UNIFORM CONDOMINIUM ACT:
SELECTED KEY ISSUES*

HENRY L. JUDY† AND ROBERT A. WITTIE‡
Washington, D.C.

INTRODUCTION

At its semi-annual meeting last February, the ABA endorsed the Uniform Condominium Act (the "UCA"), which was drafted and, in August of 1977, approved by the National Conference of Commissioners on Uniform State Laws. The UCA is a comprehensive "second generation" condominium statute that is designed for use in all states. Even before it received the endorsement of the ABA, the UCA was introduced in Minnesota (Minn. Sen. Bill No. S.1878), and the UCA is currently being considered for introduction in a number of other states.§ If this initial, favorable reaction is any indication, the UCA may be the dominant condominium statute within the next several years.

One of the most important aspects of the UCA is that it is designed to facilitate the creation of condominiums which will function properly over time. Early condominium statutes were essentially enabling laws, designed to do little more than create a legal basis for the condominium form of ownership. Many of these early statutes have since been amended, frequently on an ad hoc basis, to respond to specific problems that have arisen, such as developer abuses. The UCA, however, is addressed not only to those matters but also to the operations of the condominium and the unit owners association as a community. Many of the provisions of Articles II and III of the UCA will have more significance to the unit owners in the years after the project has been fully sold and the developer is no longer involved than they will have to the parties during construction and sale of the condominium. As a result, the UCA has a temporal aspect that is absent in most existing state statutes.

This article discusses two aspects of the UCA which are essential to the ability of condominium projects to function properly over time. Part I discusses the allocation to unit owners of common rights and obligations. These...

*Editor's Note: It was originally contemplated that the entire Uniform Condominium Act and official comments would be published with this article. Spatial limitations, however, have made that impossible. West Publishing Company has reported that it will soon have the official text and comments available for purchase. As a convenience to the readers, the authors have included in Appendix II certain selected provisions and official comments from the Uniform Condominium Act which are referred to frequently within the article.

†Henry L. Judy is the General Counsel of the Federal Home Loan Mortgage Corporation in Washington, D.C. and served as an Advisor to the Special Committee on the Uniform Condominium Act.

‡Robert A. Wittie is an attorney in private practice in Washington, D.C. He is a member of the firm of Hill, Christopher and Phillips, P.C.

§Cf., Virginia Senate Joint Resolution 69, adopted by the Virginia General Assembly on March 6, 1978, which created an advisory council to study the UCA and determine whether or to what extent it should be enacted in Virginia.
allocations must be made by the developer at the time the condominium is created, and if it is a flexible condominium, reallocations must be made at the time the condominium is expanded or contracted. Therefore, in the limited sense of requiring or precluding action, the provisions of the UCA pertaining to allocations are important only during the developmental stage of the condominium. Nonetheless, the significance of the allocations themselves will be felt throughout the life of the condominium. Part I of this article discusses, among other things, the considerations which developers and their counsel should take into account in making those allocations.

Part II of this article discusses the special lien priority which the UCA gives to the unit owners association to enable it to collect condominium fees. Condominium fees constitute the primary—and in the vast majority of cases, the only—source of revenue for the condominium. Accordingly, the ability of the association to collect these fees is critical to its continuing ability to provide essential and special services to unit owners. Part II considers the UCA provisions on lien priority by weighing the interests of the association against the competing interests of other lien claimants.

Part I of this article differs from Part II in that, in addition to discussing the reasons for the provisions contained in the UCA, it suggests guidelines for those who will be making choices in allocating rights and obligations in specific condominium projects. The considerations discussed in both parts, however, involve the balancing of the competing interests that will be involved with the condominium. The balancing of these competing interests was of substantial concern to the draftsmen of the UCA, and is relevant to many of the provisions of the UCA which are not specifically discussed in this article. Hence, an understanding of these considerations provides a context and a foundation for interpreting the whole of the UCA as well as a basis for utilizing its provisions for the benefit of all concerned parties.
# PART I:
## ALLOCATING THE COMMON RIGHTS AND OBLIGATIONS OF UNIT OWNERS UNDER THE UNIFORM CONDOMINIUM ACT

<table>
<thead>
<tr>
<th>I. Introduction</th>
<th>A. The Challenge of Planning Presented by the UCA to Developers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>B. The Allocation of Common Rights and Obligations</td>
</tr>
<tr>
<td>II. Preliminary Observations</td>
<td>A. The Limitation of Existing Statutes</td>
</tr>
<tr>
<td></td>
<td>B. The Private Governmental Function of a Condominium</td>
</tr>
<tr>
<td>III. Allocation of Interests in the Common Elements and Rights Upon Termination</td>
<td>A. The Provisions of the UCA</td>
</tr>
<tr>
<td></td>
<td>1. Interests in the Common Elements</td>
</tr>
<tr>
<td></td>
<td>2. Rights on Termination</td>
</tr>
<tr>
<td></td>
<td>B. The Interests to be Served by the Allocation of Common Element Interests</td>
</tr>
<tr>
<td></td>
<td>1. Effect on Establishment of Clear, Constant Ownership Interests</td>
</tr>
<tr>
<td></td>
<td>a. Equality, Unit Size and Par Value</td>
</tr>
<tr>
<td></td>
<td>b. Relation to Another Right</td>
</tr>
<tr>
<td></td>
<td>c. Market Value and Purchase Price</td>
</tr>
<tr>
<td></td>
<td>2. Effect on Interests at Termination</td>
</tr>
<tr>
<td></td>
<td>a. The Dilemma Created by Existing Statutes</td>
</tr>
<tr>
<td></td>
<td>b. Equality</td>
</tr>
<tr>
<td></td>
<td>c. Unit Size</td>
</tr>
<tr>
<td></td>
<td>d. Par Value</td>
</tr>
<tr>
<td></td>
<td>e. Relation to Another Right</td>
</tr>
<tr>
<td></td>
<td>f. Market Value or Purchase Price</td>
</tr>
<tr>
<td></td>
<td>3. The Dilemma of Conflicting Interests Is Solved by the UCA</td>
</tr>
<tr>
<td></td>
<td>4. Effect on Interests Under &quot;Appraisal Upon Termination&quot; Sys-</td>
</tr>
<tr>
<td></td>
<td>tem; the Considerations favoring Unit Size</td>
</tr>
<tr>
<td>IV. Allocation of Liability for Common Expenses and Right to Share in Common Profits</td>
<td>A. The Provisions of the UCA</td>
</tr>
<tr>
<td></td>
<td>B. Interests to be Served or Goals to be Attained by the Allocation of Liability for Common Expenses and Common Profits</td>
</tr>
<tr>
<td></td>
<td>C. Effect of Each Basis of Allocation on These Interests</td>
</tr>
<tr>
<td></td>
<td>1. Effect on Allocation of Liability According to Utilization of Common Elements</td>
</tr>
<tr>
<td></td>
<td>a. Equality</td>
</tr>
<tr>
<td></td>
<td>b. Unit Size</td>
</tr>
<tr>
<td></td>
<td>c. Par Value</td>
</tr>
<tr>
<td></td>
<td>d. Market Value/Purchase Price</td>
</tr>
<tr>
<td></td>
<td>e. Reference to Another right</td>
</tr>
<tr>
<td></td>
<td>2. The Appearance of Equity: Allocation on the Basis of Equality or &quot;Ability to Pay&quot;</td>
</tr>
<tr>
<td></td>
<td>3. Clarity</td>
</tr>
<tr>
<td>V. Allocation of Voting Rights</td>
<td>A. Provision in the UCA</td>
</tr>
<tr>
<td></td>
<td>B. Interests to be Served by the Allocation of Voting Rights</td>
</tr>
<tr>
<td></td>
<td>C. Effect of Bases of Allocation Upon These Interests</td>
</tr>
<tr>
<td></td>
<td>1. Efficiency</td>
</tr>
<tr>
<td></td>
<td>2. Protection of the Interests of the Minority</td>
</tr>
<tr>
<td></td>
<td>a. Generally</td>
</tr>
<tr>
<td></td>
<td>b. Equality and the Desirability of Deviating from It: the Equitable Distribution of Power</td>
</tr>
<tr>
<td></td>
<td>c. Unit Size</td>
</tr>
<tr>
<td></td>
<td>d. Par Value</td>
</tr>
<tr>
<td></td>
<td>e. Relation to Another Right</td>
</tr>
<tr>
<td></td>
<td>(1) Relation to Ownership of Common Elements</td>
</tr>
<tr>
<td></td>
<td>(2) Relation to Liability for Common Elements</td>
</tr>
</tbody>
</table>
I. Introduction

A. The Challenge of Planning Presented by the UCA to Developers

An essential premise of the UCA is that, to the greatest extent consistent with the welfare of the public, condominium developers ("declarants" under the UCA) should have the freedom to shape the characteristics of their particular projects to meet the specific market needs that they perceive to exist. Such a premise is hardly revolutionary, especially in the field of real property law, but it is important when considered in the context of the growing involvement of government in the housing field and the increasing pressure from consumers for government to take an active regulatory role. This has been a particularly important trend in the condominium field.

In many ways, the UCA is yet another—and, indeed, a major—regulatory statute, which imposes numerous restraints on developers who wish to create condominiums. Yet, taken as a whole, these restraints relate almost exclusively to how the creation of a condominium may be accomplished. The nature of the end-product is not limited. In fact, the UCA will operate to strip away many of the artificial barriers which exist under some state laws, so as to subject condominium development to the full range of the declarant’s creativity.

The draftsmen of the UCA recognized that no statute—particularly a "uniform" statute, designed to apply in every state—could anticipate all of the needs of a varied and changing marketplace. The statute could not establish precise and detailed requirements for all the aspects of the myriad types of residential and commercial condominiums which may come to exist. Consequently, the UCA creates a kind of catalogue of issues which declarants must address in order to create a valid and viable condominium. In many instances, the UCA contains "safety net" provisions—substantive terms and conditions (some provision for which was deemed critical to the existence of a viable condominium) which will govern specific condominiums automatically unless the declarant provides otherwise in the condominium documents.

By encouraging declarants to consider whether to supersede these "safety-net" provisions, or by requiring that provision for other matters be contained in the condominium documents, the UCA should cause declarants to address, in one fashion or another, the many important issues which will be essential to the proper functioning of a condominium. But the final decision as to how these issues will be resolved in each condominium is in the hands of the declarant. The freedom—and obligation—of the declarant to make the proper decisions constitutes one of the major challenges for the declarant and for future condominium development.

B. The Allocation of Common Rights and Obligations

Of the issues which the declarant must address, none is more important to the future operation of the condominium and to the welfare of the future unit owners than the allocation of the several rights and obligations which the unit owners will share in common. At the same time, no issue presents
a greater challenge to the foresight and creativity of the declarant who will establish the bases according to which these common rights and obligations will be allocated.

Part I of this article will discuss the freedom which the UCA gives to declarants in making these allocations and the considerations which declarants should keep in mind when they make them. The common rights and obligations in question are: (1) ownership of shares in the common elements; (2) ownership of rights upon termination of the condominium regime; (3) liability for common expenses and rights to share in the common profits; and (4) voting rights in the unit owners association.

Each of these rights and obligations is a part of the package of rights and concomitant obligations which ordinarily inhere in real property ownership. In contrast to ordinary fee simple ownership, however, the condominium co-owner shares many responsibilities and rights of enjoyment with other co-owners. In order for the condominium to function, these shared responsibilities (which in a communal context are raised to the level of legal obligations) and rights must be allocated among the several owners.

There undoubtedly are innumerable bases upon which such allocations might be made, and as discussed below, the UCA permits the declarant great freedom to pick and choose those bases. However, this Part I considers only the following possible bases: (1) equality; (2) unit size; (3) par value; (4) market value, purchase price and other measures which may (and probably will) vary over time; and, (5) relation back to the basis of allocation of another right or obligation. The foregoing five bases of allocation comprise virtually all of the bases which are specified by existing state statutes, and they appear to be the only ones likely to be utilized by any declarant.

---

1Even voting rights, as is evident when one realizes that a vote is only a means of participating in the decision of what to do with or on the property.

2As used herein, par value refers to a number or numbers (typically a percentage) assigned to each unit by the declaration for the purpose of allocating one or more rights or obligations. More than one par value could be assigned to each unit in a condominium so long as each par value was assigned for the purpose of allocating a different right. Par value numbers may be independent of one another or determined in relationship to one another.

Typically par value is an artificial number which does not necessarily reflect or relate in any way to the sales price or fair market value of any unit. No appraisal or market transaction changes the par value of units over time.

When par value is used to allocate relative ownership interests, it is typical that substantially identical units are assigned the same par value, but units located at substantially different heights above ground or having substantially different views, or having substantially different amenities or other characteristics that might result in differences in market value are assigned different values. When par value is used to allocate relative liabilities for common assessments, it should be expected that units with a higher level of usage of common elements will have a higher par value than units with a lower level of usage. Par value may also be used to indicate relative voting strength. Such a use might, for example, give greater voting strength to unit owners with a greater economic stake in the condominium.

3Market value is to be distinguished from the initial market value of a unit. Market value is the amount a unit would be worth if sold on the market at any given time. Purchase price is the most recent amount actually paid for a given unit. Both of these measures will clearly vary over time.
Moreover, these bases encompass all of those factors which have some rational relationship to the interests to be served by the allocations.

The approach of Part I will be: (1) to outline the limitations imposed on declarants by the UCA—or, as is more accurate in most cases, the increased flexibility granted to declarants by the UCA in comparison to existing state statutes—with respect to the allocation of the aforesaid rights and obligations; (2) to identify the interests which are to be served by each such allocation; and (3) to analyze the impact that each possible basis of allocation may have upon those interests. In that way, Part I should constitute a guide to declarants, telling them: (1) what they must do, with respect to allocations of rights and obligations, to create a condominium that complies with the UCA; and (2) what they ought to consider, in making those allocations, in order to create a condominium that will function well.

II. PRELIMINARY OBSERVATIONS

A. The Limitation of Existing Statutes

As indicated above, it is inherent in the condominium concept that the several rights and obligations which ordinarily arise out of real property ownership be delineated in the condominium documents and allocated among the unit owners. The draftsmen of early condominium statutes recognized this need, and generally, they specified the bases upon which some or all of the common rights and obligations could be allocated. Today, state condominium laws are evolving, frequently in response to particular problems and abuses, and legislators are struggling to deal with the complexities of the condominium form of property ownership.

Nevertheless, while state legislation is becoming more sophisticated, the draftsmen of most state laws do not yet seem to have appreciated the flexibility which results from the severability of these rights and obligations. Typically, they have chosen a basis for allocation of a particular right, usually the ownership of the common elements, and have used that right as

---

the basis of allocation of one or more other rights. The result of that inter-
relationship has been to make the ownership of common elements the "sun"
around which all the other rights and obligations revolve. A major conclusion
of this analysis is that such a result is improper for two reasons. First, the
ownership of common elements is really a residual concept which is rela-
tively insignificant during the life of the condominium regime. Thus, if any
right or obligation should be the "sun," it should not be common element
ownership. Second and more generally, it is a mistake to make the alloca-
tion of any right or obligation the basis of allocation of another unless the
relationship between the two itself serves an identified interest to be fur-
thered. The myriad uses to which the condominium concept can be put
suggests almost a priori that a simplistic tying of bases of allocation to one
another creates artificial legal barriers that prevent the condominium con-
cept from being of maximum utility and benefit to home buyers and others.

The draftsmen of the UCA recognized that only by permitting the bases
of allocation of each right and obligation to be different from one another
could the flexibility inherent in the condominium concept be used to its
best advantage. Hence, the UCA presents no artificial legal barriers to de-
clarants. Declarants working under the UCA have the flexibility to choose
the bases of allocation that are best suited to their particular project. In
choosing, however, declarants should consider carefully the interests to be
served by each allocation in the context of their project.

B. The Private Governmental Function
of a Condominium

While the UCA does eliminate the artificial barriers to proper alloca-
tion that exist under most existing statutes, it does impose some restraints
on the freedom of declarants to pick and choose. These few restraints were
prompted in part by the demands of adequate disclosure and, in the area of
voting rights, by considerations of equity. In the latter respect, the draftsmen
of the UCA were particularly conscious of the fact that condominiums are
really private governments, which within the "jurisdiction" of their physical
boundaries, operate in ways that often parallel municipal governments.

The questions that arise in this area are, at their core, questions of
political philosophy. Such inherently political matters as voting rights, pro-
tection of minority interests and the exercise of the power to "tax" by means
of assessments, are necessarily dealt with by the condominium documents
which are the private governmental compact. This point has been fully
developed in a recent University of Chicago Law Review article by Uriel
Reichman, Residential Private Governments: An Introductory Survey, 43

§§ 503(n), 512, 513 (West 1971, Supp. 1977); OR. REV. STAT. §§ 91.505, 91.615 (1974); PA.
STAT. ANN. tit. 68, §§ 700.311, 700.312 (Purdon 1965, Supp. 1977); P.R. LAWS ANN. tit. 31,
§ 1291R, 1291s (1968); R.I. GEN. LAWS §§ 34-36-10(5), 34-36-24 (1969); S.C. CODE §§ 57-
495(g), 57-512 (1962); TEX. REV. CIV. STAT. art. 1301a, §§ 2(j), 15 (Vernon, Supp. 1976);
UTAH CODE ANN. § 57-8-10(6), 57-8-24 (1953, Supp. 1977); VT. STAT. ANN. tit. 27, §§ 1310,
1311(6) (Supp. 1975); WASH. REV. CODE ANN. §§ 64.32.080, 64.32.090(6) (1966, Supp. 1976);
State condominium legislation, such as the UCA, can be considered to be the "constitution" and the condominium documents to be the "laws" of a particular condominium community. The statute may be general or detailed, precatory or mandatory, restrictive or permissive with regard to the matters and relationships with which it deals but, regardless of its approach, it will be the superior law by which the condominium documents themselves will be evaluated. Recognizing this fact, the draftsmen of the UCA considered the proper scope of the UCA in the context of the extent to which it should displace the private law-giving authority that otherwise would reside in the declarant and, ultimately, in the co-owners.

Thus, the need for flexibility to encourage innovation and to ensure the ability of declarants to respond to factors peculiar to their particular project and to the market were balanced with other social interests. The draftsmen assumed that society has a sufficient interest in the creation and function of these private governments to make it appropriate for society, via its laws, to establish rules to govern these private governments with regard to the substance and procedure. Both experience and theory suggest that this assumption is warranted and that a declarant’s goodwill and the discipline of the marketplace are not sufficient to assure an adequate foundation for the effective long-range functioning of these private governments.

In fact, it may well be unreasonable to expect declarants (or even their counsel) to deal with "political" concerns without guidance from state legislation. In some areas, conflict is likely between the market orientation of declarants and social interests. Moreover, the factors to be evaluated in creating private governments are myriad, and the values to be served are often not clear. Thus, the role of "law-giver" may be a difficult one even for the most responsible declarant. The draftsmen of the UCA determined, in the end, to impose relatively few restraints on declarants, relying largely on disclosure and the growing sophistication of the marketplace to obtain essentially equitable results. It is hoped that the analysis contained in Part I can—by establishing parameters and guidelines—materially assist declarants in constituting private governments which will serve their citizenry most effectively. To a significant degree, however, that result will require an awareness by all involved of the political nature of the condominium communities that are being created.

### III. Allocation of Interests in the Common Elements and Rights Upon Termination

#### A. The Provisions of the UCA

1. Interests in the Common Elements

   Section 2-108 of the UCA gives the declarant unlimited freedom in choosing a basis for allocation of the interests in the common elements of a condominium so long as the condominium is not a flexible condominium. The only requirement imposed on such declarants with respect to that allo-
cation is that the declaration "state the formulas used to establish" the allocation. Comment 1 to Section 2-108 makes clear that the declarant need not "justify" the formula, but that he must "state" or "explain" it. The purpose of this requirement is to force declarants to think through the bases of allocation before choosing one, and to permit potential purchasers to weigh the acceptability of the declarant's choice.

In a flexible condominium, the declarant's choices of a basis of allocation may be more limited depending upon the degree to which the declarant is willing and able to specify some of the characteristics of future units. The declarant in a flexible condominium may choose any basis of allocation only if the declaration either:

1. requires that any units created in additional or convertible real estate will be substantially identical to the other units in the condominium and provides that common element interests and common expense liabilities will be allocated to those units in accordance with the formulas used for the initial allocations; or
2. identifies the other types of units that may be created in additional or convertible real estate in terms of architectural style, quality of construction, principal materials to be used and ranges of sizes, and states the formulas upon which any reallocation of common element interest and common expense liability to be allocated to each unit that may be created.

Otherwise, the declarant is limited to choosing either an allocation based on the relative size of each unit or an equal allocation of common element interests to each unit. The purpose of this limitation is to protect against potential abuses that could result during the course of the expansion of a flexible condominium.

In the event that the number of units in the condominium decreases, interests in the common element interests must be reallocated. The UCA does not give the declarant any discretion with respect to such reallocation. If contraction of the condominium occurs by virtue of the withdrawal of withdrawable real estate, the declarant must file an amendment to the declaration which reallocates common element interests to the remaining units in the condominium "in proportion to the respective interests . . . of those units prior to the withdrawal". [Section 2-112(a).] If a contraction in the number of units occurs by virtue of the expiration or termination of a lease in a leasehold condominium or by virtue of a taking by eminent domain,

---

5One ambiguity in the language of Section 2-108 results from the use of the word "and" in this provision. The entire subsection relates to the allocation of both common element interests and liability to common expenses. It is not clear whether a declarant who wishes to commit to identical formulas for the allocation of common element interests in future units also needs to do so for common expense liabilities even if he does not want to take advantage of the subsection for purposes of allocating common expense liabilities. The better interpretation appears to be that he is not so required, but on its face, the subsection seems to so require. A similar problem exists in subsection (2).

6An exception to this rule exists when the number of units is decreased by virtue of the relocation of boundaries between adjoining units (Section 2-114). In such event the interests in common elements appertaining to each of those units must be reallocated among those units, but other units are unaffected. In such cases, the owners of the units, which may include or be no one other than the declarant, may agree on the reallocation, subject to the right of the executive board to disapprove the reallocation.
the common element interest allocated to the "terminated" unit also must be reallocated to the remaining units "in proportion to the respective interests . . . of those units prior to the taking. . . ." [Section 1-107(a), (c); Section 2–107 (d).] Similarly, if contraction occurs by virtue of the conversion under Section 2–115 of all of a unit, owned by declarant, into common elements, the declarant must file an amendment to the declaration which reallocates among the remaining units the common element interests formerly allocated to the converted unit "on the same basis used for the initial allocation thereof." [Section 2–115(c).]

2. RIGHTS ON TERMINATION

The UCA differs significantly from every existing condominium statute in its provisions for the rights and interests of unit owners upon the termination of the condominium. Existing state laws provide that upon termination of the condominium regime, the former co-owners will become tenants in common of the remaining real estate, and their respective interests will be in proportion to their former ownership interests in the common elements of the condominium. In contrast, in all cases other than a termination resulting from the destruction of a unit or part of the limited common elements, the UCA separates the rights of unit owners upon termination from the allocation of interests in the common elements.

Under Section 2–120(f)(1) of the UCA, the interests of unit owners following termination are the fair market values of their units, limited common elements and common element interests immediately before the termination. These values are to be determined by one or more independent appraisers selected by the association. The proportion of any unit owner's interest to that of all unit owners is to be determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

The foregoing system of appraisal will apply to any termination of a condominium which is voluntary in the sense that it is not precipitated by a casualty which destroys a unit or part of the limited common elements. As discussed more fully below (see, infra, Section III, B.3.), it was the view of the draftsmen that distribution of interests after termination by means of such an appraisal is the most equitable means of distribution. Further, the draftsmen felt that in the context of a voluntary termination—which might be motivated for such reasons as the desire of the unit owners to make a profit by sale of the property—it is not unreasonable to impose the costs of an appraisal on the unit owners. In the event of a termination resulting from the destruction of a unit or part of the limited common elements, however, the unit owners may have little choice about termination. The draftsmen of the UCA felt that under those circumstances the costs of an appraisal might be too much of a burden to impose on the unit owners. Moreover, if a unit or part of the limited common elements has been destroyed, a fair appraisal of the interests of all of the unit owners could be impossible. Accordingly, under Section 2–120(f) (2) of the UCA, if any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof prior to the termination cannot be made, all of
the interests of the unit owners are to be allocated in proportion to their respective interests in the common elements.

It should be noted that Section 2-120(e) of the UCA requires that, upon termination, all of the assets of the unit owners association are to be distributed to unit owners in the same proportion as the real property interests are to be distributed pursuant to Section 2-120(f). Some state statutes distinguish between the distribution of the unit owners' real property interests and the association's assets and provide for distribution of the latter in proportion to the allocation of liability for common expenses. Presumably, this distinction arises from the assumption that the association will have purchased its assets from the funds generated by assessments for common expenses and from the conclusion that such assets therefore should be distributed in the same fashion that they were acquired.

The early drafts of the UCA made this distinction, but the draftsmen ultimately rejected it. They concluded that, while the assets of the unit owners association are purchased out of the funds generated by assessments, so also are the improvements to the real estate itself. Fixtures, such as a new swimming pool or fences, and additional land may be purchased out of the common fund. Maintenance charges are used to preserve the overall value of the common elements.

In these and other cases, funds assessed from the owners in proportion to their liability for common expenses are transformed into equity owned in proportion to their ownership shares. It is impossible to predict the extent to which assessments will be used to acquire or preserve owner equity. Moreover, any system that was refined enough to allow for allocating asset ownership between the purchase price and the assessment contribution to ultimate ownership value would be undesirably complex and difficult to administer. Therefore, the draftsmen opted to treat the distribution of the association's assets and the interests of the unit owners upon termination in precisely the same fashion.

B. The Interests to be Served by the Allocation of Common Element Interests

In giving declarants the authority to choose virtually any basis for allocating the various rights and obligations inherent in condominium ownership, the UCA rejected one of the most common approaches of existing state condominium statutes. That approach is to make the allocation of common element ownership shares the basis for allocation of other rights. As has been noted by numerous commentators, such a relationship does not seem to be warranted. The result of establishing such a relationship has been to make the allocation of common element ownership shares the key factor in an


HeinOnline -- 13 Real Prop. Prob. & Tr. J. 447 1978
individual unit owner's other rights. Yet, by virtue of the fact that all of
the rights and obligations to be allocated among the unit owners are sever-
able, the allocation of common element interests itself is only of residual
significance. Unless there is an underlying reason why the common element
ownership share allocated to a given unit in a particular condominium
should be determinative of that unit's allocation of another right or obli-
gation, such a relationship need not and should not exist.

In point of fact there are no such underlying reasons. Ownership of a
certain percentage of the common elements of a condominium does not
imply a greater or lesser ability or right to use the common elements. Irre-
spective of the percentage of the common elements which may be allocated
to a given unit, the owners of that unit have the unlimited (or an equally
limited) right to use all of the common elements. Their obligation to pay for
that use can and should be treated separately.

Since the concept of ownership of the common elements is divorced
from the owner's right and obligation to enjoy and maintain those common
elements during the life of the condominium, the only significance of com-
mon element ownership under most statutory schemes is to establish and
preserve those rights and obligations which the unit owner will have if and
when the condominium regime is terminated. As indicated above, the UCA
limits, to the maximum extent practical, the impact of common element
ownership or rights upon termination by making the latter contingent, in
most cases, on an appraisal of fair market value. Given this limitation, the
significance of common element ownership is very small. Nonetheless, in
order to understand why the UCA contains the provisions it does, and to
enable declarants to make rational decisions in choosing a basis for alloca-
tion of common element interests, it is necessary to consider the effect of
the several possible bases of allocation on the two possible goals to be served
by that allocation. These goals are:

1. The establishment of express ownership interests which are easily
determined and which will remain constant over time; and

2. The preservation of those ownership interests so that at termination
of the condominium regime, owners (or in some instances, lenders) will ob-
tain a property interest which adequately reflects the value of their original
interests in the condominium.

