

**NCCUSL Proposes Revisions to
UNIFORM COMMON INTEREST OWNERSHIP ACT**

Kathleen J. Hopkins

Chair, ComFin Real Estate Financing Subcommittee

At the February 16, 2009 meeting of the ABA House of Delegates NCCUSL is presenting Resolution 102D - which seeks to revise the Uniform Common Interest Ownership Act (UCIOA). NCCUSL resolutions are up/down votes and amendments are not made on the floor of the house. This article discusses the resolution and identifies an area where there would be an impact on real estate finance lawyers and their clients. Many of the changes proposed by NCCUSL to UCIOA address aspects of owner association governance, including the association's relationship with individual members, foreclosures, election and recall of officers and treatment of records. There are also a significant number of changes, stylistic and substantive, to clarify and modernize the operation and governance of common interest associations. As a companion to the UCIOA is a new Common Interest Owners Bill of Rights Act. Resolution 102D is being co-sponsored by the ABA Real Property Trusts and Estates Section, and members from that section and the ComFin Committee's Real Estate Financing Subcommittee participated as observers and in other capacities in the drafting process.

It should be noted that very few states have adopted UCIOA in its full form, but UCIOA is often consulted by the states and is quite influential during the state's drafting of its own laws on this topic.

For real estate lenders, one critical clause in UCIOA is the super lien priority status granted to the owners association's lien for up to 6 months of assessments, which is defined to include attorney's fees and costs and any other sums owed to the association as a result of administrative, arbitration, mediation or judicial decisions (see UCIOA § 3-116). According to the UCIOA reporter and commissioner, William Breetz, this section, in some form, has been around since the initial drafting of UCIOA when it was proposed by Fannie Mae and Freddie Mac in 1978. Drafters point out that it is necessary to permit the association to maintain the common property and fulfill other obligations during the pendency of a foreclosure: when the borrower has no incentive to keep paying and the lender would otherwise be able to wipe out the lien with the foreclosure. The ABA RPTE Section Observer to the UCIOA Drafting Committee noted that lenders' lawyers in her state addressed the superpriority issue by requiring an escrow of assessments - at least for the 6 month superpriority status. There are other provisions of UCIOA you may wish to review, for example 2-118(k) [lender's rights on termination]; 2-119 [rights of secured lenders]; 3-104(c) [lender succession to development rights] and (e)(f) [the deep freeze for lender transfer of development rights]. The entire proposed revised act can be accessed at: http://www.law.upenn.edu/bll/archives/ulc/ucioa/2008am_approved.pdf.

The balance of this article discusses the history of the UCIOA and summarizes the amendments. This summary was provided by NCCUSL and incorporated in the report provided to the ABA House of Delegates.

The original version of the Uniform Common Interest Ownership Act was promulgated by the Uniform Laws Commission (ULC) in 1982 and succeeded and subsumed several older ULC acts, including the Uniform Condominium Act (1977 and 1980 versions), the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. UCIOA is a comprehensive act that governs the formation, management, and termination of common interest communities, whether that community is a condominium, planned community, or real estate cooperative.

In 1994, the ULC promulgated a series of amendments to UCIOA. The 1994 amendments did not change the general structure or format of the original act, but were designed to reflect the experience of those states that had adopted UCIOA (or one or more of its predecessor acts), and scholarly commentary and analyses surrounding the act. Issues addressed by the 1994 act included: increasing declarant responsibility for large and non-residential projects; allowing subdivision and expansion of projects; improving procedures for addressing use and occupancy restrictions in units; easing the process for projects begun in states prior to the adoption of UCIOA to opt in to the act; empowering the association to deal with tenants in rented units; and clarifying the standard of care that applied to association directors.

In 2004, the ULC approved a new drafting committee to consider and promulgate further amendments to UCIOA. The primary purpose of the proposed amendments was to address a growing demand in the states for a legislative solution for growing tensions between the elected directors of unit owners' associations and dissident individual unit owners within those associations. In keeping with the aims of the 1982 and 1994 versions of the act, the new amendments also reflect a comprehensive review of states' experience with UCIOA and its predecessor acts over the last 30 years.

