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Janice M. Ahern

John N. Patterson

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# CONDOMINIUM LAW: THE NEW MEXICO CONDOMINIUM ACT

JANICE M. AHERN\* and JOHN N. PATTERSON\*\*

## I. BACKGROUND

The concept of condominium ownership has its roots in Europe. Some sources place its origin during the Roman Empire. Records indicate that it was in use in renaissance Italy. From the continent, the idea spread to South America, and from there to Puerto Rico in the 1950's.<sup>1</sup>

In 1962, the Federal Housing Administration ("FHA") promulgated a model condominium statute,<sup>2</sup> setting forth the minimum legislation which a state would be required to adopt in order for FHA to consider insuring mortgages on condominium projects in that state. The officials of FHA did not intend that their act be a comprehensive piece of legislation, but rather the minimum statutory authorization necessary to legitimate a new and innovative form of land ownership.

In 1963, the New Mexico legislature passed the Apartment Ownership Act ("the old act"),<sup>3</sup> recognizing the new form of condominium ownership in New Mexico. Over the years, the act was amended several times, including changing its name to the Building Unit Ownership Act.<sup>4</sup> The old act contemplated that condominium projects would assume the multi-story structure form most commonly known to the draftsmen in the early sixties. The old act did not allow for expansion of the condominium project after the declaration creating the condominium was recorded. No protection for the consumer was included and the requirements for creating a condominium were insufficiently specific. Under the old act, a declaration could be recorded before the buildings which were to contain units had been built.<sup>5</sup> Thus, it was possible for the units to exist legally

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\*J.D., University of Akron, 1976; Partner, Gerber, Gramer & Ahern, Santa Fe, New Mexico.

\*\*J.D., University of Texas, 1970; Shareholder, White, Koch, Kelly & McCarthy, Santa Fe, New Mexico.

1. Garfinkel, *The Uniform Condominium Act*, 28 Prac. Law. 43 (1982); 1 P. Rohan & A. Reskin, *Condominium Law & Practice* § 2.01 (1967).

2. The Federal Housing Administration's Model Statute for Creation of Apartment Ownership was issued pursuant to the Housing Act of 1961, Title II of the National Housing Act, § 234, 12 U.S.C. § 1715 (1982). See 1 P. Rohan & A. Reskin, *Condominium Law & Practice* § 9.021. For the complete text of the model statute, see 1A P. Rohan & A. Reskin, *Condominium Law and Practice* ch. 23 (1978).

3. 1963 N.M. Laws ch. 221 (codified as amended at N.M. Stat. Ann. §§ 47-7-1 to -28 (Repl. Pamp. 1982)).

4. 1975 N.M. Laws ch. 318, § 1.

5. See N.M. Stat. Ann. § 47-7-16 (Repl. Pamp. 1982).

without first existing physically. The undivided interests assigned to each unit were allocated according to a rigid statutory formula which frequently did not account for differences among the units created.<sup>6</sup> As a result, the owners of those units often received inequitable treatment.

In the 1970's, the National Conference of Commissioners on Uniform State Laws created a committee charged with drafting condominium legislation which could be recommended for adoption in all the states.<sup>7</sup> This committee worked on the project for years, releasing the Uniform Condominium Act ("UCA") in 1977.<sup>8</sup> The UCA was amended in 1980 to simplify its structure.<sup>9</sup> New Mexico was the fourth state to adopt the UCA in a modified form. The UCA, without any changes, was originally introduced during the 1981 session of the New Mexico Legislature. At that time, representatives of various groups having an interest in the legislation joined together to form a task force to study the UCA and its effect on New Mexico condominium projects. This citizens' committee obtained withdrawal of the bill during the 1981 session and met regularly during the next year to modify the uniform act to meet the needs and political realities of New Mexico.

The committee's modified act, entitled the "New Mexico Condominium Act" ("NMCA"), was passed during the 1982 session of the Legislature, and signed into law by Governor Bruce King.<sup>10</sup> It became effective May 19, 1982.<sup>11</sup> All condominiums created in New Mexico after that date are governed by the NMCA.

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6. See N.M. Stat. Ann. §§ 47-7-11(F), 47-7-12 (Repl. Pamp. 1982).

7. The Uniform Condominium Act grew out of the Uniform Law Commissioners' decision that state real estate laws were outmoded. In 1969, a committee was formed to prepare preliminary drafts of a Uniform Land Transactions Act (ULTA). That act was adopted by the Uniform Law Commissioners in 1975 after provisions dealing with condominiums were deleted from the ULTA for further study. All provisions, except those relating to condominiums and planned communities, were completed in 1976 when the Uniform Simplification of Land Transfers Act (USOLTA) was adopted. The UCA was completed in 1977 and was amended in 1980. See W. Breetz, Jr., "Dealing with the Condo Concept, An Outline: Uniform Condominium Act," National Conference of Commissioners on Uniform State Laws, Chicago (no date). (Mr. Breetz, who served as a reporter-draftsman for the committee which drafted the UCA, was instrumental in obtaining passage of the New Mexico Condominium Act. He has been involved in numerous continuing legal education seminars on the subject in New Mexico.)

The committee of the National Conference of Commissioners on Uniform State Laws responsible for the preliminary drafting and review of the Uniform Condominium Act included lawyers from 12 states, the District of Columbia, and Puerto Rico and representatives from the National Association of Home Builders, the Veteran's Administration, the Mortgage Banker's Association, the Department of Housing and Urban Development, the American Bar Association, the American Land Title Association, the American Insurance Association, the Federal Home Loan Mortgage Association, the American Banker's Association, the Federal National Mortgage Association, and the National Association of Realtors. *Id.*

8. W. Breetz, Jr., *supra* note 7.

9. *Id.*

10. 1982 N.M. Laws ch. 27. The NMCA is codified as N.M. Stat. Ann. §§ 47-7A-1 to 47-7D-20 (Repl. Pamp. 1982 and Supp. 1983).

11. 1982 N.M. Laws ch. 27 contains no effective date, but was enacted at the session which adjourned on February 18, 1982. See N.M. Const. art. IV, § 23.

This Article is intended to familiarize the practitioner with the NMCA and to provide a number of practice pointers relating to the special needs of certain clients. The Article addresses the creation of the condominium, special declarant rights, the management of condominiums, and the protections for purchasers included in the NMCA. Because of the differences between the UCA and the NMCA, this Article includes a brief analysis of the differences between the two. This Article is not intended to cover ground ably covered by many others in previously published works, but to acquaint the New Mexico attorney with this new legislation.<sup>12</sup>

## II. CREATING THE CONDOMINIUM

The NMCA creates many new rights for the developer and does not mandate in detail how the project shall be structured. Short of a few constraints intended to protect the consumer, the NMCA allows the declarant to plan and to develop his condominium project as he chooses. The declarant must, however, specifically reserve the rights he thinks he might use during the project development. The focus of the NMCA is on disclosure, as opposed to regulation.<sup>13</sup> The attorney retained to draft documents for the declarant must be mindful during the drafting process of the many options available to the declarant, so that the resulting documents protect the declarant's options. The following section of this Article is intended to familiarize the practitioner with the documents he must draft to create a condominium under the NMCA.

