

UNIFORM COMMON INTEREST OWNERS BILL OF RIGHTS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

WITH PREFATORY NOTE AND COMMENTS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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MEETING IN ITS ONE-HUNDRED-AND-SEVENTEENTH YEAR
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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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BILL OF RIGHTS ACT**

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PREFATORY NOTE AND SUMMARY
THE 2008 COMMON INTEREST OWNERS BILL OF RIGHTS ACT or “UCIOBORA”

The 2008 Amendments to the Uniform Common Interest Ownership Act – In 2008, the Uniform Law Commission (the “ULC”) approved amendments to the Uniform Common Interest Ownership Act (“UCIOA”), after a four year Drafting Committee effort. Colloquially, this has become known as “UCIOA 3.0.”

UCIOA 3.0 primarily addresses a range of significant controversies between unit owner associations and individual members of those associations that have arisen in the years since the ULC last considered amendments to UCIOA in 1994. To a lesser degree, these amendments also address a range of other matters affecting common interest communities – that is, condominiums, cooperatives, and planned communities – that practitioners have identified throughout the country over the last decade.

Despite the many years of drafting efforts beginning in 1976 with The Uniform Condominium Act and culminating in the 1994 amendments to UCIOA, it had become increasingly clear by the time the Drafting Committee was created in 2005 that major tensions remained in the Common Interest Community field that neither UCIOA or any of its constituent Acts – nor most State statutes in this field – adequately addressed. Those tensions principally involved the perception that individual unit owners were often unduly disadvantaged in their dealings with the elected directors and employee/managers of unit owner associations.

Even in those few states that had adopted UCIOA more or less intact, and therefore were able to apply the detailed provisions of that Act to association activities, there has been a growing focus, both in the media and in professional conferences, on the intensity of owner/association disputes. State legislators were besieged with lobbying efforts to adopt narrowly focused special interest statutes intended to fix one or another association ‘problem’. Even the federal government became involved, enacting a federal statute to insure that associations of every form of common interest community must permit the display of the American flag on units, and another one that enabled individual unit owners to purchase individual cable television systems, notwithstanding widespread prohibitions on such purchases by unit owner associations.

Accordingly, UCIOA 3.0 systematically identified those areas where there have been allegations that those who control the decision-making apparatus of associations have either abused the rights of individual unit owners, or suffer from such inadequate legislation that they are unable to adequately assist their owners. The list is considerable and includes at least these matters:

The Need for a Free-Standing Home Owner Bill of Rights - The ULC recognized that simply amending UCIOA or the constituent Acts – Uniform Condominium Act, Uniform Planned Community Act and Model Real Estate Cooperative Act – to add enhanced provisions for each of those Acts might not offer a sufficiently broad set of statutory options for consideration by State legislators around the United States. The reason is that each of these complex Acts has its detractors who have historically blocked adoption of these Acts in any state

because of the narrow interests of that stakeholder interest group. Thus, even in the many states that adopted the 1978 version of UCA, the many benefits of that Act – especially as amended in 1994 – have not been broadly realized for most of the common interest communities in those states, in part because those states have not generally adopted the 1994 amendments to UCA, and in part because UCA does not apply to the far more common ‘planned communities’ in those States, or to cooperatives.

Accordingly, it is common today to find one body of law in a state that applies to unit owner associations for condominiums in that state and an entirely different – and much less developed – body of law applicable to unit owner associations for either cooperatives or planned communities in the same state, when the unit owners in all three forms of ownership experience identical issues.

Further, ULC acknowledges that it will often not be feasible to enact UCIOA 3.0, in part because of the difficulty drafters in the States may encounter in integrating any new adoption of the existing Uniform Acts with the laws that may already exist in a particular state.

For these reasons, ULC promulgated a free-standing and relatively short Uniform Act that addresses all of the ‘association versus unit owner’ issues touched on during the drafting of the 2008 UCIOA amendments. The free-standing Act is known as the Uniform Common Interest Owners Bill Of Rights Act or “UCIOBORA”. While not all sections of UCIOBORA are identical to UCIOA 3.0, the concepts underlying each Act are the same, and are adjusted simply to recognize the simplified nature of UCIOBORA.

ULC believes that in a state that had already adopted UCIOA, the better choice for that State would be to adopt UCIOA 3.0, rather than the UCIOBORA.

However, in states where none of these Acts has been adopted, or where only an early version of the Condominium Act had been adopted, it should be relatively easy to adopt UCIOBORA. This outcome would forego the considerable benefits that the more comprehensive statutes afford; however, it would provide the legislatures in the several states a ready means of addressing these currently controversial political issues, without engaging the other stakeholders who might be inclined to resist adoption of the more comprehensive Acts.

Highlights of the Act

Highlights of the new UCIOBORA are:

- Includes new key definitions, such as “common interest community” and “record.”
- The new Act applies to all common interest communities in the state, whether or not existing prior to enactment of UCIOBORA in a state. However, because of concerns that the statute not be construed as impairing contracts, not all sections apply to all pre-act communities.
- Powers and duties of a unit owners association and the executive board are outlined.

Treatment of association bylaws, rulemaking, operation and governance, notice methods, unit owners and board meetings, and meeting and voting procedures are also provided, as are governing provisions for the adoption of budgets and special assessments.

- UCIOBORA encompasses the authority to discipline unit owners, within limits, for failure to pay assessments, and the executive board of a unit owners association is given flexibility in determining whether to enforce the letter of each provision of its declaration, bylaws, or rules, or decline to enforce or compromise on such. The right of an association to proceed in foreclosure on a lien against a unit owner is revised and limited, and the act provides priority for the application of delinquent sums.
- Record keeping requirements and guidance are provided in greater detail, and are drawn from FOIA requirements and other sources.
- Procedures are provided for the removal of officers and directors of an association, along with certain protections for declarant-appointed directors. Removal procedures must be posted as part of the meeting notice, and the affected director or officer must have the opportunity to be heard.

Summary - Both UCIOA 3.0 and UCIOBORA address critical aspects of association governance, with particular focus on the relationship between the association and its individual members, foreclosures, election and recall of officers, meetings and treatment of records. There are a significant number of other amendments, style and substantive, to clarify and modernize the operation and governance of common interest associations. The new acts will better serve those governed by their provisions, and should be considered in every state.

Parallel Citation Table - The UCIOBORA sections, as they correspond to UCIOA Version 3.0, are:

| UCIOBORA Section | Corresponding UCIOA 3.0 Section | Section Topic |
|-------------------------|--|--|
| Section 1 | Section 1-101 | Short Title (Adds Bill of Rights) |
| Section 2 | Section 1-103 | Definitions |
| Section 3 | Section 1-104 | No Variation By Agreement |
| Section 4 | Section 1-113 | Obligation of Good Faith |
| Section 5 | Section 1-201 | Applicability to New Common Interest Communities; Effect of Amendments |
| Section 6 | Section 1-205, 1-206 | Applicability to Pre-Existing Common Interest Communities |
| Section 7 | Section 1-209, 1-210 | Exempt Real Estate Arrangements |
| Section 8 | Section 3-102 | Powers and Duties of Unit Owners Associations |
| Section 9 | Section 3-103(a) and (b), 3-101 | Executive Board Members and Officers |
| Section 10 | Section 3-106 | Bylaws |

| | | |
|--------------------|---------------------------|--|
| Section 11 | Section 3-108(a) | Unit Owner Meetings |
| Section 12 | Section 3-108(b) | Meetings of Executive Board and Committees |
| Section 13 | Section 3-109 | Quorum |
| Section 14 | Section 3-110 | Voting; Proxies; Ballot |
| Section 15 | Section 3-116(n) | Limitation on Foreclosure |
| Section 16 | Section 3-118 | Association Records |
| Section 17 | Section 3-120 | Rules |
| Section 18 | Section 3-121 | Notice to Unit Owners |
| Section 19 | Section 3-122 | Removal of Officers and Directors |
| Section 20 | Section 3-123 | Adoption of Budgets; Special Assessments |
| Section 21 | Section 4-117, 1-114 | Effect of Violation on Rights of Action; Attorney's Fees |
| Section 22 | Section 1-108 | Supplemental General Principles of Law; Conflicts |
| Section 23, 24, 25 | Section 1-110, 1-116, n/a | Uniformity of Application, Relation to ESIGN, and Effective Date |

UNIFORM COMMON INTEREST OWNERS BILL OF RIGHTS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Common Interest Owners Bill of Rights Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Assessment” means the sum attributable to each unit and due to the association pursuant to the budget adopted under Section 20.