AND THE GENERAL ASSEMBLY OF VIRGINIA, at 10. (1975). McCaughan cites the general prin-
ciple as follows:

If shares in the common elements are determined according to value or some other
means that does not afford a reasonable relation to operating costs, it may be desirable
to use a different formula to determine the sharing of common expense.

17 U. FLA. L. REV. at 37.

Gregory gives the following illustration of the inappropriateness of linking liability to
the interest in the common elements:

Responsibility for assessments is usually proportionate to ownership in the common
areas, and ownership in the common areas proportionate to the initial sale price of
the unit. This arrangement is not always appropriate, however, in projects where the
price of apartments depends not on their size but upon the view or upon other in-
tangibles, as is commonly the case in the San Francisco "high-rise" apartments.

14 HASTINGS L.J. at 201 N25.
1. EFFECT ON ESTABLISHMENT OF CLEAR, CONSTANT OWNERSHIP INTERESTS

   a. Equality, Unit Size and Par Value. As long as the basis for allocation is objective and clearly calculable, so that it can be set forth in the declaration, the requirements of clarity will be met. As long as the standard is not susceptible to change over time, it obviously will meet the requirement of constancy. Equality, unit size and par value satisfy both these requirements.

   b. Relation to Another Right. So long as the right to which the allocation is to be related is itself based upon an objective, clearly calculable, constant standard such as equality, unit size or par value, relation to another right will satisfy these requirements.

   c. Market Value and Purchase Price. These bases cannot satisfy the requirements of either clarity or constancy. Both market value and purchase price are necessarily variable standards. Use of these standards would make it impossible for anyone to know what they owned at any given time.

2. EFFECT ON INTERESTS AT TERMINATION

   a. The Dilemma Created by Existing Statutes. As indicated above, in contrast to the UCA, every state statute presently provides that the rights of unit owners upon termination of the condominium are allocated in proportion to their respective interests in the common elements. Such provisions, however, do not preserve the necessary distinction between ownership of a condominium unit and ownership of a share in the common elements. The failure to preserve this distinction results in an erroneous allocation of interests on termination. The allocation is based not on the relative values of the various condominium parcels, i.e., the whole interest of the unit owner, comprised of the unit and the common element interests pertaining thereto, but rather on the relative values of only a portion of the condominium parcels—the various interests in the common elements. This error is significant since the value of the owner's condominium unit, which the state statutes exclude from the calculation of relative ownership rights at termination, is likely to be both larger and more variable than the value of the share in common elements allocated to the unit owner's unit.

   By virtue of the prevailing rule, there arises a need to allocate ownership interests in the common elements so as to bear as close a relationship as possible to the value of the units to which those interests are allocated. Otherwise, at termination, the owners of the more valuable units in the condominium may have their interests diluted, while owners of less valuable units may receive windfall profits. However, the values of units will change over time, and the only bases of allocation which can account for such changes are bases which themselves change over time.

---

8It is nonetheless essential that the purchaser receive an undivided fractional interest in the project which approximates the value of his investment. Without this parity he would receive less than what he paid for his interest should the property suddenly be destroyed by fire, taken under eminent domain or voluntarily deregistered and sold by the association of unit owners.


9The longer the life . . . of . . . a condominium project, the less likely it will be that the respective values of those parcels will remain proportionate to the respective per-
This creates a dilemma under existing statutes for declarants who must choose a basis of allocation, since bases of allocation which vary over time are, by definition, inconstant and thereby fail to promote the need to establish clear and constant ownership interests. The scope of this dilemma can be seen by applying the various bases of allocation now used by the states to common element interests and considering their effect on values at termination.

b. Equality. Equality is highly unlikely to reflect a proper apportionment of investment values at termination. Only in condominiums in which all units are identical is there some chance that the relative ownership interests will be properly reflected. However, even in such condominiums, changes over time—principally intra-unit improvements or effects of maintenance as well as variations of location\(^\text{10}\) or other market sensitive features—may cause fair market values at termination to be different from each other.

c. Unit Size. The size of units should be a far better measure of the relative value of condominium parcels at termination than equality, since it is reasonable to assume that, all other things being equal, larger units will be more valuable than smaller units. Size is not the only measure of value, however. Unit location will affect value as will intra-unit amenities. Furthermore, size is subject to the same basic objection as equality in that unit maintenance, intra-unit improvements, and other factors will, over time, give units of identical size different values. In a multi-use condominium, a large commercial space may not be worth as much as a group of small residential units occupying the same amount of space. Conversely, a small commercial space may be worth more than a large residential unit. Thus, unit size is an unsatisfactory basis for allocation of values on termination, although it is more likely to yield an appropriate result than is equality.

d. Par Value. If properly used, par value could be a better measure of value than unit size, since it gives a declarant the flexibility to assign common element ownership interests in a fashion that will account for the variables which determine initial market value. However, the declarant need not account for these variables, or may not do so accurately,\(^\text{11}\) in which event

\(^\text{10}\) . . . units equal in square footage (and equal in ownership percentages) may be located on different floors, with varying layout and views. Accordingly, the more desirable of the two would command a premium, especially if located in the upper reaches of the building.

\(^\text{11}\) Even when the declarant attempts to assign to a unit a par value which reflects his perception of the initial value of that unit in relation to the value of the entire condominium, the subsequent sale of the units may reveal different buyer preferences. Rohan,
par value might even be a worse basis of allocation than unit size. Furthermore, as indicated above, initial values are likely to change, perhaps substantially, over time, and thus the proportion of a unit's allocated value to the whole will not always be the same as the proportion of the unit's market value to the whole. For this reason, par value is also an unsatisfactory basis for allocation.

e. *Relation to Another Right.* The effect of allocating ownership shares in accordance with the allocation of another right will, of course, result in preservation of investment values only if the basis of allocation underlying that other right would do so. The problem is the lack of such a basis which would function satisfactorily over time. The mere relation of ownership shares to another right will not result in those shares bearing any better or worse relationship to value at termination.

f. *Market Value or Purchase Price.* Two variable factors—market value and purchase price—are more satisfactory than the aforesaid constant factors in accounting for changes in value over time. Despite the ability of these bases to take such changes into account, only the Alaska state statute\(^\text{12}\) attempts to utilize either of them.

In the case of purchase price, the adjustment mechanism is imperfect since units may be sold infrequently and since some sales may be at other than a market price. Market value, which implies a value based on a professional appraisal, provides an adequate mechanism for adjusting for changes in unit value over time, but it brings with it the major disadvantage discussed above: the interest in clear, objective ownership interests is not served. Each unit owner's share of ownership in the common elements will fluctuate on the basis of what happens to his unit's value vis-a-vis other units. This lack of consistency is objectionable since it would create problems for mortgage lenders with regard to certainty of record title and ownership rights. Further, as suggested in the subsequent analysis, it would also create problems in relating common element ownership and liability for common expenses.

3. **THE DILEMMA OF CONFLICTING INTERESTS IS SOLVED BY THE UCA**

From the foregoing analysis, it is clear that the bases of allocation that best serve the interest of clarity and constancy—equality, unit size and par value—are unsatisfactory in serving the interest of preserving the proportionate interests of the unit owners at termination. Conversely, the basis of allocation that best preserves proportionate interests—market value—is entirely unsatisfactory for purposes of achieving clarity and constancy. All

\(\text{Drafting Condominium Instruments: Provisions for Destruction, Obsolescence and Eminent Domain, 65 COLUM. L. REV. 593, 616 n.186 (1965).}\)

\(\text{\textsuperscript{12}}\)Alaska seems to use market value by providing:

\(\ldots\) for periodic reappraisal of the apartments and the common areas and facilities together with a recomputation, if required, of the percentage of the undivided interest of each apartment owner in the common areas and facilities.

\(\text{ALASKA STAT. \S 34.07.180(b) (1975).}\) The state of Washington had a similar provision which it deleted from its statute in 1965.
jurisdictions which have encountered this dilemma have resolved it in favor of clarity and constancy and at the sacrifice of protecting unit owners' investment values. On balance, if a choice must be made, that may be the best choice, since the adverse consequences of the allocation upon value at termination affect only the terminal owner and, perhaps the terminal lender. Moreover, these adverse effects can be moderate if values in a particular condominium do not fluctuate disproportionately over time. On the other hand, the adverse consequences of an unclear or variable state of title are likely to be great and would affect all owners and lenders.

The draftsmen of the UCA, however, recognized that it would be a mistake to dismiss lightly the problem of unfair allocation of property rights at termination. As our experience increases and as more and more condominiums reach the termination state, the problems which are not adequately anticipated now may prove to be overwhelming. Thus, one writer on the subject has pointed out that:

Outside the U.S. . . . the more important problems are those created by the deterioration and eventual demise of buildings . . . Mere passage of time will bring about obsolescence. . . . Gradual damage in neighborhood conditions may generate a desire on the part of unit owners to dissolve the venture; progress . . . may culminate in the condemnation of a portion of its facilities.


Accordingly, the draftsmen of the UCA adopted the appraisal-based system in order to eliminate, to the maximum extent possible, the cause of the otherwise existing dilemma, i.e., the allocation of rights on termination in accordance with shares in common elements. Such an approach had been suggested by various authorities.

Under the UCA's appraisal-based system, it is not necessary for declarants to allocate ownership shares of the common elements on a basis which will reflect variations in unit values. It is only necessary to find a basis of allocation of common element ownership shares which will establish clear, constant ownership interests, and which will facilitate appraisal of the condominium parcels at termination.

18While no jurisdiction has a provision calling for individual appraisal in the event of termination, Alaska may accomplish the same result by its provision requiring the by laws to provide for periodic reappraisals and recomputation of each apartment owner's undivided interest. ALASKA STAT. § 34.07. 180(b) (1975).

14In order to permit owners to recover their investments in their units and not to discourage them from making substantial improvements to their units, Section 802 of the Unit Property Act should be amended to provide that upon termination of all or part of the condominium project for whatever reason, and appraisal of the value of the former condominium parcels must be made on the basis of the respective assessed valuations of each unit plus its respective percentage interest in the common elements.

4. EFFECT ON INTERESTS UNDER "APPRaisal UPON TERMINATION" SYSTEM; THE CONSIDERATIONS FAVORING UNIT SIZE

As indicated above (see, Section II.B.1, supra), equality, unit size and par value are all satisfactory bases of allocation for purposes of establishing clear, constant ownership interests in the common elements. Assuming that one of those three constant bases is used, preservation of the common element ownership shares thus created will follow so long as an appraisal of the value of those shares and of the units can be made at termination. One practical consideration, however, affects the choice of the basis of allocation of common element ownership shares, and favors the choice of unit size.

In some condominiums, all or the vast majority of the common elements may be comprised of the land upon which the units have been constructed, the structural elements (such as walls, floors, windows and the roof) and other facilities (such as pipes, ducts and wiring) which are essential to the functional existence of the units. Such common elements are hereinafter referred to as "essential common elements." An appraiser valuing a condominium unit in such a condominium must assume that those essential elements are attributable to that condominium unit. Otherwise, the appraiser could not fairly appraise the condominium unit. For example, the appraiser must be able to assume that each unit in a townhouse condominium includes or has been allocated rights to four walls, a roof, a floor and a foundation. If he cannot assume this, appraisal of the unit becomes virtually impossible. The appraiser also must adjust his appraisal of the remaining common elements (i.e., those which are not essential common elements) to account for the attribution of the essential common elements to units. The techniques of this adjustment are best left to appraisers to elaborate; the UCA makes no effort to make this adjustment for appraisers.

It is important, however, that the allocation of common element ownership interests not stand as a legal obstacle either to the assumption that essential common elements are attributable to units or to the adjustment in the appraisal of the "non-essential" common elements. In order to ensure that such allocation will not be an obstacle, the proportionate undivided interest in the common elements allocated to each unit must be of a magnitude sufficient to encompass the essential common elements which must be attributed to that unit upon termination. If the allocation were not sufficient in this respect, a disgruntled party might be able to interpose an objection to the appraisal at termination by contending that he, and not the owner of another condominium unit, is the owner of some of those essential common elements which, as a physical matter, ought to be attributed to that other condominium unit. This problem only exists when termination will result in a partition of the former condominium property rather than a sale of the property and a distribution of the resulting proceeds.

Such an objection might be based on the following facts. In a townhouse condominium in which all common elements are essential common elements, there are four units, one of which is twice as large as the other three, which are identical. The ownership shares in the common elements
are allocated equally. The unit owners vote to terminate the condominium, and an appraiser values the four condominium parcels, arriving at valuations of $20,000 for the condominium parcel containing the large unit and $10,000 each for the other three condominium parcels. The owner of one of the $10,000 condominium parcels might contend that since each owner had a one-fourth interest in the common elements, some of the essential common elements attributed to the $20,000 condominium parcel are properly attributable to him. Such a contention would obviously work havoc on any partition attempt. The protesting owner would be contending, in effect, that he owns part of the walls surrounding the larger unit. If the allocation of common element ownership interests contained in the condominium documents are to be determinative, a court might have a hard time resisting such a contention.

Clearly, such a situation could arise only rarely. For example, if the condominium has a large recreation area or substantial other nonessential common elements, the value inherent in those nonessential common elements can be used as a “fudge-factor” enabling the appraiser or a court to attribute value from those elements to smaller units. However, if declarants exercise foresight, the problem should not arise at all. The problem can be avoided if the declarant allocates common element ownership shares in proportion to unit size. If that is done, each condominium parcel will necessarily contain an interest in the common elements sufficient to encompass the essential common elements which must be attributed to the unit contained therein.

Thus, if the above-described problem is to be avoided, common element ownership shares ought to be allocated on the basis of unit size. The draftsmen of condominium documents might consider, of course, that the foregoing example is too unlikely to occur to worry about. Against this, however, must be weighed the seriousness of the problem should the actual situation arise and the absence of any compelling reason to allocate ownership shares on a different basis. Moreover, another more elusive consideration—that of meeting the consumer’s conception of equity—may support the use of unit size as the basis of allocation of common elements ownership shares. Analytically, it is not any more or less equitable to allocate such shares on the basis of equality, unit size, par value or any other constant measure. Whatever the allocation may be, the purchaser pays for what he gets. There is no inherent reason why a purchaser of the smallest unit in the condominium could not be permitted to buy the largest share of the common elements in a free market. Consumers, however, may not view the matter this way. It may appear to them more equitable for the persons who pay for larger units to receive larger shares of the common elements.

As suggested above, this is less than compelling. Indeed, a similar argument can be made for establishing a relationship between the allocated share of ownership of the common elements and the percentage share of liability for common expenses allocated to a unit. Thus, it can be contended that the right to own the common elements ought to be proportionate to the obli-
gation to pay for their maintenance and operation. Nevertheless, the use of unit size as a basis for allocation of ownership shares in the common elements at least comports with a perception of equity. Given the fact that it may also avoid a serious problem situation and given the fact that there are no factors suggesting that another basis of allocation is superior, declarants should favor the use of unit size as the basis for allocating those ownership shares.

IV. ALLOCATION OF LIABILITY FOR COMMON EXPENSES AND RIGHT TO SHARE IN COMMON PROFITS

The analysis now turns to examining the merits and disadvantages of the various bases of allocation which declarants may use with regard to the unit owners' liabilities for common expenses not specifically assessed and to the right of unit owners to share in common profits accruing to the condominium. As before, this requires identification of the choices permitted under the UCA and then of interests which the declarant should attempt to serve in making a choice of a basis of allocation.

A. The Provisions of the UCA

The provisions in the UCA governing the allocation of liability for common expenses of the unit owners association are precisely the same as those governing the allocation of interests in the common elements. (Section 2-108; see, Section III, A, supra.) Therefore, declarants have great discretion in choosing a basis for allocating common expense liability. As discussed below, however, the factors which must be considered by declarant in choosing a basis for allocating liability for common expenses are far more numerous and complex than those involved in allocating common element interests.

The UCA does not provide for an allocation of common profits separate and apart from common expenses. Many existing state statutes do contain a specific provision for allocation of common profits, but all of those statutes require that the allocation be the same as the liability for common expenses.16

---

16Note that this view is by no means the same as the largely discredited but nonetheless common position (see, notes 3 and 5, supra) that the liability for common expenses ought to be based upon the allocated share of the common elements. The difference lies in which is the constant and which is the variable factor. The instant analysis rejects the view that liability should vary in accordance with ownership interests because of the underlying interest that ought to be served by the allocation of such liability. (See, infra, Part II.) But, as demonstrated above, the ownership of common elements is a residual concept, and as long as the ownership interest is clearly and firmly established and the owner's proportionate interests upon termination are preserved, there is no reason not to allow the original allocation of ownership interests to be a function of the liability for payment of common expenses.
The UCA is intended to reach nearly the same result by providing in Section 3-113 [Surplus Funds] that:

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves shall be credited to the unit owners to reduce their future common expense assessments.

As indicated in the Comment to Section 3-113, the draftsmen intended that Section to allow declarants to make special provision for use of "surplus funds" (which the draftsmen considered to include "profits") for special purchases, such as recreational equipment, thus allowing profits to be shared "in kind." Otherwise, surplus funds are to be credited against future common expenses, thus ensuring that they will be distributed, automatically and regularly, in proportion to liability for common expenses.17

The UCA approach, which allocates common expenses and common profits on the same basis, is appropriate. As a general rule, the common profits of a condominium will result when the funds generated by assessments for common expenses exceed the amount authorized by the declaration for the creation of operating and capital reserves. In such instances, it is clearly equitable that profits be distributed on the same basis as the assessments themselves. Common profits could result from a source other than over-assessment, such as when profits result from the commercial operation of the common elements. At least one

17As written, however, Section 3-113 might be construed to permit an unintended loophole. The phrase "unless otherwise provided in the declaration" may be broad enough to permit the declarant to insert a special provision in the declaration which, rather than permitting "special purchases," allocates common profits on a wholly different basis than common expenses. Such an interpretation would be entirely contrary to the draftsmen’s intent. The early drafts of the UCA contained a Section 3-112, entitled "Rights to Common Profits," which provided that any common profits that are not applied to offset expenses of the condominium are to be allocated and distributed to the unit owners in proportion to the unit owners’ liabilities for common expenses. That Section 3-112 ultimately evolved into the present Section 3-115. The only significant change that the draftsmen intended to make in rewording the old provision was to make the crediting of future common expenses more automatic. The draftsmen wanted to ensure the regular distribution of profits to the unit owners, and to prevent the association from simply retaining the profits in a bank account.

Even assuming that Section 3-115 could be read to permit a declarant to provide for a separate basis of allocation of common profits, however, declarants would be ill-advised to do so. (See text.)
commentator has suggested that in those instances, it might be more equitable to distribute profits in accordance with ownership shares in the common elements but that does not seem to follow. As discussed above, ownership of the common elements is a residual concept, the primary significance of which is at termination. The day-to-day operation of the common elements is reflected in the liability to pay for that operation. If operating costs can be reduced by commercial operations, the liability for those operations should also be reduced. Such a reduction can only be properly effected by allocating shares in the profits on the same basis as the allocation of the liability for expenses.

The only situation in which equity would require that profits be distributed in accordance with ownership shares, would be if there were to be a sale of a portion of the common elements. Under the UCA, however, such a sale is prohibited. Section 2-108(d) provides, in pertinent part, that the common elements are not subject to partition, and any purported conveyance . . . or other voluntary or involuntary transfer of an undivided interest in the common elements without the unit to which it is allocated is void.

The Comment to section 2-108 notes that the prohibition of a separation of ownership of a unit from its common element interest is a “basic tenet of condominium law.”

B. Interests to be Served or Goals to be Attained by the Allocation of Liability for Common Expenses and Common Profits

“Common expenses” covers a multitude of costs and the variety and proportion of types of costs will vary according to the nature of the occupants of the condominium, the project’s intended use (commercial, residential, vacation home) and its location and physical characteristics. Moreover, these factors can—and probably will—change over time. However, one factor seems likely to be constant: unit owners are most likely to support a common expense allocation which relates liability for common expenses to usage of the facilities, utilities and services which generate the expenses. This suggests that the interests and goals in allocating common expense liabilities and rights to common profits may be broken down as follows:

1. To the maximum extent possible, liability should be related to the degree to which each unit utilizes common elements that result in expenses that are use related;
2. Profits and expenses should be distributed so as to reach an apparently equitable result; and
3. Whatever the allocation basis for expenses and for profits, it ought to be clear so as to avoid conflict and possible litigation.

C. Effect of Each Basis of Allocation on These Interests

The task of predicting which basis of allocation will best relate liability to usage will be a challenge to any declarant’s ability to analyze and antici-
pate the future. The complexities are great, but it is hoped that the following analysis will give the declarant some guidelines which are tailored to the situations most likely to occur. In this regard, it should be noted that the UCA's requirement that the declarant "state the formulas" used to establish the allocation is particularly important here. The purpose of that provision is to require declarants to disclose to prospective purchasers the analysis upon which allocations are based.

1. EFFECT ON ALLOCATION OF LIABILITY ACCORDING TO UTILIZATION OF COMMON ELEMENTS

a. Equality. The cost of operating or maintaining some common elements in a condominium will be use related—that is, the cost of operation or maintenance will increase or decrease in direct relation to the degree to which they are utilized—whereas the cost of operating and maintaining other common elements will not be use related. In some condominiums, equality will fairly reflect the degree to which each unit can be expected to utilize use related common elements. This may be true, for example, in condominiums in which the units are all of nearly the same size, use roughly the same amount of utilities and require the same amount of maintenance. Where all of the above assumptions hold true, equality is a fair basis upon which to allocate common expenses. However, the fairness in such cases is largely coincidental, and as discussed below, in such cases size or par value can be just as efficient as equality in properly allocating expenses.

In some condominiums, particularly garden-type or townhouse condominiums, many use-related expenses which would be common expenses in a high-rise may not be designated as common expenses at all. Parking areas, plumbing, even exterior walls may not be common elements, so that maintenance of those items is not a common expense; utilities may be separately metered. At the same time, those common elements which do exist, such as grounds and plantings, may not cost significantly more to operate or maintain whether used ten or one hundred times per day. In such cases, equality will be a better basis for allocating common expenses than would be another measure which requires some units to pay more than others. This is true

19Specifically, the analysis and the conclusion assume that the most typical condominium is residential, with little or no commercial space, and that the largest single item of common expense liability, constituting 50% or more of total liabilities, is related to utilities—electricity, fuels to heat and cool, and water sewage charges.

20It must be recognized that, as a practical matter, variations in use can only be considered if they relate to the characteristics of the unit and not to the characteristics of the occupants of the unit.

21A "fixed cost" common element is one of the expenses which will not significantly change depending on use; an example would be the cost of heating or cooling the building lobby. However, if a "fixed cost" common element is likely to experience a wide variation in use among unit owners, that common element should be carefully evaluated for designation as a limited common element whose expenses could be specifically assessed to the "user" owners.
since each unit can be said to have an equal potential to benefit from the maintenance, availability and operation of "fixed cost" common elements regardless of the benefit each unit owner thinks he derives from such common elements.

Nevertheless, in most high-rise condominiums, and perhaps the majority of all condominiums, the maintenance or operation of some common elements will be use related. In condominiums with single metering, utilities are undoubtedly the primary example and in all likelihood the predominant common expense. Other possible examples of common elements involving use-related expenses are exterior fittings, such as windows, recreational facilities requiring special lighting or attendants, parking facilities, and maintenance of laundry equipment and plumbing.

In mixed-use condominiums, the differences in usage among units are likely to be the most pronounced. The commercial unit owner has little interest in recreational facilities, laundry rooms, and perhaps even elevators, but is likely to make more intensive use of the utilities and may derive greater value from the lobby or driveways and parking than the ordinary resident and may make extraordinary use of utilities. In these situations, equality would be a poor means of relating liability for common expenses to use.

It thus appears that, depending upon the characteristics of the particular condominium, equality may reflect the relative contribution of each unit to the costs of operating or maintaining the common elements as well as, better than or worse than other measures. It will be a better basis for allocation where the common elements expenses are not significantly use related. It will be an adequate basis for allocation where expenses are use related but where the expected usage by each unit does not vary greatly. But it will be a poor means of allocation if expenses are use related and if usage can be expected to vary from unit to unit.

b. Unit Size. In condominiums in which common element expenses are use related, unit size (particularly if measured in cubic rather than square feet) seems as likely as any measure to account for variations among units in utilization of the common elements. Utilities are the obvious example of a use related common expense that will generally vary with unit size. A larger unit will usually require more heat or air conditioning and use more electricity. Similarly, expenses for exterior maintenance should vary with size. Size is a poor measure, however, for expenses which do not vary significantly with usage.

Of course, size may not be an entirely satisfactory measure of usage. For example, the location of a unit may be as important as size with respect to the unit's likely usage of certain common facilities, such as utilities, and for that matter, even recreation areas. Units in shady, upper floor locations or with less exterior wall area may make less use of the utilities all year round. Ground floor apartments will tend to require less cooling, while heating costs should be less for higher units. Of course, such differences are minor. Similarly, elevator usage will vary, floor by floor, but only people on the ground and perhaps the next one or two levels really are likely to make less use of them.
In mixed-use condominiums, size may be entirely irrelevant to usage. To take an extreme case, residences, hotels, offices and commercial stores might all be required to share in the common expenses of a single highrise building. Yet all owners will use utilities, parking, recreation facilities, laundries, and other common elements to drastically different degrees. Some, but not all, of this problem can be alleviated by the judicious use of limited common elements or by charging user fees. Even then, however, size is likely to be an imperfect barometer of utilization of the common elements in such a project.

c. Par Value. In theory, the flexibility inherent in the par value concept makes it possible for there to be the highest correlation between liability for common expenses and use of common facilities. A thoughtful declarant could add extra "value" (in terms of points or dollars) for special factors affecting individual units which will involve higher usage of commonly provided facilities whose costs vary with usage. In practice, however, there will be a temptation for declarants to correlate par value to initial purchase prices. Those prices, in turn, are likely to relate basically to size and location, and while they may reflect usage of common facilities, they need not.

Thus, if declarants use par value with the intention of reaching a fair allocation of expenses, then par value can be expected to be as good as, or even a better measure than, equality or unit size; if they do not, it will not be. The flexibility inherent in par value does allow declarants a means to adjust for the complexities inherent in mixed-use condominiums and other special situations.

d. Market Value/Purchase Price. There is little to be said in favor of either of these values; neither is likely to be a better measure than unit size or par value. Since the relative use of common facilities by units should not vary significantly over time, there is no advantage in allowing variations over time in the formula used to compute the allocation of liability. Indeed, as discussed below, allowing such variations is an extremely bad idea.

e. Reference to Another Right. The desirability of using such a basis inevitably depends upon the basis upon which the "other right" was itself allocated. There is no reason to believe that the mere relation to another right, such as ownership of the common elements, will better correlate liability for expenses to usage, although this could happen as a matter of coincidence.\(^\text{22}\)

---

\(^{22}\)The Kentucky condominium statute allocates liability on the basis of the owner's percentage interest in the common elements. The statute attempts to correct the fact that such an allocation may not reflect usage by providing

\[\ldots\] That the master deed may provide for adjustments by the council of co-owners for contributions proportioned upon a consideration of a combination of floor area, the number of occupants, demand on public utilities and accessibility to limited common elements.

