

**NOTE: The purpose of this bill is to update the Uniform Common Interest Ownership Act.**

§36B-1-115, §36B-1-116, §36B-1-208, §36B-2-123, §36B-2-124, §36B-3-120, §36B-3-121, §36B-3-122, §36B-3-123 and §36B-3-124 **are new; therefore, strike-throughs and underscoring have been omitted.**

§36B-3-118 **has been completely rewritten; therefore, underscoring and strike-throughs have been omitted.**

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

This bill is recommended for passage in the 2013 Regular Session by the Commission on Interstate Cooperation.

### Adjourned Sine Die

[definition: A legislative body adjourns sine die when it adjourns without appointing a day on which to appear or assemble again.]

### **Senate Bill No. 611**

(By Senators Snyder, Kirkendoll, Tucker, Chafin, Palumbo, Wells,  
Nohe and Sypolt)

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[Introduced March 22, 2013; referred to the Committee on the Judiciary.]

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A BILL to amend and reenact §36B-1-103, §36B-1-104, §36B-1-108, §36B-1-201, §36B-1-203 and §36B-1-204 of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto three new sections, designated §36B-1-115, §36B-1-116 and §36B-1-208; to amend and reenact §36B-2-109, §36B-2-112, §36B-2-116, §36B-2-117 and §36B-2-119 of said code; to amend said code by adding thereto two new sections, designated §36B-2-123 and §36B-2-124; to amend and reenact §36B-3-102, §36B-3-103, §36B-3-105, §36B-3-106, §36B-3-108, §36B-3-110,

§36B-3-112, §36B-3-116 and §36B-3-118 of said code; to amend said code by adding thereto five new sections, designated §36B-3-120, §36B-3-121, §36B-3-122, §36B-3-123 and §36B-3-124; and to amend and reenact §36B-4-103, §36B-4-109, §36B-4-112, §36B-4-116 and §36B-4-117 of said code, all relating to updating the Uniform Common Interest Ownership Act; and providing for applicability of the chapter.

*Be it enacted by the Legislature of West Virginia:*

That §36B-1-103, §36B-1-104, §36B-1-108, §36B-1-201, §36B-1-203 and §36B-1-204 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that said code be amended by adding thereto three new sections, designated §36B-1-115, §36B-1-116 and §36B-1-208; that §36B-2-109, §36B-2-112, §36B-2-116, §36B-2-117 and §36B-2-119 of said code be amended and reenacted; that said code be amended by adding thereto two new sections, designated §36B-2-123 and §36B-2-124; that §36B-3-102, §36B-3-103, §36B-3-105, §36B-3-106, §36B-3-108, §36B-3-110, §36B-3-112, §36B-3-116 and §36B-3-118 of said code be amended and reenacted; that said code be amended by adding thereto five new sections, designated §36B-3-120, §36B-3-121, §36B-3-122, §36B-3-123 and §36B-3-124; and that §36B-4-103, §36B-4-109, §36B-4-112, §36B-4-116 and §36B-4-117 of said code be amended and reenacted, all to read as follows:

**ARTICLE 1. GENERAL PROVISIONS.**

**§36B-1-103. Definitions.**

~~In the declaration and bylaws (section one hundred six, article three of this chapter), unless specifically provided otherwise or the context otherwise requires, and in this chapter:~~

In this chapter:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. For purposes of this definition: A person "controls" a declarant if the person: (i) Is a general partner, officer, director or employer of the declarant; (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the declarant; (iii) controls in any manner the election of a majority of the directors of the declarant; or (iv) has contributed more than twenty percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant: (i) Is a general partner, officer, director or employer of the person; (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the person; (iii) controls in any manner the election of a majority of the directors of the person; or (iv) has

contributed more than twenty percent of the capital of the person.

Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the following interests allocated to each unit: (i) In a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association; (ii) in a cooperative, the common expense liability and the ownership interest and votes in the association; and (iii) in a planned community, the common expense liability and votes in the association.

(3) "Assessment" means the sum attribute to each unit and due to the association pursuant to section one hundred-fifteen, article three of this chapter.

~~(3)~~ (4) "Association" or "unit owners' association" means the unit owners' association organized under section one hundred one, article three of this chapter.

(5) "Bylaws" means instruments, however denominated, that contain the procedures for conduct of the affairs of the association regardless of the form in which the association is organized, including any amendments to the instruments.

~~(4)~~ (6) "Common elements" means: (i) In a condominium or

cooperative, all portions of the common interest community other than the units; ~~and~~ (ii) in a planned community, any real estate within a planned community owned or leased by the association, other than a unit; and (iii) in all common interest communities, any other interests in real estate for the benefit of unit owners which are subject to te declaration.

~~(5)~~ (7) "Common expenses" means expenditures made by, or financial liabilities of, the association, together with any allocations to reserves.

~~(6)~~ (8) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to section one hundred seven, article two of this chapter.

~~(7)~~ (9) "Common interest community" means real estate described to the declaration with respect to which a person, by virtue of his or her ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, ~~or~~ improvement of, or service or other expenses related to, common elements, other units, or other real estate described in a the declaration: *Provided*, That any resort owner which, prior to the effective date of this article, began the development of a resort and imposed fees or assessments upon owners of real estate in the resort for maintenance and care of the roads, streets, alleys,

sidewalks, parks, common areas and common facilities in and around the resort, for fire and police protection and for such other services as may be made available to owners of real estate, may also impose the same fees and assessments to be used for the same or similar purposes upon persons purchasing real estate in the resort after the effective date of this article without creating a common interest community.

The term does not include an arrangement described in sections two hundred-nine and two hundred-ten of this article. For purposes of this paragraph, "Ownership of a unit" does not include holding a leasehold interest of less than twenty years in a unit, including renewal options.

~~(8)~~ (10) "Condominium" means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interest in the common elements are vested in the unit owners.

~~(9)~~ (11) "Conversion building" means a building that at any time before creation of the common interest community was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

~~(10)~~ (12) "Cooperative" means a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of his or her ownership interest in the association to exclusive possession of a unit.

~~(11)~~ (13) "Dealer" means a person in the business of selling units for his or her own account.

~~(12)~~ (14) "Declarant" means any person or group of persons acting in concert who: (i) As part of a common promotional plan, offers to dispose of ~~his or the~~ interest of the person or group of persons in a unit not previously disposed of; or (ii) reserves or succeeds to any special declarant right.

~~(13)~~ (15) "Declaration" means ~~any~~ the instruments, however denominated, that create a common interest community, including any amendments to ~~those~~ the instruments.

~~(14)~~ (16) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to: (i) Add real estate to a common interest community; (ii) create units, common elements or limited common elements within a common interest community; (iii) subdivide units or convert units into common elements; or (iv) withdraw real estate from a common interest community.

~~(15)~~ (17) "Dispose" or "disposition" means a voluntary

transfer to a purchaser of any legal or equitable interest in a unit, but the term does not include the transfer or release of a security interest.

~~(16)~~ (18) "Executive board" means the body, regardless of name, designated in the declaration or bylaws to act on behalf of the association.

~~(17)~~ (19) "Identifying number" means a symbol or address that identifies only one unit in a common interest community.