(2) “Association” means the unit owners association.

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

(4) “Common expense liability” means the liability for common expenses allocated to each unit.

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

(6) “Common interest community” means real estate described in a declaration with respect to which a person, by virtue of the person’s ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in that declaration. The term does not include an arrangement described in Section 7. For purposes of this paragraph, ownership of a unit does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.

(7) “Declarant” means a person or group of persons acting in concert that:

(A) as part of a common promotional plan, offers to dispose of the interest of the

person or group of persons in a unit not previously disposed of; or

(B) reserves or succeeds to any declarant right.

(8) “Declaration” means the instrument, however denominated, that creates a common interest community, including any amendments to that instrument.

(9) “Executive board” means the body, regardless of name, designated in the declaration or bylaws which has power to act on behalf of the association.

(10) “Limited common element” means a portion of the common elements allocated for the exclusive use of one or more but fewer than all of the units.

(11) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

[In the case of a land trust, the term means the beneficiary of the trust rather than the trust or the trustee.]

(12) “Record”, used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) “Residential purposes” means use for dwelling or recreational purposes, or both.

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

(15) “Unit” means a physical portion of the common interest community designated for separate ownership or occupancy.

(16) “Unit owner” means a person that owns a unit.

Comment

1. Regardless of how terms are used in a project's governing instrument, defined terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

Example: A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. Definition (6), "Common interest community" creates one comprehensive definition which is used through the Act, to refer collectively to the three particular forms of common interest community: condominiums, cooperatives, and planned communities.

Each of those forms in turn, may have a separate definition under other law of the state, but this act applies to all arrangements which meet this definition. Thus, there are but three forms of common interest community: (1) condominiums; (2) cooperatives; and (3) everything else.

The definition of "common interest community" accomplishes two other main goals. First, it makes clear that the mutual obligations of unit owners – an obligation which arises "by virtue of" that ownership – to pay a share of the project's expenses may include a share of services provided to unit owners or other expenses provided either to the common elements or the units. Second, the definition makes clear that several common real estate arrangements described in Section 7 are excluded from the definition. Section 7 thus resolves the question of whether cost-sharing arrangements between an association and either another association or a third party require creation of a new association [they do not]. Section 7(b) also confirms that a variety of simple, traditional arrangements, such as a shared driveway, party wall, or shared well, which some have argued would technically satisfy the definition of "common interest community" in the Act as originally drafted, are not subject to the Act unless the drafter chooses that result.

3. Definition (7), "Declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the common interest community, but who are not intended to be charged with the responsibilities imposed on all declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold common interest communities, ground lessors. Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because these units were "previously disposed of" when originally conveyed.

If the association, itself, or in conjunction with another declarant, is offering units for sale to others, and if those units have not previously been sold or otherwise disposed of, then the association itself is a declarant.

Finally, a person who, while in control of the association, chooses not to exercise that control, is still a declarant.

4. Definition (8), “Declaration,” is defined as “any instruments, however denominated, that create a common interest community, including any amendments to those instruments.” Thus, the term would not only include the traditional condominium declaration with which most practitioners are familiar, or the declaration of covenants, conditions, and restrictions (CC & R’s) so common in planned unit developments. It would also include, for example, a series of deeds to units with common mutually beneficial restrictions, or to any other instruments which create the relationship which constitutes a common interest community. If those recorded instruments create that relationship, then those documents constitute a declaration and must contain, for new projects, the information required by Section 2-105.

The declaration of a cooperative does not include the proprietary leases of the individual units, although a sample of such a lease might be attached as an exhibit to the declaration.

Similarly, the definition of “declaration” of any common interest community does not refer to the bylaws of the association or the documents creating the association. Such documents do not “create” the common interest community, but merely regulate its use after creation. The bylaws may, but need not be, an exhibit to the declaration.

5. The definition (13) of “residential purposes” includes “recreational purposes.” This common sense definition is used in order to avoid repeated use of a lengthier defined term, such as “residential or consumer owned recreational purposes.”

The Act contemplates that “recreational purposes” would be “consumer owned” recreational purposes commonly marketed for sale to individual owners – uses such as dock spaces for boats, campgrounds, airplane tie downs, etc. By including these kinds of uses within the definition, the Act intends to provide the same consumer protections which it offers to individual residential purchasers – persons who typically buy for their own use – as distinguished from commercial users. Thus, the definition would exclude commercial recreational facilities which are operated as a business or available to the public on a fee for use basis, such as movie theaters, athletic or country clubs, golf courses, and the like.

Further, the definition is not intended to override, and thus perhaps expand on, existing local zoning ordinances which permit only “residential” use.

However, by including these recreational purposes within the defined term “residential purposes,” no change in the plain and traditional meaning of the word “residential” is intended. Thus, the drafters recognize that owners of residential units – *i.e.*, a unit which is designed for use as a residential dwelling – may hold those units for investment purposes, or that individual owners may occasionally or regularly rent their units on an individual or rental pool basis. This is a common practice, for example, with residential communities built near ski or ocean resort areas. Rental occupancy does not change the residential character of the common interest community, or the consumer protections that must be offered to purchasers.

6. Definition (15), “Unit,” describes a tangible, physical part of the project rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a “time-share” arrangement in which a unit is sold to 12 different persons, each of whom has the right to occupy the unit for one month does not create 12 new units – there are, rather, 12 owners of the unit.

Similarly, in a cooperative, the unit remains a physical part of the real estate; its legal title is vested in the association while the right to possession is held by the unit owner under a proprietary lease. The definition, however, makes it clear that the association’s interest in the unit is unaffected by transfers of interests in that unit to or by unit owners. The unit owner’s interest is a composite interest, which consists of an ownership interest in the association, coupled with the right to occupy a unit pursuant to a lease.

The definition makes clear that in the case of a cooperative, if a unit owned by a unit owner is sold, conveyed, or encumbered or otherwise transferred by the unit owner, the interest in such unit which is affected is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit.

7. Definition (16), “Unit owner,” contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities must be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example,) as long as the seller holds title.

The definition makes it clear that a declarant, so long as he owns units in a common interest community, is the unit owner of any unit created by the declaration, and is therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

In the special case of a cooperative, the declarant is treated as the owner of a unit or “potential unit” to which allocated interests have been allocated, until that unit is conveyed to another.

By defining the term “assessment” as the “sum attributable to each unit and due to the association pursuant to the budget...,” the Act ties the term directly to the common expense liability of each unit for the unit’s share of the association budget. It also distinguishes each unit’s assessment from the other sums that may be due from a unit owner which are not a part of the association’s budget and therefore are not included in that unit’s assessment.

The definition of “bylaws” reflects the common functional meaning of that term, regardless of what different phrase might be used in the governing instruments to describe this instrument. The definition makes clear that: (i) the bylaws is the instrument that “contains the procedures for conduct of the affairs of the association” - as distinguished from the substantive role played by the declaration; (ii) the functional role of the bylaws remains consistent under the Act even if the association is organized as, for example, a limited liability company where the

term “bylaws” is not used in the statute authorizing such entities and the instrument serving that function is identified as an “operating agreement”; and (iii) amendments to the bylaws are incorporated into the amended document for purposes of this Act.