### A. Manner of Creation

Generally, a condominium is created by the recording of the declaration.<sup>14</sup> It is possible, however, to create a condominium by creating a situation which satisfies the definition of condominium found in section 47-4A-3(G). Thus, the developer who intends to create a planned unit development,<sup>15</sup> but places ownership of the common areas directly in the

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12. For an extensive bibliography of articles concerning the UCA and condominiums, see 1A P. Rohan & A. Reskin, *Condominium Law & Practice*, app. A (1978). For a detailed analysis of the issues concerning allocations of unit owners' common rights and obligations, the priority of association liens, and the UCA in general, see Judy & Wittie, *Uniform Condominium Act, Selected Key Issues*, 13 *Real Prop., Prob. & Tr. J.* 437 (1978).

13. The UCA includes an optional Article 5 which provides the legislative structure for an agency to enforce the UCA through the registration of condominium units before sale. The agency reviews the condominium to determine if it is properly financed and managed to insure its completion. Bonding or other evidence of the developer's ability to complete a project is required. The agency also reviews the declaration, disclosure statement, and bylaws of the unit owners' association. No state has adopted this section.

14. See *infra* notes 17-39.

15. The distinction between a condominium and a planned unit development or a mandatory homeowners' association or any other common interest form of ownership is that in the condominium the common elements are owned by the unit owners, not by an association of owners. It is the undivided ownership of the common elements that sets the condominium form of ownership apart. Whether a particular project should be formed as a condominium or planned unit development is usually influenced by applicable zoning, subdivision, and marketing considerations.

unit owners, in undivided interests, has created a condominium; the project is thus subject to the NMCA, including the disclosure requirements and rescission rights. Likewise, the project of a developer who intentionally avoids calling the project a "condominium" in hopes of avoiding the provisions of the NMCA is subject to the provisions of the NMCA if the project conforms to the definition of a condominium.<sup>16</sup>

### B. Drafting Documents

The three principal documents of the condominium—the declaration, the articles of incorporation, and the bylaws—have different purposes under the NMCA.

#### 1. The Declaration

The declaration creates the condominium.<sup>17</sup> This document should contain the information relevant to real estate ownership and any provisions which the declarant desires not to be changed without considerable effort. Thus, the NMCA requires the declaration to contain a description of the property submitted to the condominium form of ownership,<sup>18</sup> a description of the units in the condominium,<sup>19</sup> a description of the special declarant rights reserved by the declarant,<sup>20</sup> and numerous other matters relating to title and the nature of the property. Unlike practice under the old act, the declaration is not intended to contain lengthy provisions governing the activities of the association, which are to be placed in the bylaws, or defining the responsibilities of the association and the unit owner with regard to assessments, which are contained in the NMCA. The following is a discussion of the more important information which must be included in the declaration.

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16. Likewise, creating a condominium may not avoid the requirements of the New Mexico Subdivision Act, N.M. Stat. Ann. §§ 47-6-1 to -29 (Repl. Pamp. 1982), depending upon the units created. The Subdivision Act applies to a condominium consisting of units defined as divisions of land. The Subdivision Act does not exempt condominium units per se, but only the sale of space within a building, the ownership traditionally created by a condominium. If the declarant defines the units as divisions of land, the Subdivision Act will apply. Other land-use statutory provisions apply to condominiums. The NMCA does not invalidate any zoning, subdivision, building code, or other real estate use law or ordinance which would apply to the same development under a different form of ownership. The NMCA only prohibits discrimination against the condominium form of ownership. See N.M. Stat. Ann. § 47-7A-6 (Repl. Pamp. 1982).

17. N.M. Stat. Ann. § 47-7B-1 (Repl. Pamp. 1982). N.M. Stat. Ann. § 47-7A-3(I) (Repl. Pamp. 1982) excludes from the definition of declarant those persons who may sign a declaration for the purposes of evidencing consent, such as mortgage lien holders or ground lessors. The definition also excludes real estate brokers since the brokers are not disposing of their own interest in a unit. Unit owners reselling their units are not declarants because their units were previously disposed of when originally conveyed.

18. N.M. Stat. Ann. § 47-7B-5(A)(3) (Supp. 1983).

19. N.M. Stat. Ann. § 47-7B-2 (Repl. Pamp. 1982).

20. N.M. Stat. Ann. § 47-7B-5(A)(8) (Supp. 1983).

a. In what county is the project located?

The declaration must contain the name of each county in which any part of the condominium is located.<sup>21</sup>

b. What is to be the name of the condominium?

The declaration must contain the name of the condominium; the name must include the word "condominium" or be followed by the words "a condominium."<sup>22</sup> The declaration must also contain the name of the unit owners' association.<sup>23</sup> There is no requirement that the association name be the same as the name of the condominium. Numerous condominiums may have the same name, but the association name will have to be approved by the corporation commission as not being deceptively similar to that of an existing corporation.<sup>24</sup>

c. How are interests to be allocated?

Under the old act, the undivided interests of the unit owners in the common areas, the proportionate share of the common expenses and profits, and the share of the vote were required to be determined by the area, volume, or value of each unit.<sup>25</sup> If the condominium contained a building consisting of separate units not substantially sharing any common structural elements, the value of the unit was determined on the basis of square footage.<sup>26</sup> Most percentage interests in old act condominiums were calculated as a percentage determined by the ratio of the unit's size in square feet, within its exterior dimensions, to the sum of the sizes of all units. The old act also required that this percentage be used for all purposes, including voting.<sup>27</sup> Under the old act, therefore, no method was available to equalize voting rights or allocated expenses according to benefits, risk, or expense.

The NMCA utilizes the new term "allocated interest"; it is defined simply as the interests that the declarant must create and designate in the declaration creating the condominium.<sup>28</sup> The NMCA does not mandate the use of square footage calculations. It only requires the declarant to state the formula used to allocate a fraction or percentage of undivided interests in the common elements and expenses of the association and the votes in the association for each unit. Other than the general obligation

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21. *Id.* § 47-7B-5(A)(2).

22. *Id.* § 47-7B-5(A)(1).

23. *Id.*

24. N.M. Stat. Ann. §§ 53-8-7, 53-11-7 (Repl. Pamph. 1983).

25. N.M. Stat. Ann. § 47-7-12 (Repl. Pamph. 1982).

26. *Id.* § 47-7-11(F).

27. *Id.*

28. *Id.* § 47-7A-3(B).

of good faith, the only limitation is that the declarant cannot discriminate in favor of units owned by the declarant or use cumulative or class voting to evade any limitation imposed on declarants by the NMCA.<sup>29</sup>

The three allocated interests to be created by the declarant can be allocated on different bases, and the various bases may be totally unrelated to value. For example, the declarant may desire to allocate expenses for the maintenance of entrances to units served by the entrances. Commercial units in a mixed-use condominium could be given a higher insurance expense allocation than the residential units, based upon risk. Certain portions of the project may have building materials that require greater and more frequent maintenance than other units; a higher percentage of this maintenance cost could be allocated to those units.

With regard to voting, the declarant may give equal voting rights in the association to all units, even though the units may vary in size. Doing so greatly simplifies the job of vote tallying in meetings of the members. Establishing different allocations of voting rights for different matters, such as increasing reserves, capital expenditures, and termination, may also be desirable. If the declarant has reserved the right to add or withdraw land or units from the condominium, the declaration must also state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.

d. What special declarant rights are reserved?

Special declarant rights are the rights to complete improvements indicated on the plats and plans, to exercise development rights, to maintain sales offices and signs advertising the condominium, to use easements through the common elements to make improvements to the condominium or to added land, to make the condominium part of a larger condominium or planned community or subject to a master association, or to appoint and to remove officers and directors during the period of declarant control.<sup>30</sup> The most important aspect of the special declarant rights is the right to exercise development rights. Development rights allow a declarant to expand, contract, or change the project<sup>31</sup> to coincide with changing market conditions and to divide a project into phases which a declarant hopes, but to which the declarant is not ready to commit, will be successful enough to include all land and improvements the declarant plans to market.