~~(18)~~ (20) "Leasehold common interest community" means a common interest community in which all or a portion of the real estate is subject to a lease, the expiration or termination of which will terminate the common interest community or reduce its size.

~~(19)~~ (21) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of subdivision (2) or (4), section one hundred two, article two of this chapter for the exclusive use of one or more but fewer than all of the units.

~~(20)~~ (22) "Master association" means an organization described in section one hundred twenty, article two of this chapter, whether or not it is also an association described in section one hundred one, article three of this chapter.

~~(21)~~ (23) "Offering" means any advertisement, inducement,



solicitation or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a common interest community not located in this state, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the common interest community is located.

~~(22)~~ (24) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, ~~or~~ agency, or instrumentality, or any other legal or commercial entity. In the case of a land trust, the corpus of which is real estate, ~~however, "person" the term~~ means the beneficiary of the trust rather than the trust or the trustee.

~~(23)~~ (25) "Planned community" means a common interest community that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community.

~~(24)~~ (26) "Proprietary lease" means an agreement with the association pursuant to which a member is entitled to exclusive possession of a unit in a cooperative.

~~(25)~~ (27) "Purchaser" means a person, other than a declarant

or a dealer, ~~who~~ that by means of a voluntary transfer acquires a legal or equitable interest in a unit other than: (i) A leasehold interest (including renewal options) of less than twenty years; or (ii) as security for an obligation.

~~(26)~~ (28) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures and other improvements and interest that by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. ~~"Real estate"~~ The term includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(29) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

~~(27)~~ (30) "Residential purposes" means use for dwelling or recreational purposes, or both.

(31) "Rule" means a policy, guideline, restriction, procedure, or regulation of an association, however dominated, which is not set forth in the declaration or bylaws and which governs the conduct of persons or the use or appearance of property.

~~(28)~~ (32) "Resort" means a destination location which consists of: (i) One or more persons offering recreational facilities and

services such as skiing, golf, tennis or boating to the general public and commercial facilities such as retail stores, restaurants and hotels or other lodging accommodations; and (ii) at least one hundred residential units, a majority of which are used as vacation or second homes rather than primary residences.

~~(29)~~ (33) "Resort owner" means any person owning or operating substantially all of the recreational facilities located within a resort, or the predecessor in title of any such person.

~~(30)~~ (34) "Security interest" means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

~~(31)~~ (35) "Special declarant rights" means rights reserved for the benefit of a declarant to: (i) Complete improvements indicated on plans and plans filed with the declaration (section one hundred nine, article two of this chapter) or, in a cooperative, to complete improvements described in the public offering statement

pursuant to subdivision (2), subsection (a), section one hundred three, article four of this chapter; (ii) exercise any development right (section one hundred ten, article two of this chapter); (iii) maintain sales offices, management offices, signs advertising the common interest community, and models (section one hundred fifteen, article two of this chapter); (iv) use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community (section one hundred sixteen, article two of this chapter); (v) make the common interest community subject to a master association (section one hundred twenty, article two of this chapter); (vi) merge or consolidate a common interest community with another common interest community of the same form of ownership (section one hundred twenty-one, article two of this chapter); ~~or~~ (vii) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (subsection (d), section one hundred three, article three of this chapter); (viii) control any construction, design review, or aesthetic standards committee or process; (ix) attend meetings of the unit owners and, except during an executive session, the executive board; or (x) have access to the records of the association to the same extent as a unit owner.

~~(32)~~ (36) "Time share" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with an estate or interest in a common interest community or a specified portion thereof.

~~(33)~~ (37) "Unit" means a physical portion of the common interest community designated for separate ownership or occupancy, the boundaries of which are described pursuant to subdivision (5), subsection (a), section one hundred five, article two of this chapter. If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily or involuntarily encumbered or otherwise transferred by a unit owner, the interest in that unit which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit, and the association's interest in that unit is not thereby affected.

~~(34)~~ (38) "Unit owner" means a declarant or other person ~~who~~ that owns a unit, or a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease, the expiration or termination of which will remove the unit from the common interest community, but does not include a person

having an interest in a unit solely as security for an obligation.

In a condominium or planned community, the declarant is the owner of any unit created by the declaration. In a cooperative, the declarant is treated as the owner of any unit to which allocated interests have been allocated (section one hundred seven, article two of this chapter) until that unit has been conveyed to another person.

**§36B-1-104. No variation by agreement.**

Except as expressly provided in this chapter, ~~provisions herein~~ the effect of its provisions may not be varied by agreement, and rights conferred may not be waived. Except as otherwise provided in section two hundred seven of this article, a declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration.

**§36B-1-108. Supplemental general principles of law applicable.**

The principles of law and equity, including the law of corporations, ~~and~~ unincorporated associations and any other form of organization authorized by the laws of this state, the law of real ~~property~~ 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 chapter, except to the extent inconsistent with this chapter.

**§36B-1-115. Relation to Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits and supersedes the federal Electronic Signature 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).

**§36B-1-116. Severability.**

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provisions or applications, and to this end the provisions of this chapter are severable.

**§36B-1-201. Applicability to new common interest communities.**

Except as otherwise provided in sections 1-202 and 1-203, this chapter applies to all common interest communities created within this state after the effective date of this chapter. The provisions of chapter fifty-three, acts of the Legislature, 1963, chapter one hundred twenty-nine, acts of the Legislature, 1980, and chapter

thirty-eight, acts of the Legislature, 1984, do not apply to common interest communities created after the effective date of this chapter. Amendments to this chapter apply to all common interest communities created after the effective date of this chapter or made subject to this chapter by amendment of the declaration of the common interest community, regardless of when the amendment to this chapter becomes effective.

**§ 36B-1-203. Exception for small and limited expense liability planned communities.**

(a) If a planned community:

(1) Contains no more than twelve units and is not subject to any development rights; 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 1-114 (adjustment of dollar amounts), it is subject only to sections 1-105 (separate titles and taxation), 1-106 (applicability of local ordinances, regulations and building codes) and 1-107 (eminent domain) unless the declaration provides that this entire chapter is applicable.



(b) The exemption provided in subdivision (2), subsection (a) of this article 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 subdivision (2), subsection (a) of this article during the period of declarant control without the consent of all unit owners.

(c) If the exemption provided in subdivision (2), subsection (a) of this article was included in a declaration recorded prior to July 1, 2013:

(1) The sum stated in that declaration shall adjust pursuant to section one hundred fourteen of this article (adjustment of dollar amounts);

(2) The annual average common expense liability of the units may exceed \$300, as adjusted pursuant to section one hundred fourteen of this article, if the limitation in the declaration prevents the association from: (i) Fulfilling any duty to maintain real estate owned or leased by the association or improvements thereto, or (ii) Fulfilling any other duty imposed on the association by the declaration, articles, bylaws or applicable law; and

(3) If the declarant no longer owns any unit, the declaration may be amended by sixty-seven percent of the units to allow the association to meet its actual

financial needs, notwithstanding any provision in the declaration to the contrary. An amendment made in accordance with this subsection will not cause the community to be subject to any greater provisions of this chapter than set forth in subdivision (2), subsection (a) of this article.

(d) Any declarant electing the exemption provided in subdivision (2), subsection (a) of this article shall record with the declaration the predevelopment budget which is the basis for its subdivision (2), subsection (c) of this article determination of post-development annual average common expense liability.