However, regardless of the name of the instrument used in the declaration, this Act mandates the minimum contents of the bylaws; *see* Section 10. Further, any provision of the State’s statutes governing the content of the bylaws or, as appropriate, the operating agreement, to the extent inconsistent with the requirements of Section 10, would be overridden by this Act.

The definition of “Record” in Section 2(12) makes clear that the definition applies only when the term is used as a noun. The definition derives directly from federal and statute statutes governing electronic signatures; the term is commonly substituted for the word “writing” or “written” in other law.

The definition of “Rule” in Section 2(14) focuses on the activities to which they apply. That is, rules either “govern the conduct of persons” or they “govern...the use or appearance of property.” In either case, the policy of the Act as expressed in Section 17 is that such restrictions ought to be the subject by unit owner review before adoption, and they must in all instances be reasonable; *see* Section 17(h).

In contrast, Section 17(g) states that the “association’s internal business operating procedures need not be adopted as rules”. This distinction permits the association’s executive board or its management company to adopt or amend at will the wide variety of internal management procedures that govern the association’s daily business activities – as opposed to the conduct of persons or the use and appearance of property. It may be helpful to provide a few examples of what the drafters contemplate might be typical internal business procedures that need not be adopted as rules:

- The association wishes to solicit bids from potential contractors for a particular project or service and adopts a procedure for soliciting, reviewing and accepting those bids.
- The board approves a management contract with an outside management company. The management contract contains various procedures governing how the manager is going to carry out its duties with regard to the management of the association.
- The recreation committee adopts a sign-up procedure for using the pool table in the clubhouse.

SECTION 3. NO VARIATION BY AGREEMENT. Except as expressly provided in this [act], the effect of its provisions may not be varied by agreement, and rights conferred by it may not be waived.

Comment

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

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

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

SECTION 4. OBLIGATION OF GOOD FAITH. Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement.

Comment

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

SECTION 5. APPLICABILITY TO NEW COMMON INTEREST COMMUNITIES; EFFECT OF AMENDMENTS. Except as otherwise provided in this [act], this [act] applies to all condominiums in this state that may be used for residential purposes and to all other common interest communities that contain 12 or more units that may be used for

residential purposes and are created within this state after [the effective date of this [act]].

Amendments to this [act] apply to all common interest communities that contain 12 or more units that may be used for residential purposes and are created after [the effective date of this [act]] or are subjected to this [act] by amendment of their declaration, regardless of when the amendment to this [act] is adopted in this state.

Comment

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

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

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

Accordingly, the philosophy of this part reflects a desire to maximize the uniform applicability of the Act to all common interest communities in the enacting State, while avoiding the difficulties raised by automatic application of the entire Act to preexisting common interest communities. This Act achieves that balance by, first, selective inclusion of provisions in this Act, and second, making this Act apply only to events and circumstances occurring after the Act’s effective date. The comments to Section 6 develop this analysis in further detail.

In carrying out this philosophy with respect to “new projects,” Section 5 of the Act applies to all residential common interest communities “created” within the State after the Act’s effective date.

2. The second sentence makes clear that if an amendment to the Act is adopted after the Act is initially adopted in any State, the same body of law will thereafter apply to all common interest communities created under the Act or subjected to it. This is the corporate model, and avoids perpetuating the retroactivity issue. The issue of how the Act would apply to common interest communities created **before** the original effective date of the Act is addressed in Section 6.

SECTION 6. APPLICABILITY TO PREEXISTING COMMON INTEREST COMMUNITIES.

(a) This [act] applies to all common interest communities that contain 12 or more units that may be used for residential purposes created in this state before [the effective date of this [act]]; but this [act] applies only with respect to events and circumstances occurring after [the effective date of this [act]] and does not invalidate existing provisions of the declaration, bylaws, or plats or plans of those common interest communities.

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

Comment

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

2. The Act adopts a novel three-step approach to common interest communities created before the effective date of the Act. First, all provisions of the Act automatically apply to “old” common interest communities, but only prospectively. Second, the Act applies only in a manner which does not invalidate provisions of declarations and bylaws valid under “old” law. Third, under Section 6(b), owners of “old” common interest communities may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by “old” law, so long as (a) the amendment is adopted in accordance with the procedure required by “old” law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act.

SECTION 7. EXEMPT REAL ESTATE ARRANGEMENTS.

(a) An arrangement between the associations for two or more common interest

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

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

(c) A covenant that requires the owners of separately owned parcels of real estate to share costs or other obligations associated with a party wall, driveway, well, or other similar use does not create a common interest community unless the owners otherwise agree.

Comment

This section addresses once again the scope of the Act. It should be considered in connection with the revised definition of “Common Interest Community”. The subsections address three separate aspects of this issue:

- Whether contractual arrangements for cost sharing between two or more common interest communities require creation of a third separate common interest community; and
- Whether contractual arrangements for cost sharing between an association and an owner of real estate located outside the common interest community’s boundaries require creation of a separate common interest community.
- Whether various shared real estate arrangements – such as party walls or shared driveways – are even subject to this Act.

The following analysis may help frame the issues.

First, there appear to be numerous situations in which a declaration of easements or a

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

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

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

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

Several provisions of the Act offer remedies for circumstances where the two associations may not have equal bargaining power, and those provisions would apply here with equal force. By way of example, if the arrangement were created for purposes of avoiding the limitations of the Act, if the organizers of the arrangement had not acted in good faith, or if the allocated interests between the associations were unlawful, the mandates of Sections 3, 4, and 21 would apply.

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

Finally, in the case of the arrangements described in subsection (c), while these various forms of simple shared arrangements might arguably satisfy the definition of “common interest community,” there is no policy reason to vary common practice, which is to treat these arrangements as governed by the agreement of the parties, supplemented by common law. Accordingly, subsection (c) expressly excludes these arrangements from the Act.

SECTION 8. POWERS AND DUTIES OF UNIT OWNERS ASSOCIATION.

(a) Regardless of the powers and duties of the association described in the declaration and bylaws, the association:

- (1) shall adopt and may amend bylaws and may adopt and amend rules;
- (2) shall adopt and may amend budgets;
- (3) 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;
- (4) promptly shall provide notice to the unit owners of any legal proceedings 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;
- (5) shall establish a reasonable method for unit owners to communicate among themselves and with the executive board concerning the association;
- (6) may suspend any right or privilege of a unit owner that fails to pay an assessment, but may not:
 - (A) deny a unit owner or other occupant access to the owner's unit;
 - (B) suspend a unit owner's right to vote;
 - (C) prevent a unit owner from seeking election as a director or officer of the association; or
 - (D) withhold services provided to a unit or a unit owner by the association if the effect of withholding the service would be to endanger the health, safety, or property of any person; and
- (7) may exercise all other powers that may be exercised in this state by organizations of the same type as the association.

(b) The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commencing an action for a violation

of the declaration, bylaws, and rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

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

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

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

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

(c) The executive board’s decision under subsection (b) 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.

Comment

This section contains a shortened list of powers of the association, when compared to Section 3-102 of the Uniform Common Interest Ownership Act. It assumes the declaration may have provisions listing a variety of other enumerated powers. The important point is that the powers listed in this section may not be limited in the governing instruments.

Section 8(a)(6) allows the executive board to “suspend and right or privilege of a unit owner that fails to pay an assessment”; this is similar to statutes in other States; *compare, e.g.*, North Carolina § 47F-3-102 (11). However, unlike other States, Section 3-102 (a)(19) specifically precludes suspending the right to vote or the right to run for an association office if a unit owner has not paid her assessments.