**KY. REV. STAT. § 381.870 (1972, Supp. 1977).** That method may leave much to be desired in terms of harmony within the council of co-owners.

The New York condominium statute permits the declaration and bylaws to authorize the board of managers to specially allocate expenses and profits based on use or control:

Notwithstanding any provision of this article, profits and expenses may be specially allocated and apportioned by the board of managers in a manner different from the
2. THE APPEARANCE OF EQUITY: ALLOCATION ON THE BASIS OF EQUALITY OR "ABILITY TO PAY"

In addition to consideration of usage, declarants also should consider whether a particular allocation appears to be equitable.\textsuperscript{22} If utility expenses continue their dramatic increases and "home ownership" costs continue to become a higher proportion of household budgets, questions of the fairness of cost allocations among condominium units will become increasingly sensitive and more likely to be divisive and disruptive. Accordingly, it is important that whatever scheme is employed not be one which is likely to cause any group within the condominium to feel victimized, lest such a sense of victimization lead to dissension within the unit owners association. Dissension is detrimental not only to those involved in the condominium, such as unit owners, lenders and contractors, but also to the general public. The general public may be called upon to provide a judicial forum for the resolution of the dissension, may see the local tax base erode as the troubled condominium decreases in value, and may see the impairment of the local economy as lenders are unwilling to invest in the area and people are unwilling to move into or remain in the area.

A discussion of how to achieve apparent equity follows. This discussion is prefaced by an analysis of an allocation basis, i.e., ability to pay, not analyzed elsewhere in this paper, that can only have application to common expense liabilities.\textsuperscript{24}

Is there any virtue at all in attempting to allocate expenses in accordance with the ability to pay? Practical implementation problems clearly exist. Unit values and unit income frequently will not coincide. Yet the unit value (as measured by purchase price, market value or other measures which may vary over time) seems to be the only method available to establish a relative measure of unit owner income without raising serious "right of privacy" concerns. Moreover, our income tax systems notwithstanding, it is

common profits and expenses, to one or more non-residential units where so authorized by the declaration and bylaws. In the case of units in any building, residential or non-residential or a combination thereof, profits and expenses may be specially allocated and apportioned based on special or exclusive use or availability or exclusive control of particular units or common areas by particular unit owners, if so authorized by the declaration and bylaws, in a manner different from common profits and expenses.


The potential for conflict is nonetheless not eliminated.

\textsuperscript{22} Of course, cost of administration and ease of operation must also be considered. This is obvious if consideration is given to whether there should be two bases for allocating the expenses arising out of the operation of the common elements existing within any one condominium (the applicability of each basis of allocation to depend upon whether the expense is or is not use related). Although there may be instances in which this is desirable, this cannot be assumed to be "the best" approach. \textit{Compare} Rosenstein, \textit{Inadequacies of Current Condominium Legislation—A Critical Look at the Pennsylvania Unit Property Act}, 47 TEMPLE L.Q. 665, 672 n.44 (1974).

\textsuperscript{24} There is a surface appeal in relating ownership shares of common elements to liability for common expenses—"each owner should pay in proportion to his interest." But such a relationship has surface appeal only. Since there are no real reasons for relating the two, a decision to allocate liability for common expenses on a basis other than common element ownership is not likely to result in apparent inequity. This is true even given the influence of practice to date.
not the norm in our society for services such as a condominium owner typically receives (e.g., building maintenance and utilities) to be priced higher for those with a greater ability to pay. Allocation on the basis of ability to pay moves a condominium toward assuming traditionally governmental functions of income redistribution, but there is no apparent reason not to leave this function with the government.

It seems a fair conclusion that most unit owners, regardless of ability to pay, can be expected to feel that relating usage to common expense liability is equitable if the condominium is viewed as functioning as a non-governmental entity. As already noted, this is consistent with the pricing norm generally accepted in our society for all types of goods and services. Thus, the goal relating expense allocation to usage seems clearly consistent with an interest in achieving apparent equity. On the other hand, it would not seem improper for declarants to conclude that a basis of allocation which largely allocated in accordance with use and which is biased toward "progressive" distribution of costs is preferable to one that does a relatively poor job of allocation according to use but which tilts toward egalitarianism.

Finally, the potentially regressive impact of allowing common expense liability to be related to market value should be noted. The fact that one's unit has appreciated in value does not increase one's cash income. The use of market value as a basis to allocate common expense liability would have the same apparently inequitable impact as the present ad valorem real estate tax structure.

3. CLARITY

Declarants must also consider the clarity of the allocations they make. For purposes of allocation of liability for common expenses, clarity seems to require an objectively definable standard set forth in the condominium documents which entails neither periodic recalculation nor reference to an outside or variable source. Prospective unit owners should be able to calculate, prior to purchase, whether or not they will be able to meet the regular monthly payments. This is of particular importance to persons who have (or who expect shortly to have) fixed incomes. Unit owners should be able to consider, at the time of a vote on a budget or on particular expenditures, whether they can afford their share of the proposed expense(s). Equality, unit size and par value are all equally satisfactory for this purpose, while variable measures such as market value and purchase price are unsatisfactory. Relation to another right is also satisfactory so long as that right is based upon equality, size, par value or another objective, non-variable standard.

25Of course, this will depend, too, upon the amount of total expenses, and that will vary over time. But if proportionate shares of liability are fixed, one of two variables essential to the ability of purchasers to predict what they will be able to afford is fixed. The prediction should, accordingly, be more accurate.
D. Impact of Expansion of a Flexible Condominium on the Various Interests

1. Changes in the Number of Units

Whenever the number of units in a condominium increases, the proportionate shares of liability for common expenses allocated to each unit can be expected to drop, while the total amount of expenses should increase. If that liability was originally allocated on a basis which fairly reflected relative utilization of the common elements, the decrease in each unit's share of liability ought to be proportionate to the increased amount of common expenses which results from the addition of new units, so that the net effect of the addition of those new units will not be to increase the old unit owner's assessments. Indeed, if there is any net effect, it ought to be to decrease assessments due to economies of scale.

But, if the units created are not substantially similar to the units in the original condominium, this may not occur. It is largely for this reason that the UCA requires that, in a flexible condominium, liability be allocated on the basis of equality or unit size unless the new units will be identical to the old units or unless the allocations for new units are specified in the declaration. [See Section 2-108(b).] The draftsmen felt that either the basis of equality or unit size would be most likely to yield equitable results when the characteristics of future units could not be predicted.

However, the declarant must still make a decision between these two bases. If the new units are large and the original units were small, then the increase in utilities usage is likely to be greater than the increase in the number of units, and if liabilities originally were allocated on the basis of equality, assessments for pre-expansion unit owners will rise. However, if liability were based upon unit size, this would probably not happen. The same effect is likely to result whenever new units are added to the condominium if the characteristics, other than size, of the additional units will cause those units to utilize use related common facilities at a rate or to an extent which is neither the same as the original units nor contemplated by the declarant in choosing a basis for allocation. This problem is likely to be particularly acute if part of a condominium is comprised of new units and part is a conversion.\textsuperscript{26}

Thus, if the declarant chooses equality as the basis for allocating expenses on the grounds that all the units in his expandable condominium will utilize common facilities at approximately the same rate, he ought to be sure that the pertinent characteristics of any units created on the additional land will be comparable to those of the original units. If the units will differ and if the declarant wishes to allocate liability for common expenses in accordance with use, he must either: (a) account for that difference in the original allocation of liability by choosing a basis for allocation

\textsuperscript{26}Garfinkel, Structuring an Incremental Residential Condominium, 20 PRAC. LAW. 11, 13 (1974).
which will reflect relative use both before and after the additional units are added, and specify the allocation for new units pursuant to Section 2-108(b)(2); or (b) find a way for the new units to pay for their own use-related common expenses separately from the old units.

The latter choice may be the most logical since most expandable condominiums will probably include two or more buildings and hence will lend themselves to separate metering or billing of many use related expense items. Another device which may be employed for this purpose is the expanded use of limited common elements. Thus, the common elements of phase one of a project may become limited common elements of phase one, and the common elements of phase two may become limited common elements of phase two. The "true" common elements, i.e., those which are common to both phases, may then be those which are available to all and which are non-use related. Another potentially helpful approach might be to use a separate (and perhaps different) basis of allocation for each group of units constituting a phase, together with a mechanism (such as separate metering) to allocate expenses among the phases. Such a use of a combination of bases of expense allocation within a single condominium regime may be particularly useful in a project combining mixed uses.

2. CHANGES IN SIZE OR NATURE OF COMMON ELEMENTS

Any change in the size or nature of the common elements is likely to change the amount of each unit's liability for common expenses. Nevertheless, unless the nature of the particular common elements is such that they will be utilized by the units in proportions other than were contemplated by the original allocation of liability, the change should not affect the relationship of use to liability applicable to each unit. Most common elements that will be added in a flexible condominium will be in the nature of recreational areas or other facilities which will be either available to all or designed for the use of only some units. In the latter case, the facilities should be limited common elements; in the former case there should be no problem. Common elements that are added as integral parts of additional units are likely to be use related to those particular units. However, the impact of such changes in the common elements should have been considered in the declarant's original choice of a basis for allocation.

V. ALLOCATION OF VOTING RIGHTS

A. Provision in the UCA

In considering allocation of voting rights (in contrast to allocation of common element interests and common expense liability), declarants must become, as has already been noted in Section II.B., political scientists. The determination of the proper basis of allocation of voting rights depends to a large degree upon whether one views a condominium as more closely akin to a political or a corporate body. To the extent that a condominium is viewed as a political body, certain assumptions, based on Western democratic models, come into play. Among these are the virtue of democratic elections in which the will of the popular majority prevails, and the desir-
ability of protecting the interests of the popular minority. On the other hand, to the extent that a condominium is viewed as analogous to a corporate model, the interests of an economic majority, rather than a popular majority, are presumed to prevail.

Section 2-108(c) of the UCA permits declarants to favor either model. Declarants may allocate votes in the unit owners association on the basis of equality (i.e., one unit—one vote), or in proportion either to common expense liability or to common element interests. Section 2-108(c) also permits declarants to provide in the declaration for different allocations of votes on particular matters specified in the declaration. Thus, declarants may choose to follow a "corporate" model on financial issues, as by allocating votes on capital expenditures, in proportion to common expense liability, while following a "democratic" model on other issues by allocating other votes on the basis of equality. As discussed below, such a differentiation between voting rights for different issues is best calculated to serve the appropriate interests of all of the unit owners.

The provisions in the UCA pertinent to reallocation of rights and interests upon expansion or contraction of the condominium are, for the most part, the same as those for the reallocation of common element interests and common expense liability. An exception exists with respect to the reallocation of votes within a unit which can be subdivided into two or more units, common elements, or both, pursuant to Section 2-115. Under Section 2-108(c), if votes for other units are allocated on the basis of equality, votes for such subdividable units must be allocated on the basis of size of those units in comparison to the aggregate size of all the other units. The reason for this is that it is impossible to maintain equality of voting rights if all units are allocated one vote and then some units are subdivided so that two or more new units must share that vote. The closest approximation to equality that can be achieved in that situation results if the subdividable units are allocated more than one vote based on unit size, so that, upon subdivision, an approximation of one unit—one vote can be obtained.

B. Interests to be Served by the Allocation of Voting Rights

A decision by a declarant as to whether to favor a democratic model or a corporate model in creating a new condominium is a difficult one. In fact, the condominium is a hybrid. It functions as a political community which (at least in a residential condominium) affects the daily lives and home environment of its co-owners. At the same time, it represents major economic interests which, quite arguably, ought to be reflected in voting power. Depending upon which of the two models—democratic and corpo-

---

27 The Comment to Section 2-108 notes that these three bases are the "three methods [of allocation of voting rights] presently in common use throughout the country." Since the draftsmen appeared to have recognized that common element interests are only of residual significance (See discussion, supra, Section III ___), there appears to have been no reason for permitting allocation of voting rights in proportion to common element interests other than that it is frequently done.
rate—the declarant views as more appropriate, different conclusions may be reached as to the appropriate basis of allocation of voting rights.

In making a choice it appears that three interests must be considered. These are:

1. Establishment of an efficient means of determining vote(s) per unit and calculating votes;
2. Protection of minority interests;
3. Establishment of an allocation which is perceived to be equitable by unit owners.

C. Effect of Bases of Allocation Upon These Interests

1. Efficiency

The first purpose of any system for allocating votes is to establish an efficient means of calculating the number of votes that each voter is entitled to cast prior to the time of the voting. In order for this to occur, the allocation of votes per unit must be based upon objective, easily determined criteria, so that a minimum number of disputes will arise and so that the "record date" can be as close as possible to the date of the vote.

For these reasons, the allocation of voting rights in the unit owners association ought to be based upon objective, constant factors such as equality, unit size or par value. Equality has the further advantage of simplifying the job of vote tallying.

The UCA permits allocation of voting rights on the bases of relation to another right—the share of liability for common expenses or ownership of the common elements allocated to that unit. Such a relationship is satisfactory for this purpose so long as the right to which the allocation of votes is related is itself allocated on the basis of equality, unit size or par value. However, if liability or common element interests were based on variable factors such as price or market value, (as this paper has recommended they not be), problems would exist in terms of the efficient calculation of votes.

2. Protection of the Interests of the Minority

a. Generally. By virtue of the communal nature of condominium ownership, it may be desirable to structure the operation of the condominium association so as to protect the vital interests of the minority of owners. One means of accomplishing this goal is to allocate voting rights in such a fashion as to give a larger voice in votes on all or on certain issues to categories of owners who would otherwise constitute a minority. For example, the majority of unit owners in a particular condominium may own small

---

28There are other, perhaps more effective, means of protecting minority interests. The necessary majority on votes on a given issue may be 2/3 or 5/4. On occasion, unanimity can be required. In some instances, the dissenting minority can be given the opportunity to opt out of a decision by selling their units (cf. MASS. GEN. LAW ANN. ch. 183A §§ 12, 17, 18 (West 1969); OHIO REV. CODE ANN. § 5311.15 (Baldwin 1975)). Also, devices such as cumulative voting for elections of the board of directors can be used to ensure proportionate representation. However, none of these relates to the allocation of voting rights, and hence they are not analyzed herein.
units, but if voting rights are allocated in accordance with unit size, the owners of larger units may be able to cast a majority of the votes in any election and thereby protect their particular interests. If there is reason to believe that the interests of the owners of large units are likely to be different from those of small unit owners, and if those interests appear to be sufficiently important, then such an allocation may be desirable.

It must be recognized, however, that the allocation of voting rights is a fairly blunt tool for this particular purpose, since, as in the foregoing example, the ability to protect key interests in this respect really may constitute the power to control for all purposes. In such instances, the group that would have been the majority becomes the voting minority, and its interests may need protection. The following analysis will consider what interests can be protected by means of the choice of a particular basis for allocating voting rights, and it will discuss the desirability of protecting those interests in this fashion.

b. Equality and the Desirability of Deviating from It; the Equitable Distribution of Power. If voting rights are allocated equally, one vote to each unit, the allocation may result in the owners of certain types of units being a majority or close to a majority in every election. This may be significant if the owners of the majority of units tend to share certain interests (i.e., the efficiency and one bedroom singles who want to convert the playground used by the children in the two and three bedroom units into additional tennis courts). Thus, while equality is a neutral basis of allocation, the choice of equality as the basis of allocation may have the effect of favoring one interest group over another.

As indicated above, if there is reason to believe that the interests of the majority will be dramatically different from those of the other owners, there may be reason not to use equality as the basis of allocation. However, the ability of the popular majority to control elections is consistent with the democratic norm. Hence, at least to the extent that a condominium is viewed as based on a democratic model, the relative voting strengths resulting from the allocation of votes on the basis of equality probably should not be modified without strong justification.

Indeed, in the view of at least one commentator, allocation of voting rights in a condominium unit owners association on the basis of one vote per unit is mandated by the United States Constitution. Thus, in Walter, *Condominium Government: How Should the Laws Be Changed*, 4 *Real Estate L. J.* 141, 145 (1975), the author argues that the services supplied by condominium communities are sufficiently like those supplied by municipalities to make actions by condominium unit owners' associations functionally equivalent to state action, thereby requiring the application of the one-man one-vote principle. Acknowledging that the functional equivalence test would not apply to a single high-rise residential condominium, Walter presents an alternate theory of state action. He argues that condominiums are creatures of state law and that a requirement in the enabling statutes that voting rights be allocated unequally is also a form of state action and therefore is unconstitutional.
There are several problems with this approach to voting rights. In the first place, the Supreme Court has considerably restricted the scope of the functional equivalence test since Mr. Walter wrote his article. See Hudgens v. N.L.R.B., 96 S. Ct. 1029, 1036 (1976). The Court has returned to a stringent test of functional equivalence and requires the performance of a full spectrum of municipal powers before finding that state action exists. In the second place, statutory authorization of unequal voting rights alone would probably not be sufficient reason for a court to find state action. While a stronger argument for state action could be made if a condominium statute mandated unequal voting rights, which the UCA does not do, other indications of state involvement would generally be required to support state action.

Even if a court did find state action, there is a further serious problem with Walter's theory. The one-man one-vote principal is restricted only to governmental elections, whether federal, state or municipal, involving the selection of those who carry out governmental functions of a broad and general scope. The Supreme Court has described such municipal services as being:

- general public services such as schools, housing, transportation, utilities, roads...
- towns, shops, hospitals...
- fire department, police, buses, or trains.


It does not seem at all likely that a condominium's services—even those of a very large one—would reach a group large enough relative to the total community of persons in which the condominium is located for the condominium to be deemed to be rendering "general public services." Nor does it seem that a typical condominium's services reach the scope of services described by the Court in Salyer Land Co.

Assuming (as the draftsmen of the UCA obviously did) that the constitution does permit deviation from the one-man one-vote norm, there may be instances in which sufficient justification for such a deviation can be shown. For example, the owners of a few large or expensive units may be paying an aggregate percentage share of the common expenses which is equal to or greater than the aggregate percentage share of a larger number of owners of smaller, less expensive units. Thus, each marginal expenditure will be of substantially greater economic import to the minority of large unit owners who could be consistently outvoted by a majority of owners to whom the marginal cost would be minimal but whose use value would be the same. Similarly, in a phased condominium, the owners in the initial

29If a one-apartment-one-vote method were used in such projects, buyers might well hesitate to buy the more expensive apartments, knowing that they will be the ones who will have to pay the lion's share of the expenses for which the owners of less expensive apartments will happily vote.


30Note that in this example, no great disadvantage to the large unit owners should occur at termination if these expenditures had gone for capital improvements if the condominium common element ownership were allocated on the basis of size, as recommended in Section III, B, 4, supra. While they would have paid more in assessments, they would
phase may have substantially different interests than the owners in the final phase, especially if a significant amount of time elapses between the completion of the two phases. Yet the number of owners in either the earlier or the later completed phases may be dramatically different, so that one group could dominate the other. Also, in a mixed-use condominium, the respective interests and numbers of residential and non-residential owners are likely to be substantially different.

In such cases, it may be justifiable to avoid a simple one-unit one-vote approach in order to protect the differing interests from domination. On the other hand, it can be argued that there is nothing wrong with the majority dominating the minority for most, if not all, purposes. Even if this is not true, under the UCA the possibility of such domination would be disclosed in the condominium documents, so that unit owners would knowingly accept the possibility of domination by other groups when they purchase.

If there is no reason to believe that the interests of one group will be dramatically different from those of another, or if it is believed that a minority having dramatically different interests cannot or should not be protected by the condominium documents from the majority, equality would appear to be the preferable basis for allocating voting rights. Even if it appears that there will be minority interest groups which ought to be protected, the choice of a basis of allocation of voting rights other than equality may not provide such protection. In order for such protection to result, the basis of allocation must allocate votes along lines parallel to the protectable interests. As shown below, this is not likely to occur with the possible exception of economic interests defined in terms of potential liability for common expenses.

c. Unit Size. If voting rights are allocated in proportion to common expense liability or common element interests, and if that liability or interest is allocated in accordance with the size of the units, and if the assumption that unit size generally reflects purchase price is correct, the result will tend to be that those owners having the largest dollar investment will have a relatively larger vote. Hence those persons will be able to control the outcome of elections. This will not necessarily be the case, however, since as discussed above (see Section III, supra), size is not always a measure of purchase price. The allocation of voting rights in accordance with unit size may also result in those paying the largest portion of the common expenses being able to control elections. But, since unit size is not necessarily the basis for the allocation of liability for common expenses, this, too, may not be entitled to receive more, in basically the same proportion, on termination. However, prior to termination while the new facilities are in use, they may be paying more without a proportionate benefit of increased enjoyment, and this may create a sense of victimization if the allocation of voting rights is not perceived to be equitable.

Note that the UCA contemplates the passage of up to seven years during which declarant may add additional land to an expandable condominium. Completion of the development therein may take even longer. The needs, in terms of repairs or replacement of materials, may be substantially different among the units completed originally and those completed at the end. And if the condominium is spread out geographically, the various phases may be affected by substantially different environments.
be the case. Hence, owners of larger units will not necessarily have the largest economic interest, either in terms of initial investment or in terms of continuing expenditures. To the extent that they do not, there probably is no satisfactory justification for the owners of such units having more voting power than the owners of small units.\textsuperscript{82}

Moreover, even if unit size does reflect purchase price reasonably well, it is not clear that the fact that one owner's purchase price for a unit was larger than that of another owner is a satisfactory justification for a larger allocation of votes. Any matter to be voted upon which can affect market values of units is likely to affect the value of all units more or less equally, so that there should be no divergence of interests. If this is not so, the appropriate remedy is to limit the vote to those who are affected, to require a large majority for approval, or to provide a means for dissidents to opt out of the action voted upon. A special allocation of voting rights is an inappropriate means of solving such a problem.

A difference in allocation of votes might be justified if the difference in economic interest were so great that housing (or other utilization) objectives were altogether different for one group of owners than for another group in the same condominium. However, this should be significant only in rare cases, since most residential condominiums project a coherent image which attracts people with similar housing objectives irrespective of the size of the unit they buy.

Furthermore, to the extent that a problem does exist, it is most likely that it will be the owners of the smaller, less valuable units who will require protection from the actions of the richer owners of more valuable units. For example, tennis courts may be a desirable addition to the recreation facilities for the purposes of the owners of luxury units, while the owners of the units designed for moderate or low income families may find it burdensome to contribute to the cost of such a facility even if their proportionate share of the cost is small. In such instances, allocation of votes in proportion to unit size would exacerbate, not lessen, the problem. Even if it is the owners of the larger units who need protection, it is far from clear that it is appropriate for a statute or even the condominium documents to impose a set of "protections" upon the unit owners which will, in effect, determine which of them will control the governing of the condominium community.

In a mixed-use condominium, the relative size and the respective interests (both economic and otherwise) of non-residential and residential owners are likely to be greatly different. Without reference to the particular condominium, however, it is virtually impossible to predict whether an allocation of votes in accordance with unit size would heighten or lessen the problem. In most cases, where there are only a few commercial units as compared to

\textsuperscript{82}It may be argued that owners of larger units will use the common elements more and therefore should have a greater voice in the manner in which they are used. However, that argument seems to be a hollow one if the perception of greater use by these owners has not been translated into a larger share of expenses and, thereby, into a greater economic interest.
the number of residential units, an allocation of votes according to size would make little difference. A similar problem may result in a phased condominium in which the interests of the owners of the newest units may be substantially different from the interests of the owners of the older units. In such instances, the "non-conforming" units can best be protected by requiring majorities of all affected classes of voters or by another device which does not relate to the choice of a basis for allocation of voting rights.

In conclusion, it appears that unit size will only be an appropriate basis for allocation of votes if unit size is the basis of allocation of the unit owners' relative shares in common expenses, so that the effect of marginal expenditures will fall more heavily on those with the greater voice in the decision to incur the expenditure. If that is the case, however, it seems more logical (and less susceptible to developer abuse) to relate the allocation of voting rights directly to the unit's share of common expenses (see subsection 2(e)(2), infra) rather than to attempt to do the same thing indirectly by relation to unit size. Thus, even where allocation of voting rights on the basis of unit size would operate to protect a protectable minority interest, it will not be the most desirable means of doing so.

d. Par Value. In all probability, the effect of allocation of voting rights in proportion to a liability or interest allocated in accordance with par value will be similar to the effect of allocation in accordance with unit size. If larger units or those with a larger initial purchase price have the higher par value, the owners of those units will tend to have a larger voice in elections than will others. The desirability of their having that larger voice has been analyzed in subsection c, above.

It should be noted, however, that par value could be assigned by the declarant for the specific purpose of equalizing the voting power of certain interest groups within a condominium. For example, in a mixed-use condominium or in one in which the income levels or ages of unit owners are likely to differ dramatically from one group of units to another, a declarant could assign a larger par value to minority units for the specific purpose of equalizing voting power. Such a use of par value, however, does not seem likely to occur very often, and under Section 2–108(c) could be unwieldy, since declarant would be required to allocate either common expense liability or common element interests in accordance with par value in order to allocate voting rights that way. Hence, declarant would also have to consider whether par value is an appropriate basis for allocating such liability or interest.

e. Relation to Another Right. As for other allocations, the effect of allocating voting rights on the basis of the allocation of another right will depend upon the basis of allocation of that other right. However, it is possible that the relation of voting rights to another right or obligation may serve a positive purpose in and of itself since the fact that such right or obligation has been allocated in a particular fashion may create its own set of protectable interests. As shown below, this seems to be true of the allocation of liability for common expenses.
(1) Relation to Ownership of Common Elements

Most states which presently provide for specific bases of allocation of voting rights tie that allocation to the allocation of shares in the common elements. Such a relationship is apparently based on the supposition that ownership of a larger share justifies a larger vote. However, this justification disappears when it is recognized that that allocation of ownership shares of the common elements may bear little or no relation either to the relative purchase prices and market values of the various condominium parcels or to the relative obligations of unit owners to pay for upkeep of the condominium. (See Section III, supra.) Mere ownership of a larger share of the common elements is, in fact, no basis for having a larger voice in operating and managing the entire condominium or in determining how much money should be spent thereon.

(2) Relation to Liability for Common Expenses

On the other hand, allocating voting rights on the basis of the allocation of liability to pay for common expenses does make sense, at least to the extent that the issue being voted upon is related to such expenses. It is here that the condominium can be viewed most appropriately as based upon a corporate model. Unit owners who are obliged to pay a larger portion of expenses may argue that they need to be protected from those who, having smaller shares of the liability, would vote to spend their money for them. In the view of the Virginia Committee to Study and Recommend Revision of the Condominium Laws, such a result would amount to tyrannous "[t]axation without (proportionate) representation." Report to the Governor of Virginia at 10 (1973).

In answer to the foregoing view, the owners of units having smaller shares of liability might argue that voting power in other democratic contexts is not tied to tax liability and that liability for common expenses was apportioned in accordance with use (see Section IV, supra) and hence the owners of units having larger shares of liability are compensated by receiving larger benefits and do not also require a larger electoral voice. To this argument, the owners of units having larger shares of liability may reply

that: (a) allocation of liability in accordance with use is probably imperfect; and (b) greater utilization of the common elements in and of itself justifies a larger voice in how those elements are operated and maintained.

