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Uniform Condominium Act in Missouri, The

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THE UNIFORM CONDOMINIUM ACT IN MISSOURI

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I. INTRODUCTION

All fifty states have some type of condominium enabling statute, usually modeled after the 1962 FHA "Model Act."¹ The condominium form of ownership is possible without a statutory scheme; however, "First Generation" condominium legislation was designed and enacted in many states to standardize and simplify these developments while encouraging their financing and insurability. Missouri's Condominium Property Act,² like most first generation legislation, allowed the creation of condominiums and addressed a limited number of issues (*e.g.*, insurance and assessments). These early attempts at condominium legislation did not spell out purchaser's rights, however, and as the condominium increased in popularity, many states sought to develop legislation adequate to deal with this growing industry. First generation legislation was markedly different from state to state, making it hard for national lenders and mobile consumers to confidently assess their relative rights and obligations. First generation legislation almost totally lacked consumer protection as well as developer flexibility in management and use of the condominium. Actual and potential consequences of voluntary or involuntary termination of a condominium were not adequately addressed by first generation legislation. A "Second Generation" of condominium legislation, led by the Uniform Condominium Act (UCA),³ has developed. The Uniform Act was enacted in 1977⁴

1. G. NELSON & D. WHITMAN, *CASES & MATERIALS ON REAL ESTATE FINANCE AND DEVELOPMENT* 777-806 (1976).

2. MO. REV. STAT. § 448.101 to .220 (1978 & Supp. 1984).

3. UNIF. CONDOMINIUM ACT, 7 U.L.A. 101 (1977).

4. The 1977 version of the Uniform Condominium Act has been adopted in

and amended in 1980.⁵ The Missouri Uniform Condominium Act (Act)⁶ adopts the 1980 Uniform Act with some modification; it became law on September 28, 1983. The Act responds to an increased need for consumer protection, education, flexibility, and continuity of rights and obligations. The Act is a comprehensive, modern attempt at legislation in this popular form of community ownership.

II. OVERVIEW, ORGANIZATION AND APPLICATION OF THE ACT

The Act goes beyond the Predecessor's primary concern with the creation of a condominium; it defines the rights and obligations of developers and purchasers of condominiums. The Uniform Condominium Act is divided into four articles, with titled sections. The Act maintains the Uniform Act numbering system but discards the subsection and article headings.⁷ The Predecessor statute is not repealed by the Act. In certain limited situations, condominiums created under the Predecessor will still be governed by it. Basically, the Act applies to *all* condominiums created in Missouri after September 28, 1983.⁸ The original sale certificate provisions apply to *any* sale contract executed in Missouri.⁹ Sections 448.1-103, 1-105, 1-107, 2-103, 2-104, subsections 1-6, and 11-16 of subsection 1 of 3-102, 3-111, 3-115, 3-116, 4-105 and 4-113 apply to all condominiums created in the state before or after the effective date of the Act; these sections only apply to events and circumstances that occur *after* the Act's effective date. They do not invalidate any existing provisions of declarations, by-laws, or plats recorded under the Predecessor.¹⁰ The Predecessor applies to condominiums created before September 28, 1983; however, it cannot invalidate an amendment permitted by the new Act.¹¹

Minnesota, MINN. STAT. ANN. §§ 515A.1-101 to 515A.4-117 (West Supp. 1984); Pennsylvania, 68 PA. CONS. STAT. ANN. §§ 3101-3144 (Purdon Supp. 1984); and West Virginia, W. VA. CODE §§ 36B-1-101 to 36B-4-115 (Supp. 1984).

5. UNIF. CONDOMINIUM ACT, 7 U.L.A. 114 (Supp. 1984). The 1980 version of the Uniform Condominium Act has been adopted in Maine, ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (Supp. 1984); New Mexico, N.M. STAT. ANN. §§ 47-7A-1 to 47-7D-20 (1982); Missouri, MO. REV. STAT. §§ 448.1-101 to 448.4-120 (Supp. 1983); and Rhode Island, R.I. GEN. LAWS §§ 34-36.1-1-1.01 to 34.36.1-4.20 (Supp. 1983).

6. MO. REV. STAT. §§ 448.1-101-.4-120 (Supp. 1984).

7. Sections 448.1-101-.1-114 contain definitions and general matters. Sections 448.3-101-.3-119 detail the administration and continuing duties of the unit owners' association. Sections 448.4-101 to .4-120 are the acclaimed consumer protection sections.

8. MO. REV. STAT. § 448.1-102.1 (Supp. 1984).

9. It is unlikely that the drafters intended this provision to apply to condominiums created before September 28, 1983.

10. MO. REV. STAT. §§ 448.1-103, 1-105, 1-107, 2-103, 2-104, 3-102.1.1-6, 3.102.1-11-16, 3-111, 3-115, 3-116, 4-105, 4-113 (Supp. 1984).

11. MO. REV. STAT. § 448.1-102.2 (Supp. 1984).

III. GENERAL PROVISIONS OF THE ACT

Under the Act, broad meanings are given to the terms "unit" and "common element." Common elements are defined as all portions of the property except the units.¹² They are used by all owners and owned in an undivided interest by all owners. The Act's definition of "unit" contemplates developments with no horizontal boundaries, unlike most residential condominiums.¹³ Many first generation statutes would not allow condominiums in which non-contiguous parcels of real estate formed the "units."

Variations in the Act's requirements are generally allowed only where expressly provided.¹⁴ It would be incongruous to allow parties to defeat or frustrate the Act's goals of uniformity, simplicity, and clarity.¹⁵ For example, a declarant is unable to avoid any obligation by obtaining powers of attorney from unit owners.¹⁶ While notions of freedom of contract necessitate some allowance for variation by agreement, parties may not vary their respective obligations of good faith in the performance and enforcement of all agreements and duties¹⁷ or enter into unconscionable agreements.¹⁸

The Predecessor's failure to define "condominium" adds to the common misunderstanding that condominiums are a type of building rather than a system of real estate ownership.¹⁹ It is the form of ownership, not the physical structure of a development, which brings a condominium within the Act.²⁰ Recognizing the "three-dimensional" aspects of many condominiums, the term "real estate" is broadly defined under the Act.²¹ The Act recognizes a leasehold as a real estate interest.²² Unlike the rather unsophisticated definition of "property" in the Predecessor,²³ the Act's definition of real estate is suffi-

12. Examples of "common elements" are support structures, hallways, stairs, parking lots, and swimming pools.

13. "Units" are owned space; they may be residential, industrial, or undeveloped. MO. REV. STAT. §§ 448.1-103(29), 448.010(10), 448.2-102 (Supp. 1984).