Subsection (b) addresses the important question of whether the Association may

“selectively enforce” its rules or whether it is obliged to enforce the rules to the letter in every instance, at the risk of being found by a court to have failed to meet its fiduciary duties, or to have waived its right to enforce the rules in some future instance as a consequence of its failure to enforce the rules in this instance.

In evaluating the alternative outcomes here, the extreme positions are clear. On the one hand, one could assert that the Board’s obligation is to strictly enforce or attempt to enforce every alleged breach of the rules, so that the board can never be accused of selective enforcement, favoritism, breach of duty, or waiver.

Alternatively, the board could be held free of any obligation to enforce at any time, without in any way constraining its ability to enforce the same rules at a later time against the same or different persons in those cases where the board decided it would do so.

In the middle is a rule of law that would guide the Board’s exercise of discretion. There are a number of theoretical standards that might guide the Board’s discretion; they include: (i) the ‘business judgment rule’; (ii) arbitrary and capricious; (iii) reasonableness; (iv) bad faith; (v) discriminatory or other improper purposes; (vi) “best interests of the association”; (vii) “good cause”; or (viii) perhaps the Latin maxim “*De minimus non curat lex*” – the notion that “the law does not care about insignificant matters.”

There have also been legislative proposals in various states in response to the issue of discretionary rules enforcement, although there does not appear to be a consensus position. Several of those proposals were considered by the drafters.

The text in subsection (b) represents a middle position to guide an Executive Board as it considers whether or how to enforce a particular rule. The text identifies those circumstances where the Board might conclude, in any given case, not to enforce the rules as they have been drafted. These criteria are premised, of course, in all instances on the recognition that the decision-making process of the Executive Board is subject to the “Business Judgment Rule”; *see* Comments to Section 9.

In those circumstances where the Board declines to enforce a rule, nothing in this Act precludes an individual unit owner from seeking independently to enforce the rules in a particular instance pursuant to Section 21.

While subsection (f) deals with the executive board’s discretion in enforcing its rules in any single instance, subsection (g) states the basic principle that the board’s decision in one instance is not binding in another future instance, under another set of circumstances. At the same time, the subsection emphasizes that the Board may not act in an arbitrary or capricious fashion.

As with every provision of this Act, Section 22 makes clear that “principles of law and equity...supplement the provisions of this Act, except to the extent inconsistent with this Act”. In the case of Section 8(g), it is clear that other principles of law and equity, including the law of waiver and course of performance, would supplement this section. Such principles have often

been applied by courts in appropriate circumstances as they consider the extent to which an absence of enforcement over time has modified recorded covenants affecting real estate, and this Act does not modify those principles, except as stated in (g).

SECTION 9. EXECUTIVE BOARD MEMBERS AND OFFICERS.

(a) In the performance of their duties, officers and members of the executive board appointed by the declarant shall exercise the degree of care and loyalty to the association required of a trustee. Officers and members of the executive board not appointed by the declarant shall exercise the degree of care and loyalty to the association required of an officer or director of a corporation organized, and are subject to the conflict of interest rules governing directors and officers, under [insert reference to state nonprofit corporation law]. The standards of care and loyalty described in this section apply regardless of the form in which the association is organized.

(b) An association shall have an executive board created in accordance with its declaration or bylaws. Except as otherwise provided in the declaration, the bylaws, subsection (c), or other provisions of this [act], the executive board acts on behalf of the association.

(c) The executive board may not:

- (1) amend the declaration except as provided by law other than this [act];
- (2) amend the bylaws;
- (3) terminate the common interest community;
- (4) elect members of the executive board, but may fill vacancies in its membership for the unexpired portion of any term or, if earlier, until the next regularly scheduled election of executive board members; or
- (5) determine the qualifications, powers, duties, or terms of office of executive board members.

Comment

1. Subsection (a) makes members of the executive board appointed by the declarant liable as trustees of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

2. Subsection (a) is intended to conform the Act to expectations of owners, members of executive boards, and courts. The duty owed by an elected member of an executive board ought to parallel the standard imposed on directors of nonprofit corporations. By making reference to the nonprofit corporate model, members will also obtain the benefits of the business judgment rule, now commonly applied by courts in the nonprofit context; *see, for example*, *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530 (1990).

The Act relies on the business judgment rule as the basis for evaluating the actions of the Board. “As long as directors of a corporation decide matters rationally, honestly, and without a disabling conflict of interest, the decision will not be reviewed by the courts.” *Atkins v. Hibernia Corp.*, 182 F3d 320, 324, (5th cir. 1999) quoted in Block, Barton & Radin, *The Business Judgment Rule*, (5th ed. 1998) in 2002 Supp. Page 6.

The business judgment rule is a tool of judicial review, not a standard of conduct. The rule (1) shields directors from liability and protects decisions made by directors when the rule’s elements – a business decision, disinterestedness, and independence, due care, good faith and no abuse of discretion – are present and a challenged decision does not constitute fraud, illegality, ultra-vires conduct or waste, and (2) creates a presumption that directors have acted in accordance with each of the elements of the rule.

[Block et al at page 110.] In its 2007 decision, the Supreme Court of New Jersey confirmed the continuing vitality of the business judgment rule as the basis for evaluating the activities of the executive board of a unit owners association. *See Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association*, 192 N.J. 344; 929 A.2d 1060 (2007); the decision is expected to be widely followed.

The “fiduciary” standard of care for declarant-appointed directors is appropriate. The law contemplates many forms of fiduciary relationships; among them, the trustee’s duty is the highest.

SECTION 10. BYLAWS.

(a) The bylaws of the association must:

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

(2) provide for election by the executive board or, if the declaration requires, by the unit owners, of a president, treasurer, secretary, and any other officers of the association the bylaws specify;

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

(4) specify the powers the executive board or officers may delegate to other persons or to a managing agent;

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

(6) specify a method for the unit owners to amend the bylaws;

(7) contain any provision necessary to satisfy requirements in this [act] or the declaration concerning meetings, voting, quorums, and other activities of the association; and

(8) provide for any matter required by law of this state other than this [act] to appear in the bylaws of organizations of the same type as the association.

(b) Subject to the declaration and this [act], the bylaws may provide for any other necessary or appropriate matters, including matters that could be adopted as rules.

Comment

1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various “housekeeping” matters with respect to the common interest community. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The Act does not prevent the bylaws from permitting the executive board to delegate all its powers to a manager or to another entity. Whether or not such a delegation were to take place, the law of principal and agent would apply to that relationship, and the executive board would remain responsible for fulfillment of its duties imposed under this Act.

3. As the definition of the term “bylaws” makes clear, the bylaws are intended to address

procedural matters affecting the governance of the association. They are not intended to contain matters that might affect title to real property nor any of the covenants restricting the use of the units or the common property. That is one of the primary reasons why the Act requires that the declaration be recorded on the land records, while the bylaws need not be recorded.

4. The bylaws might include a broad range of qualifications for directors and officers. This Act neither imposes constraints on what these qualifications might be or mandates any such qualifications, other than the requirement that, after the period of declarant control ends, a majority of directors must be unit owners. Other law, of course, such as laws prohibiting various forms of discrimination, may independently impose limits on permissible qualifications.

5. Section 10(a)(6) requires the bylaws to state a method by which the unit owners may amend the bylaws. This provision complements the text in Section 9(c)(2) that precludes the executive board from amending the bylaws.

SECTION 11. UNIT OWNER MEETINGS.

(a) 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.

(b) 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 unit owners having at least 20 percent, or any lower percentage specified in the bylaws, of the votes in the association request that the secretary call the meeting. If the association does not notify unit owners of a special meeting within 30 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 subsection (c) may be considered at a special meeting.

