will take place, substantive consideration by the Commission may prove helpful. Input would be particularly useful on Sections 1-105 and 2-117.

SECTION 1-105. SEPARATE TITLES AND TAXATION.

a. 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.

b. 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

Subsection (a) of UCIOA has been deleted. It states that unit ownership in a cooperative is personalty. The findings of the Cooperative Recording Act state that a cooperative is a hybrid of real and personal property. In addition, interest in a cooperative involves stock (traditionally, personal property) and a proprietary lease (leases generally are real property). The representatives of CAI would prefer to follow the orthodox version of UCIOA and make interest in a cooperative personal property. They say that anything else causes confusion. The rest of the section is identical to UCIOA and seems to be consonant with New Jersey law.

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 treating the common interest community as the grantee and the association and ~~[in the grantor's index]~~ in the name of each person executing the declaration as the grantors.

~~(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

Small changes in subsection (a) conform the indexing requirements to the New Jersey title recording law. It is not clear how cooperatives have been established since enactment of the Cooperative Recording Act. Certainly, both before and after that Act, there is some deed to the Cooperative recorded. However, traditionally, there has been nothing like a declaration or master deed. Subsection (b) requires that units be built before the declaration is filed. That requirement is different from New Jersey practice and was deleted in the 2005 bill drafted in consultation between OLS and CAI (hereafter, 2005 bill).

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

The section might be simplified; some of its requirements may be unnecessary and some requirements may need to be added. More consultation is needed before a new draft of this section can be produced. The 2005 bills keeps all of this detail and adds provisions on requirements for repair reserves, display of flag, limitations on the permitted use of units and restrictions on design. There will be further consultation about this section before the December meeting.

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

Again, this section was accepted by the 2005 bill without substantive change. However, its requirements may be inappropriate for some condominiums. If the condominium is a conversion of an apartment house, it may not be useful, or even possible, to comply with the detail of this section. Some limitation may need to be built into the provision. More consultation, with persons who form condominiums and with the Department of Community Affairs, will be necessary to evaluate this provision.

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

The 2005 bill (section 43) provision is significantly different from this provision. The principal changes are in subsection (a) where 67% of a quorum of 50% is made sufficient, the deletion of subsection (f), and the addition of a subsection providing special procedures for the board to consider changes to the declaration, bylaws and rules when it assumes power from the declarant.:

(New section) a. Except in cases of amendments that may be executed by a declarant under subsection f. of section 34 or section 35 of P.L. , c. (C.) (pending before the Legislature as this bill); or by the association under section 7, subsection d. of section 31, subsection c. of section 33, or subsection a. of section 37 of P.L. , c. (C.) (pending before the Legislature as this bill); or by certain unit owners under subsection b. of section 33, subsection a. of section 37, or subsection b. of section 39 of P.L. , c. (C.) (pending before the Legislature as this bill); or by the executive board in accordance with subsection b. of section 53 of P.L. , c. (C.) (pending before the Legislature as this bill)), and except as limited by subsection d. of this section, the declaration, including any plats and plans, shall be amended only by vote or agreement of unit owners of units representing at least 67 percent of a quorum of the members, which quorum shall, unless the declaration requires a larger percentage, be 50 percent of the

membership in the association qualified to vote, provided the proposed amendment does not seek to prohibit a previously permitted use in a unit. In the case of an amendment that seeks to prohibit a previously permitted use in a unit, the amendment must be approved by a vote of at least 67 percent of the total allocated votes in the association. The declaration may specify a smaller percentage of votes or a smaller quorum, or both, only if all of the units are restricted exclusively to non-residential use.

b. An action to challenge the validity of an amendment adopted by an association pursuant to this section, other than an action by a governmental official or entity authorized to do so by statute or regulation adopted pursuant to statute, shall not be brought more than one year after the amendment is recorded.

c. Every amendment to a declaration shall be recorded in every county in which any portion of the common interest community is located and shall be effective only upon recordation. An amendment, except an amendment pursuant to subsection a. of section 37 of P.L. , c. (C.) (pending before the Legislature as this bill), shall be indexed in the grantee's index in the name of the common interest community and the association and in the grantor's index in the name of the parties executing the amendment.