14. *Id.* § 448.1-104. Many sections do allow variation. *See, e.g.*, UNIF. CONDOMINIUM ACT § 1-104 comment 3, 7 U.L.A. 229-30 (Supp. 1984).

15. UNIF. CONDOMINIUM ACT § 1-104 comment 1, 7 U.L.A. 228 (Supp. 1984).

16. MO. REV. STAT. § 448.1-112(1) (Supp. 1984).

17. *Id.* § 448.1-113; UNIF. CONDOMINIUM ACT § 1-104, 7 U.L.A. 228 (Supp. 1984).

18. MO. REV. STAT. § 448.1-112 (Supp. 1984).

19. *Cf. id.* § 448.1-103(7) (The Act defines condominiums as "real estate").

20. *Id.* § 448.1-103(25). The upper and lower boundaries must be precisely defined because high-rise condominium units are interstratified, unlike a two-dimensional notion of real estate ownership in which the property extends upward infinitely and downward to a point at the center of the earth.

21. Real estate is defined as "any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law pass with a conveyance of land though not described in the contract or instrument of conveyance." *Id.*

22. *Id.*; *see id.* §§ 448.1-105, 2-106 (requirement that leases shall be recorded; controls on the rights of parties affected by leasehold condominiums).

23. *Id.* § 448.010 (8).

ciently broad to include even some personal property.²⁴ This should increase the availability of the condominium form of ownership in existing and contemplated developments.

IV. EMINENT DOMAIN PROBLEMS

A state's exercise of eminent domain power raises unique problems for condominiums. Under the Predecessor, the board of managers was given the power to negotiate, execute, and deliver an appropriate conveyance in return for the agreed upon consideration.²⁵ This consideration was then allocated to common elements or the owners in proportion to their respective interests.²⁶ While the Act makes no attempt to supplant applicable state law, it does attempt to examine the consequences of eminent domain in the condominium context.²⁷ The Act requires full compensation for an owner whose unit is rendered practically useless by the condemnation.²⁸ After the taking, reallocation of allocated interests of all units is necessary.²⁹ Although the declaration may expressly vary the formula used, the Act provides an objective method to measure the extent of the allocated interests that must be reallocated when part of a unit is taken.³⁰ Since an ownership "interest" in a condominium includes an undivided interest in common elements, the full value (unit value plus common element value) of an owner's interest must be given him regardless of whether the taking involved an acquisition of the common elements.³¹

A mortgage holder is not entitled to a portion of the divided award, and there is a presumption that the proceedings and decree will adequately protect the mortgagee.³² The effect of an acquisition of an entire unit is an unanswered issue.³³

Consistent with the avowed goal of uniformity, the Act prohibits local zoning, subdivision, or real estate usage laws to the extent that they discriminate against condominium ownership.³⁴ This preemption of local law is one of the major teeth in the Act. A community may continue to establish ordinances regulating condominiums; however, no special requirements may be arbitrarily imposed on the condominium that are not required for another physically

24. *Id.* § 448.1-103(25).

25. *Id.* § 448.195.

26. *Id.*

27. UNIF. CONDOMINIUM ACT § 1-107 comment 1, 7 U.L.A. 232 (Supp. 1984).

28. MO. REV. STAT. § 448.1-107(1) (Supp. 1984).

29. *Id.*

30. *Id.* § 448.1-107(2).

31. *Id.* § 448.1-107(1).

32. *Id.* § 448.2-119.

33. The answer will undoubtedly be revealed in subsequent case law, but UNIF. CONDOMINIUM ACT § 1.107 comment 3, 7 U.L.A. 233 (Supp. 1984) suggests that the government could assert membership in the owners' association or that the unit might have to be excluded from the condominium.

34. MO. REV. STAT. § 448.1-106 (Supp. 1984).

identical building.³⁵ The Act seeks to prevent patchwork local prohibitions and regulations that burdened condominium developers but facilitated other physically similar projects.³⁶

The Act is analogous to the Uniform Commercial Code in that general provisions of law supplement the Act.³⁷ Absent specific abrogation, the Act retains relevant Missouri common law.³⁸ The owners' association may be unincorporated without violating the rule against perpetuities.³⁹

The Act should be construed and applied to effectuate its general purposes—simplification, clarification, modernization, and protection of the consumer, purchaser, and borrower.⁴⁰ The text of each section should be so read, and remedies should be liberally construed.⁴¹

V. CREATION, ALTERATION AND TERMINATION OF A CONDOMINIUM

A condominium may be created under the Predecessor or the Act *only* by recording a declaration in a manner similar to that of a real estate deed.⁴² The declaration must be recorded in every recording district where any part of the condominium will exist⁴³ and filed in the name of the owners' association and every declarant.⁴⁴ No recording or declaration is recognized by the Act until

35. *Id.*

36. Cohen, Goldberg, & Mulvaney, *Condominium Law: A Comparison of the Uniform Act with the Illinois Act*, 14 J. MAR. 387, 398 (1981) asserts that a Minnesota provision that *allows* local preemption virtually defeats the major Uniform Condominium Act purpose of uniformity.

37. See UNIF. CONDOMINIUM ACT § 1-108, 7 U.L.A. 234 (Supp. 1984).

38. MO. REV. STAT. § 448.1-108 (Supp. 1984).

39. *Id.* §§ 448.2-103(2), 448.3-101 (authorizing ownership by corporations or unincorporated associations).

40. *Id.* § 448.1-110; UNIF. CONDOMINIUM ACT § 1-110, 7 U.L.A. 234 (Supp. 1984).

41. *Id.* § 448.1-114 (Supp. 1984).

42. *Id.* §§ 448.020, 448.2-120 (Supp. 1984).

43. *Id.* § 448.2-101.1. There is no "condominium" until actual recording of the document which creates the condominium, even though other documents which divide the real estate into units and common elements might be recorded before the declaration.