For example, imagine that a declarant plans a forty-eight unit retirement condominium, but is unable to obtain construction financing for more

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29. *Id.* § 47-7B-7(A).

30. *Id.* § 47-7A-3(Y).

31. *Id.* § 47-7A-3(K).

than eight units and the infrastructure necessary to accommodate those units. The site contains approximately three acres, but eight units plus amenities would require only one-half acre. The declarant has several options, depending on which development rights he elects to reserve in the declaration. If properly reserved in the declaration, the declarant can reserve the right to add the remaining two and one-half acres to the condominium at a later date.<sup>32</sup> The land need not all be added at one time, so long as the declarant has reserved the right to add the additional tract in whole or in part.<sup>33</sup> Alternatively, the declarant may desire to include the entire three-acre tract in the condominium from the beginning because of zoning considerations or financing requirements. Therefore, rather than reserving the right to add land, the declarant may reserve the right to withdraw land from the original condominium. If the "withdrawable" land is adequately described in the declaration, the declarant may withdraw the land from the condominium at a later date without the consent of the unit owners or mortgagees. The declarant may even use this withdrawn land for entirely different purposes or sell it to another party.

Frequently, a declarant may find that the construction lender will accept security in the form of a separate tract of land but is unwilling to accept security in the form of a tract of land subject to the undivided interests of unit owners purchasing units completed in the first phase. The declarant therefore may desire to reserve the right to withdraw portions of the remaining unimproved land submitted to the condominium and the corresponding right to add all or any part of the land back into the condominium. Under this method, the lender's security is not subject to the undivided interests of unit owners, and in the event of foreclosure, the foreclosure purchaser can deal with the property free of the provisions of the declaration.

Concomitant with the right to add or to withdraw land is the corresponding reservation of the right to create units, common elements, or limited common elements. To reserve any right with respect to the adding of units, the declarant must designate the maximum number of units and common elements, limited and appurtenant, which may be created under the selected options.<sup>34</sup> Failure to reserve this right could leave the declarant with the power to add land, but without the power to create additional units on that land. This right is also useful in maintaining the flexibility necessary to modify unit sizes and configuration of common and limited common elements in both residential and commercial condominiums.

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32. N.M. Stat. Ann. § 47-7B-5(A)(8) (Supp. 1983).

33. *Id.* § 47-7B-5(A)(9).

34. *Id.* § 47-7B-5(A)(4).



The declarant may also desire to reserve the right to subdivide units or to convert units into common elements to maintain flexibility for future market demand.<sup>35</sup> For example, in a resort condominium, the market for a unit containing two thousand square feet may change dramatically between the time of planning the project and the final building stages. If the units have been designed to house several families or groups, the declarant may opt to exercise his right to subdivide each unit into three separate units which can be marketed at a price that is attractive to more buyers. In addition, the declarant may desire to use a larger unit for sales promotions and personnel<sup>36</sup> and later convert the larger unit into two units for sale.

In most projects, the declarant will want to reserve the right to appoint officers and directors of the association.<sup>37</sup> This allows the declarant to see that the project is properly maintained and otherwise managed, so that sales are not impeded by deterioration of the improvements. The right to appoint officers and directors also provides a period of time during which the declarant may acquaint the unit owners with the overall operation of the project. Then, when the association is turned over to the unit owners, they will be familiar with all aspects of project operation.

The declarant will also almost always want to reserve the right to maintain a sales office and model units. If this right is not specifically reserved, he is prohibited from doing so.<sup>38</sup>

In some projects, the declarant may want to reserve the right to make the condominium subject to a master association or part of a larger condominium or planned community.<sup>39</sup> This special declarant right is of value in those situations where a large project is planned and constituent parts are developed by different developers, or where both condominium and individually-owned property may benefit from common management or maintenance.

e. How shall the plat and plan requirements be met?

A decision must be made about satisfying the requirements of section 47-7B-9. This section sets forth in detail the information which must be included in the declaration as part of the plat, the plans, or both. An examination of this section and a detailed discussion of its requirements with the surveyor or architect is imperative. In most cases, it is an unnecessary expense to record a set of architect's plans. Therefore, if the

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35. N.M. Stat. Ann. §§ 47-7A-3(K)(3), 47-7B-13 (Repl. Pamp. 1982).

36. *Id.* § 47-7B-15.

37. *See id.* § 47-7C-3(D),(E).

38. *Id.* § 47-7B-15.

39. *Id.* § 47-7B-20.

surveyor has a good working knowledge of the plats and plans section, it is usually less expensive to have him prepare the plats and plans for recording as a single document.

## 2. The Articles of Incorporation

The articles of incorporation should generally be drafted for a non-profit corporation and should provide that the purpose of the corporation is to function as a unit owners association as defined in section 47-7A-3(C). No other special provision is required. The NMCA allows the use of an unincorporated association for the owner's association,<sup>40</sup> but this will be of limited usefulness, as the Unincorporated Associations Act provides that no such association may have a life of more than twenty years and that membership in the association terminates upon the death of a member.<sup>41</sup>

The NMCA also allows the use of a regular business corporation.<sup>42</sup> In some large projects, especially in those which may expect large, non-assessment revenues, the use of a business corporation may offer significant tax advantages.

## 3. The Bylaws

The bylaws under the NMCA usually represent the most lengthy document of the condominium package. The bylaws set forth detailed provisions regarding the operation of the association. It is in the bylaws that special provisions should be drafted dealing with the conduct of meetings, the duties of the officers and directors of the association, and the fiscal and physical management of the association and the condominium.

### III. MANAGEMENT OF THE CONDOMINIUM

#### A. *Creation of the Association*

The NMCA mandates that the unit owners association be formed no later than the date the first unit is conveyed. The powers of the association are listed in the NMCA, but may be modified by the declaration. The declarant, however, may not impose more restrictive limitations on the association's power to deal with the declarant as opposed to other unit owners. The executive board must have at least three members if it is a non-profit corporation.<sup>43</sup>

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40. *Id.* § 47-7C-1.

41. N.M. Stat. Ann. § 53-10-1 to -8 (Repl. Pamp. 1983).

42. N.M. Stat. Ann. § 47-7C-1 (Repl. Pamp. 1982).

43. N.M. Stat. Ann. § 53-8-18 (Repl. Pamp. 1983).

### B. Declarant Control

The NMCA recognizes the need for a declarant to retain control of the association at least during the period of time that the declarant holds an inventory of units or has reserved development rights in the condominium. The NMCA authorizes the declarant to provide for a period of declarant control, during which period the declarant may appoint and remove the officers and members of the executive board. This period of declarant control must terminate no later than the earlier of: (1) 180 days after conveyance of ninety percent of the units which may be created; (2) two years after all declarants have ceased to offer units for sale in the ordinary course of business; or (3) five years after any development right to add units has been exercised. The control is gradually released by the requirement that at least twenty-five percent of the members of the executive board be appointed by the declarant from among the unit owners once the declarant has conveyed fifty percent of the units which may be created.<sup>44</sup>

Although many declarants are anxious to retain control of the association as long as possible to avoid any interference with the project and any detrimental effect on sales, retention of such control has one significant drawback. The NMCA specifically provides that in the performance of their duties the officers and members of the executive board are required to exercise ordinary and reasonable care. If the officers and members are appointed by the declarant, however, they are required to exercise the care of fiduciaries of the unit owners and will be held accountable under that standard because of anticipated conflicts of interest between the unit owners and the declarant.<sup>45</sup>

### C. Budget Approvals

The NMCA also provides for budget approval by the unit owners. Should the unit owners refuse to ratify a new budget, the old budget and assessments apply until ratification of the new budget. Ratification must be determined by majority vote of all unit owners, or by a larger percentage if set forth in the declaration. The bylaws prepared by the declarant should provide a detailed method governing the annual ratification of the budget to avoid disputes.<sup>46</sup>

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44. N.M. Stat. Ann. § 47-7C-3(D),(E) (Repl. Pamp. 1982).