The resolution of these conflicting views clearly involves political considerations. However, it appears that to the extent that issues being voted upon relate to common expenditures, it may be appropriate for voting rights to be allocated on the basis of the relative liability for such expenses. Such a relationship seems to exist, directly or indirectly, in most residential condominiums created over the past decade and no popular dissatisfaction with such an allocation of voting rights has become apparent.
I. Introduction

Condominium unit owners are far more dependent upon each other for the preservation and promotion of their interests than are either conventional home owners or renters. This interdependence is particularly acute with respect to the operating expenses which must be borne by each unit owner. Depending upon the characteristics of the particular condominium, these common expenses are likely to represent a significant portion...
UNIFORM CONDOMINIUM ACT: KEY ISSUES

(15–25 percent) of a unit owner’s housing expenses. Yet, the aggregate amount of common expenses incurred by the condominium may vary substantially in relation to the care and responsibility exercised by each unit owner. More importantly, if some unit owners do not pay their share of common expenses, the burden of paying those shares may be shifted to other unit owners and may thereby substantially increase the obligations of those other unit owners. The impact of nonpayment of assessments for common expenses goes beyond the resultant increase in costs which may be incurred by the other unit owners. As discussed below, continuing non-payments may threaten the viability of the condominium itself, forcing down property values within and, conceivably, around the condominium. This, in turn, affects the interests not only of unit owners but of mortgage lenders and, less directly, of the immediate community.

The UCA contains a mechanism which will facilitate the collection of assessments for common expenses from delinquent unit owners. That mechanism is contained in Section 3–115, which provides that the condominium association shall have a lien against any condominium unit for assessments levied and unpaid. Section 3–115 also contains provisions according a special priority to the association’s lien for assessments.

Part II of this article will discuss the justification for that priority by comparing the needs of the association to the needs of other parties having lien claims against the condominium association or the owners of individual condominium units. That discussion will include an analysis of the need for according any special priority to the association’s lien, the several kinds of priority which might be so accorded, the impact of the choices made regarding relative priority, and the policy considerations relevant to all of these matters.

II. Summary

The UCA accords a relatively high lien priority to a condominium association’s assessments for common expenses. It does this by creating two special rules for the association’s priority which significantly modify the basic American principle of “first in time, first in right.”

The first special rule created by the UCA is that the lien for assessments will be prior to all encumbrances which do not predate the recordation of the condominium declaration. This means that the lien for assessments will have priority over nearly all other liens against units except for those categories of liens which are expressly subject to another rule under the UCA.

The justification for creating such a substantial lien protection for the association’s assessments derives from the peculiar nature of the condominium as “creditor.” In effect, the condominium is an involuntary creditor which becomes obligated to advance services to unit owners in return for a promise of future payment. Such advances are much like the loans made by a mortgagee under an obligatory mortgage future advances clause, but with only the most rudimentary controls upon the amount and timing of the loan advances, the terms of the loan, and the continuing creditworthiness of the borrower. At the same time, the association is very much at the
mercy of its borrowers whose defaults could impair the association's financial stability.

The threat that the condominium faces is one shared by all secured creditors—insufficient equity in a unit foreclosed upon to provide a full dollar recovery of unpaid assessments. If the equity is not there, the only remaining means to make good the unpaid assessments is to reassess the other unit owners. Clearly, the priority of the creditor's lien is a crucial determinant of the creditor's exposure to the risk of inadequate equity. The specter of reassessment and the potential impact of reassessment on a condominium, coupled with the condominium's status as an involuntary creditor, argues for the high lien priority which the UCA confers upon the association.

However, the mere fact that it is important for the association to be able to collect assessments is not of itself a sufficient reason for according the association a high lien priority. While this may be desirable, granting such a lien priority may interfere with the rights accorded to other entities. Since the interests of the general public are deemed to be more important than those of the condominium alone, real estate tax liens and other governmental charges against a unit are excepted from the priority accorded to the association.

Similarly, the association's lien priority might so contradict the expectations of other entities involved in the creation, purchase and operation of condominiums that a severe limitation on condominium development and transfers would result. In particular, construction lenders and first mortgage lenders might be reluctant to lend on the security of condominium property.

Further, federally- or state-regulated lending institutions might encounter regulatory inhibitions in relying on liens subject to the assessments of the association. In fact, most regulated institutional lenders are restricted in the amount of mortgage lending they may do which involves security other than "first liens." Other lenders, which are not subject to such regulatory limitations, also might be dissuaded from lending on the security of condominium property if they perceive the exposure which could result from the priority of the association's assessment lien as an unacceptable additional risk. Such a result seems particularly likely for construction lenders, who already face a wide range of lending risks. Were first mortgage lenders to be significantly discouraged from financing the purchase of condominium units, or were condominium unit owners to find it marginally more difficult to borrow against the equity they have in their units because of the impaired security a condominium was perceived to be by the lender, the effort to enhance the condominium form of ownership would have turned against itself.

It is for the foregoing reasons that the second special rule on lien priority under the UCA was created. The first special rule, giving the association's lien priority as of recordation of the declaration, does not apply to first mortgages. Rather, the priority of the association's lien with respect to first mortgages is to be determined by reference to the time when the assessment becomes due. However, the association is given a limited or "split" priority with respect to first mortgage liens. The association's lien is
superior to a mortgage lien which is prior to it in time to the extent of the assessments for six months immediately preceding an action to enforce the association's lien. This split priority in favor of the association is based upon a proper recognition of the greater resources typically available to first mortgage lenders in protecting themselves from the consequences of default and in ensuring that there will be equity in the property to protect them.

The UCA's split priority rule will almost certainly tend to result in requirements by first mortgagees (other than construction lenders, who can rely on other protections) that condominium owners establish an escrow in an amount approximating the assessments which may become superior to the mortgagee's lien. Since this escrow could be a large dollar amount, the draftsmen of the UCA decided to reduce the length of the period in which assessments may have priority from one year (as had been provided in the early drafts of the UCA) to six months. The draftsmen's purpose was to limit the possibility that the amount of the reserve which first mortgagees are likely to require might become a significant impediment to the purchase of condominium units, particularly by younger couples for whom the down payment and closing costs are of concern. The draftsmen also recognized that, the more limited the prior association's lien is, the less likelihood there is of a technical objection that the mortgage loan is not a first lien. At the same time, the draftsmen felt that a reduction of the lien priority period from one year to six months would not seem likely to substantially weaken the advantages which the association would gain from having a lien with special priority.

The UCA also provides that the priority of mechanics' and materialmen's liens shall not be affected by the rules established for the association's assessment lien priority. Political and related considerations dictated this result. Analytically, however, such a blanket exclusion does not seem appropriate. As discussed here in Part II, the relative priority between assessment liens and mechanics' liens ought to be considered with a distinction in mind between mechanics' liens resulting from action by the declarant and those resulting from action by the association after the period of declarant control and by individual unit owners.

Other competing claims should be analyzed on the basis of the relative ability of the competing entities to protect themselves from the defaulting owner. This part considers them as well. Included in this analysis are: the provision in the UCA that the traditional priority accorded real estate taxes should not be disturbed; and the optional provision that homestead, dower and curtesy rights will not affect the association's lien rights. This optional provision is to be used in states in which such rights exist.

Finally, it must be remembered that lien priority, while important, must be supported by an effective and low-cost remedy. Several remedies which are not related to the lien itself are available to the association. These include the ability to proceed against a defaulting unit owner personally [Section 3-115(e)] and the ability to impose such limited sanctions as a restriction on use of common elements and the loss of voting rights. However, potentially the most important remedy for the association is the right to enforce its lien through a private power of sale. The UCA contains an op-
tional provision that would grant such a right. The draftsmen considered arguments that granting the association such a right was improper or even unconstitutional. In the end, however, the draftsmen concluded that individual states should be able to grant the power of sale if they so desire. Part II suggests that a power of sale, when coupled with the limited priority over the lien of first mortgages also contained in the UCA, constitutes a strong—yet reasonable—protection for the condominium association against the dangers inherent in being an involuntary creditor.

III. The Lien Provisions of the UCA

The UCA provides for (i) the association's right to levy assessments to cover common expenses, as well as for fees, charges, late charges, fines and interest. [§ 3-115(a)]; (ii) a lien to secure payment of those assessments [§ 3-115(b)]; and (iii) the power to enforce that lien in like manner as a mortgage on real estate or, as an optional provision, by a power of sale [§ 3-115(a)]. The first two of these three elements are common in existing state statutes, dating back at least as far as the 1963 FHA model condominium statute.1 Section 3–114 mandates the allocation to units of fractional shares of common expense liability to each unit and further provides that these expenses shall be assessed at least annually.

Section 3–115 provides the association with a lien against the units for assessments levied but unpaid. If there were no special statutory provision on the subject within the UCA, the priority accorded to the association's lien would be determined in accordance with the “first in time, first in right” rule generally applied by American lien law.2 However, Section 3–115(b) supplants that rule with respect to the association's lien and substitutes instead a rule which combines aspects of a modified “priority in time” rule and aspects of an absolute priority rule.

On its face, Section 3–115(b) appears to create an absolute priority rule for the association's lien, subject, however, to exceptions for (1) liens and

1Section 23 of the FHA model condominium statute provides as follows:

(a) All sums assessed by the Association of Apartment Owners but unpaid for the share of the common expenses chargeable to any apartment shall constitute a lien on such apartment prior to all other liens except only (i) tax liens on the apartment in favor of any assessing unit and special district, and (ii) all sums unpaid on a first mortgage of record. Such lien may be foreclosed by suit by the manager of Board of Directors, acting on behalf of the apartment owners, in like manner as a mortgage of real property...  

2The priority of liens generally depends upon the time that they attach to the property involved. It is firmly established that ordinarily a prior lien gives a prior legal right which is entitled to prior satisfaction out of the subject it binds, unless the lien is intrinsically defective or is displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant, or unless the priority of liens is regulated by statute.

In the absence of statutory regulation, the common law establishes liens in the order of their acquisition, the first in order of time standing first in order of rank, but the common law has been displaced in many jurisdictions by statutes awarding to liens priority in the order of their registration.

51 AM. JUR. 2d Liens § 52 (1970).
encumbrances recorded prior to the declaration; (2) first mortgages recorded prior to an assessment due date (as to which limited priority is granted); (3) real estate tax liens and other governmental assessments or charges against units; and (4) mechanic's liens. When scrutinized, however, it appears that exception (1), above, amounts to a rule which allows the association's lien to relate back to the date the declaration is recorded. As a practical matter, such relation back of the association's lien becomes the general rule from which exceptions (2), (3) and (4), above, are the exceptions.

As to exception (2), first mortgages, the association receives a limited priority—priority for all assessments due for six months prior to an action to enforce the association's lien—over first mortgages recorded prior to an assessment due date (or the first installment due date), but it receives an absolute priority over first mortgages recorded after that date. In effect, the traditional "priority in time" rule applies under Section 3-115(b) for purposes of determining the nature of the association's priority over a first mortgage. A first mortgage against a unit will be behind assessments due and unpaid at the time of mortgage recordation and also behind assessments for the six months preceding an action to enforce the association's lien regardless of the time of mortgage recordation. Otherwise it will be superior to the lien for assessments.

As to exception (3), real estate taxes and other governmental assessments or charges against units, the UCA effectively bows to the statutory primacy normally accorded to such liens. The absence of an absolute priority for the association over such liens has the effect of allowing those liens to retain their absolute priority. The "priority in time" rule simply does not apply in this area.

The constitutionality of allowing first mortgagees to have priority over the assessment lien, but not other mortgagees who would otherwise be prior, has been questioned. One commentator raised the issue fifteen years ago:

Another common provision is one which seeks to make the lien for unpaid monthly assessments prior to all other liens except (1) taxes and (2) a first mortgage of record. Since the lien would in any event be subordinate to taxes and a first mortgage of record, the obvious intent is to make it prior to junior mortgages and other liens of record. There are no doubt good reasons for wanting this so, but again, to my way of thinking, it amounts to class legislation in that it discriminates against junior mortgagees and other lienholders of record whose priority are established under the recording laws.


The Florida Condominium Commission changed a proposal to only allow first mortgagees who purchased at the foreclosure sale of a unit to take title free of unpaid assessments by deleting the word "first." The report of the Commission stated that limiting the protection from assessment liens to first mortgages was "believed to be improper, if not unconstitutional." AMENDED REPORT OF THE FLORIDA CONDOMINIUM COMM. TO THE 1973 SESSION OF THE FLORIDA STATE LEGISLATURE (Feb. 15, 1973).

The reply to the constitutional argument depends on arguments which are elaborated in the main text. See § VI, B, infra. Basically, the answer is that there are sound public policy reasons for making the distinction, and therefore the State has the power to do so.

The impact of this relation back may be muted, however, by three years' statute of limitations applicable to the association's lien pursuant to subsection (d) of § 3-115.
As to exception (4) (which is not actually numbered in Section 3–115(b) but which exists, nonetheless, in the last unbracketed sentence of the subsection), mechanics' liens, the ordinary priority in time rule applies in full. The association lien will be effective when the assessment (or the first installment thereof) is due. However, as discussed below (Section VII, D), the effective date of the mechanics' lien may relate back, under applicable state law, in very much the same fashion as does the association's lien under the "general rule," referred to above, of Section 3–115(b).

Section 3–115(a) contains optional language that would provide a private power of sale remedy to enforce the association's lien in addition to other remedies available to it. As noted, Section 3–115(d) states that the lien for assessments is extinguished if "proceedings to enforce the lien" are not commenced within three years after the assessments become payable. While Section 3–115 does not make clear what constitutes the institution of "proceedings to enforce" the association's lien, presumably the taking of whatever action is appropriate under the State's real property foreclosure laws, or if appropriate under a mortgagee's power of sale, would be such an institution.

Finally, Section 3–115(c) states that recordation of the declaration shall be sufficient notice of record of the association's lien. In other words, the record notice that there will be a continuing lien on condominium units, without record notice of the amount of the lien or its discharge by payment, is deemed adequate notification to other lienors of a prior encumbrance. This reflects the status of the association as a permanent (and involuntary) creditor of its members from the time of recordation of the declaration.

IV. THE NEED TO PROVIDE FOR A LIEN PRIORITY
A. The Impact of Defaults and Reassessments on Non-Defaulting Unit Owners

In considering the priority to be accorded to a unit owners association's lien for unpaid assessments, it is necessary to recognize that, in contrast to other homeowners, condominium unit owners have little control over their exposure to liability for common expenses. Shares in the liability for common expenses are allocated to each unit owner regardless of whether the unit owner actually benefits from or contributes to those expenses. Indeed, many existing state condominium statutes specifically prohibit unit owners from avoiding liability for common expenses by waiving their right to use the common elements. Even the owners of vacant units must pay their allocated shares of common expenses. Thus, all unit owners, including declar-

---

6 Many states have adopted the language of the FHA model statute § 21:

No apartment owner may exempt himself from liability for his contribution towards the common expenses by waiver of the use or enjoyment of any of the common areas or facilities or by abandonment of his apartment.

ants and lenders who have foreclosed, are obliged to pay a share of the common expenses. Indeed, not only must the non-defaulting unit owners carry the burden of unrecovered assessments attributable to defaulting unit owners, but, acting through the unit owners association, they must also continue to supply services—such as utilities and common area maintenance, which cannot practically be cut off—to the defaulting unit owners. The provision of those services, of course, will result in greater and greater involuntary extensions of credit by the non-defaulting unit owners.

If the association has a lien against the unit, as contemplated by the UCA, it can pursue an *in rem* action to recover unpaid assessments. Depending upon the value of the unit, the extent of prior liens against it and the costs of pursuing the remedy, the association may recover enough to pay existing deficiencies. The association generally also will have a personal claim against the defaulting unit owner.\(^6\) However, pursuing such a remedy may be so expensive that such a course is ill-advised. This will depend on legal fees, the state of court dockets in the jurisdictions in which a unit owner is to be found, and the nature and extent of the assets of the defaulting unit owner which can be reached by the court.

The aforesaid choice of remedies is in contrast to the position of a first mortgagee and other lienors, many of whom not only have a variety of remedies but also have the ability to take protective measures prior to any default. A mortgage lender can underwrite its borrower's credit; it can demand that funds adequate to pay potentially prior lien claims be escrowed; it can control the loan-to-value ratio and, in many cases, procure mortgage insurance to protect itself against default. Other potential unit lienors may have *in rem* claims against other property of the borrower, whether the borrower is the unit owner or the association, so that the ability to lien the unit is a secondary resource. Thus, if all creditors were to have the same lien priority, the association would be relatively disadvantaged in its remedial and protective resources when compared to other potential creditors.

The credit extended involuntarily by the unit owners association will not necessarily increase the budgeted monthly assessments paid by the non-defaulting unit owners. If the association's budget would otherwise have built up reserves, a moderate default or delinquency rate may be absorbed. At a minimum, of course, the association's "savings" will be depleted. However, even substantial defaults may not lead to increased assessments if the association has effective means of recovering unpaid sums.

If sufficient amounts cannot be recovered from the defaulting unit owner or his property, the association will be forced to reassess non-defaulting owners to make up any deficiencies. Such reassessments obviously will be unwelcome and may be a serious burden for the non-defaulting unit owners. Yet, the unit owners who must bear the increased assessment burden have few alternatives to continuing to pay their increasing shares. As long

\(^6\)The majority of the state statutes, as well as Section 3-115(e) of the UCA, provide that nothing in the section on liens for common expenses shall be construed to prohibit an action at law to recover the sums due. In addition to permitting such claims, the UCA makes other remedies available to the association. See discussion, *infra* at Section IX.
as they own units, they must either pay or default themselves. Few will be
anxious to sell their units, especially in residential condominiums, in order
to avoid the expense, and many will be unable to move, either for personal
reasons or due to the then current housing markets. Indeed, if the assess-
ment burden is great enough to create an incentive for unit owners to move
out, it is likely that the market value of the units will have decreased sub-
stantially, thereby increasing the financial hardship on unit owners.

B. The Impact of Defaults and Reassessments on
Creditors, the Community and the State

The problems resulting from defaults in payment of unit assessments
may be felt beyond the condominium itself. Not only the unit owners, but
also their creditors, including their mortgagees, and the community and the
state in which the condominium is located may be adversely affected. Credi-
tors of unit owners will be directly affected by the increasing financial obli-
gations imposed upon their borrowers by virtue of the defaults of others.
If these obligations threaten the ability of those unit owner-borrowers to
service their mortgages, mortgagees may be forced to foreclose in an effort
to recover their investments. If significant numbers of mortgage foreclosures
occur, property values are likely to plummet, and the condominium may
cease to be a viable entity, causing unit owners and creditors alike to lose
substantial portions of their investments. Indeed, even if mortgage fore-
closures do not occur, the dislocations resulting from assessment shortfalls,
such as inconsistent or diminished building services, or the establishment of
a pattern of reassessments may damage the reputation of the condominium
and erode the values upon which both creditors and unit owners rely.

The community in which the condominium is located has an interest
in the stability and overall well being of the condominium. The community
will want to preserve the quality and quantity or its housing stock and to
avoid deterioration of individual housing units and of neighborhoods. The
local government will seek to maintain property values so as to preserve
its real estate tax base.

The state also has an interest in the stability of condominiums beyond
its general interest in the stability of the housing market. It may wish to
promote the development of condominiums for the sake of the efficiencies
which they can provide in terms of governmental services and energy con-

7For both unit owners and mortgagees this interest is subject to the threat of a "chain
reaction" of multiple defaults on remaining unit owners.

As more and more unit owners default the share of common expenses of the remaining
unit owners is likely to increase. . . . Thus, the mortgagee on foreclosure may find
that the common expenses allocable to the foreclosed unit are far greater than they
should be, especially where the mortgagee is a "spot mortgagee" in that it does not
hold all or a vast majority of the mortgages on the condominium units. This problem
is compounded where the condominium is on leasehold property and the common
charges include ground rent, or if any part of the common property is covered by a
blanket mortgage, thus increasing common charges for interest and principal payments.

Zinman, Condominium Investments and the Institutional Lender—A Re-View, Symposium
servation. Cooperatives, condominiums and planned unit developments, all relatively new forms of multi-unit development, share the common feature of being run by an association comparable in many ways to a municipal government.\textsuperscript{8} To the extent that the private mini-municipality takes over the functions normally provided by public governmental entities, the state has an interest in facilitating both the operation and continuation of the condominium. In fact, large scale condominiums often provide many of the essential services of a municipality. In the same way that real estate taxes and special assessments levied against real property enable the municipality to provide local improvements and services, assessments for common expenses are necessary to the upkeep and maintenance of the facilities of a large condominium. Such facilities may include driveways and walkways, sewers, garbage collection and disposal facilities. As condominiums increase in both size and services provided, the necessity of maintaining those services will take on greater and greater importance as a "municipal" enterprise.

The problems, suggested above, resulting from delinquent assessments have been well documented.\textsuperscript{9} Thus, it is clear that if defaults in payment of assessments are serious enough to result in reassessments against non-defaulting unit owners, serious, adverse consequences may be experienced by the non-defaulting unit owners, by their creditors and by the community at large. If such consequences are to be avoided, some protection in the nature of a lien priority must be provided.

C. The Likelihood that Defaults Will Result in Reassessment

The mere fact that there have been one or more defaults in assessment payments does not necessarily mean that reassessment\textsuperscript{10} will result. Reassessment will only result if the deficiency resulting from delinquencies and defaults is large enough to require that the funds be recovered to meet expenses and if there is no effective means of recovering those funds from the defaulting unit owner.

The characteristics of each condominium and the extent and nature of the assessment delinquencies existing in each case will determine whether the association will be forced to recover the delinquent funds from the de-

\textsuperscript{8}See in this regard Reichman, \textit{supra} note 1, \textit{passim}.


\textsuperscript{10}Reassessment normally would occur after the association has experienced an unrecomped default. However, the impact is basically the same if, as a result of the association's budget including a generous "reserve for bad debts", the loss is "made up" prior to being incurred. While in that case there is more budgeting predictability for the unit owners, the cost of home ownership is increased in a way not shared by other homeowners. Thus, "reassessment" can refer to any unrecouped assessment delinquency, whether or not covered by existing reserves.
faulting unit owners in order to avoid reassessments. If such recovery is necessary, lien enforcement is likely to be the most practical means available to the unit owners association to recover those funds. Since lien enforcement will only generate funds if there is equity remaining in the property after superior liens have been paid, the relative priority of the lien accorded to the unit owners association may determine whether the delinquency can be recouped from the owner’s equity or whether reassessment will be necessary.

The association will nearly always be able to recoup the amount of a delinquency (and therefore reassessment will almost never be necessary) if the unit owners association is given a lien for common expense assessments which is superior to all other liens. In such event, the proceeds which could be realized by a foreclosure sale will be more than sufficient (except, perhaps, in the most extreme cases) to cover all deficiencies. More importantly, however, inferior lienholders, particularly mortgagees, can be expected to pay delinquent assessments in order to prevent a foreclosure by the association which would have the effect of wiping out their liens. This will be true even if the unit owner has made current payments to the other lienholders. Thus, it is highly unlikely that a situation would arise in which the association would fail to recover the amount of its lien so that the costs of the defaulted payments would be passed on to the remaining unit owners.

However, if the association’s lien for common expenses is inferior to one or more large liens, such as purchase money mortgages, the likelihood that the association will not recover a sufficient amount to cover assessment deficiencies, and hence will be forced to reassess, will be substantially increased. Moreover, if loans secured by superior liens are in default, the association will be forced to expend funds to cure those defaults, thus exacerbating any cash flow problems the association may be experiencing. Foreclosure costs will further erode the available proceeds. Thus, the likelihood that the association will recover an adequate amount from a foreclosure sale to cover delinquent assessments will depend upon the amount of the unpaid assessments, the initial loan-to-value ratio of the unit, the marketability of the unit at the time of the foreclosure sale, and the extent to which there are superior liens against the unit.

V. PRIORITY FOR WHAT—THE NATURE OF COMMON EXPENSE ASSESSMENTS

In order to determine whether the special lien protection given to the condominium association by the UCA is justified, it is necessary to consider the nature of the common expense assessments. Only after comparing these expenses to those expenditures or loans which are secured by other liens is it possible to determine which of the several competing interests should be preferred over the others.

---

11This is accurate unless the payments remaining due the inferior lienholders are insignificant or unless there is no equity in the unit above the association’s lien, neither of which is likely to be the case.
A. The UCA Definition of "Common Expenses"

The definition of common expenses in the UCA is as broad as the language of most present state condominium legislation in this regard. It provides as follows:

"Common Expenses" means expenditures made or liabilities incurred by or on behalf of the association, together with any allocations to reserves. Section 1-103(5).

Thus, almost any action undertaken by the association pursuant to its powers under the UCA could be made the subject of common expense assessments. While dissident unit owners might successfully maintain that certain activities are inherently beyond the scope of the association’s powers (as, for example, investing in oil and gas drilling ventures), such limits are not reflected in the UCA’s definition of common expenses.

B. The Functional Character of "Common Expenses"

An association needs to be able to pay the costs of supplying essential services, utilities and maintenance in order to ensure the continued operation of the condominium. Thus, at least to the extent that common expense assessments are used for payment of such essential services, a strong argument can be made for giving the association a preferential ability to collect sums due. Such expenses are the *sine qua non* of the condominium’s existence.

Some of the activities funded by common expense assessments, however, are not in any way essential to the continued operation of the condominium. As to these, it is by no means clear that any preferential position should be conferred. It can be argued that such “non-essential” activities are analogous to similar services provided by municipalities, which operate pools, playgrounds, libraries, and similar facilities. As already noted in Section IV above, in many senses, a condominium functions as a “private government” which displaces or obviates many services which otherwise would be provided by a municipal or other government. Thus, while these services are *not vital* to the condominium’s continuing operation, funds to pay for these services are as much worthy of protection as are municipal revenues, which are protected by a high lien priority.

The degree of analogy between the non-essential activities of a condominium and the activities of a municipality depends upon the particular category of activity in question. "Non-essential" costs can be broken down into three general categories—investments, expenditures for recreational and social facilities and expenditures for capital additions. Investment activities bear little resemblance to the provision of municipal services, and hence, few would argue that investment activities should be supported by the protection of a high lien priority. Expenditures for recreational and social facilities, such as swimming pool operations, however, are more analogous to municipal government activities and, therefore, may merit such protection.

---

12Reichman, *supra* note 1, *passim.*
Similarly, expenditures for capital additions can be viewed as a function of the condominium that is comparable to capital improvements undertaken by municipal government. However, these improvements are not typically for the benefit of, or even accessible to, the public. Further, they tend to share many of the attributes of investments. The addition of a swimming pool or a security system presumably increases the value of the common elements and enhances the unit owners' investment in their property.

In fact, it can be argued that the condominium is more analogous to a country club than to a municipality, and that the state's interest in facilitating the provision of services to such a limited group does not justify the special protection of the high lien priority given to municipalities. To do so might be to sacrifice the interests of the general public. Accordingly, while it may be that the provision of "essential" condominium services warrants special lien protection, the provision of "non-essential" services does not appear to do so.

C. "Essential" Expenses Versus "Non-essential" Expenses

Would it have been possible for the UCA to have categorized a condominium's functions into "essential" and "non-essential," or "municipal" and "country club," giving "essential" and "municipal" expenses a lien priority or other statutory recognition which would encourage condominium development? Unfortunately, the answer seems rather clearly to be "no" because, setting aside the extraordinary complexity such categorization would have imposed upon the statute, it is difficult to identify which common expenses are "essential" or "municipal." For example, even within the category of operating expenses, some payments are more essential to the condominium's continued functioning than are others. Also, the line between operating and capital addition expenses frequently may be difficult to draw.

Of course, a narrow group of payments required for the operation of the condominium are clearly of primary importance: casualty insurance premiums covering at least the common elements, rent payments in a leasehold condominium and utilities are examples. Rent payments on a leasehold condominium would seem to be clearly "essential"; if they are not made, the existence of the condominium will be in jeopardy.13 Even though the lease may cover in part some of the condominium's "non-essential" functions, such as elaborate recreational facilities, this is not a distinction which a ground lessor is going to be willing to make.