44. The Act uses declarant in two ways. A "declarant" is any person or group of persons who act as part of a common promotional plan to offer to dispose of his or her interest in a unit which is not previously disposed of by any other means. *Id.* § 448.1-103(9). Anyone who reserves or succeeds to special declarant rights is also a statutory declarant. Declarant status establishes many obligations under the Uniform Act which cannot be avoided by a successor and must be carried out by any transferee exercising special declarant rights. If the original declarant (developer) transfers his interest voluntarily or involuntarily prior to the completion of the entire development, the purchaser remains certain that someone will be obligated to fulfill declarant promises. A pre-existing lienholder or ground lessor is not a statutory declarant; however, declarant status might arise by a succession to declarant rights. A person who resells can never become a statutory declarant. Any person who controls, is controlled by, or under common control with a declarant is an "affiliate" of a declarant. Requisite

all structural components and mechanical systems of all buildings are substantially complete.⁴⁵ A "certificate of completion" must evidence the requisite level of completion.⁴⁶ A developer may substantially complete a building and begin to sell units despite the reservation of development rights to expand in the future.⁴⁷ Exercise of development rights would not affect the integrity of the condominium originally created.⁴⁸

The requirement of "significant construction" reduces the chance that a failure to complete the project will damage expectations or interests of an owner/purchaser.⁴⁹ Significant construction is a pre-condition to assigning interests in common elements, establishing voting rights, and conveying a unit.⁵⁰ This type of protection was wholly lacking under the Predecessor since the declaration could be recorded whenever the owner decided to submit the property to condominium ownership,⁵¹ and units could then be conveyed.⁵² The substantial completion requirement should increase phased developments in which the size of the initial phase is likely to be a function of economics.⁵³

The contents of the declaration are regulated by statute. The Predecessor and the Act require the declaration to provide a legal description of the included real estate as well as unit boundaries of each unit so created.⁵⁴ An

"control" does not exist if the powers are held solely as security for an obligation and are not exercised.

Objective standards are used to determine "affiliate" status. Determination of "affiliate" status will simplify a court's task in assessing relative rights, responsibilities, and obligations in a unit owner's suit against a declarant or his successor transferees. The Predecessor is silent on the effect of developer transfer *vis-a-vis* rights and obligations of the unit owner. The Act fixes a declarant's responsibility at the time a sale is made and prevents him or his successor transferees from avoiding obligations of the previous purchaser. *See* MO. REV. STAT. §§ 448.1-103(1), (9), (27), (Supp. 1984).

45. *Id.* § 448.2-101.2. The terms "substantial completion" and "structural components" are well understood in the construction industry, and do not suggest that all buildings in which all possible units will be built must be completed prior to sale. *See* UNIF. CONDOMINIUM ACT § 2-101(b) comment 6, 7 U.L.A. 237 (Supp 1984).

46. MO. REV. STAT. § 448.2-101.2 (Supp. 1984).

47. *See* UNIF. CONDOMINIUM ACT § 2-101(b) comment 9, 7 U.L.A. 243 (Supp. 1984); MO. REV. STAT. § 448.2-105.1(8) (Supp. 1984).

48. UNIF. CONDOMINIUM ACT § 2-101(b) comment 9, 7 U.L.A. 238 (Supp. 1984) (a condominium may be created prior to the construction of anything; the units to be sold might be unimproved lots).

49. Substantial completion of structural components solves a problem that arose under the Predecessor, where a condominium's existence began regardless of whether units were completed or even begun. Under these circumstances, obligations to complete construction would be difficult to enforce, liens against the insolvent developer would be enforceable against mere airspace, and association votes would be assigned to unbuilt units.

50. MO. REV. STAT. § 448.2-101 (Supp. 1984).

51. *Id.* § 448.020 (1978).

52. *Id.* § 448.050.

53. *See* UNIF. CONDOMINIUM ACT § 2-101 comment 10, 7 U.L.A. 238 (Supp. 1984).

54. MO. REV. STAT. § 448.2-105(5) (Supp. 1984). The requirement that only

examination of the declaration requirements under the Act demonstrates the role of the declaration as a legal document compared to the original sale certificate's use as a disclosure device.⁵⁵

The declaration must contain the declarant's determination of the maximum number of units he reserves the right to build.⁵⁶ The Act requires the declarant to relinquish control of the owners' association when seventy-five percent of the reserved units are sold or two years after no units are sold rather than at the expiration of any specific time period.⁵⁷ An attempt by the declarant to inflate or exaggerate the maximum number of reserved units in order to prolong control is unlikely. Such exaggeration could hinder sales or cause a negative reaction. The expiration of the two-year "dormancy period" requires the declarant to relinquish control of the association to the owners.⁵⁸

Any developer flexibility must be reserved in the declaration.⁵⁹ The declaration must specifically reserve and describe development or declarant rights,⁶⁰ describe applicable real estate, and provide time limitations on the exercise of such rights. Omission of any required information in the declaration will result in a failure to create the corresponding right the declarant may seek to assert.⁶¹ Analyzing the statutory section controlling the contents⁶² against the

units "created by the declaration" must be described recognizes the flexibility of a project. Until new units are added by amendment they need not be described. *Id.* § 448.030 (1978).

55. *Cf. id.* § 448.4-103 (Supp 1984) (narrative descriptions in the original sale certificate).

56. *Id.* § 448.2-105(4) (helps determine when the transfer of owners' association control from declarant to unit owners must occur).

57. *See* MO. REV. STAT. § 448.3-103(4) (Supp. 1984).

58. *Id.*

59. *Id.* § 448.2-105(5). This flexibility entails reserved development rights which allow withdrawal (removal of a portion of the condominium's physical assets without terminating the condominium) or conversion of real estate or the subsequent addition of real estate. "Convertible" real estate is the dedication of previously unused real estate to common elements or the conversion of common elements into units. Cohen, Goldberg & Mulvaney, *Condominium Law: A Comparison of the Uniform Act with the Illinois Act*, 14 J. MAR. 387, 391-92 (1981). The relative ease with which the Act allows a declarant to exercise these development rights was the *quid pro quo*. Thomas, *The New Uniform Condominium Act*, 64 A.B.A. J. 1370, 1372 (1978). Addition and withdrawal of real estate was permitted by the Predecessor; however, exercise of such a right required owner unanimity and contiguous parcels of real estate. MO. REV. STAT. § 448.030.2 (1978).

60. MO. REV. STAT. § 448.1-103(27) (Supp. 1984). "Special Declarant Rights" are unique rights reserved to the declarant which are not shared with the unit owners. The Act lists virtually every significant right which a declarant might seek in the course of creating or expanding a condominium. *See* UNIF. CONDOMINIUM ACT § 1-103 comment 13, 7 U.L.A. 228 (Supp. 1984). Possession of these rights renders the holder a declarant. *See* MO. REV. STAT. § 448.3-104 (Supp. 1984) (addresses transfer of special declarant rights). The Act's flexibility arises out of the ability of the declarant to reserve and exercise "development rights." *See* MO. REV. STAT. § 448.2-110 (Supp. 1984).

