Background on the formation [1975] & birth of : The Uniform Common Interest Ownership Act

– in West Virginia it is known as WV Code §36B

The Uniform Common Interest Ownership Act (UCIOA)

A presentation by Carl Lisman, Chair of the Drafting Committee of the Uniform Common Interest Ownership Act (UCIOA)

June 09, 2006

By Carl Lisman (View author info)

Crownsville, Maryland -

The following is a presentation that Carl Lisman , Chair of the Drafting Committee on Amendments to the Uniform Common Interest Ownership Act (UCIOA).and Treasurer of the National Conference of Commissioners on Uniform State Laws presented to the Maryland Task Force on Common Ownership Communities - Maryland Department of Housing and Community Development on January 23, 2006. There were 21 people present at the meeting. A CAI survey was taken and discussed. Roger Winston Task Force Member.member introduced Mr. Carl Lisman.

Introduction of Guest - Roger Winston: "Mr. Carl Lisman is a shareholder in Lisman, Webster, Kirkpatrick & Leckerling, P.C. in Burlington, Vermont. He served as an Adjunct Professor at the Vermont Law School from1982 to 1998, teaching real estate transaction law to third year students. He is a Vermont Commissioner on Uniform State Laws and Treasurer of the National Conference of Commissioners on Uniform State Laws. As a Uniform Law Commissioner, he chaired the drafting committees on the Uniform Common Interest Ownership Act (1994) and the Uniform Nonjudicial Foreclosure Act. He is co-chair of the Joint Editorial Board for Real Property Acts. He received his B.A. from the University of Vermont and his J.D. from Harvard Law School."

Mr. Carl Lisman: Roger's given you a pretty good back ground for those of you who don't know about the National Conference of Commissioners on Uniform State Laws. It's an organization of the states. It was founded over more than 125 years ago and it is the body that brings to the states legislation, carefully thought through legislation we hope, for adoption by the states and most of the laws begin with the word "uniform" like Uniform Commercial Code, Uniform Anatomical Gift Act and the topic which we are about to discuss, the Uniform Common Interest Ownership Act, and the Condominium Act.

I became a uniform laws Commissioner in 1976, I knew very little about the organization and shortly after my appointment I received a letter congratulating me on being appointed a Commissioner, telling me that my first committee meeting will be the meeting of the Uniform Condominium Act Committee in the fall of 1976. I did not know then what a condominium was; it was a word that I had heard there weren't many of those things in Vermont at the time and those that were, were sort of thought to be weird and not anything that would gain traction in the housing market. Times have changed and I'm glad that we went through the true false test, I may be preaching to the choir but more than half the homes started in the United States are homes

that will end up in Common Ownership Communities and this gets bigger and bigger everyday and it needs more and more attention on a legislation level.

We finished drafting the Uniform Condominium Act in 1975 and immediately went back and started all over again in 76 and did some further amendments. What we discovered in the states that adopted the Uniform Condominium Act is that people who tried to evade, not avoid but evade, the act were creating what we called planned communities. This might be the time to pause for a second and get our terms straight. I'm going to talk mostly about the Uniform Common Interest Ownership Act, known by it's acronym UCIOA which is an amalgam of three different Uniform laws. Uniform Condominium Act, Uniform Planned Community Act and the Model Real Estate Cooperative Act.

In a condominium unit owners own their own unit; together they are members of an Association. The Association manages the common elements for that property because the unit owners own the common elements together. Tenants on the old law, Tenants and Condominium we don't use that term anymore.

In a planned community the unit owners own their own units and they are members of Associations and the Association owns the common elements. And what the Uniform Act refers to the Real Estate Co-operative, the Association owns the real estate and the units and by virtue of a document frequently called a Proprietary Lease, members have rights to occupy particular units. Those are the big three Common Interest Communities and that's the subject matter of the Uniform Common Interest Ownership Community Act.

We discovered after we did the condo act that people were evading the provisions of the condo act by vesting title to the elements in the Association since the definition of condominiums under the condominium act excluded that. They were of use so we came out with the Planned Community Act and right afterwards the Real Estate Co-op Act. When those were done we asked ourselves the obvious questions, can we smoosh this stuff altogether. Smoosh by the way is a defined legal term.