In some condominiums, utilities would appear to be clear cases of essential expenses. However, the supply of essential utilities to individual units

---

13An illustration of the importance to be accorded payments under the lease can be found in the Georgia Condominium Act. Under Section 85-1623e(c) payments due under the lessor's lien are accorded a priority over all other liens except liens for ad valorem taxes unless the condominium instruments grant superiority to other liens and encumbrances. Under Section 85-1641e(a) the lien for the assessments is superior to all other liens except such lessor's lien, tax liens, first and second purchase money mortgage liens and mortgage liens recorded prior to the recording of the declaration.
UNIFORM CONDOMINIUM ACT: KEY ISSUES

will depend upon the collection of common expenses only in condominiums where separate metering is not employed. Some utility payments may service recreational facilities such as heated swimming pools, saunas and lighted tennis courts. Of course, it might be possible to segregate utility expenses by category so that the electricity consumed by the sauna is distinguishable from the electricity consumed by the elevators, but this would involve a high degree of complexity if the principle were to be applied generally.

Insurance premiums might also be categorized as "essential" common expenses, although it is likely that a portion of the coverage they purchase will relate to aspects of the condominium which are recreational or investment in nature. Any lapse in the premiums, however, will affect coverage of both the "essential" and the "non-essential" aspects of the common elements.

The line between "essential" expenses (e.g., insurance premiums) and capital addition expenses becomes even more difficult to draw if consideration is given to the application of the funds provided. For example, the casualty insurance proceeds available for the construction of the common elements of a condominium may be used only to replace common elements that had been destroyed, or they may be diverted if the association decides to improve on the structure that is being rebuilt. Similar complexity in categorization exists with regard to loan proceeds. It may be appropriate to deem assessments (or a portion thereof) necessary for loan repayment as "essential" since the credit rating of the association is at stake. On the other hand, if the loan was taken out to change the decor in the party room (presumably a nonessential application), the loan repayment portion of an assessment should not be given special priority.

Furthermore, if the association has sources of income other than assessments, it is possible that payment of "essential" common expenses will be made from those sources and not the monthly assessments collected from the unit owners. Even assuming that it is possible to categorize common expenses as to "essentiality" and to determine the extent to which that payment would come out of common expense assessments, it would be necessary to further calculate the percentage of a unit owner's assessments that is attributable to such expenses. An accounting of the percentage of essential expenses to be covered by assessments in each budget would have to be kept, and this information would have to be made available to potential purchasers and encumbrancers.

The problems of the above-described complexity conceivably could be dealt with by a mechanical approach to categorization. A fixed percentage of the common expenses of any condominium could be designated as "essential" expenses, and that portion of assessments could be accorded priority with regard to other liens outstanding on the unit. The problem with this approach, however, is the wide variety among different condominium projects in the nature of common expenses normally incurred. No single percentage would necessarily approximate the correct result in any given condominium.

Thus as a practical matter, the draftsmen of the UCA had little choice but to answer to the question of "priority for what" by providing that the special lien priority given to the association for unpaid assessments applies
to the full assessment. There is no feasible way of providing a priority only for "essential" expenses. Since some expenses are essential to nearly all condominiums, and since for many condominiums a high percentage of expenses would be deemed "essential" (or at least "municipal") by reasonable people, there are good reasons for the draftsmen's decision to grant a special lien. The appropriateness of the degree of priority which the UCA gives to that lien is discussed below in relation to the nature of competing liens.

VI. PRIORITY OVER WHAT—PROTECTING THE ASSOCIATION VIS-À-VIS OTHER LIENORS

A determination of the appropriateness of the extent to which common expense assessments are accorded a lien priority under the UCA depends, in part, on the nature of the types of liens with which assessments liens must compete for priority. Some of those liens arise as a result of services or supplies provided for the benefit of the condominium. Examples of such liens would be mechanics' and materialmen's liens for work done on common element maintenance or judgment liens arising out of actions for breach of contract by the condominium. Some of these competing liens may have been given special, statutory priority because of the nature of the interests they protect; real estate tax liens are an example. Other liens, such as purchase money mortgage liens, are not given a special priority but, nevertheless, will tend to have a high priority by virtue of the "first in time, first in right" rule which generally applies.

A. Governmental Charges and Assessments

All of the state condominium statutes that provide for the priority to be accorded the lien for common expenses give a higher priority to real estate taxes and similar charges on the unit. Accordingly, states have often granted first priority to real estate tax liens irrespective of when they arise. The taxes and other governmental charges which could be accorded a special lien priority fall into the following categories: (1) taxes and special assessments against real property; (2) federal tax liens; and (3) state and local income taxes.

1. REAL ESTATE TAXES AND SPECIAL REAL PROPERTY ASSESSMENTS

Real estate taxes are granted special priority by the state legislatures because of the importance of maintaining city and state revenues. Obviously, the state considers its own revenues to be of paramount importance. It is also in the state's interest that its political subdivisions obtain sufficient revenues, since the state otherwise might have to assume their obligations. Municipalities are particularly concerned that their real estate taxes be secured by a high priority lien since they rely largely upon real estate taxes

---

14Puerto Rico is alone among American jurisdictions in placing any limitation on the extent to which back real estate taxes of the Commonwealth are to be accorded priority. Section 1293d of the condominium statute limits priority to "taxes of the last three annual assessments past due and unpaid on the apartment." P.R. LAWS ANN. tit. 31, § 1293d (1967).
15KRATOVIL, REAL ESTATE LAW § 686 (6th ed. 1974); Walbran, supra note 12 at 555.
for their financing. Thus, public policy dictates that the lien for real estate
taxes given to subdivisions of the state be accorded a high priority. Special
assessments levied by municipalities or counties for improvements, such as
sewers and street paving, are traditionally protected by a lien having as high
a priority as that accorded to real estate taxes. Such priority is justified by
the fact that such improvements enhance the value of the property being
assessed.

If liens for real estate taxes or special assessments against condominium
units were accorded a lower priority than is accorded to liens arising out
of real estate taxes and assessments against other property, the protection
provided for government revenues and for municipal improvements would
be weakened and the costs of collection would probably increase marginally.
Moreover, condominium unit owners (who would benefit from the resulting
services to the same extent as others in the community) might contribute, as
a group, somewhat less than other property owners in paying for local ser-
vices and improvements. Of course, local governments, like the condomin-
ium, will be providing all, or nearly all, of their services to all residents
whether or not their taxes are paid.

Only if a condominium were to reach a sufficient size and importance
to take on all of the basic functions of a municipality would it substitute
its own services for enough of the services normally supplied by the munici-
pality to relieve the local government from a significant obligation. Were
this to happen, an argument would exist for making the condominium's
lien at least on a par with the municipality's lien. However, it is unlikely,
at least in the near future, that condominiums will function in such a fashion.

2. FEDERAL TAX LIENS

No question exists as to the priority which the UCA should accord to
federal tax liens since, under the supremacy clause, the priority of federal
tax liens is established exclusively by federal law. United States v. Acri, 348
U.S. 211 (1955). The federal tax lien attaches automatically to the taxpayer's
personal and real property upon his failure to pay federal income taxes, and
that lien becomes effective against nearly all holders of other liens against
a condominium unit as of the date upon which such lien is recorded. In-
ternal Revenue Code, 26 U.S.C. § 6323(a), (f). Federal tax liens arising dur-
ing the course of the condominium's existence would operate on the basis
of the "first in time, first in right" rule without regard to any contrary provi-
sion of state law. Hence, the recorded lien for federal income taxes will
automatically take priority over any subsequently arising lien for common
expenses.

3. STATE AND LOCAL INCOME TAXES

The only remaining basic category of governmental taxes and charges
which could constitute a preferred lien against the unit is a lien for state
and local income taxes. In most states, however, such taxes do not auto-
matically result in a lien against the taxpayer's real property. Rather they
must first be reduced to judgment. The priority which ought to be ac-
corded to liens for assessments relative to judgment liens is treated, infra,
at Section VII.C. As a general matter, the states have not seen fit to accord judgment liens for state income taxes a higher priority than they accord to other judgment liens.

B. Mortgage Liens

In virtually all states which have statutes creating a lien in favor of the association for unpaid assessments, that lien will be inferior to the lien of first mortgages which are of record as of the date that the lien for assessments is perfected. Indeed, in some states, the association’s lien for assessments is inferior to all first mortgage liens irrespective of the time the mortgage liens are created. Usually, no special rule is created to give liens other than first mortgage liens priority over the association’s lien for assessments.

1. PURCHASE MONEY MORTGAGES

The reluctance of the states to prefer the assessment lien to first mortgage liens presumably reflects the fact that most first mortgages secure purchase money loans which are essential to condominium ownership. The states have recognized that mortgage lenders might be discouraged from making condominium purchase money loans if they felt that their liens could be primed by unpaid assessments which could accumulate to an amount sufficient to significantly reduce, and perhaps eliminate, their security. This is a particularly sensitive matter since a large percentage of residential purchase money mortgage lenders are regulated institutions.

It is possible for mortgage lenders to protect themselves, at least partially, from the erosion of their security by requiring unit owner-borrowers to make advance escrow payments of condominium assessments in the same manner that advance escrow payments of taxes and insurance are often required. Such a requirement, however, would provide only marginal protection to lenders, since unlike real estate tax and insurance payments, condominium assessments may be varied by adjustments or special assessments during the course of a year. Thus, even if lenders required a “float” in the amount of four to six months’ escrow payments, lenders would not obtain full protection.

Lenders might conclude that they are almost as well protected by merely requiring notices of defaults in regular payments of assessments to

16A typical provision would be:

all such [assessment] liens shall be subordinate to any lien for taxes, the lien of any mortgage of record and any other lien recorded prior to the time of recording of the claim of the association’s lien.

But see discussion, infra at Section VII.B.3, of Section 309 of the Illinois Condominium Property Act which gives the unit owners association the option of rendering the association’s lien superior to a first mortgage lien for a limited period of time.


18“To encourage relatively easy credit and home ownership, the purchase money lender should be subjected to as few risks as is feasible.” Walbran, supra note 12 at 556.
the association by their borrowers. However, the requirement of additional escrows and the processing of default notices for condominium loans would force lenders to incur administrative and bookkeeping expenses which they would have to incur in making non-condominium conventional loans. Hence, if the UCA made assessment liens superior to the liens of pre-existing mortgages, condominium loans might be marginally less attractive to mortgage lenders than other loans would be.

In addition, institutional lenders (who provide by far the greatest volume of residential financing) might face statutory and regulatory impediments to making such loans. Such impediments could result from state and federal regulatory and other requirements that all or most of such lenders' loans be secured by first mortgages on real estate. Of course, only tax liens can ever be truly first liens, and requirements that mortgage loans be secured by first liens must be taken in the context that some liens will always be capable of achieving priority over the mortgage lien. However, the fact that a category of lien peculiar to condominiums—i.e., the lien for assessments—would be prior to mortgage liens, might cause regulated mortgage lenders to encounter difficulties in making condominium loans which they would not encounter in making other residential mortgage loans.

2. MORTGAGES OTHER THAN PURCHASE MONEY MORTGAGES

In addition to the liens of purchase money mortgages, three other categories of mortgage liens merit analysis. These are: (1) liens for mortgages, typically securing construction loans, which arise against the property prior to the declaration being recorded; (2) liens for non-purchase money first mortgages; and (3) liens for second and other inferior, non-purchase money mortgages.

The prime consideration relevant to determining whether a lien for assessments ought to have priority over the lien of a mortgage of record prior to the recordation of the declaration (whether that mortgage is a first or second mortgage) seems to be the potentially adverse effect on condominium construction lending. Construction lenders, like purchase money mortgage lenders, might be disinclined from making loans on condominium projects if there was a possibility that unpaid condominium assessments would give rise to liens superior to the construction mortgage.

19In this regard consider the requirement in the FNMA/FHLMC "Uniform Condominium Rider" for use with mortgages on condominium units that the "Borrower shall promptly pay, when due all assessments imposed by the owners association or other governing body of the Condominium Project (herein "Owners Association") pursuant to the provisions of the declaration by-laws, code of regulations or other constituent document of the Condominium Project."

20See Appendix I, infra, which sets forth such requirements in greater detail. There requirements sometimes result from statutory limits on investment authority. See, e.g., FHLBB Reg. §§ 545.6-1, 541.9; CAL. FIN. CODE § 7102 (Deering 1971, Supp. 1977). In addition, practical limitations on the loans which lenders will be inclined to make result from the requirements which must be met in order to qualify for various guaranty and insurance programs and for purchase by the secondary market.
This is true in part because construction lenders are more vulnerable than are purchase money mortgage lenders to adverse business consequences resulting from the liens of their loans being subjected to assessment liens. The construction lender's borrower is the declarant, and it would be an unacceptable anomaly for the borrower/declarant, who will control the association during much of the construction loan period, to have available a mechanism by which the declarant could prime the lien of his own lender.

The exposure that this could create for the construction lender can be seen in a hypothetical which assumes that unit sales have begun, so that the association exists but is still controlled by the declarant. The declarant, as a bargaining tool in seeking a loan restructuring, threatens to set high assessments with a large portion of the assessments earmarked for capital reserves. The construction lender ultimately forecloses and takes title subject to a large amount of such unpaid assessments against the units it has acquired. Even though the construction lender may control the association after foreclosure, its fiduciary obligations to the other unit owners may force the lender to pay delinquent assessments even though they are not necessary to pay necessary expenses and hence could not reasonably have been anticipated by the lender. Given the numerous risks that are inherent in construction loans, construction lenders may be particularly reluctant to incur the risk of being subjected to substantial assessment liens incurred by defaulting declarants in condominium projects when the risk can be avoided in financing a conventional project.

Further, the nature of their participation in the condominium project suggests that construction lenders should not be required to bear the risk that their liens will be so primed. The involvement of construction lenders in the condominium project is short-term in nature. In most instances, the lien of a construction loan or other pre-declaration mortgage against a condominium unit will be released when that unit is conveyed by the declarant to a purchaser. The UCA21 and several existing state condominium statutes22 require such a release. Construction loans are made in order to create a project, not to enhance its viability by enabling purchasers to finance their ownership interests.23

---

21Section 4-109(a) of the UCA provides as follows:

Before conveying a unit, other than by deed in lieu of foreclosure, to a purchaser other than a declarant, a declarant shall record or furnish to the purchaser, releases of all liens affecting that unit and its common element interest which the purchaser does not expressly agree to take subject to or assume or shall provide a surety bond or substitute collateral for or insurance against the lien. . . . This subsection does not apply to any withdrawable real estate in which no unit has been conveyed.


23It is common practice in some jurisdictions, such as New York, for the lien of the construction loan to be converted to a permanent, purchase money mortgage lien; frequently this is done to avoid additional mortgage and recordation taxes. To the extent that this practice is followed and the lien of the construction loan is not discharged, the position of the construction lender is comparable to that of a purchase money mortgagee. In that case, it would seem appropriate to deem the switch from the construction loan to the permanent loan status as a novation, and to subject the lien of the "construction loan-
Hence, it seems appropriate for construction lenders to be able to obtain priority for their liens by taking care that they are recorded prior to the time of the recordation of the condominium's declaration. This is possible under the UCA. If the construction lender wishes to subordinate his interest to the interests of the association he may easily do so, either by executing a subordination agreement or by allowing the declaration to be recorded first. But while, as a practical matter, foreclosing construction lenders may find that they have little choice but to pay amounts necessary to offset operating costs, such costs may not be as high as the assessments themselves. The construction lender should not be burdened with the possibility of having to pay "expenses" other than those necessary to operation of the project.

Permanent, first mortgage loans on condominium units which are not purchase money loans (or construction financing) raise problems similar to those raised by purchase money and construction loans in that, once again, the inclination of first mortgage lenders to make loans on the security of condominium units is likely to be reduced if such loans will be subject to a superior lien which does not affect other types of realty. Non-purchase money first mortgages—loans which permit owners to convert the equity in their units to low cost cash—probably are not as essential to condominium development as are purchase money mortgages. However, to the extent that condominium unit owners are less likely to obtain such loans than are owners of other properties, condominiums will be marginally less attractive to purchasers. In any event, the UCA does not distinguish between different kinds of first mortgages.

The foregoing observations may be less true of second mortgage lenders since they necessarily accept a major subordination by taking only a second mortgage. Certainly, second mortgage lenders will not encounter the regulatory and similar impediments which first mortgage lenders may encounter if assessment liens can obtain priority over them. On the other hand, second mortgage lenders are lending on a much smaller loan-to-value ratio, and hence, the risk of any incremental reduction in the equity securing their loans (as would result if assessment liens obtained priority) may be a proportionately larger disincentive for them to make condominium loans than it would be for first mortgage lenders. However, it seems a reasonable conclusion that the possibility that second mortgages may be relatively more difficult to obtain for condominium unit owners would be much less of a threat to condominium development than the unavailability of first mortgage loans would be. Thus, the general superiority which the UCA accords the assessment lien over second mortgages seems appropriate.

3. RECONCILING THE COMPETING INTERESTS OF THE ASSOCIATION AND FIRST MORTGAGE LENDERS

The competing interest of first mortgagees and condominium associations are not easily reconciled. As is clear from the foregoing, both parties now permanent loan" to the same priority rule vis-a-vis assessment liens which would apply to purchase money mortgages which do not predate the recordation of the declaration. It would be necessary to add a special provision to the UCA to accomplish this in states in which it is appropriate.
can reasonably assert the propriety of their being protected from superior claims of the other not only for their own benefit but for the other party's benefit as well. Thus, lenders, particularly construction lenders and purchase money first mortgage lenders, can argue that the unit owners themselves benefit from allowing mortgage liens to be superior to liens for assessments, since such a grant of priority will stimulate condominium development and unit acquisition. On the other hand, unit owners can argue that a priority for the association's lien promotes stability of the condominium, which benefits lenders, at least permanent mortgage lenders, as well as the unit owners.

The practical impact of the priority granted suggests that a superior assessment lien would be less detrimental to first mortgage lenders, other than construction loan mortgagees, than the impact of a superior mortgage lien would be to a condominium association. Mortgage lenders are better able to protect themselves from foreclosure by other lien claimants than are associations. They can and almost certainly will demand escrows or notices of non-payments so as to limit the amount of the assessment liens which come ahead of them before they can take action on their own behalf. In most cases, they can absorb the cost of paying assessments in order to avoid foreclosure far better than an association could absorb either paying off a superior mortgage or curing a default to accomplish reinstatement.

Indeed, it seems unlikely that first mortgage lenders, who typically have substantial investments in their mortgage loans, would ever permit an association to foreclose a superior assessment lien, and thus, to wipe out the lender's security. Rather, lenders are likely to take control of the situation themselves by paying off the association's lien and seeking to recover from the unit owners under the terms of their mortgages. Thus, while mortgage lenders may oppose any change in the current law which would have the effect of giving the association a lien for unpaid assessments which could be superior to pre-existing mortgage liens, the practical impact of such a rule on lenders is likely to be mitigated by protective actions which the lenders may easily take for themselves.

24This would only happen, in theory, if the mortgage lender was certain that (1) there would be sale proceeds available after foreclosure to pay off all prior liens (i.e., real estate taxes and assessments, etc.) plus costs of foreclosure and the sums due it and (2) that there would be cash bidders at the sale. Even if these preconditions existed the only motivation the lender could have to defer to the association's foreclosure would be that the association has available to it a speedier remedy than does the lender (i.e., a power of sale foreclosure rather than a judicial foreclosure).

25Such a reaction by lenders actually would be more beneficial to the association than would be the case if the mortgage lenders permitted the association to foreclose. If lenders pay the assessments themselves, the association will not be forced to incur the cost of foreclosure, nor will it have to overcome the probable social pressures from the unit owners not to foreclose on one of their neighbors.

26Illinois has enacted a lien priority rule for assessments which, with a small qualification, gives the association priority over mortgagees.

The Illinois condominium statute provides that, unless otherwise provided in the condominium documents, the association can assert a lien, which would be prior to all prior recorded encumbrances, for assessments coming due within a period of ninety days from the date the association mails a notice of default in payment and claim of a lien to other
Lender resistance to such a rule should be lessened by the UCA's provision, which strikes a compromise between the competing interests of first mortgage lenders and associations. Under Section 3-115 of the UCA, the association can assert a priority over pre-existing first mortgage liens "[t]o the extent of the common expense assessments . . . due during the six months immediately preceding institution of an action to enforce the [association's] lien . . ." Thus, the association is given six months during which, if it acts to enforce its lien, it will be able to recover all of its unpaid assessments. As a practical matter, the association will be paid these funds by the mortgage lenders who do not want to allow foreclosure, and the association will not be required to incur the costs of foreclosure.

encumbrancers. ILL. ANN. STAT. ch. 30, § 309 (Smith-Hurd 1969, Supp. 1978). Since the statute permits the association to have a first priority lien for assessments coming due within ninety days of the mailing of "each" such notice, an association apparently would be able to assert such priority over all other recorded liens if it were willing to go to the trouble to give the statutorily required notice every three months. Thus, the effect of the Illinois statute is to give the association an "optional priority", which may be waived either in the declaration (by the declarant) or by inaction on the part of the association.

The statute expressly provides, however, that if the association exercises its option, the "once prior" encumbrancer has the option of paying any unpaid common expense assessment(s) against the unit and adding the amount of such payment to its own lien with the same priority ranking. The encumbrancer is also entitled, upon request, to receive from the association a statement of unpaid assessments, and if such a statement is not supplied within twenty days, any unpaid assessments existing prior to the date of the request remain subordinate to the encumbrancer's lien.

The Illinois rule was adopted "after a great amount of haggling between those who insisted that the other unit owners needed protection and those who insisted that institutional lenders would not make loans if the first lien status of their mortgage was not protected." Fegan, Financing Condominiums, Practicing Law Institute, Cooperatives and Condominiums, 246, 268 (J. McCord Ed.) Nevertheless, early experience in Illinois indicates that lenders have not, as a general rule, required that the provision be waived in the declaration in order for them to be willing to make loans. Thus, Equitable Life Insurance Company apparently has decided that it can adequately protect itself by paying the unpaid assessments and adding the amount spent to the mortgage debt. Consequently, the Illinois provision was not of sufficient importance to prevent Equitable from making loans. Id. at 268.

There is a notable objection to the Illinois statute in that its application apparently could result in an incongruity as to priority among lienholders. If the association preempted a first lien by giving a ninety day notice but did not preempt a second lien by giving that encumbrancer a ninety day notice, then upon foreclosure the first lienholder would be inferior to the association's lien but the second lienholder would not be. In such a situation, the second lienholder might recover its investment before the first lienholder, not due to act or omission by the first lienholder but to the failure of the association to give proper notice to all parties.

The Illinois provision is the only provision of its kind which is currently in force and which applies to residential condominiums. Massachusetts and New York take the approach of allowing the bylaws of primarily non-residential condominiums to provide whether or not mortgages of record should have priority over the lien for common expense assessments. N.Y. REAL PROP. LAW § 399-z (McKinney 1968, Supp. 1975); MASS. GEN. LAWS ANN. ch. 183A, § 21 (West 1977). Massachusetts limits the provision to first mortgages of record and goes one step further by allowing the priority decision to be based on:

The person or the entity to which such mortgages are given or upon such other criteria as may be specified in the bylaws.

Lenders, on the other hand, will be protected in that the amount of their exposure to assessment liens will be limited. Under most, if not all, mortgage instruments, the amount paid by the lender to the association can be added to the secured debt, and the lenders will be able to threaten the defaulting unit owners with foreclosure of their mortgages if they do not promptly pay back the lender the amount of the assessments, plus costs and interest. Thus, the burden of collection or foreclosure will be placed upon the lender, who has the most leverage over the defaulting unit owner and who is in a better administrative and financial position to foreclose if necessary.

The initial drafts of the UCA gave the association's lien priority over first mortgages for a period of one year, rather than six months. Objections were raised to the one year period, however, on the grounds that it could result in unacceptable burdens being placed on individual unit owners. As suggested above, first mortgage lenders can be expected to require an escrow to cover payments of condominium assessments to which their lien may be subject. The amount of the escrow can be expected to be equal to the maximum amount of assessment liens which could be superior to the lender's mortgage, such amount being adjusted periodically in accordance with the association's budget. Lenders might agree to pay the unit owner's fees out of the escrow, but that would entail administrative expenses, and the escrow fund would have to be replenished monthly in order to maintain an adequate amount in the fund. Hence, it is more likely that lenders would treat the escrow fund as a standby reserve for association assessments, which would be used to cure defaults if necessary and which otherwise would be returned to the borrower when the loan is retired.

Under an increasing number of state laws, interest on such escrow funds would be paid to the unit owner-borrower so that the requirement that such an escrow be created would not be unduly burdensome on unit owners in that respect. However, it might well be a substantial burden on purchasers to have to pay a full year's assessments to the lender in a lump sum at the beginning of the loan. This might be a serious disincentive to purchase condominiums.

The draftsmen of the UCA felt that if the period of assessment lien priority were shorter, the burden on purchasers would be smaller. Accordingly, they reduced the period to six months. The six month period still provides ample time for the association to act to enforce its lien, and the amount of assessments which may have to be placed in escrow will be substantially less burdensome on purchasers.

C. Judgment Liens

As discussed above in Section V, the condominium association is, in effect, an involuntary creditor of the unit owners. (Stated another way, each unit owner is potentially a debtor or creditor of the other unit owners.) The association continually supplies services and facilities to the unit owners and receives in return a promise, contained in the declaration, by the unit owners to pay for those services and facilities by paying the common expenses
assessments charged to their units. The lien which the UCA grants to the 
association secures that promise of the unit owner to pay. Both the associa-
tion's obligation to provide services and the unit owner's obligation to pay 
commence as of the date the unit owner acquires title to the unit and form 
a part of a continuum of mutual obligations beginning with the creation of 
the association and continuing until the termination of the condominium.

This suggests that it may be appropriate to view the association's lien 
as securing an obligation which arose as of the date upon which the declara-
tion was recorded, so that unless contrary policy reasons can be identified 
(as in the case of first mortgages), the lien will have a priority over any lien 
not recorded as of that time. In this sense the association's lien is analogous 
to the lien of a mortgage securing obligatory future advances whereby the 
lien is accorded a priority as of the time the obligation is incurred rather 
than when the monies are advanced or the services are rendered.

Policy reasons dictating that such a priority rule should not always 
apply have been identified herein with respect to first mortgage liens and 
tax liens, and the UCA contains special provisions concerning the priority 
 accorded to those liens. As discussed below, however, no such policy reasons 
exist with respect to judgment liens. Thus, the approach of the UCA, which 
is to make the association's lien superior to all judgment liens not recorded 
prior to recordation of the declaration,\(^\text{27}\) appears to be appropriate.

Judgment liens may attach to individual units either as a result of judg-
ments rendered directly against individual unit owners or as a result of 
judgments rendered against the association.\(^\text{28}\) Either category of judgment 
may result from claims in tort or in contract (or from governmental claims 
for taxes for which no special lien right is otherwise provided). Each of 
these types of liens will be considered in turn.

I. JUDGMENT LIENS ARISING OUT OF CLAIMS 
AGAINST INDIVIDUAL UNIT OWNERS

Given the mutual obligations of the association and the individual unit 
owners to provide and to pay, respectively, for condominium services, which 
obligations are established and publicly recorded prior to the time that a 

\(^{27}\)See Section 3-115(b)(1). As a practical matter, the only judgment lien which could 
have superiority over an existing association lien for unpaid assessments would be a lien 
against a unit owned by the declarant. Obviously any judgment rendered against an assor-
iation or unit owner other than the declarant would have to occur after the condominium 
has come into existence, which would be after the declaration had been recorded. A lien 
resulting from such a judgment would be inferior to the association lien.