45. *Id.* § 47-7C-3(A). For a comprehensive analysis of issues concerning the respective roles of the developer and the association and related liabilities, see Hyatt & Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 Wake Forest L. Rev. 915 (1975); Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 Emory L.J. 977 (1975); Krasnowiecki, *Townhouses with Home Associations: A New Perspective*, 123 U. Pa. L. Rev. 711 (1975).

46. N.M. Stat. Ann. § 47-7C-3(C) (Repl. Pamp. 1982).

#### *D. Termination of Contracts*

To prevent possible abuses while the declarant is in control of the association, the NMCA permits the association to terminate, without penalty, unconscionable contracts or leases with the declarant or an affiliate upon ninety days notice to the other party to the contract. The association may also terminate any contract which is not bona fide or which was unconscionable to the unit owners at the time entered into considering the prevailing circumstances.<sup>47</sup>

#### *E. Upkeep of the Condominium*

Unless modified in the declaration, the association is responsible for the upkeep of the common elements. The unit owners, including the declarant as a unit owner, are responsible for the maintenance of their units. The declarant alone is responsible for expenses in connection with real estate subject to development rights.<sup>48</sup>

The declarant may want to alter these responsibilities to provide that the association should maintain exterior walls or roofs—even if the declaration defines the roofs and walls as part of the unit—to ensure that all the unit owners share such major costs as roof repairs or to keep the building facades uniform. Likewise, the declarant may provide that the unit owners are responsible for maintenance of all limited common elements to reduce the amount of assessments that must be collected by the association and the amount of association control. By doing so, however, the declarant may create problems with insurance and tort liability for the unit owners.<sup>49</sup> If the declaration is silent, the general provisions of the NMCA will control.

### IV. PROTECTION OF CONDOMINIUM PURCHASERS

The old act dealt solely with the creation of condominiums. It did not attempt to address the interests of purchasers. The NMCA, with limited exceptions, requires the delivery of a disclosure statement and resale certificate in the case of a sale of a residential unit.<sup>50</sup> The disclosure statement is a detailed disclosure of all pertinent factors relating to the condominium and the unit to be sold.<sup>51</sup> The resale certificate is required to be delivered by a selling owner of a unit purchased previously from the declarant; it is much more abbreviated than the disclosure statement.<sup>52</sup>

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47. *Id.* § 47-7C-5.

48. *Id.* § 47-7C-7.

49. Some policy forms provide that damages flowing from a failure to maintain are not covered if the insured is not charged with the duty to maintain.

50. See N.M. Stat. Ann. §§ 47-7D-1, 47-7D-9 (Repl. Pamph. 1982).

51. See *id.* §§ 47-7D-3 to -6.

52. *Id.* § 47-7D-9.

In addition to disclosure, the NMCA provides rescission rights to the purchaser of a condominium unit,<sup>53</sup> requires the escrow of all deposits received from purchasers in connection with the sale of a unit,<sup>54</sup> provides for the release of liens and encumbrances before the conveyance of a unit,<sup>55</sup> provides for the regulation of promotional material,<sup>56</sup> and prohibits the conveyance of a unit until the declaration creating the condominium is recorded and the unit is substantially completed in accordance with the plans.<sup>57</sup> The NMCA also provides certain protections for tenants of conversion buildings.<sup>58</sup>

#### A. Disclosure Provisions

The right to receive a disclosure statement cannot be waived by purchasers of residential units.<sup>59</sup> For condominiums of not more than twenty-five units, the statement need not contain all the information required for larger condominiums.<sup>60</sup>

The disclosure statement must fully and accurately disclose information concerning the declarant and a variety of disclosures relating to fiscal matters, including insurance. If the declarant has reserved any development rights, the nature and extent of the rights must be described. The declarant must set forth any assurance as to the future of the project, such as restrictions on the use of added units and whether new units will be of the same quality of construction.<sup>61</sup> The purchaser is thus given an opportunity to make an informed decision about the purchase of a unit.

If the declaration authorizes the ownership or occupancy of any unit in time-share interests, other disclosures must be made. These disclosures include a description of the time-share interests that may be created, the units which may be affected, and the duration of time-share interests. Consistent with the NMCA, disclosure must be made about the extent to which creation of time-share interests may affect the enforceability of the association's lien for assessments.<sup>62</sup>

The viability of the project after creation is still a major concern. If a project involves a conversion building containing more than fifteen residential units, the disclosure statement must contain additional information, owing to the difficulty associated with a purchaser attempting to

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53. *Id.* § 47-7D-8.

54. *Id.* § 47-7D-10.

55. *Id.* § 47-7D-11.

56. *Id.* § 47-7D-18.

57. *Id.* § 47-7D-20.

58. *Id.* § 47-7D-12.

59. *Id.* § 47-7A-4.

60. *Id.* § 47-7D-3(B).

61. *Id.* §§ 47-7D-3, -4.

62. *Id.* § 47-7D-5.

determine the condition of the building. Thus, the declarant is required to retain a licensed architect or engineer to report on the present condition of the structural components and mechanical and electrical installations material to the use and enjoyment of the building. The declarant must also disclose "actual notices" of uncured violations of building codes or other municipal regulations and the estimated cost of curing those violations. The disclosure does not require listing of known violations having no effect upon the structural components or fixed mechanical and electrical installations of the condominium unless actual notices have been received. If actual notices of violations do exist, such violations would be the responsibility of the unit owners and, therefore, the estimated cost of curing these outstanding violations must also be disclosed.<sup>63</sup>

### *B. Right to Cancel*

The most effective right granted to a purchaser under the NMCA is the right to rescind the purchase agreement with the declarant. While the NMCA also grants private remedies,<sup>64</sup> the ability of the purchaser to cancel the sale for any reason at all provides the necessary incentive to encourage a declarant to prepare and to deliver the required disclosure statement. This right, however, is not without a time limitation. The declarant is required to deliver a disclosure statement to a purchaser of a unit no later than the date of the contract for sale of the unit. Unless the purchaser is given the disclosure statement more than seven days before execution of the contract, the purchaser, before conveyance, may cancel the contract within seven days after first receiving the disclosure statement.<sup>65</sup>

If the purchaser elects to cancel, he need only give written notice of his election by hand-delivering or mailing the notice to the declarant or his agent for service of process. Cancellation is without penalty. All payments made by the purchaser must be refunded promptly.<sup>66</sup>

### *C. Resale Certificates*

A provision that is unique to the UCA and the NMCA is the requirement that unit owners who sell "used" units are required to make certain limited disclosures in the form of a resale certificate. Any purchase agreement made with a selling unit owner is voidable by the purchaser until seven days after the resale certificate has been provided or until conveyance, whichever occurs first.<sup>67</sup>

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63. *Id.* § 47-7D-6.

64. *Id.* § 47-7D-17.

65. *Id.* § 47-7D-8.

66. *Id.*

67. *Id.* § 47-7D-9.