The ULC approved these amendments at its Annual Meeting in 2008. They incorporate non-substantive, style changes to update the act and harmonize it with state legislative developments and terminology changes. The 2008 UCIOA amendments also incorporate a considerable number of substantive amendments, including the following highlights:

- Among new general provisions, the definition of “common interest community” is revised to confirm that unit owners' mutual obligations to share the costs of services provided by the association is sufficient, without more, to create a common interest community. However, by reference to sections 1-209 and 1-210, the definition confirms that cost-sharing agreements between two associations, or an association and a separate owner of real estate, do not require creation of a separate common interest community. The term “special declarant right” adds new rights granted to a declarant. Several new definitions are added, including treatment of the term “record” as a noun for e-signature purposes, and the new act includes standard language on interaction with the federal Electronic Signatures in Global and National Commerce Act (ESIGN).
- Selected 2008 amendments are made retroactive to all residential common interest communities created before adoption of UCIOA in a particular state; these include sections 1-206 (governing instruments for older projects), 2-102 (unit boundaries), 2-117(h) and (i) (amendment to declaration), 2-124 (termination following catastrophe), 3-103 (executive board members and officers), 3-108 (meetings) and 3-124 (litigation involving the declarant). The amendments also grant greater flexibility to nonresidential projects by allowing the declaration to

provide that only Articles 1 and 2 of UCIOA (definitions and general provisions, development flexibility, and title safeguards) apply.

- The 2008 amendments revise UCIOA's treatment of the creation, alteration, and termination of common interest communities. Declarations are now required to authorize a process for association administration of any design criteria and building approval process, or for the enforcement of aesthetic standards; those that fail to do so will not have the authority to enforce such requirements. Also, the declaration may restrict unit owners' use of common elements, in addition to existing restrictions on limited common elements, and common elements may now be restricted to use for "the purposes for which they were intended."
- Residential projects may now benefit from increased flexibility in the percentage of unit owners required to amend the declaration. Now, consent may be presumed from lenders, where lender consent is necessary for amendment, with proper notice and 60 days of silence. The amendments also clarify that special declarant rights reserved in the declaration may not be amended without consent of the beneficiary.
- The 2008 amendments expand UCIOA's treatment of association bylaws, rulemaking, operation and governance, notice methods, meetings, meeting and voting procedures, and the adoption of budgets and special assessments. The Act adopts important 'open meeting' requirements for both unit owner and executive board meetings, and greatly limits the use of executive sessions. The changes made by the 2008 amendments mandate that each unit owners association have an executive board, and expand the forms that unit owners associations may organize as, to include limited liability companies or any other form permitted by state law. The declaration may provide for direct election of the association's executive board officers by unit owners, and also allows the declaration to provide for a limited number of independent outside directors, apart from those elected by unit owners or appointed by the declarant.
- Mandatory and discretionary association actions are clarified, as are certain rules regarding investment and borrowing practice, and an association's right to suspend a unit owner's privileges (within limitations) is confirmed. 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 them. The association is given greater flexibility to seek payment of the costs for damage resulting from willful misconduct or gross negligence directly from a unit owner instead of filing a claim with the association's insurer. The status of an association's statutory lien for all sums due from unit owners is clarified, and the right of an association to proceed in foreclosure on a lien against a unit owner is significantly limited.
- Record keeping requirements and guidance are provided in greater detail, and are drawn from FOIA requirements and other sources.
- Liability is expanded for declarants for false or misleading statements made in public offering statements, and increased financial disclosures are required. Minor changes are made with regard to express warranties of quality, allowing a model or description to clearly state that it is only "proposed" or "subject to change."

In addition to the 2008 amendments to UCIOA, a new **Uniform Common Interest Owners Bill Of Rights Act (UCIOBORA)** was also drafted that draws together a number of the existing provisions of UCIOA as well as many of the 2008 amendments that, together, provide significant rights to unit owners in all common interest communities. UCIOBORA can be enacted by states as a stand-alone act when it is deemed not feasible to adopt all of UCIOA. The UCIOBORA would then supplement existing state law with many of the most important updates and protections of the 2008 act.

The 2008 UCIOA amendments seek to 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, 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. Taken as a whole, the aggregate of these amendments is a stronger UCIOA that better serves those governed by the act's provisions. It should be considered in every jurisdiction that has not already adopted it in the United States.