(c) An association shall notify unit owners of the time, date, and place of each annual and special unit owners meeting not less than 10 days or more than 60 days before the meeting date. Notice may be by any method reasonably calculated to provide notice to the person. The notice for any meeting must state the time, date, and place of the meeting and the items on the agenda, including:

- (1) a statement of the general nature of any proposed amendment to the declaration or bylaws;
- (2) any budget changes; and
- (3) any proposal to remove an officer or member of the executive board.
- (d) The minimum time to give notice required by subsection (c) may be reduced or waived for a meeting called to deal with an emergency.
- (e) Unit owners must be given a reasonable opportunity at any meeting to comment regarding any matter affecting the common interest community or the association.
- (f) 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 Section 12(g).
- (g) Except as otherwise provided in the bylaws, meetings of the association must be conducted in accordance with the most recent edition of Roberts' Rules of Order Newly Revised.

Comment

1. This section imposes a variety of requirements dealing exclusively with unit owner meetings, while Section 12 contains new "open meeting" requirements for executive board meetings and meetings of committees which are authorized to act for the Board.
2. The section contains several provisions designed to enhance unit owner participation in unit owner meetings. For example, paragraph (e) requires that unit owners be provided the opportunity to address the executive board during each meeting of the unit owners. While this provision is an important part of the democratization process in community associations, it is implicit that the officers and executive board members have the inherent right to establish reasonable controls over the behavior of unit owners during the meetings. Thus, for example, the board could prevent unit owners from interrupting the regular conduct of business and the time of other speakers, and could, as well, set reasonable limits on the number of speakers at any one meeting, the repetitiveness of unit owner comments, and the aggregate time that unit owners may consume during the meeting.
3. Subsection (b) provides that, with respect to special meetings of the unit owners, "only matters described in the meeting notice...may be considered at" that meeting. The purpose of limiting the agenda of a special meeting to the subjects identified in the notice is to allow a

member, who has no concern about the items listed in the notice, to decide not to attend the meeting, secure in the knowledge that other topics cannot be raised and voted on without his or her knowledge. A generic heading such as “New Business” would not be sufficient to permit items to be taken up if they were not otherwise described in the notice. In contrast, of course, at an annual meeting, unit owners are entitled to consider any matter, whether or not on an agenda.

4. Subsection (c) details the procedures and minimum content of the notice sent to unit owners. Importantly, the notice must contain “a statement of the general nature of any proposed amendment to the declaration or bylaws,” rather than containing the precise text of any proposed amendment. Thus, the unit owners are entitled to make germane amendments to whatever text is proposed at the meeting; they are not bound to a “yes” or “no” vote on text fixed in that notice.

5. Experience demonstrates that the “town meeting” model for unit owner meetings – where only those persons physically present at a meeting of unit owners may vote – is no longer suited to a considerable number of communities, particularly larger communities and communities made up largely of second homes. Section 14 of this act complements this section; it greatly expands the available procedures for voting, to include absentee ballots and voting without a meeting by electronic means or paper ballots.

6. Section (f) contemplates that the declaration or bylaw may provide for unit owners to “meet” “by telephonic, video or other conferencing method...,” so long as such meetings enable sufficient unit owner participation.

7. Subsection (g) provides that meetings of the association must be conducted in accordance with Robert’s Rules of Order unless the bylaws otherwise provide. As a consequence of this default rule, it is not necessary for this Act to address a range of procedural issues and, in the normal situation, it will be unnecessary for the association to adopt detailed meeting procedures, either in the bylaws or in separate rules.

By way of example, we might assume that a regularly scheduled unit owners’ meeting was properly noticed and held, but that a quorum was not present. In that case, the procedural issue is presented as to whether that meeting might be recessed in these circumstances to enable solicitation of more attendance, or proxies, in order to conduct business. The statute might be drafted to address the issue, either directly or by requiring the bylaws to address it. The default rule of relying on Robert’s Rules, however, completely resolves the issue, by expressly permitting a recess in these circumstances. *See Robert’s Rules of Order Newly Revised (10th ed. 2000) at 336-37.*

Of course, it may be that the board of an association may prefer a more simplified set of meeting procedures. The bylaws could be amended to adopt such procedure, and many models are available. *See, e.g., Nagle, Meetings and Elections: How Community Associations Exercise Democracy (CAI Press, 2005).*

SECTION 12. MEETINGS OF EXECUTIVE BOARD AND COMMITTEES.

(a) Meetings of the executive board and committees of the association authorized to act

for the association 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:

(1) consult with the association's attorney concerning legal matters;

(2) discuss existing or potential litigation or mediation, arbitration, or administrative proceedings;

(3) discuss labor or personnel matters;

(4) 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

(5) 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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 10 days before the meeting and must state the time, date, place, and agenda of the meeting.

(f) 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.

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

(1) 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

(2) the process provides all unit owners the opportunity to hear or perceive the discussion and to comment as provided in subsection (d).

(h) After termination of any period when the declarant controls the association, unit owners may amend the bylaws to vary the procedures for meetings described in subsection (g).

(i) 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.

(j) 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 [60] 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.

Comment

1. This section sets out a series of “open meeting” requirements for meetings of the executive board and any committees to which the board has delegated authority. The provisions are generally consistent with several existing state statutes; *see, e.g.*, Virginia Stat. Ann. § 55-510.1. The highlights of the section are these:

First, the section provides generally that all meetings of the executive committee (except executive sessions) must be open to unit owners. To make this right meaningful, the section requires that unit owners be given notice of those meetings, access to the same materials provided to members of the executive board, and the right to speak at executive board meetings.

Second, while the executive board may meet in executive session, the purposes for which such meetings may be held, and the permissible outcomes of those meetings are considerably limited. Such sessions may only be held in conjunction with a regular or special meeting of the executive board (and therefore noticed to unit owners); no final vote or action may be taken during an executive session; and the purposes for which an executive session may be held are considerably circumscribed.

Third, the Act provides that the 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.

Fourth, the Act mandates that the executive board meet at least four times a year, and that those meetings “must be at” or “at a place convenient to” the common interest community.

Fifth, while the executive board may meet telephonically, by video or other conferencing method, it may only do so if unit owners have a means to participate in that conference and hear or perceive the proceedings.

Sixth, while the executive board may act without a meeting by unanimous written consent – a procedure uniformly allowed by all corporate statutes – they may do so after the period of declarant control “only to undertake ministerial actions or to implement actions previously taken at a meeting of the executive board.”

2. Subsection (e) does provide that the need for notice to unit owners of executive board meetings may be avoided in the event of an “emergency”. While the Act does not define that term, the concept plainly includes the notion of “immediate irreparable harm” or other circumstances where the board must act promptly to either avoid an adverse outcome or avoid failing to take advantage of an opportunity. “Emergency” includes the further notion that there is insufficient time from the time the issue came to the attention of the directors to give complete notice to owners.

3. Subsection (j) seeks to strike a balance between the open meeting requirements of subsection (b) and the legitimate expectations of third parties who may rely on the action of an executive board that, in hindsight, was taken without complying with the notice or other constraints imposed on executive board actions by this section. Under this section, a decision of the executive board will be insulated from challenge because of defective notice to unit owners or other failure if the challenge is not brought within 60 days after the minutes of the executive board at which the action is taken are distributed, or those minutes are approved, whichever is later.

SECTION 13. QUORUM.

(a) Unless the bylaws otherwise provide, a quorum is present throughout any meeting of the unit owners if persons entitled to cast [20] percent of the votes in the association:

- (1) are present in person or by proxy at the beginning of the meeting;
- (2) have cast absentee ballots solicited in accordance with the association’s procedures which have been delivered to the secretary in a timely manner; or
- (3) are present by any combination of paragraphs (1) and (2).