The reselling owner is required to deliver a copy of the declaration (without plats and plans), the bylaws, the rules and regulations of the association, and a number of fiscal, insurance, and other documents concerning the condominium and the unit to the new purchaser. Even though this obligation rests with the reselling owner, the association has the obligation to issue a certificate containing the information required to be disclosed in the resale certificate to the reselling owner within ten days after request is made. Should the association fail to provide this information, the resale owner has a right of action against the association.<sup>68</sup>

If the information that is provided is incorrect as to assessments due, the purchaser is not liable for any payment greater than the amount set forth in the certificate prepared by the association. The association is bound by its own negligence and is prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase. The owner is not liable to the purchaser for erroneous information provided by the association; the owner is only responsible for the misinformation provided by him and not contained in the association's certificate.<sup>69</sup>

#### *D. Escrow of Deposits*

Any deposit made in connection with the purchase or reservation of a unit from the declarant is required to be placed in escrow and held in New Mexico in an account designated solely for that purpose. The funds are to be held until delivered to the declarant at closing, until delivered to the declarant as a result of the purchaser's default under the contract, or until refunded to the purchaser. Separate accounts are not required and comingling of funds in the same account is permissible. These escrow requirements apply whether a deposit is made under a sales agreement or a nonbinding reservation agreement. The disposition of interest earned on escrow funds is not regulated, but should be considered if the funds are comingled with other deposits. The NMCA permits the use of title companies, real estate brokers, and attorney's trust accounts as depositories of these funds.<sup>70</sup>

#### *E. Liens*

Before conveyance of a unit, the declarant is required to record or to furnish to the purchaser a release of all liens affecting the unit and its appurtenant common elements which the purchaser does not agree either to take the unit subject to or to assume.<sup>71</sup> An exception is available for

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68. *Id.* § 47-7D-17.

69. *Id.*

70. *Id.* § 47-7D-10.

71. *Id.* § 47-7D-11.

liens against any real estate which the declarant has the right to withdraw. If the lien attaches after the recording of the declaration and the creation of the condominium, however, the lien can attach only to the declarant's right to withdraw (the only interest retained by the declarant after creation of the condominium, other than his unsold units). The expiration of this right by lapse of time would extinguish the lien unless the right to withdraw were exercised. When units are created in withdrawable real estate, the units must be free of liens when sold. After a unit is sold in a particular withdrawable parcel, that parcel can no longer be withdrawn.<sup>72</sup> After a unit is sold in withdrawable real estate, the exception from the release-of-lien rule no longer applies. The right to withdraw real estate has expired.

#### *F. Promotional Material*

If a declarant has not completed all planned improvements, he must indicate on the plat and plans and any promotional materials whether he is committed to building these improvements. If the declarant has not committed himself to build certain improvements, he need not show the improvements at all. If he does show the improvements, but is not totally committed to building them, he must label the improvements "NEED NOT BE BUILT." Should the declarant neglect to label the improvements as "NEED NOT BE BUILT," the declarant will have obligated himself to build these improvements. If the declarant does intend to complete certain improvements he may label them as "MUST BE BUILT" and obligate himself to complete these improvements.<sup>73</sup>

The labeling requirement is intended to require a declarant to remain committed to his building plans. If the declarant does not desire to remain committed, then he will be prohibited from deceiving purchasers as to the firmness of his commitment. Since no labeling is required if contemplated improvements are not shown, it is best not to show uncompleted improvements at all. If shown, they should be labeled "NEED NOT BE BUILT."

#### *G. Substantial Completion of Units*

The NMCA also has introduced an entirely new provision designed to eliminate the problems of "ghost" units or units sold and conveyed but never completed. In the case of a sale of a unit, other than a unit in a conversion building restricted in its entirety to nonresidential use, a contract of sale may be executed, but no interest in a unit may be conveyed until the unit is substantially completed (as evidenced by a recorded certificate) and the declaration is recorded.<sup>74</sup>

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72. *Id.* § 47-7B-10(D).

73. *Id.* § 47-7D-18.

74. *Id.* § 47-7D-20.



The certificate of substantial completion may be executed by the declarant, by a licensed engineer or architect, or by the building inspector; it must be recorded prior to or simultaneously with the declaration. The certificate must certify that all structural components and mechanical systems of the buildings containing units are substantially completed according to the plans.<sup>75</sup> What is considered "substantially completed" is not defined by the NMCA. The term, however, is considered to have a well-defined meaning in the construction industry.<sup>76</sup> A certificate of occupancy will also suffice.

The requirement of certifying the substantial completion of a building operates to encourage phasing of the project. Thus, a declarant can sell and convey the units in a completed building and simply reserve development rights to complete the units in another, unfinished building. If the second building is never completed and those units are not added to the condominium, the integrity of the original condominium should not be affected. Phasing should also assist the declarant in financing the project and in meeting the pre-sale requirements of lenders.

#### *H. Conversion Buildings*

Residential tenants and subtenants are entitled to notice of a pending conversion of their building to the condominium form of ownership. They are granted the right to purchase any units created, unless the conversion substantially changes the boundaries of the converted unit or the use of the building will be restricted exclusively to nonresidential use. The tenants and subtenants are entitled to notice of the conversion and to delivery of the disclosure statement no later than sixty days before the tenants and subtenants are required to vacate. The notice is to be hand-delivered or mailed. If mailed, the notice is deemed received the day of actual receipt, or thirty days after mailing, whichever occurs first.<sup>77</sup>

For sixty days after notice, the declarant is required to offer the unit to the tenant in possession. If the tenant does not purchase the unit within sixty days, the declarant cannot offer to dispose of the unit during the next sixty days at a price more favorable to the buyer than the price offered to the tenant. If the declarant conveys the unit to a purchaser for value and without notice of the tenant's right, the tenant's right to purchase the unit is extinguished and the tenant has a right of action against the declarant for damages.<sup>78</sup>

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75. *Id.* § 47-7B-1.

76. *See* Schaeffer v. Kelton, 95 N.M. 182, 619 P.2d 1226 (1980); Tabet Lumber Co. v. Baughman, 79 N.M. 57, 439 P.2d 706 (1968).

77. N.M. Stat. Ann. § 47-7D-12 (Repl. Pamp. 1982).

78. *Id.*

The declarant cannot increase the rental rate applicable to the unit if the tenant in possession accepts the declarant's offer to sell. If the tenant does not opt to buy the unit, the declarant can increase the rental rate as provided in the lease. No lease may be affected by the conversion of the building. No tenant or subtenant can be required to vacate earlier than required without the conversion.<sup>79</sup> Any provision in a lease which would allow termination of the lease before the end of its term, based solely upon a conversion of the building to a condominium, is unenforceable.

### *I. Private Remedies*

The NMCA provides a general cause of action for failure to comply with the act. The cause of action is against the declarant and any person subject to the NMCA's provisions, such as other unit owners, successor declarants, or the association. The NMCA specifies only that the relief is to be "appropriate"; the nature of the relief will be determined under general law. The section, however, does allow a court to award attorney's fees in the appropriate case. What is appropriate will have to wait for a determination by the courts.<sup>80</sup>

## V. PRACTICE UNDER THE NMCA

Practice under the NMCA will necessitate changes in the way condominiums are approached by those other than the declarant's attorney. Some of the special considerations applicable to groups who frequently deal with condominiums are included below. The issues addressed are by no means comprehensive but will allow the practitioner to be able to recognize the more obvious problem areas.