61. MO. REV. STAT. § 448.2-105(8) (Supp. 1984) (there is no prescribed maxi-

statutory requirements for creation of the declaration⁶³ indicates that if the required information is not contained within the declaration, the instrument is not a declaration and no condominium should be created by recording the deficient instrument.

The new Act removes the Predecessor's prohibition against the leasehold condominium.⁶⁴ A leasehold condominium is a development in a building or on land that is leased by the developer from the owner.⁶⁵ In a commercial development or densely populated area where title to real estate is difficult to obtain, the advantages of the leasehold condominium are fairly obvious.⁶⁶ As evidence of the lessor's consent to condominium ownership, the lessor is required to sign the declaration.⁶⁷ The declaration must detail any rights of the unit owners to redeem the reversion.⁶⁸

The drafters of the Act recognized the problems created by the failure of the lessee to make rent payments or fulfill other covenants.⁶⁹ Unit owners are protected from delinquent lessees because any unit owner who pays his share of the rent on the underlying lease may not be deprived of the enjoyment of his unit.⁷⁰ Regardless of his status as lessee or sublessee, all obligations are fractionalized in order to insulate the unit owner from default by fellow owners.⁷¹

An essential premise of the Act is that declarants should have the freedom to shape the characteristics of their particular project to meet specific market needs.⁷² Due to the inherent sharing of responsibilities and enjoyment in a condominium, allocation of common rights and obligations is of the utmost importance to the future operation of the condominium and welfare of future unit owners.⁷³ This allocation affects an owner's interest in common elements, association votes and applicable assessment for common area ex-

num time limit on said exercise).

62. *Id.* § 448.2-105.

63. *Id.* § 448.2-101.

64. *See Id.* § 448.020 (1978) (fee simple); *cf. Id.* § 448.2-103(25) (expressly recognizing condominium ownership by leasehold).

65. *See UNIF. CONDOMINIUM ACT* § 1-103(15) comment 10, 7 U.L.A. 227 (Supp. 1984).

66. Downtown urban areas, where title to real estate is difficult to obtain, or resorts built on government leased land (such as most ski areas) are examples of where leasehold condominiums are advantageous.

67. MO. REV. STAT. § 448.2-106(1) (Supp. 1984).

68. *Id.* § 448.2-106(4).

69. *See UNIF. CONDOMINIUM ACT* § 2-106 comment 4, 7 U.L.A. 245 (Supp. 1984).

70. MO. REV. STAT. § 448.2-106.2 (Supp. 1984).

71. *Id.* (should the association default on the common lease, the unit owner who pays his proportionate share of the liability cannot be deprived of enjoyment of his interests).

72. Judy & Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP., PROB. & TR. J. 437, 440 (1978).

73. *Id.*

penses. The Predecessor allocated *any* interest of a unit owner on a single, common basis tied to the initial value of the unit in relation to the property's value as a whole.⁷⁴ The allocation remained constant unless changed by a unanimous vote of the unit owners.⁷⁵ The myriad of uses for condominiums suggests that a simplistic tying of bases of allocation creates artificial legal barriers that prevent maximum utility and benefit to unit owners.

The Act represents a radical change from first generation allocation. Each allocation may be made on a different and unrelated basis, without regard to value.⁷⁶ Any formula may be used to determine the allocation if it is expressed in the declaration. The allocations may be based on equal division, pro rata per size, or any other basis or combination which the declarant may choose. The basis chosen, however, may not discriminate in favor of the declarant.⁷⁷

If size is the basis for allocating common expenses, then area or volume must be indicated as the relevant measurement.⁷⁸ Heated or unheated areas might be included or excluded by such an allocation. Although value-based allocations are generally based on dollar valuations, the Act would allow allocations to be based on "weighted" values which recognize proximity, view, or location of different units.⁷⁹

In modern mixed-use condominiums, or condominiums with limited common elements, it might be desirable to allocate interests and expenses differently among the owners based on the expenses or issues involved. Class voting could be utilized in recognition of specific issues that have disparate effect on members of differing classes.⁸⁰ A declarant may not use class voting to avoid any obligation imposed on him by the Act, nor may declarant-owned units constitute a class.⁸¹

A "limited common element" is a portion of the common elements allocated by the declaration or operation of Missouri Revised Statutes section 448.2-102⁸² for the exclusive use of one or more, but fewer than all, of the

74. MO. REV. STAT. § 448.030.

75. *Id.*

76. *Id.* § 448.2-107.

77. *Id.* § 448.2-107(1).

78. UNIF. CONDOMINIUM ACT § 2-107 comment 2, 7 U.L.A. 246 (Supp. 1984).

79. *See* UNIF. CONDOMINIUM ACT § 2-107 comment 4, 7 U.L.A. 246 (Supp. 1984).

80. MO. REV. STAT. § 448.2-107(3) (Supp. 1984). Owners of townhouse units, in a single project consisting of both townhouse units and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting just the townhouses, but they may not be permitted to vote by class on rules for the use of facilities used by all units. *See* UNIF. CONDOMINIUM ACT § 2-107 comment 9, 7 U.L.A. 247 (Supp. 1984).

81. MO. REV. STAT. § 448.2-107(3) (Supp. 1984).

82. (Supp. 1984) (shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but outside the unit's boundaries).

units.⁸³ Unless otherwise determined, the owners' association would be responsible for the maintenance of a limited common element. The better view allocates the maintenance costs of limited common elements to only those unit owners who benefit from them.⁸⁴ The declaration may be amended to change a previously allocated common element to a limited common element.⁸⁵ The Predecessor allowed neither multiple allocations nor limited common elements. The concept of limited common elements is the natural result of the ability to allocate elements, votes, and expenses on an independent basis.

No portion of a common element may be partitioned without a partition of the unit to which the common element is allocated.⁸⁶ A lien or encumbrance on a common element which is not linked to the unit to which that common element interest is allocated is void.⁸⁷ This is consistent with the condominium concept of individual ownership of a unit with an inseparable, undivided ownership interest in common elements.