(b) Unless the bylaws specify a larger number, a quorum of the executive board is present for purposes of determining the validity of any action taken at a meeting of the executive board only if individuals entitled to cast a majority of the votes on that board are present at the time a vote regarding that action is taken. If a quorum is present when a vote is taken, the affirmative vote of a majority of the board members present is the act of the executive board

unless a greater vote is required by the declaration or bylaws.

Comment

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort common interest communities where many owners may reside elsewhere, often at considerable distances, for most of the year.

SECTION 14. 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.

(2) If only one of several owners of a unit is present, 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 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 [act] 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:

(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 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.

(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 cast 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) 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:

(1) this section applies to lessees as if they were unit owners;

(2) unit owners that have leased their units to other persons may not cast votes on those specified matters; and

(3) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners.

(f) Unit owners must also be given notice of all meetings at which lessees are entitled to vote.

(g) Votes allocated to a unit owned by the association must be cast in any vote of the unit owners in the same proportion as the votes cast on the matter by unit owners other than the association.

Comment

1. Subsection (e) addresses an increasingly important matter in the governance of common interest communities: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the common interest community.

2. This section contains provisions enabling unit owners to cast ballots in several ways besides during a physical meeting of the unit owners. It offers a very broad range of voting options.

The current text incorporates both existing and proposed laws from a significant number of states' corporate and common interest community statutes, as well as existing provisions of the Model Nonstock Corporation Act, and proposed amendments to that model act that were pending at the time this Act was promulgated.

3. Section 14(d) permits voting by ballot without the need for a meeting; it borrows significantly from Florida statutes governing the election of directors of the unit owners association; *see Fla. Gen. Stat. 718.112 (Bylaws) (2)(d)2, 3.*

4. Proxy voting has been the subject of some controversy in the states, primarily as a consequence of some unit owners seeking to collect very large numbers of undirected proxies to be cast at meetings where contested matters are to be voted on. While the declaration and bylaws may impose further restrictions on proxy voting, this section imposes only two: subsection (c)(5) limits the validity of a proxy only to the meeting at which it is cast; and (c)(6) limits the proxies that any one person may cast to a percent set by statute.

5. Subsection (g) confirms that votes allocated to units owned by the association will be counted towards the quorum for any meeting, but will otherwise not affect the outcome of the voting by other unit owners.

SECTION 15. LIMITATIONS ON FORECLOSURE.

(a) Regardless of provisions in the declaration, an association may not commence an action to foreclose a lien on a unit under this section unless:

(1) the unit owner, at the time the action is commenced, owes a sum equal to at least [three] months of common expense assessments based on the periodic budget last adopted by the association pursuant to Section 20 and the unit owner has failed to accept or comply with a payment plan offered by the association; and

(2) the executive board votes to commence a foreclosure action specifically against that unit.

(b) Unless the parties otherwise agree, the association shall apply any sums paid by unit owners that are delinquent in paying assessments in the following order:

(1) unpaid assessments;

(2) late charges;

(3) reasonable attorney's fees and costs and other reasonable collection charges;

and

(4) all other unpaid fees, charges, penalties, interest, and late charges.

(c) If the only sums due with respect to a unit are fines and related sums imposed against the unit, a foreclosure action may not be commenced against the unit unless the association has a judgment against the unit owner with respect to the fines and related sums and has perfected a judgment lien against the unit under [insert reference to state statute on perfection of judgments].

(d) Every aspect of a foreclosure, sale, or other disposition under this section, including the method, advertising, time, date, place, and terms, must be commercially reasonable.

Comment

1. Few issues are more contentious in common interest communities than the prospect of unit owners losing their homes as a consequence of non payment of common charges – and the loss of all or most of their equity – when the association forecloses. The reaction in state legislatures in recent years has been widespread.

At the same time, it is crucial that the association be able to secure timely payment of common charges in order to provide services to all the residents of the common interest community.

In an effort to balance these competing interests, this section provides several safeguards governing foreclosure of liens for unpaid common charges. These new procedures may be summarized as follows:

First, subsection (a) bars foreclosure for sums that are less than 3 months of common charges;

Second, the same subsection also requires the association board, to first, offer the delinquent owner a payment plan which the owner rejects, and second, expressly approve each foreclosure action;

Third, subsection (b) requires that payments of delinquent assessments be applied first to principal rather than to interest and fees, in order to avoid the usual practice of accruing additional interest and late charges as the monthly fees remain unsatisfied while the attorneys fees and interest are paid first.

Fourth, subsection (c) bars any foreclosure for fines alone unless the association first secures a personal judgment against the unit owner.

Finally, Subsection (d) requires that if a foreclosure does go forward, any sale of a unit must be commercially reasonable. In the first reported case of foreclosure arising in a state that has adopted this Act, the court required that the sale be reasonable. *See Will v. Mill Condominium Owners Association et al*, 176 VT 380, 848 A2d 336 [2004].

These special procedures would comprise an overlay on existing state foreclosure procedures, whether judicial or non-judicial. Taken together, they respond in a concise but responsible way to the widespread reports of abuses in this field. Hopefully, they will also be viewed by the various States as a responsible and balanced response to the issues confronting elected officials, defaulting unit owners and homeowners association directors with a fiduciary responsibility to maintain the property.

2. In requiring a delay for 3 months in commencement of a foreclosure proceeding, subsection (o) imposes some risk on the association. Since, at best in some states, the association's lien has only a limited priority over that of a first mortgage, anything which delays the commencement and completion of a foreclosure by the association, but does not result in the unit owner bringing his or her account current, may be seen as simply raising the cost to the association, and, therefore, to all of the other unit owners who are paying their common charges on time.

3. The reaction of some legislators to this Section may depend on the extent to which foreclosure actions in the respective states are subject to judicial supervision. In states where non-judicial foreclosure is either not available or not used in association lien foreclosures, the active role played by the court may minimize the need for certain of the borrower protections in this section.

SECTION 16. ASSOCIATION RECORDS.

(a) The 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 unit 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 [act], 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 other requirements of law;

(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 [act];

(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.

Comment

1. There are two significant policy issues connected with the association's records: first, what records the association must retain, and second, who has access to those records. This section addresses both issues.

The sections provisions are generally consistent with the cognate provisions of the Revised Model Nonstock Corporation Act, supplemented by specific provisions from other more modern State enactments and proposals in the homes association field. In this latter regard, the amendments, for example, authorize a unit owner to have access to a mailing list of unit owners, although the association may retain the right to mail materials to unit owners at their last known addresses, in order to maintain the unit owners' privacy; and (ii) insure that minutes of all meetings must be kept.

2. Subsection (a) outlines the records that the Association must retain. The subsection generally avoids any substantive requirements as to how the Association's financial records are

to be maintained, relying simply on the obligation to retain “detailed records of receipts” and “appropriate accounting records,” “all financial statements and tax returns for the past 3 years” and, as in the original Act, “financial and other records sufficiently detailed to enable the association” to comply with law. The Act rejects any proposal that it require records to be maintained in accordance with “generally accepted accounting principles”; there are simply too many associations for which that would be an unnecessary and burdensome requirement.

4. The rules of various Bar associations make it imprudent for this Act to characterize the files of an attorney representing the association as property of the association and thereafter to assert that those files are nevertheless exempt from disclosure. For that reason, the Act does not address the status of an attorney’s records, but subsection (c)(5) does make clear that communications with the association’s attorney will generally be exempt from disclosure.

5. Many associations, especially smaller ones, may not have a complete set of records going back to the first organization of the association. This may be attributable to many reasons, and often are not the fault of the association or its current leadership. For example, the original declarant may not keep adequate records or may have failed to turn them over at transition. Managers may fail to turn records over when their contracts expire or are terminated.