A judgment against a declarant or his predecessor could attach to property that would 
become a part of a condominium parcel, and thereby be superior to the future associa-
tion's lien. However, under Section 4-109(a), such a lien must be either released or ex-
pressly assumed by a purchaser before the parcel can be conveyed by the declarant. Since 
it is extremely unlikely that a purchaser would assume such a lien, the only situation in 
which a judgment lien is likely to prime an association's lien is if the declarant continues 
to own the unit in question. The propriety of allowing such judgment liens to be superior 
to the association's lien seems unassailable. Any other rule might permit a would-be de-
clarant to frustrate a judgment creditor simply by creating a condominium on the liened 
property and then assessing massive assessments against himself.

\(^{28}\)Section 3-111(b).
judgment lien against a unit arising out of claims against the unit owner can be recorded, it would be necessary to identify sound public policy reasons for making judgment liens against individual units, but not all units, superior to the association's lien. It appears, however, that no such reasons exist.

In contrast to the probable behavior of mortgage lenders, the actions of potential judgment lienors are not likely to be affected by the existence or non-existence of a priority in favor of judgment liens over a possible lien by the association. This is obviously the case with respect to potential tort claimants, who have no control as to the identity of persons who may be guilty of tortious conduct against them. It is also true of private contracting parties. Relatively few such parties will be concerned enough with the creditworthiness of the unit owners to look into the possible prior claims against their units. Those that do are unlikely to be disturbed by a possible superior lien in favor of the association. The amount of the potential lien will be minimal in comparison to the nearly inevitable first mortgage, and potential creditors who are overly concerned about so marginal an encumbrance as the association's lien either are likely to seek a security interest in other property of the unit owner or are unlikely to extend credit in any event.

Moreover, if potential contract claimants are concerned about the effect on a unit owner's creditworthiness of a potential association lien, they are forewarned, and they can decide whether or not to take the risk (perhaps charging an appropriate premium for doing so), in accordance with their business judgment. The same is not true of the association's ability to choose its "borrowers" since it is, as indicated above, an involuntary and perpetual creditor. Thus, the possibility that a relatively small number of potential contractors might decide not to do business with a few unit owners is a small social and economic price to pay in return for helping to ensure the stability of the condominium association.

Tort claimants, of course, will not be voluntary claimants any more than the association is. Such claimants, however, generally will have the advantage of insurance funds to satisfy all or a portion of their claims, whereas the association will not. Moreover, given the probable size of many tort claims, to give a tort claimant a lien against a condominium unit that is superior to that of the association would be far more likely to deplete the owner's equity, thereby precluding recovery by the association, than would be the case if the positions of the tort claimant and the association were reversed.

Thus, both tort claimants and contract claimants have advantages over the association in terms of collection which more than offset any disadvantage which may result to them from having their lien be inferior to that of the association.29

---

29If either class of judgment creditor has a less advantageous position than the other, the difference is small. Any argument, based on that difference, which might be made for providing a different priority for one type of judgment lien as compared to the other is countered by the frequently fuzzy line between tort claims and contract claims and the distortions that could result from giving plaintiffs an incentive to assert one claim instead of another in order to improve their lien position.
Tax liens for which no special lien right is otherwise provided by state law present a somewhat different category of judgment lien than results from private tort or contract claims. Some arguments exist for denying association liens an automatic priority over such liens. The government, like the association, is an involuntary creditor of the delinquent unit owner/taxpayer. Moreover, as discussed in connection with real estate taxes, the failure to pay taxes adversely affects state revenues and, thereby, has an impact on the general public, not just the owners of a single condominium. Nevertheless, the very fact that the states have not chosen to enact a generally applicable, special lien priority for such taxes argues persuasively that no special status should be accorded to such liens in condominiums.

Accordingly, the UCA approach, which makes the association's lien superior to all judgment liens arising out of claims against non-declarant unit owners, appears to be proper.

2. JUDGMENT LIENS ARISING FROM A SUIT AGAINST THE UNIT OWNERS ASSOCIATION

The arguments made in the preceding section with regard to the probable behavior of contract creditors, their ability to make an evaluation of creditworthiness and the availability of insurance for tort claimants also apply to justify the UCA's approach with respect to liens arising out of claims against the association. The case is even stronger with respect to such claims because granting the association a superior claim facilitates the generation of revenues which can be used by the association to pay the judgment creditor's claims directly.

Granting the association a superior lien would further the ends of the judgment creditor, since any funds which the association is successful in collecting, by enforcing its lien or otherwise, from a delinquent unit owner would be available to the judgment creditor and presumably would be subject to the judgment lien against the association's assets. Thus, the judgment creditor is as well or better served (for purposes of getting the relatively small amount of money which any given unit owner is likely to owe the association as the owner's pro rata share of the creditor's claim) by letting the association foreclose and obtain the delinquent assessment, all of which will then be subject to the judgment creditor's lien against the association, then by foreclosing directly against the unit owner to obtain a pro rata share of the judgment.

Indeed, there not only is no advantage to the judgment creditor in allowing him to assert a lien which is superior to that of the association, but also it is likely that distortions of liability allocations among the unit owners would result from such a priority. For example, assume that a $10,000 judgment is rendered against an association in a 100-unit condominium and that the assets of the condominium at the time are only sufficient to pay $2,000 of the judgment. A judgment lien in the amount of $8,000 would then attach to the association assets and (assuming liability for common expenses has been allocated equally among the unit owners), $80 judgment liens would attach to each unit. If some of the unit owners are delinquent in paying their assessments, then the non-delinquent unit
owners will have contributed more toward the $2,000 already paid than the delinquent unit owners will have contributed. Yet, all unit owners will be subject to an $80 lien.\textsuperscript{80} If the judgment lienor has a lien superior to that of the association and if he forecloses on one of the delinquent units, he will eliminate the association’s practical means of collecting the delinquent assessment and thereby of equalizing the contributions of each unit owner to the judgment.\textsuperscript{81}

D. Liens Held by Mechanics or Materialmen

Mechanics’ and materialmen’s liens (“mechanics’ liens”) will arise as a result of a breach of a contract for the provision of materials or services which either benefit the condominium as a whole (e.g., services or materials procured by the association or procured by the declarant and relating to the development of the project) or individual units (e.g., improvements made by individual unit owners). If they were no more than contract claims which could be reduced to judgment, mechanics’ liens would be subject to the same considerations discussed in sub-section C, supra, regarding judgment liens. However, in most jurisdictions mechanics’ liens are accorded a more favorable position than judgment liens.

Frequently, mechanics’ liens are given priority as of a time antecedent to the time the lienor’s claim is perfected. In many states all mechanics’ liens growing out of a particular project relate back to the commencement of the construction of the project irrespective of the time that a particular mechanic commenced his work and irrespective of when his lien was recorded. In other states the lien attaches as of the date of the contract between the

---

\textsuperscript{80}If the non-delinquent unit owners pay the amounts due under the judgment liens against their units, it might be desirable to provide some method for them to offset those amounts from future assessments due to the association. Section 4-109(b) of the UCA protects the unit owner from paying the association future assessments for liens which he has already paid. However, the UCA does not provide for reimbursement for liens which he has had to pay because others failed to pay past assessments.

Theoretically, the provision could be amended to permit unit owners who have already paid both an assessment and a judgment lien toward the same common expense to offset the payment of the judgment lien against future assessments by the association irrespective of whether the common expenses underlying that assessment were incurred in connection with that lien. However, this might result in undue complications in trying to determine actual contributions toward the particular expense, and it probably would have only a minute dollar impact.

\textsuperscript{81}This example is suggestive of problems which may exist in connection with the larger issue of whether judgment and other creditors of the association ought to have liens against both the association assets and the individual units as well. A full discussion of the propriety of such a dual lien right is beyond the scope of this discussion. Nevertheless, it is worth noting that to whatever extent creditors of the association are able to proceed directly against unit owners, even on a pro rata basis, there may be resultant distortions in the allocation of real liability among unit owners. On the other hand, the ability of creditors to recover from the unit owners directly is really an ability to circumvent the association and thereby prevent the unit owners from using the association as a shield to protect their own assets. [Depending on the definition of the association’s assets], and the limits, if any, imposed on the ability of a creditor of an association to lien those assets, this may or may not be necessary or desirable. (Cf. note 34, supra).
owner and the mechanic. In some jurisdictions, such as Virginia, mechanics’ liens are given absolute priority over mortgages and other non-tax liens even if those other liens are of record prior to the time work commences. State laws vary tremendously as to the type of work or materials for which such a mechanic’s lien may be asserted as well as to the procedures for perfection and lien enforcement.

The UCA has not attempted to modify the special provisions for priority for mechanics’ liens which are contained in the various state mechanics’ lien laws. Indeed, the only provision in the UCA expressly relating to the priority to be accorded mechanics’ liens is the last unbracketed sentence in Section 3–115(b) which states: “This subsection does not affect the priority of mechanics’ or materialmen’s liens.” This provision denies the association’s lien any special priority over mechanics’ liens and thereby requires, in effect, that the association’s lien compete with mechanics’ liens for priority in accordance with other applicable law. (If state law does not provide an absolute priority for mechanics’ liens, the applicable law will be the “first in time, first in right” rule. See Section IV, supra.) State law may or may not provide that the time at which a mechanics’ lien is effective relates back to an earlier point than recordation for purposes of that rule.) Thus the effect of the UCA provision does not seem to be any different than would be the case if mechanics’ liens were simply included as a fourth numbered exception to the general rule, stated in Section 3–115(b), that the association’s lien is prior to all other liens.

By declining to make the special lien priority for the association’s lien applicable to mechanics’ liens, the draftsmen of the UCA have impliedly recognized the complexities of establishing lien priorities where two favored classes of claimants exist.\(^{32}\) Nevertheless the following analysis will attempt to identify the factors relevant to any efforts to establish priorities between these competing interests.

\(^{32}\)Mechanics and materialmen have traditionally maintained a strong lobby to ensure that the relatively high priority statutorily granted to their liens is not diluted. The apparent effects of the legislative presence of mechanics and materialmen can be seen in a statute adopted both in New York and Hawaii. Section 339–1 of the New York condominium statute and section 514–9 of the Hawaii condominium statute read substantially as follows:

No labor performed on or materials furnished to the common elements shall be the basis of a lien thereon, but all funds received and to be received by the manager or board of directors in payment of common expenses, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor or materials performed or furnished at the express request or with the consent of the manager or board of directors, and the same shall be expended first for such purpose before expending any part of the same for any other purpose.


This provision is clearly objectionable in that it would require use of condominium assessments to pay mechanics’ lien claimants even before essential operating costs such as for utilities and heating fuel are covered. This would severely disrupt cash flow. Rather than see this type of legislation enacted, it would be preferable to preserve without change the existing statutory priority accorded mechanics and materialmen to the same extent in condominium projects as in non-condominium properties.
1. LIENS FOR WORK CONTRACTED FOR
   BY THE DECLARANT

   Even if the UCA provision did not specifically exclude mechanics' liens
from the effect of the special priority rule for the association's lien, a
portion of the liens that might attach to the condominium by virtue of
work or materials contracted for by the declarant probably would be ex-
cepted from the automatic priority of the association's lien by virtue of being
recorded prior to the recordation of the declaration. The degree to which
this would be the case in any given condominium depends, of course, on the
amount of construction which occurs prior to the recordation of the declara-
tion, and upon the speed with which unpaid contractors record their liens.33

   As discussed above, the mechanics' lien laws in most states allow the
mechanics' lien to relate back to the point in time when the work com-
menced, in very much the fashion that for most purposes the UCA allows
the association's lien to relate back to the date that the declaration was filed.
For this reason it is appropriate that the UCA acquiesces to any "relation
back" rule governing mechanics' liens. It is clearly appropriate for the UCA
to permit liens which predate the recordation of the declaration to have
priority over that of the association since they will have arisen before the
commencement of the continuum of obligations between the association and
the unit owners (see Section V, supra).

   In fact, the UCA does not merely allow the normal "relation back" rule
applicable to mechanics' liens to apply to condominiums. For purposes of
determining the relative priorities between the association's lien and me-
chanics' liens, the UCA also prevents the association's lien from relating back
to the date of recordation of the declaration. Rather, the association's lien
vis-à-vis mechanics' liens will be effective as of the time that the assessment,
or the first installment thereof, is due. As a practical matter, this means that
most mechanics' liens resulting from work contracted for by the declarant
will be prior to the association's lien for assessments.34

   During the period of declarant control, such a rule seems essential in
order to prevent the declarant from abusing the assessment mechanism in
order to avoid the priority of the mechanics' lien. For example, if the associa-
tion's lien related back to the date of recordation of the declaration, and if
the declaration were recorded prior to the commencement of construction,
a declarant who encountered financial difficulties might use the shell of the

33The number of such prior liens could be enlarged if a jurisdiction followed a "rela-
tion back" rule which gave mechanics' liens priority as of some point prior to recordation
and if that point was held to be the time of "recordation" for purposes of applying the
priority rules of Section 3-115. Such an interpretation would ignore the wording of Section
3-115 but could be based on the wording of the state's mechanic's lien statute.

34This is based on the assumption that the association will not start levying assessments
until after "work" on the project (for purposes of the mechanic's lien laws) has commenced.
This assumption may not be accurate. Since the association is formed as of the date the
declaration is recorded (see Section 3-101) if the declaration is recorded before construction
begins, and if assessments are levied from the beginning of the association's existence, some
assessments could antedate the mechanics' liens. However, the potential for abuse, discussed
in the next paragraph of the main text, would be limited even if events occurred in that
order.
association to shelter equity from the lien of unpaid mechanics simply by defaulting on assessments. While such abuses presumably would occur only rarely, the temptation might be great for a declarant who sees that there would be equity in its project if it only had to pay back its construction loan but did not have to pay some of its contractors. If assessments were high enough, the contractors could have no gain from foreclosure due to the construction loan and assessment liens ahead of them.

However, such abuses would not be possible after the period of declarant control of the association has ended. After that time, the clear equities in favor of the unpaid contractor over the defaulting declarant disappear. Once the association is controlled by the unit owners, it is they who could suffer if the association’s liens for unpaid assessments are destroyed by virtue of mechanics’ liens asserted by the declarant’s contractors.

To some extent this problem is mitigated by the fact that under Section 4-109(a), the declarant will be required to obtain a release (or an express assumption by the unit purchaser) of, or provide bonding or insurance for all previously perfected liens affecting a condominium unit before conveying it. Thus, the only unassumed mechanics’ liens relating to work contracted for by the declarant which may become superior to the lien of the association will be liens against units owned by the declarant and liens which are inchoate as of the time the units are conveyed. But it is the inability to collect from a potentially insolvent declarant that will give rise to both the association’s lien for unpaid assessments and the contractor’s mechanics lien.

Both of these parties are innocent of wrongdoing themselves and are in danger of not receiving payments due them by virtue of defaults by the declarant. Neither party has any clearly superior method to protect itself beyond its lien claim. Mechanics’ lienors could be said to have been able to demand payment and avoid large arrearages better than the condominium association, which may have been controlled by the declarant during the period in which all or a large part of the delinquent unit assessments accrued. On the other hand, under the UCA, the unit purchasers, who make up the association, are entitled to disclosures which should alert them to the possibilities of mechanics’ liens before they buy units. Thus, in the absence of declarant fraud, prospective purchasers should have a fair degree of foreknowledge of potential mechanic’s lien problems. (Of course, fraudulent, or grossly inadequate, disclosure may well occur when the declarant is hard pressed.)

The foregoing factors provide little basis for preferring either mechanics lienors or an independent unit owners association over the other in their competing lien claims against units owned by the declarant. However, the unit owners, while not guilty of wrongdoing, almost always will be the beneficiaries of the work performed by the mechanics’ lienors. That benefit may be limited in that the work for which the mechanics’ liens are asserted may only have contributed to the value of the common elements rather than any individual unit. In some cases, such as in a phased development, the work to which the liens relate may add virtually no value to the interests of many of the unit owners who are affected by such liens but who are in an earlier phase. Moreover, the unit owners may have paid for their share of
the work in the purchase price even though that money was not transmitted to the mechanics' lienor.

Nevertheless, it can be said that the unit owners have benefitted, albeit indirectly, from the efforts of the mechanics' lienor. They are, thus, in a weaker equitable position than is the mechanics' lienor, who does not receive benefit from the unit owners. Accordingly, the approach of the UCA, which would allow existing state mechanic's lien law to apply without granting the association any special position with respect to mechanic's lien claimants, seems appropriate insofar as it prefers mechanics' liens which arise from work performed at the instance of the declarant.

2. LIENS FOR WORK OR MATERIALS CONTRACTED FOR BY THE ASSOCIATION OR UNIT OWNERS

Different considerations apply when the declarant no longer controls the association and the work underlying the mechanic's lien resulted from contracts with an independent association or a unit owner.

When work is performed at the instance of an independent association, the same considerations must apply as in the case of judgment liens (subsection C., supra). The special priority normally accorded to mechanics' liens is inappropriate in such situations. The ability of the mechanic's lien claimant to wipe out an association lien for unpaid assessments amounts to nothing more than the ability to defeat the association's ability to pay its debts directly. (For an elaboration of this point, see subsection C.2., supra). Moreover, the mechanic's lien claimant can, by seeking a judgment, obtain the further right to assert a lien against the association's property, including assessments. Thus, the mechanic's lien claimant loses little ultimate security by giving up lien priority on the units themselves since any money the association collects can be made subject to a lien against the association's assets. Any equity in the unit beyond the superior liens will still be subject to the mechanics' lien against the unit. Hence, analytically, the association's lien ought to be superior to such mechanics' liens. The UCA does not provide for this, however.

When the work in question is performed at the instance of an individual unit owner, the mechanics' lienor does not have the ability to recover from the association and, hence, may be harmed by having its lien cut off by a foreclosure by the association. Thus, the situation is akin to that discussed in subsection VII.D.1., supra, in that both the association and the mechanics' lienor are competing for the assets of a unit owner who has defaulted in his obligations to both. However, in the former situation the defaulting unit owner was the declarant, and the work contracted for was likely to have benefited all of the unit owners who comprise the association. When the defaulting unit owner is not the declarant, the work which gives rise to the mechanics' lien will have been work performed only on his unit and hence is not likely to benefit anyone else.

Thus, the primary equity which in the former situation favored preferring the mechanics' lienor over the association is missing. With that equitable factor of "benefit conferred" missing, the issue turns upon whether the stability of the condominium is to be given more importance than the
interests of a mechanics' lienor and upon whether either party is better able to protect itself than the other. These factors have been considered in connection with the proper priority to be accorded to the association as against second mortgage lienors (see Section VII.B., supra). For mechanics' liens as well as for second mortgages, the equities appeared to favor according a priority to the association. The appropriateness of this conclusion is strengthened by the fact that in the case of mechanic's lien claimants, the primary factor in favor of according a priority to mortgage lienors—a possible decrease in their propensity to make loans—is absent. Few laborers and materialmen are likely to refuse to do work for creditworthy unit owners because of the possibility that their lien may be subordinate to future condominium assessments.

Hence, it would have been appropriate for the UCA to cause the association's lien to be superior to mechanics' liens arising from work performed under contracts with non-declarant unit owners or with an independent association. That the UCA does not do so is attributable largely to a recognition of the probable difficulties facing state legislators attempting to do so.

E. Homestead Rights and Dower and Curtesy Rights

Section 3-115(b) of the UCA includes, as an option, a provision that the association's lien will not be affected by homestead, dower, curtesy or other exemptive rights. The optional language is recommended for any jurisdiction in which such rights exist, provided the rights can be modified by contract or are modified by statute (e.g., a statutory exemption for purchase money mortgages). The reasons for recommending this language are discussed in this Section.

Statutory and common law protections for the benefit of the unit owner's family may also affect the association's power to foreclose its lien for common expense assessments. The homestead exemption and dower and curtesy rights are designed to give a householder or spouse an interest in the family's real estate, or a portion of that real estate, free from claims of creditors.

In those states which have not abolished dower and curtesy rights, those rights will affect the association's ability to recoup the sums due it upon foreclosure of a unit. For example, assume that a married couple resides in one of the minority of jurisdictions in which dower has not been abolished. If the wife does not sign the purchase contract (and perhaps even if she does, although it would seem that her signature would be an acknowledgement of the assessment obligation) and the association later seeks to foreclose upon its lien for assessments, her dower rights may affect the marketability of the title to the unit in that the association may not be able to convey the unit free of her inchoate claim (which typically would be a life estate in one third of the unit). Further assume a spouse who occupies a unit pur-

---

35Some state condominium statutes specify that the laws of the state relating to the exemption of homestead property from levy, execution or forced sale are to apply to a unit ownership estate with the same force and effect as any other estate in real property. See, e.g., OKLA. STAT. ANN. tit. 60, § 522 (West 1971, Supp. 1975); TENN. CODE ANN. § 64-2715 (Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 1301a, § 17 (Vernon, Supp. 1978).
suant to his or her statutory share. If there are unpaid assessments, the association can only foreclose upon the portion of the unit not subject to the statutory life estate or it will have to seek judicial partition. The impact on marketability in the first case and the reduction of equity available to meet the association’s claims to the extent of the value of the spouse’s life estate in the unit both represent a significant threat to the association’s ability to protect itself.

A similar threat is posed by the homestead exemption. The exact scope of the homestead exemption varies from state to state. However, the exemption typically protects a family’s primary residence from forced sale by creditors. If a unit is properly claimed as homestead property, the association would either be barred from foreclosing for unpaid assessments or, if the exemption claimed was less than the value of the unit, the association would be confronted with a substantial reduction in the equity available to it.

In determining whether the association merits protection from these impacts, several points should be considered. First, it is noteworthy that the states often provide that certain liens will be superior to homestead rights. Purchase money mortgages are generally rendered superior to homestead rights and, in most jurisdictions, liability for state taxes can be enforced against homestead property.38 Mechanics’ liens also are excluded from the operation of the homestead laws under some state statutes.

With the exception of tax liens, these exceptions to the homestead exemption all relate to liens arising in connection with loans or services which have either permitted the initial acquisition of the property or, in most cases, enhanced its value. It can be argued that common expense assessments should be granted similar statutory protection since they too provide a direct benefit, by way of preservation if not enhancement, to the homestead property.37

Two other points relative to homestead, dower and curtesy are even more persuasive arguments for excluding the association’s lien from their scope. First, an inchoate obligation to pay for assessments arises at the time the declaration is filed, and, therefore, antedates the acquisition of title to the condominium unit by the party claiming a homestead, dower or curtesy interest. The unit owner takes title subject to the declaration, including the obligation to pay the assessments thereafter lawfully levied. The unit purchaser should never be considered to have acquired a property interest free of the covenants and conditions of the declaration, and neither homestead, dower nor curtesy should be deemed to enlarge the property interest of the purchaser’s spouse or family. This is true regardless of the fact that the assessment obligation is “inchoate”, i.e., not yet levied (or a lien) against the property in a certain dollar amount.

37 One commentator suggested that the lien for common expenses could arguably be said to fall under the Florida statutory exception from the homestead exemption of liens for work or material performed on the real property in question since the assessments are designed to pay for expenditures which would fall under the homestead exemption if incurred directly by the unit owner. MaCaughan, The Florida Condominium Act Applied, 17 U. FLA. L. REV. 1, 24 (1964).
The second reason relates to the fact that creditors in jurisdictions with homestead, dower and curtesy rights often can protect themselves by insisting on a waiver when making the loan or by requiring that the spouse join in the transaction. In contrast, no clear mechanism exists for an association to obtain such waivers. It may be that a waiver could be obtained from the spouse at the time of purchase of a unit if appropriate conditions applied to unit transfers. However, it would be difficult for the association to protect itself against homestead, dower or curtesy rights attaching as a result of a marriage entered into after the purchase. Even if the association had some means of being kept informed of such marriages, it is reasonable to assume reluctance on the part of unit owners and their families to give waivers. Thus the second reason for a statutory provision permitting an association to foreclose its lien free of homestead, dower or curtesy interests is that such a rule is necessary to (and does no more than) put the association in the position it would be if it were a normal creditor who obtained a waiver in a jurisdiction where waiver is permitted.

VII. PRIORITY "IN TIME" FOR COMMON EXPENSE ASSESSMENTS

The preceding sections have discussed the justification for the UCA giving the association's lien an absolute priority over other types of liens. As to some liens, however, the UCA does not give the association such an absolute priority. In those cases the UCA provides a rule by which the priority "in time" of common expense assessments can be determined. This is necessary so that the association's lien priority can be determined vis-a-vis other liens which are subject to the general rule of "first in time, first in right" (e.g., federal tax liens, as noted in Section VII.A.2, supra).

As discussed in Section IV, supra, Section 3-115(b) of the UCA in effect establishes two points in time, either of which may constitute the effective date of the association's lien for purposes of establishing its priority over competing liens. With respect to first mortgages and mechanics' liens, the association's lien must be deemed effective as of the due date of an assessment or the first installment thereof. With respect to all other liens, the effect of Section 3-115(b) is to make the association's lien effective as of the date that the declaration is recorded.

Just as the discussion of the extent to which the association's lien should be given an absolute priority over other types of liens required consideration of the policies which might justify such a rule, so the following consideration of the various points in time which the UCA could have used as the effective date of the association's lien requires consideration of the relative importance the law is to accord such a lien. In addition to the relative importance of the lien, the certainty with which the chosen effective date may be ascertained must be considered as a second criterion in choosing the effective date. "Certainty" has two dimensions: the definitiveness of the point in

---

38 The association's lien has either an absolute or a limited priority over first mortgages, depending upon whether the mortgage is recorded after or before such due date.
time itself, and the existence of an adequate record notation, private or public.

A. Points in Time Which Might Be Chosen

Several possible points in time could have been chosen by the draftsmen of the UCA as the effective date of the association's lien. In the order of the extent to which those points advance the point in time at which the lien is effective, and thus enhance the priority of the association's lien, they are as follows:

1. the time at which the declaration is recorded;*
2. the time at which the expenditure or budget to which the assessment relates is approved;
3. the time at which the assessment is formally levied by the association or its executive board;
4. the time at which the assessment becomes due and payable;*
5. the time at which the assessment has been past due and unpaid for a given period of days;
6. the time at which the unpaid, past due assessment has been reduced to judgment; and
7. occurrence of the action or event in categories (2) through (5) accompanied by a requirement of recordation of the notice of lien in a designated public record or of some other form of public notification.

The balance of this discussion will examine each of these possible points with regard, first, to its ascertainability and, second, to its merits in relation to the importance to be accorded the lien.

B. The Relative Ascertainability of the Possible Points

1. The time of recordation of the declaration is the most clearly delineated and easily ascertained of all of the aforementioned points in time. It is one of the points in time utilized by the UCA in Section 3–115(b). Only the recordation of a lien or the entry of a judgment can match the precision and ease with which the actual time that such recordation occurred can be verified, after the fact, in the public records. The difficulty with this approach lies in the fact that the notice is only one of the possibilities of a lien; no notice is provided (i) as to the units against which liens actually attach or (ii) as to the exact amount of any such liens. Such notice can only be given if a lien containing such specifics is recorded. (See subsection VIII.B.7, infra.)

2. In contrast, the next point in time available as a choice to the draftsmen—the time of approval of the budget or of the expenditure to which the assessment relates—often would be difficult to determine. Frequently it will not be clear that the approval occurred on a specific day. Thus, a rule based on the time of approval would have necessitated the adoption of a

---

* A rule adopted in the UCA for determining priority vis-a-vis certain types of liens.
rather formal procedure by the association to clarify the record as to the exact time of approval.