We smooshed this altogether and came up with the Uniform Common Interest Ownership Act. We also discovered in the smooshing process that we had different rules that made little sense for otherwise physically identical pieces of property. I used to try and trick my students at the Vermont Law School by drawing on the board little stick figures of a box, a house on top, one line going down and one line going across so that it looked like a two story house. I'd draw three of them on the black board and ask which one is the condominium, which one is the planned community and which one was the co-op, and of course you couldn't answer that by looking at the picture because physically identical property can take different forms of the ownership and then if you took that black board and placed it on its side that funny looking figure of the house now becomes a sub-division and with a triangle on them they now become a property and we soon realized that from a legal stand point it made little sense to have the law perpetuate the myth. The myth being that condominiums are high rise buildings, that planned communities are sub-divisions, and that co-ops look like apartments. Because none of them from a legal stand point has to, and for a variety of good reasons should not be required to fit the mold.

Let me tell you the three basic principles of Common Interest Ownership Act. Remember these and you will pass my course.

The first is that UCIOA is a disclosure law not a regulatory law. Although there is an optional part 5 to UCIOA it is essentially self enforcing through private mechanism. There is no governing overlay in creating a common interest community.

Secondly it's long. You ask yourself, why that is a guiding principle? It's long because many of the provisions of the act begin with the phrase "Unless the declaration otherwise provides." We wanted to create default rules, we wanted to be able to shorten legal documents, we wanted to

try to get the process started so that people could make intelligent decisions about whether to buy or lend based on the legal documentation as between 2 physically such as they are, identical projects where the price point is the same, the units are the same, and they really are right next to one another. What is there to differentiate one from the other from a buyer's perspective? We thought that attempting to standardize documentation we could help people see what's outside the norm and then let the market deal with whether or not outside the norm would be attracted to buyers and to lenders. So that we have a document called the Uniform Form 1, a Simple Condominium declaration. Simple Condominium Declaration is 3 ½ pages because the law otherwise fills in all the blanks.

And finally and perhaps most importantly in the underlying principles, when UCIOA was written we believed it to be a very balanced and fair act to all of the constituents who have an interest in common interest ownership communities. Developers to developer's, lenders to buyers, to sellers, units managers to officers and directors to Associations and to some degree to the municipalities that interact with the Associations. It's balanced because of the political realities of getting a very long and complicated law passed through a legislature that is probably not going to say this is not their number one priority or not their number two priority.

I testified in a number of states where the legislative reaction has been it's too long and too complicated and that's a real issue for UCIOA. Once people read it they see how well it works, how balanced it is for all who have an interest. So for those of you who have not read it let me try to distill it for you within just a few minutes of time. I'm going to do it in the context of the four major constituencies in a common interest community.

The developers, the associations, the lenders and the owners. Mostly in that order because that's mostly the order in which the act current deals with these constituency groups. That's not intended to suggest that the developers are more important than others or that lenders should have a lower priority than the association. First, the developer, which under the Uniform Act we call a Declarant. Declarant declares the declarations that's why we call it the declarant. The Declarant gets flexibility and protection. That's probably the most important benefit of the Act to a developer.

Let me point out to you that on the disclosure principle of the Act we go a long way to separate what goes into the Declaration, which gets reported in the land record on the one hand, from what is meaningful information to a perspective buyer or a unit lender on the other hand. We see the Declaration as being a title document, we don't typically ask home buyers to read title documents. We leave that to abstractors and lawyers, and title insurance companies, they comment on them and they may call something to the attention of a buyer or owner but they're not trained to read those types of documents. Those other folks are.

So, in the first instance we focus on the declaration of the Uniform Act and we say to the developer here's a list of eighteen things that you have to put in every declaration regardless of the type of the project-condo plans, community, co-op, high rise, sub-division, garden apartments, lots, whatever it is under the scope of the act you have to put these things in your declaration. Most of them are pretty basic stuff legally sufficient description of real estate, reference to a plat that shows the boundaries of common interest community, and so forth. But there are a couple of provisions that has to be in the declaration. For title purposes they also have a minor disclosure. As long as developer reserves the right in a declaration to do enumerated events, that developer has a right to do that and that right can not be taken away.

The association says ahah we have wrested control from the associated developer let's take away the developer's rights to build the next building. We call those rights development rights.

Under the Uniform Common Interest Ownership Act the development rights are the rights to

1) Add real estate once identified in the declaration to the common interest community;

2) remove portions of the common interest community from the reach of the declaration;
3) to create units common elements and limited common elements within the region;
4) sub-divide units;
5) to convert units into common elements and vice versa; and as long as the developer specifies in the declaration which or all of those rights it wants to have and the time period in which to exercise them the developer does have those rights. That's a very valuable tool for a developer.

The developer says I'm going to build a 12 story high rise and I'm going to put residential units on all of the floors, the market may change as the project is being build-out, interest rates may change, circumstances may change, outside the project a smart developer will reserve the right to change the size of the units and maybe the floor plans of those units to meet changed market demands.