**§36B-1-204. Applicability to preexisting common interest communities.**

~~(a) Except as provided in section 1-205, Same; exception for small preexisting cooperatives and planned communities, sections 1-105 (separate titles and taxation), 1-106 (Applicability of local ordinances, regulations and building codes), 1-107 (Eminent domain), 2-103 (Construction and validity of declaration and bylaws), 2-104 (Description of units), 2-121 (Merger or consolidation of common interest communities), 3-102(a)(1) through (6) and (11) through (16) (Powers of unit owners' association), 3-111 (Tort and contract liability), 3-116 (Lien for assessments),~~

~~3-118 (Association records), 4-109 (Resales of units), and 4-117 (Effect of violation on rights of action; attorney's fees), and section 1-103 (Definitions) to the extent necessary in construing any of those sections, apply to all common interest communities created in this state before the effective date of this chapter; but those sections apply only with respect to events and circumstances occurring after the effective date of this chapter and do not invalidate existing provisions of the declaration, bylaws or plats or plans of those common interest communities. Except for a cooperative or planned community described in section 1-205 (Same-Exception for small preexisting cooperatives and planned communities), or a nonresidential common interest community described in section 1-207, (Same; Exception for Small Preexisting Cooperatives and Planned Communities), the following apply to a common interest community created in this state before the effective date of this article:~~

- (1) Section 1-105 (Separate Titles and Taxation);
- (2) Section 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes);
- (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 and Bylaws);

(7) Section 2-104 (Description of Units);

(8) Section 2-117(h) and (i) (Amendments to Declaration);

(9) Section 2-121 (Merger or Consolidation of Common Interest Communities);

(10) Section 2-124 (Termination Following Catastrophe);

(11) Section 3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association);

(12) Section 3-103 (Executive Board Members and Officers);

(13) Section 3-111 (Tort and Contract Liability);

(14) Section 3-116 (Lien for Assessments);

(15) Section 3-118 (Association Records);

(16) Section 3-124 (Litigation Involving Declarant);

(17) Section 4-109 (Resales of Units);

(18) Section 4-117 (Effect of Violation on Rights of Action; Attorney's Fees); and

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

(b) The sections described in subsection (a) apply only to events and circumstances occurring after the effective date of this chapter and do not invalidate existing provisions of the

declaration, by laws, or plats or plans of those common interest communities.

~~(b)~~ (c) The provisions of chapter one hundred fifty-three, Acts of the Legislature, 1963, chapter one hundred twenty-nine, Acts of the Legislature, 1980, or of chapter thirty-eight, Acts of the Legislature, 1984, do not apply to condominiums or other common interest communities created after the effective date of this chapter and do not invalidate any amendment to the declaration, rules, bylaws, plats and plans and code of regulations of any condominium or common interest community created before the effective date of this chapter if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by chapter one hundred fifty-three, Acts of the Legislature, 1963.

If the amendment grants to any person any rights, powers or privileges permitted by this chapter, all correlative obligations, liabilities and restrictions in this chapter also apply to that person.

~~(e)~~ (d) This chapter does not apply to condominiums or units located outside this state, but the public offering statement provisions, (sections 4-102 through 4-109) apply to all contracts for the disposition thereof signed in this state by any party

unless exempt under section 4-101(b).

~~(d)~~ (e) The provisions of this chapter shall apply to all condominiums or common interest communities to the extent such provisions conflict or are inconsistent with the provisions of chapter one hundred fifty-three, Acts of the Legislature, 1963: *Provided*, That the provisions of this chapter shall not modify, limit or nullify any rights, duties or obligations created or existing under any declaration, bylaws or plats or plans of condominiums created in this state before the effective date of this chapter.

**§36B-1-208. Other Exemption Real Estates Arrangements.**

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

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

the units in the common interest community required by the arrangement must be included in the periodic budget for the common interest community and the arrangement must be disclosed in all public offering statements and resale certificates required by this chapter.

**ARTICLE 2. CREATION, ALTERATION AND TERMINATION OF COMMON INTEREST COMMUNITIES.**

**§36B-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 chapter 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:

(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;

(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) The 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) The 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 noncontiguous parcels of real estate comprising the common interest community;

(10) The location and dimensions of limited common elements, including porches, balconies and patios, other than parking spaces and the other limited common elements described in sections



2-102(2) and (4); and

(11) In the case of 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) To the extent not shown or projected on the plats, plans of the units must show or project:

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

(2) Any horizontal unit boundaries, with reference to an established datum and that unit's identifying number; and

(3) Any units in which the declarant has reserved the right to create additional units or common elements (section 2- 110(c)), 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) Any 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.

**§36B-2-112. Relocation of boundaries between adjoining units.**

(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 thirty 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 sixty-seven percent of the votes in the association, including sixty-seven 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.

~~(b)~~ (c) The association (i) in a condominium or planned community shall prepare and record plats or plans necessary to show the altered boundaries between adjoining 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 between adjoining units and their dimensions and identifying numbers.

**§36B-2-116. Easement rights.**

(a) Subject to ~~the provisions of~~ 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 chapter or reserved in the declaration.

(b) ~~In a planned community, subject~~ Subject to ~~the provisions of~~ sections 3-102(a)(6) and 3-112, the unit owners have an easement ~~(i) in the common elements for purposes of access to their units. (ii) to use the common elements and all real estate that must become common elements (section 2-105(a)(6)) for all other purposes.~~

(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.

**§36B-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, ~~or by~~ the association under section 1-107, 2-106(d), 2-108(c), 2-112(a), or 2-113, or ~~by~~ certain unit owners under section 2-108(b), 2-112(a), 2-113(b), or 2-118(b), and except as limited by ~~subsection~~ 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 sixty-seven percent of the votes in the association are allocated, ~~or any larger majority~~ 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 effectiveness, the amendment is not valid without that approval. ~~The declaration may specify a smaller number only if all of the units are restricted exclusively to nonresidential use.~~

(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 chapter, no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this chapter 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 eighty

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 eighty 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) (Contents of the Declaration) 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 eighty percent of the votes in the association, including eighty percent of the votes allocated to units not owned by the declarant, agree to that action. The agreement is effective thirty 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 thirty-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 chapter, law, 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 sixty 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: *Provided*, That this subsection (i) shall not apply to amendments which: (A) Permit a unit



previously restricted to residential occupancy to be utilized for nonresidential purposes; (B) increases the share of common expenses allocated to the unit in a manner disproportionate to the formula stated in the declaration pursuant to section one hundred eighteen of this article; (C) terminates the common interest community pursuant to section one hundred eighteen of this article; (D) transfers from the association to the unit, the duty to maintain and common element or limited common element previously performed by the association; or (E) the unit owner is contractually precluded from consenting to by the terms of a planned unit development rider in a recorded security instrument.

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

(1) If:

(A) Unit owners of units to which at least eighty 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 sixty days after the association delivers notice; or

(2) Unit owners of units to which at least eighty percent 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 a the circuit court of the county in which the common interest community is situate 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.

**§36B-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 chapter 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).

**§36B-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 five-hundred units that may be used for residential purposes, and at the time of the reservation that declarant owns or controls more than five-hundred

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:

(i) 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

(ii) 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 chapter 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 four 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 chapter on the addition of unspecified real estate-(section 2-122) 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.