d. Except to the extent expressly permitted or required by other provisions of P.L. , c. (C.) (pending before the Legislature as this bill), an amendment shall not create or increase special declarant rights, increase the number of units or change the boundaries of any unit or the allocated interests of a unit in the absence of unanimous consent of the unit owners.

e. Amendments to the declaration required by P.L. , c. (C.) (pending before the Legislature as this bill) to be recorded by the association shall 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. Within 24 months following assumption by the owners of control of the executive board, the executive board shall re-examine the bylaws, declaration and rules of the association and present such proposed amendments as the executive board may deem appropriate, as well as any amendments proposed by initiative signed by persons eligible to cast at least 20 percent of the votes, for approval by vote of the unit owners; provided, however, that any such proposed amendment shall be unambiguous and consistent with applicable law and with the provisions of the governing documents that are not proposed to be amended. Notwithstanding the terms of the declaration or bylaws, an amendment to an existing bylaw, rule, or declaration, except an amendment that proposes to prohibit a previously permitted use, may be adopted pursuant to this section by the lesser of: (1) a majority of votes that are entitled to be cast by all unit owners; or (2) 67 percent of the votes actually cast, provided not less than a majority of the eligible votes have been cast. An amendment that proposes to prohibit a previously permitted use shall be adopted only in accordance with the terms of subsection a. of this section. At least 30 days advance notice of any referendum, including the text of any new bylaw or amendment or repeal of an existing provision to be voted on, shall be given to all unit owners by registered or certified mail, or by personal delivery. Changes to declarations, bylaws, and rules shall be applied prospectively and shall not be construed as depriving any unit owner of a right exercised prior to the time that the change is made; provided, however, that any right relating to personal property, a physical improvement, or a pet, that was exercised prior to the adoption of any change to the declaration, bylaws, or rules shall apply only to the specific item of personal property, physical improvement, or pet existing or present at the unit on the effective date of the change. An item of personal property or a physical improvement that violates the terms of a change to the declaration, bylaws, or rules shall not continue to be maintained after suffering damage to more than 50 percent of its value.

g. The time limits specified in the declaration pursuant to paragraph (7) of subsection a. of section 30 of P.L. , c. (C.) (pending before the Legislature as this bill) within which reserved development rights must be exercised shall 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 to extend the time limits shall be 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 interest in those rights:

(1) record a written objection within that 30-day period, in which case the amendment shall be void; or

(2) consent in writing at the time the amendment is recorded, in which case the amendment shall be effective when recorded.

h. If any provision of the declaration of any common interest community in this State, whether created before or after the effective date of P.L. , c. (C.) (pending before the Legislature as this bill),

requires the consent of a person holding a security interest in a unit as a condition to the effectiveness of an amendment to the declaration, that consent is granted if no written refusal to consent is received by the association within 45 days after the association delivers notice of the proposed amendment to the holder of the interest or mails the notice to the holder of the interest by certified mail, return receipt requested. The association may rely on the last-recorded security interest of record in delivering or mailing notice to the holder of that interest.

i. If the declaration of the common interest community, whether created before or after the effective date of P.L. , c. (C.) (pending before the Legislature as this bill), contains a provision requiring that amendments may be adopted only by the vote or agreement of unit owners of units to which more than 80% of the votes in the association are allocated, such a proposed amendment shall be deemed approved if:

(1) (a) Unit owners of units to which at least 80% 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 that have not voted or agreed to the proposed amendment and no written objection to the proposed amendment is received by the association within 30 days after the association delivers notice; or

(2) Unit owners of units to which at least 80% 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 the Superior Court against all objecting unit owners, the court finds that the objecting unit owners do not have a unique minority interest, different in kind from the interests of the unit owners, that the voting requirement of the declaration is intended to protect.

My difficulty with the section is not with the procedure but with the allowable substance of amendments. The only restriction on the subject of amendments is in subsection (f). As written, the section would allow amendments that substantively changed a unit owner's property rights. In theory, a super-majority could reduce the size of one unit. That probably was not intended. It would also allow a super-majority to make major changes in permitted uses of a unit, but it requires "reasonable protection" for prior uses.