Becky Bowman: Do you specify a time period that the developer obtain these rights? And how does that work with the representations being made to the purchasers of the units?

Mr. Lisman: Good question for those of you who did not hear the question. Is there a time frame on the exercise on the Developer's rights and how do you deal with the representations that were made to the initial purchasers? Yes, there's time frame when we did the original Uniform Condominium Act we looked intensely at the Virginia Condominium Act which was relatively new at the time and under the Virginia Act it said that those rights can be exercised if at all only within 7 years. We put that in the original Condominium Act and decided after a while that was a really bad idea. Every project is of a different size and complexity. They all change so we finally concluded that the right answer was to say let the developer choose the time period and as long as the developer discloses it, then buyers will know, and they will make a meaningful decision. I've seen documents where the developer's rights have been reserved for 99 years. I've seen disclosure in the public offer statement but I've never seen anybody well and appropriately disclosing a 99 year reservation. I think a 99 year reservation really borderlines in violating the act.

So giving the Developer this flexibility really, really, really is important for developers because they now have a statutory safe harbor which they might not have in common law because judges may say this is unreasonable when the statute says you may do it. In addition to development rights the Act also goes into a concept of special declarant rights. There are too many instances over time where Associations and developers were at odds very early in the process and the Associations tried to stop the developers from finishing the projects. Taking away the right to build Tower C, refusing to let the Developer's construction vehicles on private road way, it goes on and on and on.

So there are a whole bunch of special declarant rights that at least the Act statutorily creates and can not be taken away including the right to complete improvements shown on the plan. A right to go on the common elements for that purpose, it's a pretty extensive list and it's very valuable list because it tells the developers that they are protected. Third point on what the Act is to developers is a statutory right to control the association board for a period of time during build-out and sell-out. The Act is pretty specific about when a certain percentage of the units have been sold that one person has to go on board from among the owners.

Then when a second percentage is reached and so forth until that at a particular point there is a transition where the unit owners have taken control of the Association and there are two important factors here from the Developer's stand point during build-out and sell-out. Controlling the Association, essentially having a veto over the Association, at least with respect to the relationship with the Developer, is a very valuable and comforting asset. But developers don't get away with just getting the asset without having the liability to balance. The liability that balances that right to obtain control are two. One is Directors on the Association Board were appointed by the developer having a higher duty of care than those who are elected by the Unit Owners, they're held to a higher standard. And the second is for so long as the developers retain control

over the board, the statute of limitations doesn't begin to run on claims for construction defects with respect to the common owners.

So let me stop there and move to what the Associations get. Under the Uniform Act they get really two things that they wouldn't otherwise. One is there is an extensive list of the numerated powers of the Association. Power to fine, after notice and opportunity to have been heard. In many States' associations have no authority to fine. There's a Virginia Supreme Court decision that says that only the state could fine. Private associations couldn't. Extensive list of the numerated power, sue be sued, own real estate, convey real estate and so forth, because not all associations are incorporated, and because they are not all incorporated there are a number of issues about the power of an association.

And even if they are incorporated there are a number of issues about of what an association can and can not do. Secondly, and also of great importance, the Uniform Act came up with the concept of the super Lien. The Association has the power to assess, maintenance fees, annual assessments what ever you call them. It has a lien either by statute or common law and the declaration especially if it's a planned community. It says that the Association has a lien against the owners unit or lot for the unpaid assessment. The problem with that, if we stop right there is that more likely than not there's going to be a mortgage on the unit or the lot and that mortgage is going to have a priority ahead of the association's lien.

By analogy we looked to municipal taxes in home mortgages and came up with what we thought at the time a very innovative and good solution. We are now convinced that we are more brilliant than we thought we were. The analogy with home mortgages and taxes is lenders who have a first mortgage will never want to see the property sold for unpaid property taxes, use their powers in mortgaging under the mortgage to pay the taxes and then stick it to the homeowners owner who hasn't paid. They add the balance to the notes of the mortgage. So what we did is we came up with the concept of the super lien. We said that the Association has a priority for unpaid Assessments up to and about equal to 6 months of unpaid assessments and ahead of the first mortgage and what happens of course is the Association contacts the bank, the bank doesn't want to see the unit foreclosed and have their mortgage lowered in priority, the bank advances the unpaid assessments and deals with its delinquent borrower in that context. It really is important for almost every Association that there not be one or two or three people who don't pay their assessments.