**§36B-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 the circuit court of the county in which the common interest community is situate 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.

**ARTICLE 3. MANAGEMENT OF THE COMMON INTEREST COMMUNITY.**

**§36B-3-102. Powers of unit owners' association.**

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association, even if unincorporated, may:

(1) Adopt and amend bylaws and rules and regulations;

(2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;

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

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community;

(5) Make contracts and incur liabilities;

(6) Regulate the use, maintenance, repair, replacement, and

modification of common elements;

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

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real estate or personal property, but: (i) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to section one hundred twelve of this article; and (ii) part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to section one hundred twelve of this article;

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

(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in subsections (1) and (4), section one hundred two, article two of this chapter, and for services provided to unit owners;

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

(12) Impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by section one hundred nine, article four of this chapter, or statements of unpaid assessments;

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

(14) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;

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

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

(17) Institute litigation or administrative proceedings in its own name against a unit owner for the collection of dues or assessments that are overdue or in arrears; ~~and~~

(18) Exercise any other powers necessary and proper for the governance and operation of the association;

(19) May require that disputes between the association and unit owners or between two or more unit owners regarding the common interest community be submitted to nonbinding alternative dispute



resolution as a prerequisite to commencement of a judicial proceeding;

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

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

(B) Withhold services provided to a unit or a unit owner by the association if the effect of withholding the service would be to endanger the health, safety, or property of any person; and

(21) The association may, after notice, suspend a unit owner's right to vote and/or right to seek election as a director or officer of the association for failure of the unit owner to pay assessments. The suspend rights to vote or seek election shall be immediately restored to the unit owner upon payment of all past due or delinquent assessment even if paid during a meeting or election.

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

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

(2) Institute litigation or an arbitration, mediation or administrative

proceeding against any person, subject to the following:

(A) The association shall comply with section 124 of this article, if applicable, before instituting any proceeding described in subsection (a) of said section in connection with construction defects; and

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

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

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

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

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

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

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

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

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

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

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

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

(3) Although a violation may exist or may have occurred, it is not so

material as to be objectionable to a reasonable person or to justify expending the association's resources; or

(4) It is not in the association's best financial or other interests to pursue an enforcement action.

(g) The executive board's decision under subsection (f) not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

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

**§ 36B-3-103. Executive board members and officers.**

(a) Except as otherwise provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the executive board ~~may act in all instances~~ acts on behalf of the association. In the performance of their duties, the officers and members of the executive board ~~are required to exercise (i) if appointed by the declarant the care required of fiduciaries of the unit owners shall exercise the degree of care and loyalty to the association required of a trustee. and (ii) if elected by the unit owners, ordinary and reasonable care.~~

(b) Officers and members of the executive board not appointed by the declarant shall exercise the degree of care and loyalty to the association required of an officer or director of a corporation organized, and are subject to the conflict of interest rules governing directors and officers, under West Virginia Code Chapter 31E. The standards of care and loyalty described in this section apply regardless of the form in which the association is organized.

~~(b) (c) The executive board may not; act on behalf of the association:~~

~~(1) to Amend the declaration except as provided in (section 2-117);~~

~~(2) Amend the bylaws;~~

~~(3) to Terminate the common interest community (section 2-118);~~

~~(4) or to Elect members of the executive board but may fill vacancies in its membership for the unexpired portion of any term or, if earlier, until the next regularly scheduled election of executive board members; or~~

~~(5) Determine the qualifications, powers, and duties, or terms of office of executive board members (section 3-103(f). ), but the executive board may fill vacancies in its membership for the unexpired portion of any term.~~

~~(c) The executive board shall adopt budgets as provided in section 3-123. Within thirty days after adoption of any proposed budget for the common interest community, the executive board shall provide a summary of the budget to all the~~

~~unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than thirty days after mailing of the summary. Unless at that meeting a majority of all unit owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners must be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.~~

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by him the declarant may appoint and remove the officers and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before the period ends. In that event, the declarant may require during the remainder of the period that specified actions of the association or executive board, as described in a recorded instrument executive by the declarant, be approved by the declarant before they become effective. Regardless of the period provided in the declaration, and except as provided in section 2-123(g) (Master Planned Communities), a period of declarant control terminates no later than the ~~earlier~~

earliest of:

(i) Sixty days after conveyance of ~~seventy-five percent~~ three-fourths of the units that may be created to unit owners other than a declarant;

(ii) Two years after all declarants have ceased to offer units for sale in the ordinary course of business;

(iii) Two years after any right to add new units was last exercised; or

(iv) The day the declarant, after giving notice in a record to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association. ~~A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event the declarant may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.~~

(e) Not later than sixty days after conveyance of ~~twenty-five percent~~ one-fourth of the units that may be created to unit owners other than a declarant, at least one member and not less than twenty-five percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than sixty days after conveyance of ~~fifty percent~~ one-half

of the units that may be created to unit owners other than a declarant, not less than ~~thirty-three and one-third percent~~ one third of the members of the executive board must be elected by unit owners other than the declarant.

(f) Except as otherwise provided in section 2-120(e), not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom must be unit owners. Unless the declaration provides for the election of officers by the unit owners, the ~~The~~ executive board shall elect the officers. The executive board members and officers shall take office upon election or appointment.

(g) ~~Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant.~~ A declaration may provide for the appointment of specified positions on the executive board by persons other than the declarant during or after the period of declarant control. It also may provide a method for filling vacancies in those positions, other than by election by unit owners.  
However, after the period of declarant control, appointed members:

(1) may not comprise more than one third of the board; and



(2) have no greater authority than any other member of the board.

**§36B-3-105. Termination of contracts and leases of declarant.**

(a) If entered into before Within two years after the executive board elected by the unit owners pursuant to section 3-103(f) takes office, the association may terminate without penalty, upon not less than ninety days' notice to the other party, any of the following if it was entered into before the executive board was elected:

(i) Any management, maintenance, operations, or contract, employment contract, or lease of recreational or parking areas or facilities; or

(ii) Any other contract or lease between the association and a declarant or an affiliate of a declarant. ~~or~~

~~(iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated~~

(b) The association may terminate without penalty ~~by the association~~ at any time after the executive board elected by the unit owners pursuant to section 3-103(f) takes office upon not less than ninety days' notice to the other party, any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into.

(c) This section does not apply to:

(i) Any lease the termination of which would terminate the common interest community or reduce its size, unless the real estate subject to that lease was included in the common interest community for the purpose of avoiding the right of the association to terminate a lease under this section; or

(ii) A proprietary lease.

**§36B-3-106. Bylaws.**

(a) The bylaws of the association must provide:

(1) The number of members of the executive board and the titles of the officers of the association;

(2) Election by the executive board of president, treasurer, secretary, and any other officers of the association the bylaws specify;

(3) The qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;

(4) Which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;

(5) Which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; ~~and~~

(6) A method for amending the bylaws;

(7) Any provision necessary to satisfy requirements in this chapter or the declaration concerning meetings, voting, quorums, and other activities of the association; and

(8) Any matter required by law of this state other than this chapter to appear in the bylaws of organizations of the same type as the association.