Even if the condominium instruments established such a procedure and the association complied with it, it is easy to imagine situations in which the time of approval could be disputed. For example, if an association decided to enter a contractual obligation on a trial basis, subject to cancellation within a designated time period, the time of "approval" might be the time of the execution of the contract or the time of the expiration of the cancellation period. Since no statutory provision could resolve all of the questions of this type which might arise, a rule based on approval would involve a considerable degree of uncertainty. Furthermore, a rule based on approval would be difficult to apply to special assessments levied in order to cover deficiencies in the already existing budget and not to specific expenditures.\(^3\)

A rule based on the time of approval test would also be subject to the disadvantage that, absent a recordation or other public notice requirement, the action taken by the association will not be public information. This has two consequences. First, it will be difficult for persons doing business either with the condominium association or with the unit owners to know the lien status of the property. Even if the law required the association to make such data available on request, creditors would have an additional burden of inquiry. Second, the lack of public notation would enable an association to falsify the record in order to enhance its priority at the expense of other creditors.

3. A rule based on the time an assessment is levied would suffer from the same defects as one based on the time the budget is approved. Indeed, in most instances, the assessment for common expenses will be levied at the same time that the budget is approved. Assessments for special, non-budgeted expenditures probably would be levied as of the time that the expenditures are approved.

4. The rule based on the time the assessment becomes due, which is one of those adopted by the UCA, shares some of the same defects as that based on the time the assessment is levied, such as the problems of contracting parties in determining which assessments might give rise to liens superior to theirs. However, the time an assessment falls due, or the time the first monthly installment of an assessment falls due, is likely to be a clearly established calendar date. Thus, the procedural problems of establishing the exact time that a decision was finalized do not exist with regard to the due date.

One aspect of a rule based on the time the assessment becomes due which requires special consideration is the treatment of an assessment payable in installments. Typically, common expense assessments are levied on an annual basis, with the yearly assessment being due and payable in equal

---

\(^3\)No particular problems should result from a change in the budget itself which increased or decreased the assessment attributable to each unit. If the change was a budget increase, existing creditors should come ahead of the assessment lien to the extent of the increase.
monthly installments. In adopting a rule based on the "due date," it was necessary for the UCA to specify in the statute whether the test referred to the due date of each individual installment or whether the due date of the first installment was also the due date of any subsequent installment of that yearly assessment. The UCA adopts the second alternative in Section 3-115(a), and this is an appropriate choice.

5. A variation on the foregoing test would have been to provide that the lien becomes effective as of a date which is a specified period of time after the assessment became due. In effect, such a rule would create a kind of grace period for payment and would make the lien effective only if the assessment is not paid by that date. Such a rule would also require a special provision in the case of assessments payable in installments. If second and subsequent installments came due after the "trigger date," a rule which made the lien for the entire assessment effective as of a given number of days after the first installment was due would be unduly cumbersome and would make little sense. Hence, it would have been advisable to adopt this variety of a "due date" rule only if the rule were to operate on a per installment basis.

6. If the rule were based on the date of a judgment or court sanction, the purpose of giving the association a special lien would have been defeated because the effective date of the lien would really be the same as the date that an ordinary judgment lien would arise. Furthermore, in most jurisdictions utilization of the power of sale, created by Section 3-115 would mean that there would be no judgment date and no court appearance. In such cases the test of certainty could never be met.

7. The final choice available to the draftsmen was to use any of the foregoing trigger points coupled with a requirement that a notice of lien be recorded in a designated public record. The effective date of the lien would then have been the time of recordation. Such recordation of the lien would provide adequate notice of the amount of the lien's existence against any given unit.

Under such a rule, the tests based on approval of the budget or the date an assessment is levied or becomes due would all benefit in certainty from the addition of a recordation requirement. The date of the association's lien would then be available in a central, public source and the falsification problem discussed above would be eliminated. Nevertheless, since such a requirement would impose an extra duty on the association, it would not have been advantageous for the association. Under such a requirement, if the association fails to take the further action of recording the lien, an otherwise available lien protection will be lost. If the association must rely on

---

40Section 3-115(a) reads as follows:

If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

41The recording of the notice of assessment, the provision for recordation of a notice of ratification of the lien, and the automatic expiration of the lien assure that the prospective purchaser or mortgagor will be able to determine from the record with reasonable accuracy the amount of the lien.

14 Hastings L.J. at 204, n. 32.
counsel to avoid such a problem, additional expenses will have to be incurred. Finally, as is true for any test involving a recordation requirement, there are always the problems that can arise if the recorded information is incorrect or is not properly indexed.

C. Policy Considerations Regarding the Association's Lien Priority in Time

As already noted, the date that the declaration is recorded is, in effect, one of the approaches taken by the UCA. With the exception of first mortgages, real estate taxes and other governmental assessments against units and mechanics’ liens, the association’s lien has priority over all liens recorded after the recordation of the declaration. Such a rule, as discussed in Section VII.C, supra, can be justified on the basis of the fact that the continuum of mutual obligations between unit owners and the association begins at that time, thus making the declaration analogous to a mortgage which secures obligatory future advances. This result is further justified on the basis of the importance of maintaining the stability of the condominium. (See Section V, supra.)

The other approach taken by the UCA is to make the association’s lien effective as of the date the first installment of any given assessment is due. This rule applies to the priority of the association’s lien with respect to mechanics’ liens and first mortgages which are not prior in time to the declaration. Certainly, such a rule is appropriate in that it does not accord too much priority to the association’s lien. Requiring the lien to be effective at a date later than the due date would be to reduce the priority below that given to most other liens, and the considerations which support the existence of the association lien are too important to permit such a reduction. On the other hand, the considerations supporting the granting of a strong lien position to first mortgages and to mechanics’ liens, discussed above in Sections VII.B and D., justify the UCA’s approach which denies the association any greater priority with respect to such other liens.

A rule which would make the lien effective a fixed period of days after an assessment becomes due has little policy rationale to commend it. There is no logical relationship between the creation of a grace period and the priority to be accorded to a lien for non-payment. Moreover, as discussed above, such a rule could be procedurally cumbersome. Hence, this approach ought to be ruled out.

A rule based on the recordation of the lien would place the association lien on equal footing with most other liens which need to be recorded in order to be effective. The frequency with which assessments become payable, the fact that people dealing with condominium associations or unit owners

---

42 This additional burden may in reality be quite small since the association must keep track of unpaid assessments in order to comply with the resale requirements of § 4-107. If recordation of unpaid assessments were required, prospective purchasers could learn the amount of unpaid assessments from the public records.

43 The UCA provides for a limited priority for the association lien over first mortgages recorded prior to the assessment due date, but it grants an absolute priority in favor of the association over first mortgages recorded after that date.
can be expected to know that assessments against units will almost surely exist, and the desirability of not overburdening the association with paperwork are strong factors which would argue against such a rule. Against those factors must be weighed the superiority of the notice to third parties which would be provided by recordation of the lien. The burdens on the association seem to outweigh the superior notice considerations, so that this paper does not recommend use of a “recordation of the lien” rule. It is, however, a close decision.

Considering all of the factors, it seems that the approach to priority in time adopted by the UCA is fully warranted. This analysis suggests that the rather complex structure of priorities in time set out in Section 3-115 represents a fair compromise among the competing interests. The UCA manages to provide basic lien protection to the association without overreaching.

VIII. REMEDIES TO ENFORCE THE ASSOCIATION'S LIEN

The final issue to be considered is the remedy available under the UCA to enforce the lien given the unit owners association. The availability of efficient, relatively low cost means by which the association may enforce its lien is essential if the lien is to be of more than only marginal value.

In jurisdictions in which the amount of attorneys' fees that may be collected by a lienor are determined as a percentage of the debt, unit owners associations, unlike typical mortgage lenders, will not have a lien for an amount which would support large fees. Even if such a limitation is not present, it must be remembered that, unlike small loan lenders whose high interest rates are geared to cover unrecouped costs of collection, a condominium association should not be expected to build into its budget a large margin designed to absorb unrecouped expenses due to defaults. Moreover, as will be elaborated hereafter, an association will not have the flexibility of the small lenders who take security interests in chattels which can be seized and liquidated to satisfy a debt pursuant to the UCC. Thus, it is important that the remedies available to the association be designed to keep costs low.

A. LIEN AGAINST PROCEEDS OF VOLUNTARY TRANSFERS; PERSONAL LIABILITY OF GRANTEES

One remedy that exists under some state statutes but is not available to associations seeking to enforce their liens under the UCA, is to permit collection of the indebtedness out of proceeds of a voluntary sale or transfer.

44Certainly, it should be possible for the association to choose to put a notice of assessment liens in the public record; presumably the great majority, if not all, of the states' present recording laws would allow this.

45As an alternative to giving the condominium a lien against the delinquent units, many states provide that the unpaid assessments shall constitute a lien against the sales price of the unit to be paid by the purchaser in preference to any but certain enumerated charges, and further that the purchaser is jointly and severally liable with the seller for amounts owing by the latter. This approach thus gives the apartment owner a measure of security against foreclosure, although his unit is always subject to attachment and levy in execution of a personal judgment for the unpaid expenses. However, since this security is achieved only by denying the condominium organization a
of the unit. Such a remedy has advantages, but it would not be adequate as the primary remedy available to the association. The association cannot know, nor can it control, when the proceeds of such a sale will generate sufficient cash proceeds to satisfy its lien claims. Hence, this remedy would not provide the condominium with a sufficiently timely remedy. Moreover, in the event that there was a foreclosure of a superior lien while delinquent assessments were still outstanding, the association's ability to recover would be totally erased. No doubt it is useful to an association to have a claim against sale proceeds as a back up to other remedies, but the lack of predictability and control over the time of ultimate collection is such that in many cases the association would choose or be forced to invoke some other remedy in its arsenal. Moreover, it is likely that the mere fact that the overdue assessments constitute a lien against the unit will be a sufficient incentive for purchasers to cause the outstanding amounts due to be paid to the association at the time of sale. Thus, the additional protection provided to condominiums does not justify the burden that would be placed on realtors and other parties conducting sales of condominium units.

The same result as is obtained by a lien against the proceeds of a voluntary transfer can also be obtained by making both the grantor and the grantee jointly and severally liable for the unpaid assessments without prejudice to the grantee's right to recover from the grantor any amounts paid by the grantee. In existing statutes providing for such liability, the grantee generally has a statutory right to a statement of the overdue assessments, which is then binding on the association.

The UCA seems to contemplate at least a limited grantee liability in the section on Resales of Condominium Parcels, Section 4–107, which states in subsection (c), that: "[a] purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association." The negative pregnant of this provision implies that, in addition to the continuation of the association's lien against the condominium parcel, the grantee is personally liable for the amount which is set forth in the certificate. However, the UCA is not explicit on the grantee's personal liability. The UCA does not give the purchaser an express right to recover against the grantor for amounts paid to the association, but even in the absence of a statutory provision, it seems that the purchaser would be subrogated to the association's claim against the grantor and could recover on that ground.

It is not essential to the association's interests, however, that the UCA be made to create personal liability on the part of the grantee. The association—
tion's interests should be adequately protected by the fact that the lien for unpaid assessments continues against the unit. Indeed, one commentator has suggested that making the purchaser personally liable for unpaid assessments may infringe upon his constitutional rights.\(^4\)

B. Summary Possession

One unusual remedy which is not provided to unit owners associations under the UCA is made available to associations under the laws of Illinois. That remedy is the right to summary possession of the unit upon default, provided that the condominium instruments reserve such a remedy to the association. ILL. REV. STAT. ch. 57, § 2 (1972, Supp. 1977) reads as follows:

The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided:

"Seventh, When any property is subject to the provisions of the 'Condominium Property Act', approved June 20, 1963, as amended, and the Board of Managers of such property is entitled to possession of a unit therein by reason of the failure or refusal of the owner of such unit to pay when due his proportionate share of the expenses of administration, maintenance and repair of the common elements of such property, or of any other expenses lawfully agreed upon, and such unit owner withholds possession of his unit after demand in writing setting forth the amount claimed by the Board of Managers, or its agents."

Section 3 spells out how the demand is made and requires notice to be sent thirty days before institution of the proceeding to obtain a right to possession. Section 13.1 describes the proceeding and reads as follows:

As to property subject to the provisions of the "Condominium Property Act," approved June 30, 1963, as amended when the action is based upon the failure of an owner of a unit therein to pay when due his proportionate share of the expenses of administration, maintenance and repair of the common elements, or of any other expenses lawfully agreed upon, and if the court finds that such expenses are due to the plaintiff, the plaintiff shall be entitled to the possession of the whole of the premises claimed, and he shall have judgment for the possession thereof and for the amount found due by the court together with reasonable attorney's fees, if any. . . . (Emphasis added).

One commentator has pointed out that a problem with this section arises with regard to the rights of the executive board once it is entitled to possession. As a practical matter, the executive board is not free to lease or otherwise deal with the unit as it deems necessary since the unit owner may vacate the judgment of possession by curing his default of payment, thus regaining his right to possess the unit. Note, Recent Changes In the Illinois Forcible Entry and Detainer Act Regarding Condominium Property, 49 CHI.-KENT L. REV. 200, 202 (1972).

\(^4\)It would have been sufficient to provide that the apartment conveyed shall be subject to a lien for such unpaid assessments and payable out of the proceeds of the sale, but to make a purchaser personally liable for the debt of his seller seems to me to come very close to infringing upon the constitutional guaranty of due process of law. Ramsey in Condominium, The New Look in Cooperative Building, PROCEEDINGS OF ABA SECTION OF REAL PROP., PROB. & TR. LAW p.4, 12 (1962).
On the other hand, such a remedy gives the association a weapon to pressure a unit owner to pay assessments or, if that is beyond his means, to sell his unit. Further, to the extent to which a vacant unit will make less demand on utilities and other items or services paid for as common expenses, dispossession of the defaulting unit owner will alleviate the association's burden in being an involuntary creditor. Thus, summary possession does have some merit as a remedy designed to mitigate losses. However, it is a more extreme measure than the draftsmen felt appropriate or necessary for the UCA.

C. Civil Judgments

A lawsuit for a money judgment is an essential remedy which must always be available to an association. Even if a state adopts the optional power of sale language of Section 3-115(a), litigation of a claim for unpaid assessments might be the remedy of choice if there is bona fide dispute as to the indebtedness. The opportunity of resort to a court for a judicial determination of the amount of assessments due will prevent the unit owner from later contesting the validity of the assessment. Furthermore, the ability to threaten to bring such a suit may be a useful collection tool.

However, a lawsuit for a money judgment will not always be satisfactory in terms of efficiency or cost. Legal fees are likely to be high, and crowded court dockets and the concomitant delays could be expensive or otherwise troublesome to the association. Moreover, such a remedy, unless it becomes a judicial foreclosure, will not allow the association to take advantage of special lien priorities.

D. Foreclosure by Judicial Proceeding or Power of Sale

The primary remedy provided to the association by the UCA is foreclosure. Such foreclosure is to be accomplished "in like manner as [foreclosure under] a mortgage on real estate" in the enacting jurisdiction. In most states, this means foreclosure by judicial proceeding. The UCA also contains optional language which would permit associations to foreclose by means of a power of sale. It is contemplated that states permitting mortgages to be foreclosed by a power of sale will adopt the optional language, thereby giving the same power of sale rights to associations.

Due to the delays inherent in judicial proceedings, the foreclosure remedy ideally should not require a judicial hearing. Even though the priority of the association's lien will not depend upon the nature of the chosen foreclosure remedy, assessments will continue to accumulate during the time

---

49In addition to providing for enforcement of the lien for common expenses in the same manner as the foreclosure of a mortgage, Ohio allows a unit owner to bring a court action in the court of common pleas for the discharge of any lien for common expenses that he believes were improperly charged to his unit. OHIO REV. CODE ANN. §5311.18(c) (Baldwin 1975). Florida also grants the unit owner the opportunity to contest a lien against his unit, not through a separate judicial proceeding, but by filing a notice requiring the association to enforce its lien within 90 days. FLA. STAT. ANN. § 718.116(4)(a) (West, Supp. 1977).
required to enforce the lien. Whereas a judicial foreclosure sale may take up to eighteen months to accomplish, it is generally much more efficient to effect a private power of sale, which may be accomplished in not much more than one month. Given the stated concerns for efficiency and low costs, it appears that states would be well advised to permit a private power of sale remedy whenever that is consistent with the remedies given to mortgage creditors.

It should be noted that an express statutory grant of a power of sale is probably necessary in order for an association to have that remedy, even in jurisdictions where such a remedy is available to first mortgagees by law or contract. Without specific statutory authority, the threat of title questions might prove to be a practical bar to creating a purely contractual remedy (based on the declaration) which theoretically would otherwise be possible. Nor does it seem feasible to infer a grant of power of sale to the association from the statutory power of sale granted to mortgage lenders. This is particularly true in deed of trust jurisdictions. The statutory deed of trust terminology and the differences in the parties are too great for mortgage power of sale provisions to apply to a condominium statute.

E. Limited Sanctions

Other possible remedies merit a brief discussion because they may be relevant to the ability of the association to collect unpaid assessments with dispatch and economy. Such remedies are more limited in scope than suit or foreclosure on the condominium unit, but their availability might serve as an inducement to payment.

A common form of limited sanction granted to condominium associations, which is not contained in the UCA, is the right to restrict or suspend the defaulting unit owner's use of certain common element facilities, typically recreational facilities. Of course, in some buildings, particularly those involving non-residential uses, this remedy might be much more direct and include such things as an interruption or cut back of utility service supplied

---


The period of lien foreclosure may be too long for expedient enforcement with the result that an extra burden is placed upon the other unit owners for unpaid expenses. A possible solution is to permit foreclosure under power of sale where that is permissible under local law.

51The Costs of Mortgage Loan Foreclosure: Some Recent Findings, 8 Fed. Home Loan Bank Bd. J. No. 6 at p. 7 (June, 1975) (analysis is of Illinois, California and Texas foreclosures).

52Jackson suggests that title insurance companies are reluctant to issue a title insurance policy where the homeowners association obtained title at a foreclosure sale "pursuant to the statutory procedures applicable to the exercise of powers of sale in mortgages and deeds of trust." Jackson, Homeowners Associations: Remedies to Enforce Assessment Collections, L.A. BAR J. 423, 434 (1976). He suggests as a solution that the initial grantee of the home sign a grant deed and expressly transfer such powers contained in the declaration to the association. A statutory grant of power of sale to unit owners associations would seem to be an even better method of avoiding title insurance problems.

53As another form of sanction, Maryland permits the bylaws to prohibit a unit owner from voting if the council of unit owners has recorded a statement of lien against such owner's unit and such lien remains unpaid at the time of the council meeting. Md. REAL PROP. CODE ANN. § 11-104(d) (1974, Supp. 1977).
by the association.\textsuperscript{54} This has the advantage of reducing the common expenses in proportion to the default.

There are, however, several practical problems with such an approach. It may be hard to police; it is ineffective against absent owners; it is hard to do if utilities are not separately metered; it does not necessarily result in a cure of the default even if successfully implemented; and it may violate due process requirements if not pursuant to judicial order. In sum, this remedy frequently will not be a major aid to an association.

"Partial foreclosure" of a lien against a unit owner's property, i.e., foreclosure of property interests which are less than the entire condominium unit, is also a possibility. However, it has not been provided for by statute in any jurisdiction. Two other possible sanctions, which are types of partial foreclosure, would be to grant the association the power to attach a unit owner's right to common profits or even a unit owner's personal chattels in satisfaction of the association's lien.

There seems little reason not to permit the association to offset outstanding assessments against a defaulting unit owner's share in common profits. This remedy, however, is not likely to provide much additional protection to the association. In many instances any profits which may exist will not be distributed to the unit owners but will be used to reduce the outstanding liability of the condominium, or will be placed into reserves. Furthermore, few condominiums are likely to be operated on a profitable basis. In some cases profits may result from an assessment of common expenses beyond the amount required for the operation of the condominium or authorized for the establishment of reserves. In that situation it seems only fair that those unit owners who failed to contribute to the assessment in the first place not receive any share in the subsequent reimbursement of that amount. This has been effected under Section 3-113 of the UCA which requires that, unless the declaration provides otherwise, those surplus funds "remaining after payment of or provision for common expenses and any prepayments of reserves" to be "credited" to the unit owners. In the case of a defaulting unit owner, such a "credit" would constitute an offset.

Providing the association with the additional remedy of attaching the unit owner's personal property seems unnecessary and impractical. In the first place it would be difficult for the association to locate a unit owner's personal property and to then prevent the unit owner from removing the property from the reach of the association. In the second place it would be necessary for the association to record a lien against the unit owner's chattels in order to establish priority of the association's lien.\textsuperscript{55} The association

\textsuperscript{54}Subject to the approval of a majority of the unit owners, two states provide for severance of utility services to a delinquent apartment owner unless the assessment is paid within ten days after notification by the unit owners association. \textit{Alaska Stat.} § 34.07.220 (1975); \textit{Wash. Rev. Code Ann.} § 64.32.200 (1966, Supp. 1976).

\textsuperscript{55}It could be argued that the recording of the condominium instruments ought to be used as record notice of a lien against the personal property of a unit owner. However, while it seems fair to require purchasers or encumbrances of a condominium parcel to check with the association to make sure that no liens are outstanding on the parcel, it would be totally impractical to place a similar burden on purchasers of chattels who would have no reason even to be informed of the existence of the condominium parcel.
would also have to check the recording files to make sure that no purchase money mortgages attached against the same property. The additional expenses of locating the property, checking filing recordings and perfecting the association's lien does not seem justified in light of the fact that the sale of second-hand personal property is not likely to generate much cash. The UCA does not provide for this form of limited remedy.

The final possibility which should be noted is the possibility of allowing the association to foreclose on less than all of the defaulting unit owner's condominium interests, that is, authorizing foreclosure on certain types of limited common elements or readily partitionable parts of units. The most obvious examples of such an interest would be parking spaces. Other possibilities would be plots of ground set aside as limited common elements or conveyed as parts of units. The governing criteria for eligible property should be that the property be partitionable in such a way that it would be resaleable to others and would not unreasonably diminish the value of the affected unit.

While the foreclosure process itself would be as complex procedurally, the ability to conduct a partial foreclosure has one significant potential advantage for an association—there may well be a larger pool of active bidders for such property (i.e., a parking space) that for a unit, thereby better enabling the association to realize a prompt recovery.

However, to the extent that the association lien is not superior to other liens against a unit, such as a first mortgage, the idea of partial foreclosure poses a problem: superior liens either must be discharged against the partial interest to be foreclosed or recast in proportionate shares against the unit and discharged against the common element interest to be foreclosed. Otherwise there would be no value in the partial interest being foreclosed; no one would bid on a parking space, worth $5,000, if it would remain subject to a purchase money mortgage lien on the entire parcel of, for example, $45,000.

Hence, partial foreclosure would necessitate a rule whereby the association could assert an absolute lien priority (subject, perhaps, only to governmental liens which would be apportioned on a value or square footage basis) on certain types of limited or general common elements interests which are part of a parcel. This does not appear warranted. The association's lien already is given a high priority generally, and the degree of additional protection to the association by virtue of having a high priority in the partial interest does not justify the complexities inherent in such a rule.
APPENDIX I

I. FEDERAL REGULATIONS

The following tabulation sets forth the most significant federal and illustrative state statutory and regulatory requirements mandating that certain institutional mortgage lenders only lend on the security of "first liens."

A. Federal Housing Administration

The National Housing Act defines mortgagees eligible for insurance as follows:

The term "mortgage" means a first mortgage on real estate . . . and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the state in which the real estate is located, together with the credit instruments, if any, secured thereby.

[12 U.S.C. § 1707(a)]

Section 1715y(b) on mortgage insurance for condominiums specifies that the term "mortgage" shall have the same meaning as under § 1707. The regulations under § 1715(y) specify in more detail the requirements pertaining to an eligible mortgagor:

A mortgagor shall establish that after the mortgage offered for insurance has been recorded, the mortgaged property will be free and clear of all liens other than such mortgage and that there will not be outstanding any other unpaid obligation contracted in connection with the mortgage transaction or the purchase of the mortgaged property, except obligations which are secured by property or collateral owed by the mortgagor independently of the mortgaged property.

[24 C.F.R. § 234.55]

B. Veterans Administration

Chapter 37 of Title 38, U.S.C., deals with home, farm and business loans. 38 U.S.C. § 1803 contains the following provision relating to loan guaranty:

(3) Any real estate loan (other than for repairs, alterations, or improvements) shall be secured by a first lien on the realty. In determining whether a loan for the purchase or construction of a home is so secured, the Administrator may disregard a superior lien created by a duly recorded covenant running with the realty in favor of a private entity to secure an obligation to such entity for the homeowner's share of the costs of the management, operation, or maintenance of the property, services or programs within and for the benefit of the development or community in which the veteran's realty is located, if he determines that the interests of the veteran borrower and of the Government will not be prejudiced by the operation of such covenant. In respect to any such superior lien to be created after the effective date of this amendment, the Administrator's determination must have been made prior to the recordation of the covenant.

The original provision was amended in 1969, and the provision authorizing the administrator to disregard superior liens under the appropriate circumstances was inserted at that time. 38 U.S.C. § 1810(a)(6)(c) requires...
loans for the purchases of condominium units to conform to the provisions of Chapter 37 (except with regard to certain aspects irrelevant to the present discussion).

The regulations promulgated under Chapter 37 contain the following relevant provisions:

_**Loans, first, second, or unsecured.**_

Loans for the purchase of real property or a leasehold estate as limited in the regulations concerning guaranty or insurance of loans to veterans, or for the alteration, improvement, or repair thereof, and for more than $1,000 and more than 40 percent of the reasonable value of such property or estate prior thereto shall be secured by a first lien on the property or estate. Loans for such alteration, improvement, or repairs for more than $1,000 but 40 percent or less of the prior reasonable value of the property shall be secured by either a first or second lien. Those for $1,000 or less need not be secured, and in lieu of the title examination the lender may accept a statement from the borrower that he or she has an interest in the property not less than that prescribed in § 36.4350(a).

[38 C.F.R. § 36.4351]

_**Tax, special assessment and other liens.**_

Tax liens, special assessment liens, and ground rents shall be disregarded with respect to any requirement that loans shall be secured by a lien of specified dignity. With the prior approval of the Administrator, Chief Benefits Director, or Director, Loan Guaranty Service, liens retained by nongovernmental entities to secure assignments or charges for municipal type services and facilities clearly within the public purpose doctrine may be disregarded. In determining whether a loan for the purchase or construction of a home is secured by a first lien the Administrator may also disregard a superior lien created by a duly recorded covenant running with the realty in favor of a private entity to secure an obligation to such entity for the homeowner’s share of the costs of the management, operation, or maintenance of property, services or programs within and for the benefit of the development or community in which the veteran’s realty is located, if the Administrator determines that the interests of the veteran-borrower and of the Government will not be prejudiced by the operation of such covenant. In respect to any such superior lien to be created after June 6, 1969, the Administrator’s determination must have been made prior to the recordation of the covenant.

[38 C.F.R. § 36.4352]

Note that the Administrator must determine that it is in the interest of the veteran-borrower and of the government that the lien created by the duly recorded covenant be superior to the mortgage lien.

Section 5(c) of the VA Loan Guaranty Release No. 22–75 (1975) provides:

_c. Lien._ The loan must be secured by a first lien on the realty superior to any assessment lien that may be imposed by the condominium regime.