### *A. Representing the Lenders*

Whether financing the construction of a condominium or the purchase of a single unit, lenders must be concerned with several issues which are peculiar to condominiums. First is the description to be used in the mortgage. Unlike practice under the old act, the NMCA requires that all buildings containing units be substantially complete before the declaration may be recorded.<sup>81</sup> Therefore, a mortgage securing a construction loan must attach to a parcel by metes and bounds description, not by unit description. When the buildings are completed and the declaration recorded, the construction lender must release units for sale to the public. This may be done by proper drafting of the mortgage instrument, pro-

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79. See generally the Uniform Owner-Resident Relations Act, N.M. Stat. Ann. §§ 47-8-1 to -51 (Repl. Pamp. 1982 and Supp. 1983).

80. See N.M. Stat. Ann. § 47-7D-17 (Repl. Pamp. 1983).

81. *Id.* § 47-7B-1. See *supra* text accompanying notes 74-76.

viding for partial releases by unit description and reserving to the lender the right to review and to approve the declaration and other constituent documents prior to recording. After the declaration is recorded, the lender should always bear in mind that no lien may attach to condominium property except by unit description.<sup>82</sup> Lenders seeking a mortgage on a unit, therefore, must ensure that the description used in the mortgage instrument contains the name of the condominium, the unit number, the county in which the declaration is recorded, and the declaration's recording date.<sup>83</sup>

Second, the NMCA creates a new class of property rights, known as "development rights," which may be used as security.<sup>84</sup> These development rights include the very valuable rights to add land and units to, and to withdraw land and units from, a condominium. A mortgagee who forecloses on all units and real estate in a condominium which is subject to development rights also succeeds to all those reserved rights, but only if the mortgagee so requests.<sup>85</sup> In the event the lender receives a deed in lieu of foreclosure, all development rights must be described in the deed, and the mortgagee must execute the deed, in order for the transfer to be effective.<sup>86</sup>

Third, to ensure that a valid interest is subjected to its mortgage, the lender should require that the mortgagee's policy of title insurance be issued with the condominium endorsement attached. This endorsement insures that the documents creating the condominium are in compliance with the law and that the condominium is legally valid.<sup>87</sup>

Fourth, the lender contemplating numerous loans secured by mortgages on units in the same project should be concerned with the long-term operation of the project because the value of a unit as security may be diminished by the actions of the declarant or of the unit owners themselves. A widely used set of guidelines outlining the actions of an association which may not be taken without the approval of mortgagees has been developed by the Federal National Mortgage Association.<sup>88</sup> The lender must recognize that the value of a unit as security for its loan is strongly dependent on adequate maintenance of the whole project, adequate insurance, and proper management of the unit owners' association.

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82. N.M. Stat. Ann. § 47-7C-17 (Supp. 1983). See *supra* text accompanying notes 71-72.

83. N.M. Stat. Ann. § 47-7B-4 (Repl. Pamp. 1982). See *supra* text accompanying notes 17-42.

84. N.M. Stat. Ann. § 47-7A-3(K) (Repl. Pamp. 1982). See *supra* text accompanying notes 30-39.

85. N.M. Stat. Ann. § 47-7C-4 (Repl. Pamp. 1982).

86. *Id.* § 47-7C-4(A).

87. American Land Title Association (ALTA) condominium endorsement form number 4 insures against loss or damage by reason of failure of the documents to comply with state law governing condominiums and the priority of any assessment lien over the lien of the insured mortgage.

88. Federal National Mortgage Association, Federal National Mortgage Association Lending Guide, pt. 4, ch. 3 (date unknown).

### *B. Representing the Realtor*

To the real estate broker, the sale of a condominium unit differs little from the sale of any other kind of real property. In the area of liability, however, the sale of condominium property may hold some hidden dangers. These dangers may be easily avoided by paying attention to a few details. First, if the broker is retained by the declarant, the broker should obtain the disclosure statement from him at the time the listing agreement is signed. No contract for the sale of a unit by the declarant is truly binding until seven days after delivery of the disclosure statement to the buyer.<sup>89</sup> If the disclosure statement has been prepared by the declarant, the broker should include in the listing agreement a certification from the declarant stating that the disclosure statement has been prepared by the declarant in accordance with the NMCA. A statement that updated versions will be delivered to the broker as appropriate and that the declarant will indemnify the broker for any misrepresentation contained in the disclosure statement should also be included in the listing agreement. The NMCA allows the declarant to transfer responsibility for preparation of all or part of the document to others.<sup>90</sup> Although it is unusual in New Mexico for this procedure to be employed, the certification should protect the broker from allegations that he is responsible for the disclosure statement's content. The broker should also be aware that he is required to deliver a disclosure statement if he is selling a unit which he owns, even if he is not the declarant.<sup>91</sup>

Second, if the broker is retained by a unit owner to sell a unit and the owner is not a declarant, the buyer is entitled to a resale certificate. This certificate, prepared by the unit owners' association, provides much of the same information as a disclosure statement. Because it is prepared by the association, and the potential buyer can inspect the completed project and talk to unit owners who are living there, it is not required to be as detailed as the disclosure statement. The broker should ask for a resale certificate at the time the listing agreement is signed, in order to become familiar with the project. It is not necessary, however, to deliver a resale certificate to a buyer until a contract has been signed.<sup>92</sup>

### *C. Representing the Association*

The NMCA places many responsibilities on the unit owners' association. These are set forth in some detail in article 7C of the NMCA (entitled "Management of the Condominium"). Representation of the association may be divided into two phases, that during the period of declarant

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89. See *supra* text accompanying notes 59-66.

90. N.M. Stat. Ann. § 47-7D-2(B) (Repl. Pamp. 1982).

91. See *id.* § 47-7D-2(C).

92. *Id.* § 47-7D-9. See *supra* text accompanying notes 67-69.

control, and that following the assumption of control by the unit owners. During the period of declarant control, the officers and directors of the association may be appointed by the declarant.<sup>93</sup> Most declarants will avail themselves of this right. The attorney representing the association during this period must realize that he is representing the association, and not the declarant. The declarant and the officers and directors appointed by him are, after all, officers and directors of a corporation, and the usual rules governing the duties of officers and directors to their corporations are in full force. Language in the corporate documents purporting to indemnify the officers and directors is limited in its effectiveness. No nonprofit corporation may indemnify an officer or director for negligence or misconduct in the performance of his duties.<sup>94</sup>

Both during and after the period of declarant control, the attorney for the association must see that fiscal affairs of the association are properly managed. From the standpoint of the attorney, the three main duties of the association in this regard are the preparation of the budget,<sup>95</sup> the acquisition of insurance,<sup>96</sup> and the filing of tax returns. Even though the association is usually a nonprofit corporation, it must file tax returns with the state and federal governments.<sup>97</sup> Returns for unit owners' associations usually reflect no tax due, but penalties for failure to file still apply. The taxation of unit owners' associations is beyond the scope of this Article, but the attorney representing the association should see to it that competent advice is sought on these matters from a tax attorney or a certified public accountant.

The attorney representing the association in its relations with unit owners will face a multitude of problems, not unlike a municipal attorney. In the context of the condominium, the association has the power to tax,<sup>98</sup> to impose penalties for the violation of its rules,<sup>99</sup> to regulate the use of the common areas,<sup>100</sup> to incur liabilities,<sup>101</sup> and to do a variety of other things to control the condominium. The attorney should ensure that rules and regulations are properly adopted in accordance with the bylaws and are properly maintained for the benefit of the unit owners.