These Associations' budgets, and I'm not talking about Columbia where one or two or three people wont' make a difference, I'm talking about the average size Association in the United States today where somebody isn't paying and the Association can't do something that they expect them to do when they adopted the last budget. Otherwise other folks have to subsidize that's not a fair result. So the super lien gives the association some power of great importance. What do lenders get? They get the comfort of good title.

Every state has a law on what lenders can lend for and what collateral they can take and loan value ratios and interest limitations and stuff like that. For a long time there was a question in the legal world as to whether or not you could have what we now label the flying freeholds. That is to say if you have an interest in real estate, the unit that starts on the third floor, your unit doesn't touch the ground it's held up by steel girds, steel girds go into the ground but no part of your unit is attach directly to the ground. The Uniform Act and the predecessor FHA Model Act both legitimize flying freehold. The other area in which they give comfort on title is Unreasonable Restraints on alienation and the Rule Against Perpetuities. For those of you who are lawyers, remember law school was the last time you thought about the Rule Against Perpetuities. Both of those deal with tying interest together over a period of time. In the case of a condominium the tying of the Common Ownership Interest with a unit lasts forever.

We talked about development rights and how important those were to developers and we talked briefly about special declarants rights, of which the developer's rights are a sub-set. Suppose you

are a construction lender, you commit to a 25 million dollar construction loan, ABC Inc. is going to build the XYZ condominium project. The whole project is declared without any phasing or reservation of developers rights, the developer starts construction, starts with the infrastructure the water, sewer, the roads and so forth and about a third through the project the developer goes belly up. The loan got out of balance, there was no way that developer would have 2 nickels to rub together, it just didn't work, so now the lender is sitting there saying I've got a project that's 1/3 built. What am I going to do?

Well, one thing the lender could do is go to its own default department and deputize someone there to be the new developer and build the project up. That's happened but lenders don't like to do that because that's not their business, because they are not developers. They are lenders. So the second alternative is to find someone to buy the project. That's where the rub comes. That buyer is going to want to be able to stand in the shoes of the original developer in so far as having all of the rights of the original developer, but if that subsequent developer thought about it for more than 7 seconds, the subsequent developer wouldn't want to have all of the liabilities of the failed original developer. But one of the issues is, should that subsequent developer be responsible for the warranty obligations of the failed developer? And then, just to stir the pot a little more, think of the poor lender.

Because, if the lender, by transferring the developing rights to a successor developer it's deemed itself to be the successor developer, now there are 2 successor developers. If that lender is a successor developer it's the biggest target in town and everything that's wrong with that project is going to result in a law suit with the bank. Now if you want banks to lend to people who build common interest communities then you've got to give them some protection. What we came up with was the concept of Transfer of Special Declarant Rights, which says that if a lender takes the developer's special declarant rights at the time the loan is given and then after default transfer them without exercising them, then that lender is not a successor declarant, and has no liability for what the original developer did or did not do or the subsequent developer will do or doesn't do. It's a way to encourage lenders to lend and a way to make sure that failed projects at least in the construction phase find a new home and a new developer so that they could be built out.

Third, five unit condominium projects, row houses, one right next to the other there's a leak in the roof and the insurance doesn't cover it so the president of the association walks down the street to the bank and says we need a $100,000 to replace the roof, the lender looks at the president of the association and says, great we will be pleased to make you the loan, you have five owners, that's fine just get all five owners to sign the loan. It can be done but it is really difficult and why does the lender say that he wants all five units to sign the mortgage? Because in a condominium the association doesn't own the common units, the unit owners own them. How can an Association give a mortgage on the units, only the unit Owners can so the president rings the door bells and comes back to the bank and says I can't get everybody to sign but we still need the new roof then the bank says no problem I'll give you the money just sign this guarantee right here. The treasurer would have to sign the guarantee too. People don't volunteer for those kinds of reasons. So that left the association between a rock and a hard place especially when the circumstances are dramatic where do you get the money from?

So the Uniform Act says what if the association has a condo playing community collateral? That's really its most valuable asset. The most valuable assess in the association was its ability to assess its members. Backed up by that Assessment plan including a 6 month priority. So the uniform act say that if the declaration authorizes it, the association may pledge the income stream of the association as collateral, it's great for the bank and also great for the association because it means that you don't have to go through all kinds of silly hoops and there's a statutory basis for doing this. We do association loans all the time in states where there is a uniform act, and in states where there isn't, but it's a lot more comforting to the lender when you have this statutory basis.