(b) Subject to ~~the provisions of~~ the declaration and this chapter, the bylaws may provide for any other necessary or appropriate matters, ~~the association deems necessary and appropriate, including~~ matters that could be adopted as rules.

**§36B-3-108. Meetings.**

~~A meeting of the association must be held at least once each year. Special meetings of the association may be called by the president,~~

(a) The following requirements apply to unit owner meetings:

(1) An association shall hold a meeting of unit owners annually at a time, date, and place stated in or fixed in accordance with the bylaws.

(2) An association shall hold a special meeting of unit owners to address any matter affecting the common interest community or the association if its president, a majority of the executive board, or ~~by~~ unit owners having at least twenty percent, or any lower percentage specified in the bylaws, of the votes in the association

request that the secretary call the meeting. Not less than ten nor more than sixty days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid If the association does not notify unit owners of a special meeting with thirty days after the requisite number or percentage of unit owners request the secretary to do so, the requesting members may directly notify all the unit owners of the meeting. Only matters described in the meeting notice required by paragraph (3) of this section may be considered at a special meeting.

(3) An association shall notify unit owners of the time, date, and place of each annual and special unit owners meeting not less than ten days or more than sixty days before the meeting date. Notice may be by any means described in section 3-121 ~~by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner.~~ The notice of any meeting must state the time, date and place of the meeting and the items on the agenda, including:

(A) A statement of the general nature of any proposed amendment to the declaration or bylaws;

(B) Any budget changes; and

(C) Any proposal to remove an officer or member of the executive

board.

(4) The minimum time to give notice required by subdivision (3) of this section may be reduced or waived for a meeting called to deal with an emergency.

(5) Unit owners must be given a reasonable opportunity at any meeting to comment regarding any matter affecting the common interest of the community or the association.

(6) The declaration or bylaws may allow for meetings of unit owners to be conducted by telephonic video, or other conferencing process, if the alternative process is consistent with subsection (b)(7) of this section.

(b) The following requirements apply to meetings of the executive board and committees of the association authorized to act for the association:

(1) Meetings must be open to the unit owners except during executive sessions. The executive board and those committees may hold an executive session only during a regular or special meeting of the board or a committee. No final vote or action may be taken during an executive session. An executive session may be held only to:

(A) Consult with the association's attorney concerning legal matters;

(B) Discuss existing or potential litigation or mediation, arbitration, or administrative proceedings;

(C) Discuss labor or personnel matters;

(D) Discuss contracts, leases, and other commercial transactions to purchase or provide goods or services currently being negotiated, including the review of bids or proposals, if premature general knowledge of those matters would place the association at a disadvantage; or

(E) Prevent public knowledge of the matter to be discussed if the executive board or committee determines that public knowledge would violate the privacy of any person.

(2) For purposes of this section, a gathering of board members at which the board members do not conduct association business is not a meeting of the executive board. The executive board and its members may not use incidental or social gatherings of board members or any other method to evade the open meeting requirements of this section.

(3) During the period of declarant control, the executive board shall meet at least four times a year. At least one of those meetings must be held at the common interest community or at a place convenient to the community. After termination of the period of declarant control, all executive board meetings must be at the

common interest community or at a place convenient to the community unless the unit owners amend the bylaws to vary the location of those meetings.

(4) At each executive board meeting, the executive board shall provide a reasonable opportunity for unit owners to comment regarding any matter affecting the common interest community and the association.

(5) Unless the meeting is included in a schedule given to the unit owners or the meeting is called to deal with an emergency, the secretary or other officer specified in the bylaws shall give notice of each executive board meeting to each board member and to the unit owners. The notice must be given at least ten days before the meeting and must state the time, date, place, and agenda of the meeting.

(6) If any materials are distributed to the executive board before the meeting, the executive board at the same time shall make copies of those materials reasonably available to unit owners, except that the board need not make available copies of unapproved minutes or materials that are to be considered in executive session.

(7) Unless the declaration or bylaws otherwise provide, the executive board may meet by telephonic, video, or other conferencing process if:

(A) The meeting notice states the conferencing process to be used and provides information explaining how unit owners may participate in the conference directly or by meeting at a central location or conference connection; and

(B) The process provides all unit owners the opportunity to hear or perceive the discussion and to comment as provided in subdivision (4) of this subsection.

(8) After termination of the period of declarant control, unit owners may amend the bylaws to vary the procedures for meetings described in subdivision (7) of this subsection.

(9) Instead of meeting, the executive board may act by unanimous consent as documented in a record authenticated by all its members.

The secretary promptly shall give notice to all unit owners of any action taken by unanimous consent. After termination of the period of declarant control, the executive board may act by unanimous consent only to undertake ministerial actions or to implement actions previously taken at a meeting of the executive board.

(10) Even if an action by the executive board is not in compliance with this section, it is valid unless set aside by a court. A challenge to the validity of an action of the executive board for failure to comply with this section may not be brought more than sixty days after the minutes of the executive board of the meeting



at which the action was taken are approved or the record of that action is distributed to unit owners, whichever is later.

**§36B-3-110. Voting; proxies; ballots.**

(a) Unless prohibited or limited by the declaration or bylaws, unit owners may vote at a meeting in person, by absentee ballot pursuant to subsection (b)(4), by a proxy pursuant to subsection (c) or, when a vote is conducted without a meeting, by electronic or paper ballot pursuant to subsection (d).

(b) At a meeting of unit owners the following requirements apply:

(1) Unit owners who are present in person may vote by voice vote, show of hands, standing, or any other method for determining the votes of unit owners, as designated by the person presiding at the meeting.

~~(a)~~ (2) If only one of several owners of a unit is present ~~at a meeting of the association,~~ that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the owners casts the votes allocated to ~~that~~ the unit without protest being made promptly to the person presiding over the meeting by any of the other owners of

the unit.

(3) Unless a greater number or fraction of the votes in the association is required by this chapter or the declaration, a majority of the votes cast determines the outcome of any action of the association.

(4) Subject to subsection (a), a unit owner may vote by absentee ballot without being present at the meeting. The association promptly shall deliver an absentee ballot to an owner that requests it if the request is made at least three days before the scheduled meeting. Votes cast by absentee ballot must be included in the tally of a vote taken at that meeting.

(5) When a unit owner votes by absentee ballot, the association must be able to verify that the ballot is cast by the unit owner having the right to do so.

(c) Except as otherwise provided in the declaration or bylaws, the following requirements apply with respect to proxy voting:

~~(b)~~ (1) Votes allocated to a unit may be cast pursuant to a directed or undirected proxy duly executed by a unit owner.

(2) If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy.

(3) A unit owner may revoke a proxy given pursuant to this section

only by actual notice of revocation to the person presiding over a meeting of the association.

(4) A proxy is void if it is not dated or purports to be revocable without notice.

(5) A proxy ~~terminates one year after its date, unless it specifies a shorter term~~ is valid only for the meeting at which it is cast and any recessed session of that meeting.

(6) A person may not cast undirected proxies representing more than 15 percent of the votes in the association, unless the undirected proxies are for units under common ownership.

(d) Unless prohibited or limited by the declaration or bylaws, an association may conduct a vote without a meeting. In that event, the following requirements apply:

(1) The association shall notify the unit owners that the vote will be taken by ballot.

(2) The association shall deliver a paper or electronic ballot to every unit owner entitled to vote on the matter.