Plats and plans are documents used to define the boundaries of a development and detail proposed additions and improvements. Under the Predecessor scheme, a "plat" describing the property subject to the declaration was filed with the declaration.⁸⁸ Under the Act, the plat is similar to the Predecessor plat except that it requires a description of withdrawable real estate, leasehold real estate, identification of non-contiguous parcels, the location and dimensions of limited common elements, and real estate subject to further development rights.⁸⁹ The plan must disclose horizontal and vertical dimensions of each unit.⁹⁰ A new plat/plan must be filed upon any exercise of a development right, addition, or conversion of property.⁹¹ The plat is not intended to be a survey nor is the plan an "as built" plan. The plat and plan are disclosure documents designed to indicate which improvements and buildings a declarant obligates himself to build.⁹²

The flexible condominium concept advanced by the Act is accomplished through the reservation and exercise of "development rights" under Missouri

83. *Id.* §§ 448.1-103(17), 448.2-108.

84. *Id.* § 448.2-108(2).

85. *Id.* § 448.2-108(3) (regardless of whether denoted as limited common element or not, the owners' association may restrict an owner's rights surrounding its use).

86. MO. REV. STAT. 448.2-107(5) (Supp. 1984). *But cf. Id.* § 448.1-107 (eminent domain allows taking of common elements without appurtenant units). Unlike the 1977 Uniform Condominium Act, the Missouri Condominium Property Act and 1980 Uniform Condominium Act prevent voluntary and involuntary partition. Presumably § 448.2-107(5) also includes limited common elements.

87. *Id.* § 448.2-107(5).

88. *Id.* § 448.010(7) (definition of plat); *id.* § 448.030(2) (declaration must contain legal description of plat, which may consist of identifying number or symbol of unit as shown on plat); *id.* § 448.040 (contents of plat and how it is recorded).

89. *Id.* § 448.2-109.

90. *Id.* § 448.2-109.4(2).

91. *Id.* § 448.2-110(1).

92. *Id.* § 448.2-109.3 (contemplated improvements must be labeled "shall be built" or "need not be built.").

Revised Statutes section 448.2-110.⁹³ Prior to exercise of any development right, the declarant must prepare an amendment to the declaration assigning unit numbers to the units created and reallocating interests among the owners as necessary.⁹⁴ Although new development rights may be reserved in real estate added to the condominium pursuant to original development rights, this does not extend the original time limit for the exercise of a development right. The development process occurs within the declarant's self-imposed time limits.⁹⁵

When exercising a development right to subdivide units or convert a previously created unit into additional units or common elements, a reallocation of allocated interests must be made.⁹⁶ Reallocation will depend on whether the unit is subdivided, with or without common elements, or converted wholly into common elements.⁹⁷

Withdrawal of units by the declarant cannot be made after conveyance to a purchaser.⁹⁸ Real estate subject to developer right to withdrawal must be specifically described. Failure to do so forfeits the declarant's right to withdraw *any* real estate after conveyance to one unit purchaser.⁹⁹

Generally, creation and reservation of development rights is closely related to financing. Lender review and control of development rights is common.¹⁰⁰ A lender holding a mortgage on a portion of a condominium cannot, prior to foreclosure, cause the embarrassed portion of the real estate to be withdrawn unless there is a cooperative declarant and no unit owners exist.¹⁰¹ After foreclosure, or transfer by deed in satisfaction of the mortgage, the lender becomes a statutory declarant, an undesirable but unavoidable status.¹⁰² It may be desirable for the lender to require the declarant to execute a withdrawal amendment at the time the loan is made. This will secure the loan without the disadvantages or necessity of foreclosure.¹⁰³

Under Missouri Revised Statutes section 89.300(3),¹⁰⁴ the withdrawal of real estate from a condominium may constitute a sub-division of land.¹⁰⁵ Al-

93. (Supp. 1984).

94. MO. REV. STAT. § 2-110.1 (Supp. 1984).

95. *See supra* note 56 and accompanying text.

96. MO. REV. STAT. § 448.2-110.3 (Supp. 1984).

97. *Id.* § 448.2-110.3(1) (reallocation similar to that under *id.* § 448.1-107); *id.* § 448.2-110.3(2) (reallocation in any manner reasonable).

98. *Id.* § 448.2-110.4(2).

99. *Id.* § 448.2-110.4(1).

100. UNIF. CONDOMINIUM ACT § 2-110 comment 2, 7 U.L.A. 251-52 (Supp. 1984).

101. The cooperation required, of course, is an amendment properly executed by the declarant.

102. *See* MO. REV. STAT. § 448.1-103(1) (Supp. 1984).

103. *Id.* § 448.2-110.

104. (1978).

105. The Missouri statutes offer no exact definition of a subdivision; withdrawal of real estate, however, would seem to fit within the scope of the definitions given.

though the owner of the real estate is generally considered the sub-divider, a declarant under the Act should be considered the "owner" of the withdrawn common elements. The declarant would be considered the "sub-divider" due to his unique interest and control over the real estate, and he would be forced to bear applicable costs.

Most first generation statutes, including the Predecessor, prohibited subdivision of units and common elements.¹⁰⁶ The Act allows the owners' association to create additional smaller units not originally included in the declaration.¹⁰⁷ Unless expressly authorized by the declaration, the owners' association must prepare a subdivision amendment to the declaration, including plat and plans.¹⁰⁸ This presumably protects the expectations of the unit owners and purchasers by requiring compliance with the project's original development plan.¹⁰⁹

Missouri Revised Statutes section 448.2-114¹¹⁰ illustrates the Act's foresight and comprehensiveness *vis-a-vis* the Predecessor. The Act recognizes that actual physical boundaries may differ slightly from recorded plats or plans. Since condominium ownership has both horizontal and vertical boundaries, there are technical encroachments on adjacent property as described in the plat and plan. These encroachments are caused by natural settling, shifting, or lateral movement. Except in cases of willful misconduct, the existing physical boundaries of a unit become its actual boundaries rather than the metes and bounds expressed in recorded documents.¹¹¹

The Act grants the declarant the right to maintain and use portions of a condominium for sales purposes, offices, and management space.¹¹² There are no practical limits on the declarant's right to use model units or common elements; the declarant's ability to maintain such sales aids, however, is preconditioned on adequate notice in the declaration to prospective purchasers or unit owners.¹¹³

The declarant also reserves an easement through the common elements to the extent that an easement is reasonably necessary to discharge any obligations or exercise any special declarant rights.¹¹⁴ This is not an easement for all purposes, and the declarant is obligated to repair and restore the property as required by his use of the easement.¹¹⁵

106. MO. REV. STAT. § 448.050 (Supp. 1984).

107. *Id.* § 448.2-113.