Finally, what do the owners get? First they get a public offering statement. They're buying from

the developer, the developer is required to deliver the purchaser the public offering statement. Understanding what the contract purchaser says there's a contract decision period measured from when the buyer gets the public offering statement. It's a disclosure document we go on in great length about what it is that is suppose to go in the disclosure document. But from a practical perspective it's the kind of information that you or I, if we were going to be buying in a common interest community, would want to know about. Public offering statement is real meat and potatoes.

If you are buying a resale not from the developer but from another unit owner you get a resale certificate. Some what less information than a public offering statement but none the less very meaningful information.

Secondly buyers from the developers get statutory warranties. If there's a model that the unit owner is showing off then the unit that gets actually sold needs to conform to what that actual model looks like, if there are representations made what the units will be and what will be in them and what the view will be those expressed warranties and representations are actionable.

Third there is a requirement that plans be labeled "must be built" or "need not be built" so that the swimming pool or the tennis court, golf course, recreational building whatever it may be shows up on that nice glossy brochure. There has to be a label on there showing these people that I have no intention of building it. Finally for those of you who have experience in condominiums, in planned communities, one of the things you will notice when you compare documents, for what might other wise be physically identical projects, is that votes in the association common expense liability in the condominium, and ownership interest in the common owners, are treated differently.

Under the old FHA Model Act which was the law and 2/3 of the states used until the Uniform laws started to be adopted, it said that those who we call now allocated interest have to be the same for every unit. That is to say if it was 3.4% Ownership Interest in the common elements, it's 3.4% interest common expense liability and 3.4% of the votes whatever the allocations may be. The problem with that is it does not make a whole lot of sense in these communities frequently in planned communities 1 unit, 1 vote or the amount of expenses it pays in assessments in the associations so one of the great steps forward in the Common Interest Ownership Act is this creation of concept of allocated interests and allowing the developer to specify in the declaration the basis for the allocations, so that more often than not the uniform state gets 1 unit and 1 vote without regard to the size of its common elements.

Its common expense liability is probably more lined up with the appropriate share of the common expenses, the replacement size of the value, and the ownership of the common elements may be based on the original pricing but the advantage of the allocation that way is that it fits better with reality. It stops forcing round pegs into square holes. I've got one more topic that I want to talk about when we wrote the original Uniform condominium Act and even when we were doing the original version of the Common Interest Ownership Act the big issue in the world for common interest communities was the developer overreaching.

That issue hasn't gone away, but it still was the biggest issue, every other issue paled in comparison so much of those laws were written to deal with overreaching developers and I think that you will discover that if you ask folks practicing in the states with the law, the developer overreaching is now not an issue. But in the last 5 or 10 years, another issue has risen we didn't anticipate when we started writing these laws in the early 70's, and that is overreaching or perceived overreaching by the board and prospective unit owners.

It is really a hot button issue and I say perceived because in some cases I don't think that it's real but in other cases I know that it is real so we now have a committee that's hard at work drafting what we call a Homeowners Bill of Rights a lot of it is procedure stuff. In the procedural stuff is a lot of substance by way of example requiring the board to give notice to the unit owners before adopting the rule, requiring the association to give notice to the unit owners to before

commencing litigation, mandating that an association can not act arbitrarily, requiring open board meetings, dealing with the whole contentious issue of foreclosures with regard to assessments needs. You have figured out and we have too that associations come in all sizes and one law has to fit all sizes so there's a lot of flexibility built into what we are doing and what we have done to achieve positive results.

For more information, please check out the articles listed below:

- Maryland Task Force on Common Ownership Communities to Hold Public Hearings - Jeanne N. Ketley
- The National Conference of Commissioners on Uniform State Laws - NCCUSL - UCIOA
- Robert H. Nelson - proponent for creation of homeowner association private governments
- Maryland Homeowner's Association
- Maryland Dept of Housing & Community Development (DHCD) Task Force on Common Ownership Communities
- Maryland DHCD Task Force on Common Ownership Communities Appointees - 2006
- Maryland Mediation and Conflict Resolution Office - Louis G. Gieszl, Deputy Director
- Issues Homeowners Have With Common Interest Developments - Bob Lewin
- A New Jersey Homeowner Association Bill Announcement - Wilfredo Caraballoo & Joseph V. Doria Jr.
- Carl H. Lisman - Lisman, Webster, Kirkpatrick & Leckerlin

Submitted Files

Description
The Uniform Common Interest Ownership Act (UCIOA) - A presentation Carl Lisman a Uniform Laws Commissioner and Treasurer of the National Conference of Commissioners on Uniform State Laws.

REFERENCE SOURCE: 4/3/2011
http://www.ahrc.se/new/index.php/src/news/sub/article/action/ShowMedia/id/2929