In either of these cases, the cost of suing to obtain the missing records is prohibitive, or certainly out of proportion to the loss or inconvenience caused by the missing documents. In many smaller communities, the minutes and other non-financial records are kept by a volunteer officer of the association. If someone dies, is taken ill or moves away, the records are often lost. While this reality may impede the practical realization of the requirements in this Act, a goal of the section would be that over time, those “ancient” records may become of less practical importance in older associations, while newer associations will be guided by the requirements of this Section to adopt sound record keeping practices from the outset.

6. Subsection (b)(1) permits the parties to agree on a mutually acceptable time and place for the inspection of the records. If they do not agree, the subsection provides that the inspection shall take place “during reasonable business hours or at a mutually convenient time and location.” Another concern has to do with smaller self-managed associations where the records may be kept by a unit owner who works during the day. If the volunteer treasurer cannot easily leave his or her job during the day to meet with a unit owner, it may be unreasonable to insist that the unit owner, or the unit owner’s attorney or accountant, have the power to make the treasurer take a day off from work.

SECTION 17. 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 regulating display 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.

Comment

1. This section addresses in a single location the Act's provisions concerning rules, including procedures governing how rules are to be adopted, and several constraints on what rules may address. The section also addresses constraints on the association's ability to regulate unit owner behavior, consistent with increasing sentiment to this effect in a number of states.

2. Subsections (a) and (b) enable unit owners to be aware of and involved in the rules adoption process. Under these procedures, the association must notify unit owners of its intention to engage in changing the rules, and provide owners the text of any proposed change. Unit owners are also entitled to submit comments on the proposed rules, and to know of the date before which those comments may be submitted for consideration. Finally, under subsection (b), after a rule has been changed, the association must notify unit owners of the change, and provide them a copy of any new or revised rule.

3. The section addresses in several ways the subject of how and when the unit owners may be subjected to constraints on the owner's ability to make changes on the exterior appearance of a unit, or engage in construction activity on a unit – including a lot – that would be visible from outside the unit.

It is increasingly common throughout the United States for associations to assume the power to establish and enforce design criteria and control the exterior appearance of units, whether those units are in high rise condominiums, townhouses or single family homes on individually-owned lots. It is often asserted that the power of the association to maintain a uniformly attractive and consistent appearance throughout a community adds considerably to the value and desirability of many of these communities.

At the same time, anecdotal evidence suggests that many of the decisions made during the design approval process have been controversial and, in some instances, are subject to abuse by those charged with enforcing the design criteria.

This Section confirms the ability of the association to adopt such a process, but subject to significant constraints intended to protect the interests of individual unit owners.

This section first provides in subsection (c) that the ability of the association to regulate the design process must be affirmatively reserved in the declaration. It is common for the developer of a project to reserve such a right for itself to regulate aesthetic changes, and this requirement tracks that typical outcome.

Second, assuming the authority exists in the declaration, the section requires that the rules of the design committee must be formally promulgated by the executive board, including a procedure for prompt consideration of an application. The rules must also describe the consequences flowing from the failure of the design committee or other group charged with enforcement of the criteria to act on an application within the time frame stated. This does not mean that the necessary effect of that failure is that the application will be deemed approved; the rules may state a different consequence, as they are permitted to do. As a practical matter, however, one might expect that in the usual case, the parties to an application pending before a design committee may choose to formally agree to extend the time within which the committee is otherwise required to act, in order to avoid the consequences of a failure to act, and nothing in this Act is intended to affect the parties' ability to do so.

4. The Act creates a significant interplay between the declaration and the association's rules when the subject is the possibility of a change in a permitted "use occupancy, or behavior", as that term is used in subsection (f)(2).

Basically, the association's ability to adopt rules affecting use of or behavior in units is restricted to implementing provisions of the declaration, or regulating "any behavior in or occupancy of a unit which ...adversely affects the use and enjoyment of the units or the common elements by other unit owners." An obvious example of the latter would be noise regulations.

5. Subsections (d) and (e) expand existing federal law mandating that unit owners be allowed to display the flag of the United States, *see* The Freedom to Display the American Flag Act of 2005, Public Law 109-243 to provide greater freedom of action to unit owners. These sections increase the rights of unit owners to display flags of the enacting State, and political signs on their units. Like the federal law, the association is entitled to adopt regulations governing the time, place, size, number and manner of those displays." Similarly, the unit owners are entitled under subsection (e) to peacefully assemble on the common elements to consider matters related to the common interest community.

6. In perhaps the most significant change affecting rules, subsection (h) requires all rules to be "reasonable." The reasonableness standard, unlike the business judgment rule, is likely to lead to considerable controversy over the impact of particular rules; it may also lead to more constraint in the adoption of a variety of rules, which some unit owners may find onerous.

SECTION 18. NOTICE TO UNIT OWNERS.

(a) An association shall deliver any notice required to be given by the association under this [act] 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.

Comment

1. This section recognizes that electronic notice to unit owners should only be permitted if unit owners agree to receive it. The new additional forms of notice are electronic transmissions and “(4) any other method reasonably calculated to provide notice to the unit owner.” However, even if authorized, electronic notice would not be mandatory and the section would allow, depending on the circumstances, posting notice on bulletin boards, placing large and legible “sandwich boards” at the entrances to the common interest community, or other methods. As a consequence, the Act does not designate the method of giving notice in particular instances.

2. Just as the Act does not require that notice be given in a particular manner, it also does not require that the bylaws must specify the method by which notice is to be given. However, there is no reason why either the declaration or the bylaws could not specify a particular form or method of giving notice to the unit owners, and such a requirement would be binding on the association. Whether or not the documents designate a specific form of notice, the declaration cannot override the statement in subsection (b) that protects actions taken at a meeting despite the failure of the notice to actually be delivered, so long as the notice was given in good faith.

3. Note that whatever form of notice may be used or required in a particular common interest community, Section 12(c) requires that the unit owners in that community receive the same notice of a meeting of the executive board that is given to the members of the board.

SECTION 19. 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) if a member may be elected or appointed pursuant to the declaration by persons other than the declarant or the unit owners, that member may be removed only by the person that elected or 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.

Comment

1. This section is intended to simplify the procedures available for removal of officers or directors. Thus, for example, while the section speaks in terms of a “meeting” of unit owners held for the purpose of removal, the section should be read in conjunction with Section 14 on voting. There, unless the declaration or bylaws prohibits or limits the various means by which voting may be conducted, the full panoply of decision making by vote would be available in the context of a “meeting” to consider removal. Accordingly, subject to any limitations contained in the community’s documents, a removal vote could be taken by electronic or paper ballot.

2. For the same reasons discussed in comment 1, proxies will commonly be permitted in recall votes. The drafters recognize that generally, if both sides are soliciting

proxies, the unit owners are likely to be given a realistic opportunity to choose between positions. In any event, there is no reason to distinguish those votes where proxies are permitted from others where they are prohibited.

3. While this Act simplifies the procedures for a removal vote, other provisions of the new section are designed to protect the reasonable expectations of other stakeholders in the process, and to reflect a basic sense of fairness. Thus, for example, the Act requires that any person who is subject to a removal vote must be given an opportunity to speak before the vote. Further, if the vote were to be taken by ballot without a meeting, then the procedures in the Act that allow informational materials to be distributed before the ballots are due would satisfy the policy underlying this provision.

Similarly, the Act provides that no one but the person who appoints or elects a director may remove that director, thus protecting the legitimate interests of parties who may be entitled under the provisions of a particular community to appoint “outside” directors.

SECTION 20. 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 [30] 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 10 days or more than 60 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 subsection (c), 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 shall become 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.

Comment

1. Subsection (a) requires at least an annual budget for the association. The Section permits the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect.