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93. N.M. Stat. Ann. § 47-7C-3(D),(E) (Repl. Pamp. 1982). See *supra* text accompanying notes 44-45.

94. N.M. Stat. Ann. § 53-8-26 (Repl. Pamp. 1983).

95. N.M. Stat. Ann. § 47-7C-2(A)(2) (Repl. Pamp. 1982). See *supra* text accompanying note 46.

96. N.M. Stat. Ann. § 47-7C-13 (Repl. Pamp. 1982).

97. 26 U.S.C. § 6012(a)(7) (1982); N.M. Stat. Ann. § 7-2A-9 (Repl. Pamp. 1983). See generally P. Rohan & A. Reskin, *Condominium Law and Practice* § 15.06 (1980).

98. N.M. Stat. Ann. § 47-7C-15 (Repl. Pamp. 1982).

99. *Id.* § 47-7C-2(A)(11).

100. *Id.* § 47-7C-2(A)(6).

101. *Id.* § 47-7C-2(A)(5). See also Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 Emory L.J. 977 (1975).

## VI. COMPARISON OF THE NEW MEXICO CONDOMINIUM ACT AND THE UNIFORM CONDOMINIUM ACT

The NMCA differs in some material respects from the UCA as promulgated by the National Conference of Commissioners on Uniform State Laws. Both the citizens' committee which pressed for passage of the NMCA and the legislators made changes to the original text of the UCA to deal properly with the situation in New Mexico. In spite of requests from both the citizens' committee and legislative leaders, the Statute Compilation Commission chose to publish the comments to the UCA as part of the current compiled statutes. The presence of these comments, which were not edited to reflect differences between the UCA and the NMCA, may be quite misleading. The most significant changes are listed below. The items discussed do not include minor changes in terminology, which are covered in the compiler's notes included in the published statutes.

### A. *Applicability*<sup>102</sup>

In addition to establishing the effective date of the NMCA, this section was changed from the UCA in an effort to validate provisions of declarations filed under the old act.<sup>103</sup> An old act declaration which purports to authorize the developer to add additional units to the condominium (a procedure not specifically authorized by the old act, but authorized by the NMCA<sup>104</sup>) would be retroactively validated, so long as the draftsman of the declaration attempted to reserve the right to add additional units in the manner provided in the NMCA. The UCA contains other provisions which would retroactively apply parts of the UCA to old act condominiums. These provisions were omitted from the NMCA because some of them were deemed adequately dealt with by the old act and, therefore, unnecessary.

### B. *Definitions*<sup>105</sup>

Subsections R and S of section 47-7A-3,<sup>106</sup> dealing with mobile homes, were added because it was the specific intention of the legislature to allow mobile home parks to be subjected to the condominium form of ownership. A recent Illinois case<sup>107</sup> had cast some doubt on the ability to do this. Although the Illinois statute involved in that case was considerably

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102. N.M. Stat. Ann. § 47-7A-2 (Repl. Pamp. 1982).

103. *See id.*

104. *See id.* §§ 47-7A-3(k), 47-7B-10; N.M. Stat. Ann. § 47-7B-5 (Supp. 1983).

105. *See* N.M. Stat. Ann. § 47-7A-3 (Repl. Pamp. 1982).

106. *Id.* § 47-7A-3(R),(S).

107. *State ex rel. County of LaSalle v. Grundy County Nat'l Bank*, 97 Ill. App. 3d 101, 422 N.E.2d 648 (1981).

different from the UCA,<sup>108</sup> the legislature saw fit to include this specific authorization. The NMCA would allow a mobile home park condominium in any event, without these definitions.

### C. Taxation<sup>109</sup>

This section was lifted intact from the old act,<sup>110</sup> with changes in nomenclature appropriate to the NMCA. The question of how condominium property should be taxed for ad valorem purposes was felt by the legislature to have been adequately dealt with in the older statute.

### D. Unconscionable Agreement or Term of Contract<sup>111</sup>

A provision of the UCA which treats a difference in the price of one unit from the price of similar units in the market as an unconscionable term was eliminated. The legislators believed that the provision was at odds with New Mexico's philosophy and that ascertaining prices of "similar units" would be extremely difficult in New Mexico. Developments in this state have not historically followed a pattern from which "similarity" may be readily inferred. Projects in New Mexico have been relatively small, with many individual design and amenity elements, rather than large and substantially aimed at a mass market, which is more frequently the case in more populous states.

### E. Creation of Condominium<sup>112</sup>

Unlike the old act, the NMCA requires that all structural components and mechanical systems of all buildings which contain units be substantially complete before the declaration may be filed. This state of completion must be certified before the declaration may be recorded. The UCA allows architects, engineers, and surveyors to perform this certification function.<sup>113</sup> The NMCA eliminates surveyors from this provision, as it was believed that they are not professionally trained to opine on the state of completion of buildings. Inspection authorities were added, as they are so trained. The declarant also was added, as New Mexico has historically had many small developments in which architects and engineers have not been involved, and it is not always possible to obtain the signature of a public official on a certificate which is outside the regular scope of his duties. Thus, the NMCA gives the declarant a choice of

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108. Compare Ill. Ann. Stat. ch. 30, § 302 (Smith-Hurd 1969 and Cum. Pocket Part 1984-85) with N.M. Stat. Ann. § 47-7A-3(R),(S) (Repl. Pamp. 1982).

109. See N.M. Stat. Ann. § 47-7A-5 (Supp. 1983).

110. See N.M. Stat. Ann. § 47-7-23 (Repl. Pamp. 1982).

111. See *id.* § 47-7A-12.

112. See *id.* § 47-7B-1.

113. UCA § 2-109(9).

certifying completion himself or of obtaining certification of completion from any of a number of other sources. The declarant will be subject to penalties for misrepresentation, however, if he wrongly certifies completion. The NMCA eliminates the requirement of a certificate of completion in the case of condominiums which are restricted to nonresidential use.

#### *F. Unit Boundaries*<sup>114</sup>

The provisions of section 2-102(4) of the UCA are included in subsections (D) and (E) of section 47-7B-2 without material change. However, the dividing of these provisions into two subsections necessitated a 1983 amendment to section 47-7B-8 to correct a cross-reference.<sup>115</sup>

#### *G. Leasehold Condominiums*<sup>116</sup>

A provision of the UCA which requires a lessor under a lease being submitted to the condominium form of ownership to execute the declaration<sup>117</sup> was omitted from the NMCA. Testimony during committee hearings indicated that lessors under long-term leases who were dissatisfied with the terms of the leases they had negotiated were refusing to cooperate with lessees who wanted to create leasehold condominiums, unless the lessees agreed to renegotiate their leases. Termination of the requirement of the lessor's consent was meant to eliminate this problem.

#### *H. Plats and Plans*<sup>118</sup>

This section requires plats to be signed by surveyors, and plans to be certified by surveyors, architects, or engineers. Under New Mexico licensing laws, only surveyors are allowed to certify plats.<sup>119</sup>

#### *I. Lien for Assessments*<sup>120</sup>

The UCA provides that the lien for assessments would have a priority superior to the lien of mortgages recorded prior to the due dates of unpaid assessments, to the extent of six months assessments. At the time the legislature was considering this matter in early 1982, the Federal National Mortgage Association (FNMA) was taking the position that mortgages on units created under the UCA provision were not eligible for purchase by FNMA. The legislators concluded that the availability of FNMA financing to unit purchasers in New Mexico was more important than the

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114. See N.M. Stat. Ann. § 47-7B-2 (Repl. Pamp. 1982).