(3) The ballot must set forth each proposed action and provide an opportunity to vote for or against the action.

(4) When the association delivers the ballots, it shall also:

(A) Indicate the number of responses needed to meet the quorum requirements;

(B) State the percent of votes necessary to approve each matter other than election of directors;

(C) Specify the time and date by which a ballot must be delivered to the association to be counted, which time and date may not be fewer than three days after the date the association delivers the ballot; and

(D) Describe the time, date, and manner by which unit owners wishing to deliver information to all unit owners regarding the subject of the vote may do so.

(5) Except as otherwise provided in the declaration or bylaws, a ballot is not revoked after delivery to the association by death or disability or attempted revocation by the person that case that vote.

(6) Approval by ballot pursuant to this subsection is valid only if the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action.

~~(e)~~ (e) If the declaration requires that votes on specified matters affecting the common interest community be cast by lessees rather than unit owners of leased units:

(i) ~~The provisions of subsections (a) and (b) apply~~ This section applies to lessees as if they were unit owners that have leased their units to other persons may not cast votes on those specified

matters;

(ii) Unit owners who have leased their units to other persons may not cast votes on those specified matters; and

(iii) Lessees are entitled to notice of meetings, access to records, and other rights respecting these matters as if they were unit owners.

(f) Unit owners must also be given notice ~~in the manner provided in section 3-108,~~ of all meetings at which lessees are entitled to vote.

~~(d)~~ (g) ~~No votes~~ Votes allocated to a unit owned by the association ~~may~~ must be cast in any vote of the unit owners in the same proportion as the votes case on the matter by unit owners other than the association.

**§36B-3-112. Conveyance or encumbrance of common elements.**

(a) In a condominium or planned community, portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent of the votes in the association, including eighty percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but all owners of units to which any limited common element is allocated must agree in order to convey that limited common element or

subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association.

(b) Part of a cooperative may be conveyed and all or part of a cooperative may be subjected to a security interest by the association if persons entitled to cast at least eighty percent of the votes in the association, including eighty percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specified, agree to that action; but, if fewer than all of the units or limited common elements are to be conveyed or subjected to a security interest, then all unit owners of those units, or the units to which those limited common elements are allocated, must agree in order to convey those units or limited common elements or subject them to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association. Any purported conveyance or other voluntary transfer of an entire cooperative, unless made pursuant to section 2-118, is void.

(c) An agreement to convey common elements in a condominium or planned community, or to subject them to a security interest, or in

a cooperative, an agreement to convey any part of a cooperative or subject it to a security interest, must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The 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.

(d) The association, on behalf of the unit owners, may contract to convey an interest in a common interest community pursuant to subsection (a), but the contract is not enforceable against the association until approved pursuant to subsections (a), (b), and (c). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(e) Unless made pursuant to this section, any purported conveyance, encumbrance, judicial sale, or other voluntary transfer of common elements or of any other part of a cooperative is void.

(f) A conveyance or encumbrance of common elements or of a cooperative pursuant to this section does not deprive any unit of its rights of access and support.

(g) ~~Unless the declaration otherwise provides, a conveyance or encumbrance of common elements pursuant to this section does not affect the priority or validity of preexisting encumbrances if the holders of first security interests on eighty percent of the units that are subject to security interests on the day the unit owners' agreement under subsection (c) is recorded consent in writing:~~

(1) A conveyance of common elements pursuant to this section terminates both the undivided interests in those common elements allocated to the units and the security interests in those undivided interests held by all persons holding security interests in the units; and

(2) An encumbrance of common elements pursuant to this section has priority over all preexisting encumbrances on the undivided interests in those common elements held by all persons holding security interests in the units.

(h) The consents by holders of first security interests on units described in subsection (g), or a certificate of the secretary affirming that those consents have been received by the association, may be recorded at any time before the date on which the agreement under subsection (c) becomes void. Consents or certificates so recorded are valid from the date they are recorded for purposes of calculating the percentage of consenting first



security interest holders, regardless of later sales or encumbrances on those units. Even if the required percentage of first security interest holders so consent, a conveyance or encumbrance of common elements does not affect interests having priority over the declaration, or created by the association after the declaration was recorded.

~~(h)~~ (i) In a cooperative, the association may acquire, hold, encumber, or convey a proprietary lease without complying with this section.

**§36B-3-116. Lien for assessments.**

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charged pursuant to section 3- 102(a)(10), (11) and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except: (i) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to; (ii) a first security interest on the unit recorded before the date on which the assessment sought to be

enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. (The lien under this section is not subject to the provisions of (insert appropriate reference to state homestead, dower and curtesy, or other exemptions)).

(c) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessments becomes due.

(e) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from

taking a deed in lieu of foreclosure.

(f) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(g) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within ten business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

~~(h) For the purpose of perfecting and preserving its lien, the association shall give notice to the unit owner in the manner set forth in section one (§56-2-1), article two, chapter fifty-six of this code, or by registered or certified mail, return receipt requested, and in a form reasonably calculated to inform the owner of his or her liability for payment of the assessment. The lien shall be discharged as to subsequent purchasers for value without notice unless the association shall cause to be recorded a notice of the lien in the office of the clerk of the county commission of any county wherein any part of the condominium is located. The notice shall contain:~~

~~(1) A legally sufficient description of the unit;~~

~~(2) The name or names of the owners of the unit;~~

~~(3) The amount of unpaid assessments due together with the date when each fell due; and~~

~~(4) The date of recordation.~~

~~The clerk of the county commission in whose office the notice is recorded shall index the notice in the appropriate deed books and lien books in the name of the unit owners and of the association. The cost of recordation shall be assessed against any unit owner found to be delinquent in a subsequent proceeding to enforce the lien.~~

~~Upon payment of the assessment, the association shall execute a written release of the lien in the manner set forth in section one (§38-12-1), article twelve, chapter thirty eight of this code. This release shall be recorded, at the expense of the association, in the office of the clerk of the county commission wherein the notice of the lien was filed.~~

~~(i) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.~~

(h) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(i) For the purpose of facilitating requests to the association by trustees and judicially appointed commissioners, the association shall at all times record its notice address in either the office of the West Virginia Secretary of State, or in the office of the clerk of the county commission of each county in which the common interest community is located.

**§36B-3-118. Association records.**

(a) An association must retain the following:

(1) Detailed records of receipts and expenditures affecting the operation and administration of the association and other appropriate accounting records;

(2) Minutes of all meetings of its unit owners and executive board other than executive sessions, a record of all actions taken by the unit owners or executive board without a meeting, and a record of all actions taken by a committee in place of the executive board on behalf of the association;

(3) The names of unit owners in a form that permits preparation of a list of the names of all owners and the addresses at which the association communicates with them, in alphabetical order showing the number of votes each owner is entitled to cast;

(4) Its original or restated organizational documents, if required by law other than this chapter, bylaws and all amendments to them, and all rules currently in effect;

(5) All financial statements and tax returns of the association for the past three years;

(6) A list of the names and addresses of its current executive board members and officers;

(7) Its most recent annual report delivered to the Secretary of State, if any;

(8) Financial and other records sufficiently detailed to enable the association to comply with section 4-109;

(9) Copies of current contracts to which it is a party;

(10) Records of executive board or committee actions to approve or deny any requests for design or architectural approval from unit owners; and

(11) Ballots, proxies, and other records related to voting by unit owners for one year after the election, action, or vote to which they relate.