108. *Id.* § 448.2-113.1.

109. UNIF. CONDOMINIUM ACT § 2-113 comment 1, 7 U.L.A. 254 (Supp. 1984).

110. (Supp. 1984).

111. MO. REV. STAT. § 448.2-114 (Supp. 1984). An alternative provision of the Uniform Condominium Act allows an "easement for encroachments." UNIF. CONDOMINIUM ACT § 2-114 [Alternative A], 7 U.L.A. 254 (Supp. 1984).

112. *Id.* § 448.2-115.

113. *Id.*

114. *Id.* § 448.2-116.

115. *See* MO. REV. STAT. § 4-119.2 (Supp. 1984).

The Predecessor allowed for amendment of the owners' association by-laws if the owners unanimously consented.¹¹⁶ Under the Act, the declarant may unilaterally amend the plat and plan¹¹⁷ or reserved development rights.¹¹⁸ The owners' association may amend portions of the declaration, and in certain instances even individual owners are empowered to amend the declaration.¹¹⁹ In all other cases, a two-thirds majority vote of the owners' association is required to amend the declaration.¹²⁰ The declaration may require a larger majority percentage, and in non-residential developments it may specify a smaller percentage.¹²¹ Any increase or creation of special declarant rights by amendment requires unanimous unit owner consent.¹²² Any challenge to the validity of an amendment must be brought within one year.¹²³

Action by the owners' association is likely to affect a lender's security interest. The Act provides protection to a lender by allowing the declaration to require a percentage of the mortgagees to approve association action.¹²⁴ The Act permits ratification of association action by secured parties, but there are some limits to lender control. A lender is prohibited from exercising control over the general administrative affairs of the association. The lender may not exercise control over the association before or during litigation.¹²⁵ The lender may not retain or prohibit the distribution of insurance proceeds prior to the application of the proceeds to rebuilding.¹²⁶ Although Missouri Revised Statutes section 448.2-119¹²⁷ provides some lender protection, the lender is not, and cannot become, a unilaterally appointed receiver or trustee.

Under the Predecessor, unanimous agreement of unit owners was a precondition to removal of property from condominium ownership. A lienholder with a lien on *any* unit could effectively block termination. Liens were transferred to any undivided interest of the unit owner, and all the property was then held by the owners as tenants in common. Common elements were divided, and each owner was given a percent of the undivided interest in the common element corresponding to his ownership interest.¹²⁸

116. *Id.* § 448.030.2 (1978).

117. *Id.* § 448.2-109 (Supp. 1983).

118. *Id.* § 448.2-110.

119. *See, e.g.*, MO. REV. STAT. §§ 448.1-107, .2-106, -108, -112, -113 (Supp. 1984).

120. *Id.* § 448.2-117.1.

121. *Id.*

122. *Id.* § 448.2-117.4; *see id.* § 448.1-104 (declarants cannot obtain powers of attorney in order to circumvent the Act).

123. *Id.* § 448.2-117.2.

124. *Id.* § 448.2-119.

125. *Id.* It is conceivable that the secured party's interests may be adverse to the association's.

126. *See id.* § 448.3-113 (no insurance money may be distributed to the mortgagee until the purposes of the proceeds have been fulfilled).

127. (Supp. 1984).

128. MO. REV. STAT. § 448.160 (Supp. 1984).

Although condominium termination is a rare occurrence, first generation legislation did not adequately address problems caused by termination. Under the Act, only eighty per cent of the owners must agree to termination.¹²⁹ There are provisions for time limitations during which the requisite consent must be gathered, common elements disposed, and the sale or non-sale of the real estate completed.¹³⁰ The Act also prevents a period of limbo between approval and execution, termination, and subsequent sale.¹³¹

After termination, sale proceeds of any real estate are held by the association as trustee for the unit owners and lienholders.¹³² Perfected lien priority is determined according to general commercial law provisions for secured transactions, or other applicable state law.¹³³

Termination cannot be forced upon a condominium by foreclosure or enforcement of a lien or encumbrance against the condominium.¹³⁴ Foreclosure against a non-withdrawable portion of the real estate does not withdraw that portion from the condominium.¹³⁵

VI. MANAGEMENT OF THE CONDOMINIUM

The Predecessor required the condominium's by-laws to control the election of officers in the owners' association and methods of calling owners' meetings.¹³⁶ The Act requires the legal structure of the owners' association to be formed prior to the sale of the first unit.¹³⁷ Early assembly of the owners' association clarifies the relationship between developer and owner, thereby facilitating and encouraging owner involvement during the period of declarant control.¹³⁸ The Predecessor and Act are indifferent to the association's decision to become a for-profit, not-for-profit, incorporated, or unincorporated

129. *Id.* § 448.2-118.1 (Supp. 1984).

130. *Id.* § 448.2-118. Eighty percent is the general requirement. The declaration may require more, but less is permitted in a non-residential development. If a declarant owned eighty percent of the units entitled to vote, he could terminate the condominium despite unanimous owner opposition.

131. *Id.* § 448.2-118.2 (termination occurs only at recording, and within a specified time period to avoid a prolonged period of limbo); *id.* § 448.2-118.6 (upon termination and prior to sale, the owners are tenants in common); *id.* § 448.2-118.4 (in a condominium with vertical boundaries, or any development where interests in the underlying land are viable despite termination, sale of the land cannot be forced on the owners); *id.* § 448.2-118.1 (in a high-risk type condominium, upon termination, the declaration may provide for sale of the units and common elements despite objection).

132. *Id.* § 448.2-118.7.

133. *Id.*

134. *Id.* § 448.2-118.9; *cf. id.* §§ 448.2-118.10 (foreclosure of liens and encumbrances junior and senior to the declaration).

135. *Id.* (foreclosure against a withdrawable portion does not in and of itself withdraw that portion).

136. *Id.* § 448.180.

137. *Id.* § 448.3-101.