Relevant opinions of the General Counsel of the Veterans Administration are as follows:

1. A title guaranty policy protected the lender, who had made a GI loan, when a superior mechanic’s lien was discovered after the loan was guaranteed, but such policy did not satisfy the requirement that the holder retain a first lien on the security, and his failure to do so impaired the

2. Where an improvement association retained a lien for annual maintenance charges which constituted a lien prior to the lien of a VA-guaranteed mortgage, the requirements that the lien of the VA-guaranteed mortgage be a first lien will be satisfied if the improvement association executes an agreement, submitted by the VA, which subordinates the lien of the association to the lien of the VA-guaranteed mortgage. [VA Gen. Coun. Op. No. 46-55, August 9, 1955, and No. 46A-55, September 26, 1955] (Emphasis added).

3. The VA did not intend to depart from the directive of Congress that liens of mortgages guaranteed by the VA be a first lien on real estate when the VA amended Section 36.4352 of the VA Regulations which makes an exception for a lien for a municipal-type service held by a nongovernmental organization. The amended regulation only makes exception as to such lien when approval of the VA Administrator is obtained. [VA Gen. Coun. Op. No. 1-56, January 3, 1956]

C. Home Owner's Loan Act of 1933

12 U.S.C. § 1464(c) provides that federal savings and loan associations shall

[L]end their funds only on the security of their savings accounts or on the security of first liens upon real property . . . which constitute first liens upon homes, combinations of homes and business property. . . .

D. Federal Home Loan Bank Board Regulations

Section 545.6-1 of the Federal Home Loan Bank Board regulations requires that certain types of loans be made on the security of first liens on improved real estate, and the regulations define "loans on the security of first liens" to mean:

[L]oans on the security of any instrument (whether a mortgage, deed of trust, or land contract) which makes the interest in the real estate described therein (whether in fee or in a leasehold or subleasehold extending or renewable automatically or at the option of the holder (or at the option of the Federal association) for a period of at least 10 years beyond the maturity of the loan) specific security for the payment of the obligation secured by such instrument; Provided, The instrument is of such nature that, in the event of default, the real estate described in such instrument could be subjected to the satisfaction of such obligation with the same priority as a first mortgage or a first deed of trust in the jurisdiction where the real estate is located. § 541.9(a).

E. Federal Savings and Loan Insurance Corporation Regulations

Section 569.9(g)(3) of the regulations defines "nationwide loans" as:

[A]ny loan secured by a first lien upon improved real estate located outside the insured institution's normal lending territory but within any state of the United States.
II. STATE REGULATIONS

A number of state statutory provisions dealing with savings and loan associations also seem to require mortgages to be secured by “first” liens.

A. California

Loan . . . must be secured . . . by (a) A first mortgage or deed of trust on the property.

CAL. FIN. CODE § 7102 (Deering).

California law makes specific provision for the exclusion of taxes and tax assessments from the definition of prior encumbrances which would prevent a mortgage from having the status of a first lien, although this provision is only applicable to loans and investments by banks other than savings and loan associations:

For the purpose of determining whether any loan or investment is secured by a first lien on real property as required by any provision of this division, none of the following shall be deemed a prior encumbrance unless any installment or payment thereunder other than a rental or royalty under a lease, is due and delinquent:

(a) The lien of any tax, assessment, or bond levied or issued by any state or territory of the United States or by any district, political subdivision, or municipal corporation thereof, except the lien of an assessment levied against a particular parcel of real property and of any bond given or issued pursuant to law in lieu of the payment of such assessment.

GA. CODE ANN. § 41A–3501(b).

B. Georgia

“Building and loan associations” means a local mutual association existing under the laws of this state on April 1, 1975, or organized under this Chapter without capital stock which

. . . (3) lends the greater portion of its funds on the security of first liens or security titles on homes and on the security of first liens on its own deposits.

GA. CODE ANN. § 41A–3501(b).

C. New York

No loan shall be made under the provisions of this section upon the security of a mortgage:

(a) Which is not a first lien upon the property described therein, unless all prior mortgages, liens or encumbrances thereon are owned by such association; and no such prior mortgage, lien or encumbrance shall be sold, transferred or assigned by such association until every subsequent mortgage, lien or encumbrance owned by it shall have been fully paid and satisfied; and further provided that whenever loans are made under both subdivisions one and three of this section upon the same real estate the limitations of amount applicable to the loan under such subdivision shall be determined by first segregating that portion of the appraised value of the premises necessary to sustain the prior mortgage, lien or encumbrance, and the limitation of amount applicable to the additional mortgage, lien or encumbrance shall then be determined with reference only to the remaining portion of the appraised value; provided further that the loan under subdivision three shall provide for equal or substantially equal periodic payments.
of interest and principal at least annually in amount sufficient to pay all interest and effect full repayment of principal within thirty years. . . .


D. Texas

No association shall . . .

(4) make a real estate loan which is not secured by a first and prior lien upon the property described in the mortgage, deed of trust or other instrument creating or constituting such lien, unless every prior lien thereon is owned by such association.


Texas also has the following provision dealing with the eligibility of loans as investments for lending institutions:

Loans on the individual apartments and the undivided interests in the common elements appurtenant thereto are hereby declared to be eligible investments for all banks, savings and loan or building and loan associations. . . . In determining the eligibility of the existence of any prior lien for taxes, assessments (including but not limited to those for administration, maintenance and repairs) or other similar charges not yet delinquent shall not be considered in determining whether a mortgage or deed of trust upon security is a first lien.


III. Agencies of the Federally Sponsored Secondary Market

Agencies of the federally sponsored secondary mortgage market generally require condominium first mortgages which they purchase to be superior to unpaid dues or charges against a condominium unit which accrue prior to the acquisition of title to such unit by the mortgagee.

A. Federal National Mortgage Association

With respect to conventional mortgage loans, Section 313 of the FNMA Conventional Selling Contract Supplement requires the lien of the mortgage to be a

first and paramount lien on the mortgagor's estate in the real property subject only to liens for taxes and special assessments not in arrears, and conditions, restrictions, and encumbrances deemed by FNMA not to be material. . . .

In addition, Section 502.03b.2., dealing with documentation requirements for condominium projects, provides:

The following requirements must be met by virtue of state law, the provision of the Master Deed or other condominium documentation or a combination thereof:

(b) Any lien of the Owners Association resulting from nonpayment of assessments must be subordinate to the first mortgage lien.

B. Federal Home Loan Mortgage Corporation

With respect to conventional mortgage loans, Section 3.201p of the Federal Home Loan Mortgage Corporation Sellers' Guide provides:
Each mortgage must be a valid first lien on the Mortgaged Premises. The Mortgaged Premises must be free and clear of all encumbrances and liens prior to the first lien of the mortgage loan and no rights may be outstanding that could give rise to such liens, subject only to liens for real estate taxes and special assessments not yet due and payable, and exceptions, waived by FHLMC in Part III, Section 3.202d.

Section 3.202 of the FHLMC Sellers' Guide deals with title insurance requirements, and specifies that the title insurance policy must not be subject to any exceptions, other than those which are waived in writing by FHLMC or which are permitted under the terms of Section 3.202. Subsection d of Section 3.202 lists a number of prior liens and encumbrances which are acceptable without express approval by FHLMC, but such permissible exceptions do not include unpaid dues or charges in connection with a condominium unit. More specifically, Section 3.207c. of the Sellers' Guide requires the seller of the mortgage to FHLMC to warrant that

Any first mortgagee who obtains title to the Condominium Unit pursuant to the remedies provided in the mortgage or foreclosure of the mortgage will not be liable for such unit's unpaid dues or charges which accrue prior to the acquisition of title to such unit by the mortgagee.

C. Statement of Proposed Policies for Condominium Documentation of the Condominium Task Force Composed of HUD, VA, FNMA and FHLMC:

The Condominium Task Force composed of HUD, VA, FNMA and FHLMC has issued a statement of proposed policies for condominium documentation dealing in part with the instant issue, as follows:

To the extent permitted by applicable law, the declaration shall provide for the subordination of any lien of the Owners Association for common expense charges and assessments to any first mortgage on any unit recorded prior to the date on which such lien of the Association arises. Such a lien for common expense charges and assessments shall not be affected by any sale or transfer of a unit except that a sale or transfer pursuant to a foreclosure shall extinguish a subordinate lien for common expense charges and assessments which became payable prior to such sale or transfer. Any such sale or transfer pursuant to a foreclosure shall not relieve the purchaser or transferee of a unit from liability for, nor the unit so sold or transferred from the lien of, any common expense charges thereafter becoming due.


It is noteworthy that the statement of the Condominium Task Force quoted above is qualified by the introductory phrase "to the extent permitted by applicable law." It is not clear what the position of the Task Force agencies would be if all states adopted laws subordinating first mortgage liens to the association's lien. So long as the requirements of FNMA and FHLMC set forth above remain unchanged, however, lenders may be reluctant to finance first mortgage loans that are not superior to the association's lien due to concern that such loans could not be sold in the secondary market.
IV. Changes in First Lien Requirements

A. Federal Reserve System Member Banks

12 U.S.C. § 371 formerly required loans made on certain real estate by national banking associations to be secured by first liens thereon. The provision was amended in 1974 to require only that the loans be secured by liens, with specific limits on the total value of the loan.

B. New York Insurance Law:

N.Y. Ins. Law (Consol.) § 81 was recently amended to permit insurance companies to lend on the security of both first and second liens upon real property, rather than requiring only first liens.
APPENDIX II

Listed here are selected provisions and official comments from the Uniform Condominium Act which are referred to frequently within the article.

SECTION 2–108

[Allocation of Common Element Interests, Votes, and Common Expense Liabilities]

(a) The declaration shall allocate a fraction or percentage of undivided interest in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas used to establish those allocations.

(b) In a flexible condominium, the common element interest and common expense liability allocated to each unit must be equal, or proportionate to the relative size of each unit, unless the declaration as originally recorded:

(1) requires that any units created in additional or convertible real estate be substantially identical to the other units in the condominium and provides that common element interests and common expense liabilities will be allocated to those units in accordance with the formulas used for the initial allocations; or

(2) identifies all other types of units that may be created in additional or convertible real estate in terms of architectural style, quality of construction, principal materials to be used, and ranges of sizes, and states the formulas upon which any reallocations of common element interests and common expense liabilities will be made, or states the common element interest and common expense liability to be allocated to each unit that may be created.

(c) The number of votes allocated to each unit must be equal, proportionate to that unit’s common expense liability, or proportionate to that unit’s common element interest. If the declaration allocates an equal number of votes in the association to each unit, each unit that may be subdivided or converted by the declarant into 2 or more units, common elements, or both (Section 2–115), must be allocated a number of votes in the association proportionate to the relative size of that unit compared to the aggregate size of all units, and the remaining votes in the association must be allocated equally to the other units. The declaration may provide that different allocations of votes shall be made to the units on particular matters specified in the declaration.

(d) Except in the case of eminent domain (Section 1–107), expansion or conversion of a flexible condominium (Section 2–111), withdrawal of withdrawable real estate (Section 2–112), relocation of boundaries between adjoining units (Section 2–114) or subdivision of units (Section 2–115), the common element interest, votes, and common expense liability allocated to any unit may not be altered without unanimous consent of all unit owners. The common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary
transfer of an undivided interest in the common elements made without the unit to which it is allocated is void.

(e) Except for minor variations due to rounding, the sums of the undivided interests in the common elements and common expense liabilities allocated at any time to all the units shall each equal one if stated as fractions or 100 percent if stated as percentages. In the event of discrepancy between the common element interest, votes, or common expense liability allocated to a unit and the result derived from application of the formulas, the allocated common element interest, vote, or common expense liability prevails.

COMMENT

1. Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

   Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formulas the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating expenses and common element interests, while "equality" is used for allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained.

2. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formulas he has chosen.

3. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in Comment 2, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

4. The purpose of subsection (b) is to afford some advance disclosure to purchasers of units in the first phase of a flexible condominium of how common element interests, votes, and common expense liabilities will be reallocated if additional units are added. In the case of a flexible condomin-
ium, a declarant wishing to make allocations on a basis other than equality or size must describe from the outset the types of additional units that may be created. In addition, the reallocation formulas set forth pursuant to subsection (a) must be comprehensive enough to disclose from the outset the weight that will be given to various factors in reallocating common element interests, votes, and common expense liabilities, among the additional units and the original units.

5. Subsection (d) means what it says when it states that a lien or encumbrance on a common element interest without the unit to which that common element interest is allocated is void. Thus, consider the case of a flexible condominium in which there are 50 units in the first phase, each of which initially has a 2 percent undivided interest in the common elements. The declarant borrows money by mortgaging additional real estate which will later become phase 2 and the construction lender takes a lien on the additional real estate. When the declarant expands the condominium by adding phase 2 containing an additional 50 units, he reallocates the common element interests in the manner described in his original declaration, to give each of the 100 units a 1 percent undivided interest in the common elements in both phases of the condominium. At this point, the construction lender cannot have a lien on the undivided interest of phase 1 owners in the common elements of phase 2 because of the wording of the statute. Thus, the most that the construction lender can have is a lien on the phase 2 units together with their common element interests. The mortgage documents may be written to reflect the fact that upon the addition of phase 2 of the condominium, the lien on the additional real estate will be converted into a lien on the phase 2 units and on the common element interests as they pertain to those units in both phase 1 and phase 2; however, see Comment to Section 2-111.

Unless the lender also requires phase 2 to be designated as withdrawable real estate, the phase 2 portion may not be foreclosed upon other than as condominium units and the construction lender may not dispose of phase 2 other as units which are a part of the condominium. In the event that phase 2 is designated as withdrawable land, then the construction lender may force withdrawal of phase 2 and dispose of it as he wishes, subject to the provisions of the declaration. If one unit in phase 2, however, is owned by anyone other than the declarant, then phase 2 ceases to be withdrawable land by operation of Section 2-112(b).

6. Subsection (c) provides that if votes in the unit owners association are equally distributed to the other units, the declaration shall nevertheless assign votes to any unit which the declarant may subdivide or convert into common elements (called a “convertible space” in some existing state statutes) on the basis of “size.” The declaration would have to indicate whether area or volume had been chosen as the measure of size and explain any further refinements of the formula as mentioned in Comment 3, above.

7. If a unit owned by the declarant may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is not a unit “that may be subdivided or converted into 2 or more units,
common elements, or both" within the meaning of subsection (c) of this section or Section 2-115.

**SECTION 2-120**

*Termination of Condominium*

(a) Except in the case of a taking of all the units by eminent domain (Section 1-107), a condominium may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to non-residential uses.

(b) An agreement of unit owners to terminate a condominium must be evidenced by their execution of a termination agreement or ratifications thereof. If, pursuant to a termination agreement, the real estate constituting the condominium is to be sold following termination, the termination agreement must set forth the terms of the sale. A termination agreement and all ratifications thereof must be recorded in every [county] in which a portion of the condominium is situated, and is effective only upon recordation.

(c) The association, on behalf of the unit owners, may contract for the sale of the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If the real estate constituting the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lien holders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection (f). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in interest remain liable for all assessments and other obligations imposed on unit owners by this Act or the declaration.

(d) If the real estate constituting the condominium is not to be sold following termination, title to the real estate, upon termination, vests in the unit owners as tenants in common in proportion to their respective interests as provided in subsection (f), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

(e) Following termination of the condominium, and after payment of or provision for the claims of the association's creditors, the assets of the association shall be distributed to unit owners in proportion to their respective interests as provided in subsection (f). The proceeds of sale described in
subsection (c) and held by the association as trustee are not assets of the association.

(f) The respective interests of unit owners referred to in subsections (c), (d), and (e) are as follows:

(1) Except as provided in paragraph (2), the respective interests of unit owners are the fair market values of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated. The proportion of any unit owner’s interest to that of all unit owners is determined by dividing the fair market value of that unit owner’s unit and common element interest by the total fair market values of all the units and common elements.

(2) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof prior to destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

(g) Foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable real estate, does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real estate from the condominium.

Comment

1. Unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the condominium despite the unanimous opposition of other unit owners if the declarant has the requisite number of votes.

2. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium, but if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium to be terminated pursuant to subsection (a) of this section.

3. A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower’s undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to the first sentence of subsection (d).
4. With respect to the association’s role as trustee under subsection (c), see Section 3-117.

5. If an initial appraisal made pursuant to subsection (f) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

6. “Foreclosure” in subsection (g) includes deeds in lieu of foreclosure, and “liens” includes tax and other liens on convertible or withdrawable real estate.

7. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the condominium which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a condominium which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

SECTION 3-111
[Tort and Contract Liability]

(a) An action in tort alleging a wrong done by a declarant or his agent or employee in connection with a portion of any convertible or withdrawable real estate or other portion of the condominium which the declarant has the responsibility to maintain may not be brought against the association or a unit owner other than a declarant. Otherwise, an action in tort alleging a wrong done by the association or by an agent or employee of the association, or an action arising from a contract made by or on behalf of the association, shall be brought against the association. If the tort or breach of contract occurred during any period of declarant control (Section 3-103(c)), the declarant is liable to the association for all unreimbursed losses suffered by the association as a result of that tort or breach of contract, including costs and reasonable attorney’s fees. Any statute of limitation affecting the association’s right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from bringing an action contemplated by this subsection because he is a unit owner or a member or officer of the association.

(b) A judgment for money against the association [if recorded][if docketed] [if (insert other procedure required under state law to perfect a lien on real property as a result of a judgment)] is a lien against all of the units, but no other property of a unit owner is subject to the claims of creditors of the association.

(c) A judgment against the association shall be indexed in the name of the condominium.

COMMENT

1. Subsection (a) provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the associa-
tion and not against the individual unit owners. This changes the law in some states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subsection (a) provides that the association shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. Under subsection (b), a judgment against the association may be satisfied either from the property of the association or, because it becomes a lien against each of the units for a pro rata share of the judgment, from the individual units. The judgment can be collected in the same manner as an assessment for common expenses, and partial releases of that lien would be available under Section 4-109(b). The judgment is still against the association, however, and is not converted into a personal judgment against each unit owner. Each unit owner's liability is limited, therefore, to the value of his equity in his unit. A creditor of the association who obtains a judgment against the association after termination of the condominium does not have a lien against any of the property formerly constituting the condominium and can only proceed against any assets which the association is holding and not assets held in trust for the unit owners. This may leave the creditor remedyless.

4. The bracketed language in subsection (b) should be modified in each state to incorporate the procedure whereby money judgments become a valid lien against real property.

SECTION 3-113

[Surplus Funds]

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves must be credited to the unit owners to reduce their future common expense assessments.

COMMENT

Surplus funds of the association are generally used first for the prepayment of reserves, and remaining funds are thereafter credited to the account of unit owners. In some cases, however, unit owners might prefer that sur-
plus funds be used for other purposes (e.g., the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

**SECTION 3-114**

*Assessments for Common Expenses*

(a) Until the association makes a common expense assessment, the declarant shall pay all the expenses of the condominium. After any assessment has been made by the association, assessments shall be made at least annually and shall be based on a budget adopted at least annually by the association.

(b) Except for assessments under subsection (c), common expenses shall be assessed against all the units in accordance with the common expense liability allocated to each unit (Section 2-108). Any past due assessment or installment thereof shall bear interest at the rate established by the association not exceeding [18] percent per year.

(c) Except as provided by the declaration:

(1) any common expense associated with the maintenance, repair, or replacement of a limited common element shall be assessed in equal shares against the units to which that limited common element was assigned at the time the expense was incurred; and

(2) any common expense benefiting fewer than all of the units shall be assessed exclusively against the units benefited.

(d) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

**COMMENT**

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid billing the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Subsection (d) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include Section 1-107 (eminent domain), Section 2-107(d) (expiration of certain leases), Section 2-111 (conversion and expansion of flexible condominiums), and Section 2-115(b) (subdivision or conversion of units).
SECTION 3–115

[Lien for Assessments]

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien may be foreclosed in like manner as a mortgage on real estate [or a power of sale under (insert appropriate state statute)]. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3–102(10), (11) and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (1) liens and encumbrances recorded before the recordation of the declaration, (2) mortgages and deeds of trust on the unit securing first mortgage holders and recorded before the due date of the assessment or the due date of the first installment payable on the assessment, and (3) liens for real estate taxes and other governmental assessments or charges against the unit. To the extent of the common expense assessments made under Section 3–114(b) due during the 6 months immediately preceding institution of an action to enforce the lien, the lien is also prior to the mortgages and deeds of trust described in clause (2) above. This subsection does not affect the priority of mechanics' or materialmen's liens. [The lien is not subject to the provisions of (insert appropriate reference to state homestead, dower and curtesy, or other exemptions).]

(c) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(d) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the assessments become payable.

(e) Nothing in this section shall be construed to prohibit actions or suits to recover sums for which subsection (a) creates a lien, or to prohibit an association from taking a deed in lieu of foreclosure.

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

(g) The association shall furnish to a unit owner upon written request a recordable statement setting forth the amount of unpaid assessments currently levied against his unit. The statement shall be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

COMMENT

1. Subsection (a) provides that the association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens. In addition, if the use of a power of sale pursuant to a mortgage is permitted in a particular state, the bracketed language (with an appropriate statutory
citation inserted) may be used to ensure that the association's lien for unpaid assessments may also be enforced through the power of sale device.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the association's lien shall take priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration and those imposed for real estate taxes or other governmental assessments or charges against the unit.

Further, the association's lien has priority over mortgages and deeds of trust on any unit securing first mortgage holders and recorded before the due date of the assessment, provided that such priority shall extend only to assessments due for 6 months immediately preceding any action to enforce the association's lien. A significant departure from existing practice, this approach strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. This is a reasonable result because mortgage lenders have greater resources than the association for collecting such debts from unit owners and because the mortgage lenders' interests are best served by having the assessments paid and the association solvent. If the mortgage lender wishes, an escrow for assessments can be required, much the same as with real estate taxes. Since this requirement may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

3. Subsection (e) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. In view of the association's powers to enforce its lien for unpaid assessments, subsection (f) provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (a), currently levied against his unit. The statement is binding on the association, the executive board, and every unit owner in any subsequent action to collect such unpaid assessments.

Section 4–107

[Resales of Units]

(a) In the event of a resale of a unit by a unit owner other than a declarant, the unit owner shall furnish to a purchaser before execution of any contract for sale of a unit, or otherwise before conveyance, a copy of the declaration (other than the plats and plans), the bylaws, the rules or regulations of the association, and a certificate containing:
(1) a statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit;
(2) a statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling unit owner;
(3) a statement of any other fees payable by unit owners;
(4) a statement of any capital expenditures proposed by the association for the current and two next succeeding fiscal years;
(5) a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any specified projects;
(6) the most recent regularly prepared balance sheet and income and expense statement, if any, of the association;
(7) the current operating budget of the association;
(8) a statement of any judgments against the association and the status of any pending suits to which the association is a party;
(9) a statement describing any insurance coverage provided for the benefit of unit owners;
(10) a statement as to whether the executive board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned thereto violate any provision of the declaration;
(11) a statement as to whether the executive board has knowledge of any violations of the health or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the condominium; and
(12) a statement of the remaining term of any leasehold estate affecting the condominium and the provisions governing any extension or renewal thereof.

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

(c) A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the purchase contract is voidable by the purchaser until the certificate has been provided and for [5] days thereafter or until conveyance, whichever first occurs.

Comment

1. In the case of the resale of a unit by a private unit owner who is not a declarant, a public offering statement need not be provided. See Section 4–101(b)(6). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchas-
ing the particular condominium unit. Accordingly, each unit owner is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the condominium and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within 10 days after a request for such information. Under Section 3-102(a)(12), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right of action against the association pursuant to Section 4-115.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

SECTION 4-109

[Release of Liens]

(a) Before conveying a unit, other than by deed in lieu of foreclosure, to a purchaser other than a declarant, a declarant shall record or furnish to the purchaser, releases of all liens affecting that unit and its common element interest which the purchaser does not expressly agree to take subject to or assume, or shall provide a surety bond or substitute collateral for or insurance against the lien as provided for liens on real estate in [insert appropriate references to general state law or Sections 5-211 and 5-212 of the State Uniform Simplification of Land Transfers Act]. This subsection does not apply to any withdrawable real estate in which no unit has been conveyed.

(b) Whether perfected before or after creation of the condominium, if a lien other than a deed of trust or mortgage, including a lien attributable to work performed or materials supplied before creation of the condominium, becomes effective against 2 or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit and its common element interest. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.
COMMENT

1. Subsection (a) requires that, before conveying a unit, a declarant must either record releases of all liens affecting the unit which the purchaser does not expressly agree to take subject to or assume, or must furnish the purchaser with such releases. Alternatively, this section permits the seller to provide a surety bond, insurance, or substitute collateral for the lien as provided under state law.

2. The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. The exemption does not, however, result in any potential liability for unit owners, even if the declarant's option to withdraw the real estate subject to a lien expires prior to the release or satisfaction of the lien. In such a case, the lien would itself expire upon the expiration of the option to withdraw. This result follows from the provisions of Sections 1-105 and 2-108(d). When the option to withdraw expires, the real estate previously subject to the option is rendered part of the "ordinary" common elements which cannot be subjected to a lien or attached without the units to which they appertain. Accordingly, if a lienholder fails to require the exercise of the option of withdrawability prior to its expiration, the lien on the withdrawable real estate would expire. Such a result is perfectly reasonable since the lienor can obviously attach only the interest of his lienee and, in the present case, the only interest the declarant has in the withdrawable real estate is the right to withdraw it in the manner and within the time period specified in the Act and the declaration.

A similar result would occur if a declarant constructed units in withdrawable real estate. In such a case, any lien on the withdrawing estate would also attach to the units constructed. However, if the declarant (after complying with the requirements of this subsection with respect to the release of liens prior to sale of units) transferred ownership of one such unit to another person, then the option to withdraw the real estate (or that portion of it in which the transferred unit was located) would expire pursuant to Section 2-112(b). The lien would simultaneously expire.

3. Subsection (b) provides for the partial release of liens which are attributable to 2 or more units unless those liens are deeds of trusts or mortgages. This provision is desirable in order to facilitate the free marketability of units in condominiums. The reference in the second sentence to "the common expense liabilities of all unit owners whose units are subject to the lien" includes all units "subject to the lien" whether the lien has been perfected with respect to all such units or not. Thus, if a mechanic's lienor performed $10,000 worth of work on the common elements of a 100-unit condominium, all 100 units would be "subject to the lien" for purposes of this subsection, even if the lienor perfected the lien with respect to only one unit. Accordingly, each unit owner (assuming equal common expense liability for each unit) would be liable for only $100, notwithstanding the actions taken (or not taken) by the lienor to perfect his lien.

4. If a mechanic's lien, inchoate at the time the declarant conveys a unit, is subsequently perfected, the declarant is responsible under subsection...
(a) for any loss suffered by the unit owner as a result of a failure to furnish a release of that lien. In circumstances where the declarant is no longer solvent, this may create a loss against which the unit owner cannot protect himself, except through owner's title insurance. However, this problem is not unique to condominiums, and the Act does not vary state law governing inchoate mechanics' liens. The law governing mechanics' liens in each state should be reviewed in order to eliminate any inconsistencies between that law and this Act.

5. The last sentence of subsection (b) means that if a unit owner pays his share of the amount secured by a common lien, the association may not use funds attributable to that unit owner in paying off the balance. Suppose, for example, that a $10,000 lien has become effective against all units in a 100-unit condominium in which each unit owner has an equal common expense liability. One unit owner pays $100 to the lienholder to obtain a release of his unit from the lien. If the association subsequently pays off the balance of $9,900 by utilizing a contingency reserve fund to which all unit owners had contributed equally, the last sentence of subsection (b) would be violated unless the unit owner who had already paid his own pro rata share is either reimbursed $99 by the association or given a $99 credit against future assessments.