(b) Subject to subsections (c) and (d), all records retained by an association must be available for examination and copying by a unit owner or the owner's authorized agent;

(1) During reasonable business hours or at a mutually convenient time and location; and

(2) Upon five days notice in a record reasonably identifying the

specific records of the association requested.

(c) Records retained by an association may be withheld from inspection and copying to the extent that they concern:

(1) Personnel, salary, and medical records relating to specific individuals;

(2) Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently being negotiated;

(3) Existing or potential litigation or mediation, arbitration, or administrative proceedings;

(4) Existing or potential matters involving federal, state, or local administrative or other formal proceedings before a governmental tribunal for enforcement of the declaration, bylaws, or rules;

(5) Communications with the association's attorney which are otherwise protected by the attorney-client privilege or the attorney work-product doctrine;

(6) Information the disclosure of which would violate law other than this chapter;

(7) Records of an executive session of the executive board; or

(8) Individual unit files other than those of the requesting owner.

(d) An association may charge a reasonable fee for providing copies of any records under this section and for supervising the unit owner's inspection.

(e) A right to copy records under this section includes the right

to receive copies by photocopying or other means, including copies through an electronic transmission if available upon request by the unit owner.

(f) An association is not obligated to compile or synthesize information.

(g) Information provided pursuant to this section may not be used for commercial purposes.

**§36B-3-120. Rules.**

(a) Before adopting, amending or repealing any rule, the executive board shall give all unit owners notice of:

(1) Its intention to adopt, amend, or repeal a rule and provide the text of the rule or the proposed change; and

(2) A date on which the executive board will act on the proposed rule or amendment after considering comments from unit owners.

(b) Following adoption, amendment, or repeal of a rule, the association shall notify the unit owners of its action and provide a copy of any new or revised rule.

(c) An association may adopt rules to establish and enforce construction and design criteria and aesthetic standards if the declaration so provides. If the declaration so provides, the association shall adopt procedures for enforcement of those standards and for approval of construction applications, including a reasonable time within which the association must act after an application is submitted and the consequences of its failure to



act.

(d) A rule regarding displaying of the flag of the United States must be consistent with federal law. In addition, the association may not prohibit display on a unit or on a limited common element adjoining a unit of the flag of this state, or signs regarding candidates for public or association office or ballot questions, but the association may adopt rules governing the time, place, size, number, and manner of those displays.

(e) Unit owners may peacefully assemble on the common elements to consider matters related to the common interest community, but the association may adopt rules governing the time, place, and manner of those assemblies.

(f) An association may adopt rules that affect the use of or behavior in units that may be used for residential purposes, only to:

(1) Implement a provision of the declaration;

(2) Regulate any behavior in or occupancy of a unit which violates the declaration or adversely affects the use and enjoyment of other units or the common elements by other unit owners; or

(3) Restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders that regularly make loans secured by first mortgages on units in common interest communities or regularly purchase those mortgages.

(g) An association's internal business operating procedures need not be adopted as rules.

(h) Every rule must be reasonable.

**§36B-3-121. Notice to unit owners.**

(a) An association shall deliver any notice required to be given by the association under this chapter to any mailing or electronic mail address a unit owner designates. Otherwise, the association may deliver notices by:

(1) Hand delivery to each unit owner;

(2) Hand delivery, United States mail postage paid, or commercially reasonable delivery service to the mailing address of each unit;

(3) Electronic means, if the unit owner has given the association an electronic address; or

(4) Any other method reasonably calculated to provide notice to the unit owner.

(b) The ineffectiveness of a good faith effort to deliver notice by an authorized means does not invalidate action taken at or without a meeting.

**§36B-3-122. Removal of officers and directors.**

(a) Notwithstanding any provision of the declaration or bylaws to the contrary, unit owners present in person, by proxy, or by absentee ballot at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board and any officer elected by the unit owners, with or without cause, if the

number of votes cast in favor of removal exceeds the number of votes cast in opposition to removal, but:

(1) A member appointed by the declarant may not be removed by a unit owner vote during the period of declarant control;

(2) A member appointed under subdivision 3-103(g) may be removed only by the person that appointed that member; and

(3) The unit owners may not consider whether to remove a member of the executive board or an officer elected by the unit owners at a meeting of the unit owners unless that subject was listed in the notice of the meeting.

(b) At any meeting at which a vote to remove a member of the executive board or an officer is to be taken, the member or officer being considered for removal must have a reasonable opportunity to speak before the vote.

**§36B-3-123. Adoption of budgets; Special assessments.**

(a) The executive board, at least annually, shall adopt a proposed budget for the common interest community for consideration by the unit owners. Not later than thirty days after adoption of a proposed budget, the executive board shall provide to all the unit owners a summary of the budget, including any reserves, and a statement of the basis on which any reserves are calculated and funded. Simultaneously, the board shall set a date not less than ten days or more than sixty days after providing the summary for a meeting of the unit owners to consider ratification of the budget.

Unless at that meeting a majority of all unit owners or any larger number specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. If a proposed budget is rejected, the budget last ratified by the unit owners continues until unit owners ratify a subsequent budget.

(b) The executive board, at any time, may propose a special assessment. Except as otherwise provided in subsections (c) and (d), the assessment is effective only if the executive board follows the procedures for ratification of a budget described in subsection (a) and the unit owners do not reject the proposed assessment.

(c) If the executive board determines by a two-thirds vote that a special assessment is necessary to respond to an emergency:

(1) The special assessment becomes effective immediately in accordance with the terms of the vote;

(2) Notice of the emergency assessment must be provided promptly to all unit owners; and

(3) The executive board may spend the funds paid on account of the emergency assessment only for the purposes described in the vote.

(d) The board may not levy a special assessment for the purpose of circumventing the annual budget requirements of subsection (a).

**§36B-3-124. Litigation involving declarant.**

(a) The following requirements apply to an association's authority under subdivision 3-102(a)(4) to institute and maintain a

proceeding alleging a construction defect with respect to the common interest community, whether by litigation, mediation, arbitration, or administratively, against a declarant or an employee, independent contractor, or other person directly or indirectly providing labor or materials to a declarant:

(1) Subject to subsection (e), before the association institutes a proceeding described in this section, it shall provide notice in a record of its claims to the declarant and those persons that the association seeks to hold liable for the claimed defects. The text of the notice may be in any form reasonably calculated to give notice of the general nature of the association's claims, including a list of the claimed defects. The notice may be delivered by any method of service and may be addressed to any person if the method of service used:

(A) Provides actual notice to the person named in the claim; or  
(B) Would be sufficient to give notice to the person in connection with commencement of an action by the association against the person.

(2) Subject to subsection (e), the association may not institute a proceeding against a person until forty-five days after the association sends notice of its claim to that person.

(3) During the period described in subdivision (2), the declarant and any other person to which the association gave notice may present to the association a plan to repair or otherwise remedy the

construction defects described in the notice. If the association does not receive a timely remediation plan from a person to which it gave notice, or if the association does not accept the terms of any plan submitted, the association may institute a proceeding against the person.