138. *See Id.* § 448.3-103.

association.¹³⁹

The declaration may not impose limits on the power of the association to deal with the declarant that are more restrictive than the limits on the association's power to deal with other persons.¹⁴⁰ Under many first generation statutes, courts held associations had insufficient ownership interests for standing to maintain or defend suit in their own name without specific statutory authorization. The Act does specifically grant this power.¹⁴¹ The association may sell or encumber common elements without terminating the condominium only upon a vote of unit owners.¹⁴² Easements, leases, and licenses may be granted unilaterally by the individual unit owner.¹⁴³

An executive board controls the association. Board members appointed by the declarant hold their offices as fiduciaries of the unit owners.¹⁴⁴ This high standard of care is imposed upon the declarant-appointed officers in recognition of the great potential conflict between declarant and owner and the power the board wields over unit owners' property interests.¹⁴⁵ An officer or Board member elected by the unit owners must only exercise ordinary and reasonable care.¹⁴⁶ This minimal standard is designed to encourage unit owner participation in the Board. Unit owners may reject the Board's budget. If the budget is rejected, assessments will continue according to the last approved budget until a new budget is approved.¹⁴⁷

Declarant control of the owners' association may be necessary during early stages of development. Therefore, the Act provides for a period of "declarant-control."¹⁴⁸ Declarant control ceases after: the expiration of sixty days after the sale of seventy-five percent of the reserved units, two years after the declarants have ceased to offer units for sale, or two years after the last exercise of the right to add units. The declarant may bargain away his right to declarant control in exchange for veto power over certain Board activities.¹⁴⁹ This encourages transfer of control from the declarant to the unit owners as early as possible without impinging the declarant's right to reserve ultimate

139. *Id.* § 448.3-101 (an incorporated owners' association has all the powers of a corporation under state law); *see id.* § 448.1-108.

140. *Id.* § 448.3-102.2.

141. *Id.* § 448.3-102.

142. *Id.* § 448.3-102.1(6) (regulates use, maintenance, repair, replacement, and modification of common elements); *id.* § 448.3-102.1(7) (additional improvements); *id.* 448.3-102.1(8) (power to build and convey property).

143. *Id.* § 448.3-102.1(8) (power to hold and transfer property); *id.* § 448.3-102.1(9) (power to grant easements, licenses, and concessions).

144. *Id.* § 448.3-103.1.

145. *See* UNIF. CONDOMINIUM ACT § 3-103 comment 1, 7 U.L.A. 274 (Supp. 1984).

146. MO. REV. STAT. § 448.3-103.1(2) (Supp. 1984).

147. *Id.* § 448.3-103.3.

148. *See id.* § 448.3-103.4 ("control" is the ability to appoint and remove officers of the owners' association).

149. *Id.*

control over any matters deemed particularly important during the declarant control period.¹⁵⁰

The Act, unlike the Predecessor, seeks to balance declarant-owner struggle by encouraging a gradual transfer of control from the declarant to the owners' association.¹⁵¹ This should hasten unit owners participation and increase their experience in association matters. Within sixty days after fifty percent of the units are conveyed to owners other than the declarant, at least one-third of the Board must be owner-elected.¹⁵² Within sixty days after twenty-five percent of the units are conveyed to owners other than the declarant, at least one and not less than one-fourth of the Board members must be elected by the unit owners.¹⁵³ Prior to termination of declarant control, the unit owners must elect a Board with at least three members, a majority of which are unit owners.¹⁵⁴ The Board then elects the officers.¹⁵⁵

Missouri Revised Statutes section 448.3-104¹⁵⁶ is a long and complex examination of respective liabilities incurred or retained in the transfer of Special Declarant Rights. In this unique provision, the Act undertakes a two-part analysis of the extent to which obligations and liabilities of a declarant are retained by the declarant or imposed upon a third party successor in interest pursuant to either voluntary or involuntary transfer of the declarant's interest.¹⁵⁷

Under the Act's general scheme, the original declarant remains liable to all unit owners for all promises, acts, or omissions undertaken during the period of declarant control.¹⁵⁸ When all or a part of a special declarant right is transferred to a non-affiliated successor, the declarant is not liable for the transferee's subsequent acts, omissions, or breaches.¹⁵⁹ A transferee is not liable for the obligations of a non-affiliated declarant-transferor. An affiliated transferee and the declarant-transferor are jointly and severally liable, however, for any previous obligations or new undertakings relating to the condominium.¹⁶⁰ This prevents the declarant from evading obligations through transfer.

Tempering the obvious need to protect unit owners from collusive transfers is the equally important need to protect innocent successors such as mort-

150. Section 448.3-103.4 requires that these actions be recorded.

151. See UNIF. CONDOMINIUM ACT § 3-103 comment 4, 7 U.L.A. 274 (Supp. 1984) (a declarant-unit owner retains his vote as a unit owner).

152. MO. REV. STAT. § 448.3-103.5 (Supp. 1984).

153. *Id.* Many lenders *insist* on purchaser control after seventy-five percent of the units are sold.

154. *Id.*

155. *Id.* § 448.3-103.6.

156. (Supp. 1984).

157. See UNIF. CONDOMINIUM ACT § 3-104 comment 1, 7 U.L.A. 276 (Supp. 1984).

158. MO. REV. STAT. § 448.3-104.2(1) (Supp. 1984).

159. *Id.* § 448.3-104.2(4).

160. *Id.* § 448.3-104.2(2).

gagees. The Act offers a three-prong solution to the problems posed by a successor whose sole interest is protecting debt security.¹⁶¹ Generally, such a successor will only be subject to transferee liability if he requests a transfer of the special declarant rights.¹⁶² Such a successor may declare his intention to hold the rights in order to transfer them to a third party purchaser. A transferee holding the rights but incurring no liability or obligation will not be able to exercise any special declarant rights.¹⁶³

The Act thus allows a foreclosing mortgagee to bid in his debt and obtain the project at the foreclosure sale for the purpose of resale without undertaking the full burden of declarant obligations and liabilities.¹⁶⁴ Whether this will encourage condominium financing remains to be seen, but allowing a foreclosing mortgagee-purchaser to assume association control certainly should not discourage lenders. Finally, a successor-transferee may avoid declarant obligations and liabilities when he retains only the right to "sell out" the remaining units and make no additional improvements.¹⁶⁵

Developer self-dealing and "sweetheart" contracts with affiliates are a major condominium problem which is often difficult for purchasers to discover. These long-term agreements arise during the period of declarant control of the owners' association, ostensibly for the association's benefit.¹⁶⁶ Some contracts and leases executed by the declarant are so critical to the operation of the condominium and full enjoyment of owners' rights that they are voidable by the owners' association upon expiration of declarant control.¹⁶⁷ This option does not apply to leases if voiding the lease would terminate the condominium, unless the declarant's principal purpose in subjecting the leased real estate to condominium ownership was to prevent the termination of the underlying lease.¹⁶⁸

Under first generation statutes, association by-laws were required and generally had to be recorded.¹⁶⁹ The Act foregoes any recording requirement

161. *Id.* § 448.3-104.3.