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 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

The 2005 bill (section 46) provision is substantively identical to this provision, except that the 2005 bill adds a subsection (f) clarifying when declarant control ends where a master association is in place. However the section has references to Article 3 of UCIOA that are now problematic and provisions on elections that will need to be reconsidered.

IV. Sections Unchanged

The balance of the draft is as it appears in UCIOA. In a few instances, issues raised have been dismissed. As to most of the sections, up to now, no one has suggested changes.

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

This section is identical to UCIOA 1-106 and continues current New Jersey law. See e.g. 40:55D-58. Condominiums and cooperative structures and uses; 40:67-23.3. Municipality to reimburse private community for services or provide services; *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super. 219, 221-222 (App. Div. 1971). The limitation of subsection (b) has some basis in current law. A municipal restriction against a

development involving ownership of common elements was upheld in *Bonner Properties, Inc. v. Franklin Tp. Plan. Bd.*, 185 N.J. Super. 553 (Law Div. 1982) on the basis that it might be difficult to collect taxes from the association if the individual units were not involved.

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 judgment 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 divided among the owners of the units to which that limited common element was allocated at the time of acquisition in proportion to their rights in the limited common elements.

d. The court condemnation judgment must be recorded in every county in which any portion of the common interest community is located.

COMMENT

This section is substantively identical to UCIOA 1-107 except for an addition to subsection (c) recognizing that unit's interests in limited common elements may not be equal and a wording changes in subsection (d.)

SECTION 1-108. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW APPLICABLE.

The principles of law and equity, including the law of corporations, 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

This section is identical to UCIOA 1-108.

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 is identical to UCIOA 1-109.

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.

COMMENT

This section is identical to UCIOA 1-111.

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 is identical to UCIOA 1-113.

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.

COMMENT

This section is identical to the first sentence of UCIOA 1-114. The second sentence of the UCIOA provision has been deleted as ambiguous and, to the extent that it limits consequential and other damages, foreign to New Jersey law.

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

This section is identical to UCIOA 1-116.

ARTICLE 2 -- CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES

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

This section is identical to UCIOA. The 2005 bill provision is substantively identical to this provision

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

The 2005 bill provision is substantively identical to this provision

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

This section is identical to UCIOA. The 2005 bill adds a subsection establishing the right of unit owners to use common elements.

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

This section is identical to UCIOA and to the 2005 bill

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

This section was accepted by the 2005 bill without substantive change.

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

The 2005 bill provision is substantively identical to this provision. The phrase, "the exterior appearance of a unit" may be too broad. If the unit is a row house or apartment, the phrase works well. However if the unit is a house and some ground, some leeway may need to be built in.

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

The 2005 bill provision is substantively identical to this provision.

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

The 2005 bill provision is substantively identical to this provision.

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.]

COMMENT

This is Alternative B of UCIOA. The 2005 bill provision is substantively identical to this provision. Alternative A would give only an easement for encroachments.

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

The 2005 bill provision is substantively similar to this provision. It deletes the last sentence and divides and improves the first sentence as follows: “Unless the declaration provides otherwise, a declarant may maintain sales offices, management offices, and models in units or on common elements for the common interest community in which the facilities are located. The declarant may provide in the declaration that it may maintain sales offices, management offices and models in a common interest community for another common interest community, provided it expressly reserves such right in the declaration, and such use is not otherwise prohibited by law.”

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

The 2005 bill (section 43) provision is significantly different from this provision. The principal changes are in subsection (a) where 67% of a quorum of 50% is made sufficient, the deletion of subsection (f), and the addition of a subsection providing special procedures for the board to consider changes to the declaration, bylaws and rules when it assumes power from the declarant.

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

The 2005 bill (section 44) provision seems to be substantively similar to this provision.

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

The 2005 bill (section 45) provision is substantively identical to this provision.

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

The 2005 bill (section 47) provision is substantively identical to this provision. However the 2005 bill adds a subsection requiring that merges of nonprofit corporations comply with N.J.S.15A:10-1 and -2.

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

The 2005 bill (section 48) provision is substantively identical to this provision. However the 2005 bill adds a provision allowing 51% of the unit owners to waive the restrictions.

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

The 2005 bill (section 49) provision is significantly different from this provision. The differences seem to reflect New Jersey land use law and law on public offering statements.

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

The 2005 bill has no provision on this subject.