(4) If the association receives one or more timely remediation plans, the executive board shall consider promptly those plans and notify the persons to which it directed notice whether the plan is acceptable as presented, acceptable with stated conditions, or not accepted.

(5) If the association accepts a remediation plan from a person the association seeks to hold liable for the claimed defect, or if a person agrees to stated conditions to an otherwise acceptable plan, the parties shall agree on a period for implementation of the plan.

The association may not institute a proceeding against the person during the time the plan is being diligently implemented.

(6) Except as otherwise provided in subdivision 4-116(d) for warranty claims, any statute of limitation affecting the association's right of action against a declarant or other person is tolled during the period described in subdivision (2) and during any extension of that time because a person to which notice was directed has commenced and is diligently pursuing the remediation plan.

(b) After the time described in subsection (a)(2) expires, whether

or not the association agrees to any remediation plan, a proceeding may be instituted by:

(1) The association against a person to which notice was directed which fails to submit a timely remediation plan, the plan of which is not acceptable, or which fails to pursue diligent implementation of that plan; or

(2) A unit owner with respect to the owner's unit and any limited common elements assigned to that unit, regardless of any action of the association.

(c) This section does not preclude the association from making repairs necessary to mitigate damages or to correct any defect that poses a significant and immediate health or safety risk.

(d) Subject to the other provisions of this subsection, the determination of whether and when the association may institute a proceeding described in this subsection may be made by the executive board. The declaration may not require a vote by any number or percent of unit owners as a condition to institution of a proceeding.

(e) This subsection does not prevent an association from seeking equitable relief at any time without complying with subsection (a)(1) or (2).

#### **ARTICLE 4. PROTECTION OF PURCHASERS.**

##### **§36B-4-103. Public offering statement; general provisions.**

(a) Except as provided in subsection (b), a public offering

statement must contain or fully and accurately disclose:

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

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

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

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

(5) Any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for one year after the date of the first conveyance to a purchaser and thereafter the current budget of the association, a statement of who prepared the budget and a statement of the



budget's assumptions concerning occupancy and inflation factors.

The budget must include, without limitation:

(i) A statement of the amount or a statement that there is no amount, included in the budget as a reserve for repairs and replacement;

(ii) A statement of any other reserves;

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

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

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

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

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

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

(10) The terms and significant limitations of any warranties

provided by the declarant, including statutory warranties and limitations on the enforcement thereof or on damages;

(11) A statement that:

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

(ii) If a declarant fails to provide a public offering statement to a purchaser before conveying a unit, that purchaser may recover from the declarant ten percent of the sales price of the unit plus ten percent of the share, proportionate to his or her common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community: *Provided*, That purchaser is required to show that he or she has been actually damaged as a result of the failure to provide such offering statement and that his or her action to recover such damage and the penalty provided in this paragraph is instituted within three years from the date on which purchaser's right of action shall have accrued; and

(iii) If a purchaser receives the public offering statement more than fifteen days before signing a contract, he or she cannot cancel the contract;

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

actual knowledge;

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

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

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

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

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

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

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

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

(21) a description of any arrangement described in section 1-209 binding the association.

(b) The public offering statement must contain any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for one year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include:

(A) a statement of the amount, or a statement that there is no amount, included in the budget as a reserve for repairs and replacement;

(B) A statement of any other reserves;

(C) The proposed common expense assessment by category of

expenditures for the association; and

(D) The projected monthly common expense assessment for each type of unit.

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

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

**§36B-4-109. Resales of units.**

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

(1) A statement disclosing the effect on the proposed disposition

of any right of first refusal or other restraint on the free alienability of the unit;

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

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

(4) A statement of any capital expenditures anticipated by the association for the current and two next succeeding fiscal years;

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

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

(7) The current operating budget of the association;

(8) A statement of any unsatisfied judgments against the association and the status of any pending suits in which the association is a defendant;

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

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

(11) A statement as to whether the executive board has knowledge of

any violations of the health or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the common interest community;

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

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

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

(15) A statement describing any pending sale or encumbrance of common elements; and

(16) A statement disclosing the effect on the unit to be conveyed of any restrictions on the owner's right to use or occupy the unit or to lease the unit to another person.

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

by the association and included in the certificate.

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

**§36B-4-112. Conversion buildings.**

(a) A declarant of a common interest community containing conversion buildings, and any dealer who intends to offer units in such a common interest community, shall give each of the residential tenants and any residential subtenant in possession of a portion of a conversion building notice of the conversion and provide those persons with the public offering statement no later than one hundred twenty days before the tenants and any subtenant in possession are required to vacate. The notice must set forth generally the rights of tenants and subtenants under this section and must be hand delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than one hundred twenty days' notice, except by reason of nonpayment of rent, waste, or conduct that disturbs other tenants' peaceful enjoyment of the



premises, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession.

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

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

(d) If a notice of conversion specifies a date by which a unit or proposed unit must be vacated and otherwise complies with the provisions of applicable law, the notice also constitutes a notice to vacate specified by that statute.

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

**§36B-4-116. Statute of limitations for warranties.**

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

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

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

(2) As to each common element, at the time the common element is completed or, if later, as to (i) a common element that may be added to the common interest community or portion thereof, at the

time the first unit therein is conveyed to a bona fide purchaser, or (ii) a common element within any other portion of the common interest community, at the time the first unit is conveyed to a bona fide purchaser.

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

(d) During the period of declarant control, the association may authorize an independent committee of the executive board to evaluate and enforce any warranty claims involving the common elements, and to compromise those claims. Only members of the executive board elected by unit owners other than the declarant and other persons appointed by those independent members may serve on the committee, and the committee's decision must be free of any control by the declarant or any member of the executive board or officer appointed by the declarant. All costs reasonably incurred by the committee, including attorney's fees, are common expenses, and must be added to the budget annually adopted by the association under section 3-115. If the committee is so created, the period of limitation for a warranty claim considered by the committee begins to run from the date of the first meeting of the committee.

**§36B-4-117. Effect of violations on rights of action; attorney's fees.**

(a) If a declarant or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. A declarant, association, unit owner, or any other person subject to this chapter may bring an action to enforce a right granted or obligation imposed by this chapter, the declaration, or the bylaws. Punitive damages may be awarded for a willful failure to comply with this chapter. The court in an appropriate case, may award reasonable attorney's fees and costs.

(b) Parties to a dispute arising under this chapter, the declaration, or the bylaws may agree to resolve the dispute by any form of binding or nonbinding alternative dispute resolution, but:

(1) A declarant may agree with the association to do so only after the period of declarant control has expired unless the agreement is made with an independent committee of the executive board elected pursuant to subdivision 4-116(d); and

(2) An agreement to submit to any form of binding alternative dispute resolution must be in a record authenticated by the parties.

NOTE: The purpose of this bill is to update the Uniform Common Interest Ownership Act.

§36B-1-115, §36B-1-116, §36B-1-208, §36B-2-123, §36B-2-124,

§36B-3-120, §36B-3-121, §36B-3-122, §36B-3-123 and §36B-3-124 are new; therefore, strike-throughs and underscoring have been omitted.

§36B-3-118 has been completely rewritten; therefore, underscoring and strike-throughs have been omitted.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

This bill is recommended for passage in the 2013 Regular Session by the Commission on Interstate Cooperation.