115. See N.M. Stat. Ann. § 47-7B-8 (Supp. 1983).

116. See N.M. Stat. Ann. § 47-7B-6 (Repl. Pamp. 1982).

117. See UCA § 2-106.

118. See N.M. Stat. Ann. § 47-7B-9 (Repl. Pamp. 1982).

119. N.M. Stat. Ann. § 61-23-6(G) (Repl. Pamp. 1981).

120. See N.M. Stat. Ann. § 47-7C-16 (Supp. 1983).



limited protection afforded to the association by the UCA; they, therefore, omitted the provision.

### *J. Other Liens Affecting the Condominium*<sup>121</sup>

The UCA does not attempt to deal with all the different approaches to liens which are inherent in the laws of the fifty states. Therefore, subsection (D) of section 47-7C-17 is in addition to the provisions of the UCA. It is taken from the old act in its entirety, with appropriate changes in terminology.

### *K. Liability for Disclosure Statement Requirements*<sup>122</sup>

The wording of section 47-7D-2 was changed from that of the UCA to clarify that responsibility for misrepresentations and misleading statements in the disclosure statement is not chargeable personally to an employee or attorney who prepares the disclosure statement for a declarant. This change also absolves the declarant of responsibility in the event he transfers the responsibility for preparation to a successor declarant or to a real estate broker.

### *L. Disclosure Statement; General Provisions*<sup>123</sup>

A number of detail changes were made in the requirements of the disclosure statement provisions. Most notable of these changes is that the declarant must provide a brief narrative description of contracts which may be cancelled by the association rather than copies of the contracts. Historically, this practice has not been an area of consumer abuse in New Mexico, as it has in other parts of the country, and it was deemed adequate to provide a description rather than the contracts themselves.

Section 47-7D-3(A)(11)(b) provides that the remedy for failure to deliver a disclosure statement to a unit purchaser before closing is rescission and that the purchaser may rescind at any time within six months of the date of conveyance. The UCA provided for damages to the purchaser in the amount of ten percent of the unit purchase price, but no rescission. The change conforms the remedy in the NMCA to that provided by the New Mexico Subdivision Act<sup>124</sup> under similar circumstances. Changes were also made in section 47-7D-8 to affect the same conformity.

### *M. Time-Shares*<sup>125</sup>

The legislature added the language found in subsection A of section 47-7D-5. The subsection now requires the declarant to disclose whether

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121. See *id.* § 47-7C-17.

122. See N.M. Stat. Ann. § 47-7D-2 (Repl. Pamph. 1982).

123. See *id.* § 47-7D-3.

124. See *id.* §§ 47-6-1 to -29.

125. See *id.* § 47-7D-5.

any contemplated time-sharing arrangement will be a "right to use" or a "fee" arrangement.<sup>126</sup>

#### *N. Condominiums Containing Conversion Buildings*<sup>127</sup>

The NMCA makes the report described in subsection A(1) of section 47-7D-6<sup>128</sup> applicable only to buildings containing more than fifteen residential units. The UCA requires the report in all cases of residential units. The smaller buildings in this part of the country which are subject to conversion traditionally are not heated and cooled by central systems, as they are elsewhere.

#### *O. Resales of Units*<sup>129</sup>

The UCA requires delivery of a resale certificate before the execution of any contract for sale of a unit by an owner. The NMCA requires delivery prior to conveyance. Most condominiums in New Mexico are relatively small and operate without professional management. The burden of preparing resale certificates when no agreement for the sale of a unit had been executed was deemed unacceptable.

The NMCA requires the resale certificate to disclose the existence and terms of any right of first refusal or other restraint on free alienability of a unit.<sup>130</sup> The UCA requires the resale certificate to disclose the "effect on the proposed disposition" of these items.<sup>131</sup> The UCA was deemed to require a legal analysis of restrictive provisions, and it was decided that the cost of such an analysis was properly borne by the unit purchaser, rather than the association.

#### *P. Conversion Buildings*<sup>132</sup>

The NMCA reduces from one hundred twenty days to sixty days the period during which the tenants of units in a conversion building have a preferential right of purchase. It also removes the prohibition against the giving of more favorable "terms" to non-tenants, it being determined that, while the price of a unit may be easily determined, the favorableness of "terms" is so dependent upon the financial situation and subjective perception of the buyer that it should not be included.

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126. In a fee time-share, the buyer receives an interest in the real estate which is part of the project being time-shared. In a right to use time-share, the buyer does not receive an ownership interest in any part of the real estate; these arrangements usually take the form of leases, licenses, or club memberships.

127. See N.M. Stat. Ann. § 47-7D-6 (Repl. Pamp. 1982).

128. The report must describe the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building. *Id.* § 47-7D-6(A)(1).

129. See *id.* § 47-7D-9.

130. *Id.* § 47-7D-9(A)(1).

131. UCA § 4-109(a)(1).

132. See N.M. Stat. Ann. § 47-7D-12 (Repl. Pamp. 1982).

### *Q. Warranties*<sup>133</sup>

The UCA contains many specific provisions on warranties to be provided by the declarant. The NMCA did not adopt these provisions. The laws of New Mexico, at the time the NMCA was adopted, did not require developers of property which was not to be held under the condominium form of ownership to provide any warranty; the legislators, therefore, decided not to require warranties of condominium developers either.

### *R. Effect of Violations on Rights of Action; Attorney's Fees*<sup>134</sup>

UCA language authorizing the awarding of punitive damages in cases of willful failure to comply with the statute was not included in the NMCA. It was deemed unnecessary to include this language, as the courts of this state freely award punitive damages in situations where they find such awards appropriate.

## VII. CONCLUSION

The NMCA has been in effect for almost three years. Experience during this time allows several conclusions to be drawn about the NMCA. First, it is considerably more flexible than the old act. Projects have been created under the NMCA which could not have been done under the old act because of the rigid structure which the old act imposed. Projects combining both residential and commercial uses have appeared. Developers have undertaken larger projects, made possible by the NMCA's feature allowing development rights to be reserved for exercise over a period of time. Title insurers are more willing to insure the titles of unit owners because the NMCA is much more specific about what must be done to create a condominium, thus bringing greater certainty to the underwriter when the documents are examined. The requirement that the declarant provide a disclosure statement initially led to considerable grumbling among the development community and the practicing bar, but generally has been well accepted once the nature of the statement was understood. The requirement that buildings containing units be substantially complete before the declaration may be recorded and units sold, in addition, has proved to be a most effective safeguard against under-capitalized and unscrupulous developers.

Other provisions of the NMCA hold promise for the future, but several more years of experience must be gathered before an assessment may be

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133. See *id.* §47-7D-13 to -16; see also *id.* §47-7A-1 and accompanying compiler's notes (explaining that the warranty sections of the UCA were not adopted in New Mexico).

134. See *id.* §47-7D-17.

made. For example, the effectiveness of the disclosure statement as a device for protecting consumers is, at this time, unknown. In addition, the sections which govern termination of the condominium and eminent domain have not been employed, to the knowledge of the authors; it is expected, however, that the owners of the units created under the NMCA will have a much smoother time dealing with these matters than will the owners of old act units. Finally, while not yet judicially tested, the detailed procedures which the NMCA sets forth for the governance of a unit owners' association should be of help to officers and directors of the association, many of whom have no background in performing their duties.

The NMCA is an effective and flexible tool for the development and operation of housing projects which meet the needs of a society in which commonly held land and the sharing of maintenance and other costs are increasingly attractive. It should continue to be effective in the future as housing needs and financing opportunities change.