2. The drafters extensively considered the issue of whether state law should mandate that the declarations of all common interest community associations create a reserve fund for the replacement of common elements as they become necessary and, if so, the extent to which they should be mandated. This is a subject of considerable scholarly debate and widely varying statutory treatment in the States.

As drafted, Section 20(a) requires the association to provide a summary of the budget – including any provisions for reserves and a statement of the basis on which the reserves are calculated. However, the Act does not require that the association maintain any reserves.

This is not the policy of all States. Some states either mandate that reserves be maintained or establish a default rule that such reserves be created in the absence of an affirmative vote by the association membership not to create reserves. Other states require that the association board undertake periodic studies of the association’s need for reserves.

It is also true that the underwriting guidelines used by Fannie Mae when deciding whether to purchase mortgages in common interest communities, requires in condominiums – but not in planned communities – not only that the association maintain reserves but that those reserves be “adequate,” without defining the meaning of that word.

Evidence suggests that the needs, practices and expectations of unit owners in common interest communities differ widely, depending on, for example, the size, age, location and design of the physical structures as well as the age, economic circumstances and other demographic

characteristics of the unit owners.

For example, small, self-managed associations commonly will maintain minimal reserves and will typically self-assess for repairs as needed. Other larger common interest communities, particularly in high maintenance buildings, may choose to establish substantially higher reserves.

On the other hand, it appears that very few associations maintain reserves at a level which would be actuarially required by evaluating the useful life of each component of the building and then accumulating reserves through increases in the monthly common charges paid by each owner, based on a schedule reflecting each component's useful life.

Associations confront the same choices that a single family homeowner confronts in thinking about, for example, the future need to replace the roof on her house. That owner has at least three choices: (i) she can set aside a sum of money each month in a segregated fund – perhaps even calling it a 'reserve' fund – so that when the roof or other parts of her home need to be replaced, she will have the needed funds; (2) she can maintain savings which are not segregated and pay cash from those savings at the time the roof replacement occurs; or (3) she can borrow the needed funds, and pay that money back during the years when she is enjoying a dry home. She can also use a combination of these techniques. Today, associations are increasingly engaged in borrowing as an alternative to self-funding of reserves by unit owners who may, in fact, be unable to realize the economic value of those reserve payments if they sell their units early in the life of the project.

The drafters were also mindful of the impact of a possible law mandating reserves on the needs of the elderly and those of limited economic means. In practice, older unit owners often resist reserves, while younger families may perceive a greater long term value in their creation. There are also special concerns for lower income owners in common interest communities, where poorer owners may default on their mortgages and abandon their units because of their inability to maintain mortgage payments and monthly common charges. If a statute were to mandate fully funded reserve payments, policy maker should then be concerned with two possible unintended consequences: first, such a mandate might so raise the monthly common charges that many potential buyers might be disqualified from homeownership; and second, the increases in charges might accelerate the collapse of common interest communities housing marginal income existing owners, who might abandon their units in increased numbers. Neither of these outcomes would be desirable.

At the same time, the drafters understood the natural interest of elected officials, who may often be faced with constituent demands that government 'do something' about a common interest community that has not prudently managed its affairs, with the result that needed repairs have not been made and the needed funding is not readily identifiable.

This Act does not require a particular outcome for reserves. It simply requires that the budget must affirmatively address the issue one way or the other. Over the long term, better education of declarants and unit owners alike, and the growth of 'best practices' in the common interest community field under the leadership of national and state interest groups, must provide the optimal outcome in each particular circumstance.

3. New subsection (b) addresses the issue of special assessments. The policy of the subsection assumes that, except in the case of an emergency, the executive board should follow the same procedures as apply in adoption of the regular periodic budget of the association.

On the other hand, it is not unusual for the executive board to be confronted with an emergency. In that event, as discussed in subsection (c), if 2/3s of the executive board determine that an emergency exists, the board may dispense with the unit owner vote and proceed directly to adopt a special assessment. The balance of subsection (c) describe various safeguards designed to avoid abusive use of the emergency special assessment.

Note that the term “special assessment” is not defined. However, as used in subsection (b), it refers to any assessment that is not part of the regular budget. Given the safeguards contained in (b), it is not likely that the procedure will be commonly abused.

4. The Act as presently drafted does not limit or prohibit the imposition of “so-called” transfer fees. It does require their disclosure.

Some courts, in reviewing similar statutory provisions, have held that transfer fees are not permitted; *see, e.g., Micheve, LLC vs. Wyndham Place at Freehold Condominium Association*, 885 A.2d 35 (N.J. Super. Ct. App. Div. 2005.).

In any event, this Act takes no position on the validity or suitability of “transfer fees”, whether imposed by the declarant, the association, or some third party. Plainly, there are abusive circumstances where some persons assert the right to be paid a fee on transfer of title; some states have sought to regulate such efforts. In other cases, advocates assert that transfer fees can measurably assist in the betterment of common interest communities, despite the fact that the fees are generally levied against persons who are departing from those communities and are therefore not likely to enjoy whatever theoretical benefits are to be realized as a consequence of these fees. The subject becomes more significant, of course, depending on the magnitude of the fees, and the extent to which the fees are paid at a time of rapidly increasing – rather than decreasing – property values.

SECTION 21. EFFECT OF VIOLATIONS ON RIGHTS OF ACTION;

ATTORNEY’S FEES.

(a) A declarant, association, unit owner, or any other person subject to this [act] may bring an action to enforce a right granted or obligation imposed by this [act], the declaration, or the bylaws. [Punitive damages may be awarded for a willful failure to comply with this [act].]

The court may award reasonable attorney’s fees and costs.

(b) Parties to a dispute arising under this [act], 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; and

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

(c) The remedies provided by this [act] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential or special damages may not be awarded except as specifically provided in this [act] or by other rule of law.

Comment

1. This section provides a general cause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, the declarant, or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission, or reconveyance if appropriate under the law of the State, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section, in bracketed text, permits punitive damages to be awarded in the case of willful failure to comply with the Act and also permits court costs and attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

The language of subsection (a) is intentionally broad, and emphasizes the traditional authority of a court in equity to fashion a remedy suited to the circumstances of the case. Importantly, the provisions of this section would apply with equal force to a violation of either this Act or the declaration or bylaws by "any person" besides the declarant – including, for example, the association in its dealings with unit owners, a property manager or unit owners whose own behavior violates those same laws or instruments.

In appropriate cases involving association or executive board activities, the court might grant relief in the form of requiring new elections, removal of officers from office, and orders requiring offending parties to make the association whole for improperly expended funds. A civil action may lie, in an appropriate case, for failure of the executive board to comply with the "open meeting" requirement of Section 12. These examples are not intended to exhaust the traditional authority of a judge to grant "appropriate relief", and that authority is emphasized by the specific grant of discretion to authorize punitive damages or attorneys fees, as the

circumstances warrant.

2. Subsection (b) reflects the Conference's judgment that resolving disputes by non-judicial means is a desirable outcome, subject to the limitations contained in this section.

3. Nothing in this section prohibits a unit owner from seeking independently to enforce any provision of the declaration, bylaws or rules. However, limitations in those instruments may require that the unit owner participate in some form of alternative dispute resolution before commencing suit.

SECTION 22. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW;

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

Comment

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

2. The bracketed language concerning unincorporated associations should be deleted if the enacting State requires incorporation of a unit owners' association

SECTION 23. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

Comment

This Act should be construed in accordance with its underlying purpose of making the law uniform with respect to all forms of common interest communities, as well as the purposes

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

SECTION 24. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

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

(a) A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law—

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999” [with certain exceptions] or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if [they meet certain criteria] and

(B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

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

SECTION 25. EFFECTIVE DATE. This [act] takes effect [date].