To: New Jersey Law Revision Commission
From: John Cannel
Re: Common Interest Ownership
Date: May 11, 2015

M E M O R A N D U M

I have begun outreach to parties interested in UCIOA. I have spoken to parties with divergent interests. Obviously, I hope to get to a consensus on a draft, but that may prove difficult. This Memo represents an effort to address some of the first issues.

As an overview, UCIOA is composed of five articles. The first includes technical matters and eight pages of definitions. That article also includes provisions on which communities UCIOA governs. The focus of the second article is requirements for establishment of a common interest community. Many of these provisions are applicable when a community is first set up. However others have importance throughout the life of the community. The third article regulates the management of communities. Most of it is of continuing importance, but some of it concerns things like the developer's rights until everything is sold. Articles four and five are separable from the rest. Four regulates the sale of common interest community units and is focused on first sale by developers. Five establishes a regulatory agency to enforce Article Four. That article is labeled "optional". In fact, the Commission may decide to treat both Four and Five as beyond the scope of the project as they would replace the regulatory scheme now administered by the Department of Community Affairs.

I have intended to delay consideration of the first part of Article One because the important provisions in it are the definitions. Definitions are best considered in the context of the operative provisions to which they relate. The second part of Article One involves a threshold issue that I would ask the Commission to begin thinking about. That issue is which communities should be subject to UCIOA. While this issue involves some hard decisions, there seems to be less disagreement on this issue than on others. One aspect of this decision is temporal, prospective as opposed to retroactive. The other aspect concerns the nature of the common interest communities.

The temporal aspect of applicability to particular communities is governed by Sections 1-201 and 1-204. Section 1-201 states the general rule that UCIOA applies only to communities established after the act; section 1-204 provides for a long, but not comprehensive, list of exceptions to that rule.

> **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.

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; **SEPARATE TITLES AND TAXATION**

(2) Section 1-106; **APPLICABILITY OF LOCAL ORDINANCES, etc**

(3) Section 1-107; **EMINENT DOMAIN**

(4) Section 1-206; **AMENDMENTS TO GOVERNING INSTRUMENTS**

(5) Section 2-102; **UNIT BOUNDARIES**

(6) Section 2-103; **CONSTRUCTION AND VALIDITY OF DECLARATION, BYLAWS.**

(7) Section 2-104; **DESCRIPTION OF UNITS**

(8) Section 2-117 (h) and (i); **AMENDMENT OF DECLARATION**

(9) Section 2-121; **MERGER OF COMMON INTEREST COMMUNITIES**

(10) Section 2-124; **TERMINATION FOLLOWING CATASTROPHE**

(11) Section 3-102(a)(1) to (6) & (11) to (16); **POWERS OF ASSOCIATION**

(12) Section 3-103; **EXECUTIVE BOARD MEMBERS AND OFFICERS**

(13) Section 3-111; **LIABILITY; TOLLING OF LIMITATION PERIOD.**

(14) Section 3-116; **LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT**

(15) Section 3-118; **ASSOCIATION RECORDS**

(16) Section 3-124; **LITIGATION INVOLVING DECLARANT**

(17) Section 4-109; **RESALES OF UNITS.**

(18) Section 4-117; **VIOLATIONS ON RIGHTS OF ACTION; ATTORNEY'S FEES** and

(19) Section 1-103 **DEFINITIONS** 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.

The first question is whether the rules of UCIOA should be limited to new communities. That approach made sense in 1982 when UCIOA was first written. However, its application now to New Jersey would result in most condominiums being governed in part by the old law forever. My preliminary contacts with both board and unit owner groups support abandoning that approach. Of course, there are some provisions of UCIOA cannot be applied fairly to established communities. For example, requirements for the master deed cannot be applied retroactively, and the developer's rights should not be changed by the enactment of UCIOA. However, the list of exceptions in Section 1-204 does not turn on these limited issues. Under that list, some important provisions on the management of communities would apply to all, others only to new communities. Arguments can be made for and against the inclusion of particular provisions on the list of those applicable to all communities. Overwhelming these arguments is the fact that if different laws apply depending on when a community was established, and only a minority of communities will be governed by most of UCIOA, there will be long term confusion and inconvenience.

The straightforward approach would be to reverse the basic rule of Section 1-201 and provide that all communities whenever established be governed by the rules of UCIOA with exceptions for particular provisions. The exceptions can be made in general terms. For example provisions about the rights and obligations of the developer could be made prospective. And, of course, actions that were taken in compliance with older law should not be made improper by the change in the law. Alternatively, it would be possible to list the provisions that should be applied only to new communities. That effort would be easier if the provisions that cannot be applied rationally or fairly to existing communities were grouped together, but the drafting can be done and would

be no more confusing than the UCIOA 1-204. The parties with whom I have spoken tentatively support some kind of approach that would apply UCIOA to existing communities.

The second issue is whether certain communities should be exempted from UCIOA based on the nature of the community. The provisions on this subject are complicated, and include the definition of common interest community and Sections 1-202, 1-203, 1-205, 1-207, and 1-210:

> (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.

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.

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.

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.

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).

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.

The exception for small communities may be justified as some of the management requirements are burdensome. However, small communities can have large disputes. The exception also may not be broad enough. The dollar amounts are very low. In addition, there may need to be an exception based on the nature of the community. There is a large variety of communities that may fall within the definition of "common interest". At one extreme is a club community where the common property is limited to recreational facilities and the board's authority does not extend to the houses or yards. Communities exist through a wide range from that both in terms of common ownership and board authority. One commenter suggested distinguishing among communities along that line, based on the power that the board is given by the master deed.

If the Commission has preliminary ideas for the kind of community that should be exempt (or subject to fewer restrictions) I can attempt drafts.