162. *Id.* § 448.3-104.3 (such successors may be foreclosure, bankruptcy, or trustee sale purchasers). Foreclosure of *all* units without a request of the special declarant rights will terminate those rights. *See id.* § 448.3-104.4.

163. *Id.* § 448.3-104.5(4).

164. Any assumption of declarant rights renders the transferee a declarant. *See id.* § 448.1-103(9).

165. *Cf. Id.* § 448.2-110. If a declarant has the right to convert common elements to units, he has a mortgagable interest even though the unit owners have title to the common elements. If the declarant's mortgagee forecloses, the purchaser can choose to limit his liability by holding the declarant rights only for transfer, or he may go ahead and assume the rights as contemplated by § 448.3-104.3.

166. *Id.* § 448.3-103 (declarant's fiduciary duty).

167. *Id.* § 448.3-105. For example, the declarant may enter into long term leases of recreation facilities during declarant control. A "critical contract" is one that deals with the management or development of the condominium.

168. *Id.* § 448.3-105. Subjective intent is the standard. *See UNIF. CONDOMINIUM ACT* § 3-105 comment 3, 7 U.L.A. 279 (Supp 1984).

169. MO. REV. STAT. § 448.170 (Supp. 1984).

since the declaration is comprehensive and recorded. The by-laws operate merely as a document relating to the internal operation of the owners' association. The only information required in the by-laws concerns procedures and qualifications for Board members, their election and removal, and the ability to execute and certify certain amendments.¹⁷⁰

The Act requires a mere twenty percent quorum.¹⁷¹ This recognizes the inherent difficulty of inducing owners' attendance at association meetings, especially at resort condominiums. Most first generation statutes granted voting rights only to unit owners.¹⁷² A condominium often is owned by investors but occupied by a tenant. The Act recognizes the desirability of allowing lessees the right to vote on routine operation issues that significantly affect them.¹⁷³ This facilitates integration of such tenants into the condominium community.

Any action in tort or contract pursuant to an act or omission of the association must be brought against the association, not against the individual unit owners.¹⁷⁴ A unit owner is not precluded from maintaining an action under the Act solely because he is an owner, officer, or member of the association.¹⁷⁵ Special rules govern the period of declarant control. The association may sue the declarant for any loss, including attorney's fees to the association or owner, arising under tort or contract during the period of declarant control. The statute of limitations is tolled until the expiration of declarant control in order to prevent a declarant-controlled Board from influencing the association's decision to bring an action against the declarant.¹⁷⁶

An eighty percent agreement within the association allows the sale or encumbrance of common elements. This power may be exercised during the period of declarant control only upon agreement of the non-declarant unit owners.¹⁷⁷ Sale or encumbrance (without termination) of unused or reserved common elements will increase the association's ability to raise capital for other desired improvements.¹⁷⁸ The agreement is not the actual conveyancing instrument. It must be recorded as evidence of the association's power to execute the deed or mortgage.¹⁷⁹ The conveyance may not operate to deprive any unit of support or access rights.¹⁸⁰ The sale or encumbrance is also subject to

170. *Id.* § 448.3-106.

171. *Id.* § 448.3-109. Under the Predecessor, the quorum percentage was determined by the by-laws. *See id.* § 448.180.2 (1978).

172. *E.g., id.* § 448.180.

173. *Id.* § 448.3-110.3 (Supp. 1984).

174. *Id.* § 448.3-111. This changes the usual common law requirement of naming the real party in interest in a suit against the association.

175. *Id.* This allows an "aggrieved" owner to bring suit on his own should the association decline to bring suit.

176. *Id.*

177. *Id.* § 448.3-112; *cf. id.* § 448.2-118 (termination).

178. UNIF. CONDOMINIUM ACT § 3-112 comment 1, 7 U.L.A. 283 (Supp. 1984). This should facilitate increased long-term, low rate financing.

179. MO. REV. STAT. § 448.3-112.2 (Supp. 1984).

180. *Id.* § 448.3-112.5.

the superior priority of any prior mortgage on a unit, unless the mortgagee releases his interest.¹⁸¹

The issue of insurance was addressed comprehensively by the Predecessor. The Predecessor obligated the Board to obtain and maintain insurance against loss or damage by fire and similar hazards for full replacement cost of the units and common elements. The insurance was payable to the Board as trustee for the owners, and premiums were a common expense.¹⁸² Reconstruction was required only if sufficient proceeds existed.¹⁸³ If proceeds were insufficient, the Board had 180 days to voluntarily make provision for reconstruction, otherwise the condominium was terminated, owned in common by the unit owners, and subject to partition, sale and division.¹⁸⁴

The Act also requires insurance to be maintained, but only to the extent reasonably available.¹⁸⁵ In an interstratified building, the Act requires the association to obtain and maintain property insurance on both the units and common elements.¹⁸⁶ Any improvement installed by the owner can be insured by that owner.¹⁸⁷

Absent an agreement to terminate the condominium or a decision by eighty percent of the units owners to not rebuild, any damage to any portion of

181. *Id.* § 448.3-112.6. This is a natural incident of condominium ownership—each unit owner has an undivided interest in the common elements appurtenant to his unit. When the unit is mortgaged, so are the common elements. The owner cannot convey his unit separately from this interest, or vice versa. Neither can the association convey the common elements clear of an encumbrance on the units. The declaration might provide otherwise, however, in order to protect the lender, and allow conveyance of the fee by requiring lender approval as a precondition to giving the lender a portion of the sale price. *See* UNIF. CONDOMINIUM ACT § 3-113 comment 3, 7 U.L.A. 286 (Supp. 1984).

182. MO. REV. STAT. § 448.120 (Supp. 1984).

183. *Id.* § 448.130. "Reconstruction" is restoration to substantially the same condition in which the condominium existed prior to the disaster, vertical and horizontal boundaries to remain the same.

184. *Id.* § 448.140.

185. *Id.* § 448.3-113.1. Eighty percent is not seen as a minimum requirement, but rather as a suggested base. One hundred per cent is an inflexible requirement and thus eschewed by the Act. Some projects do not require total coverage with attendant high premiums.

186. *Id.* § 448.3-113.2. First generation legislation generally did not require either association or unit insurance. *But see id.* § 448.120. In this type of building, there is a greater interdependence of units, and the distinction between unit and common element is difficult. Total insurance further simplifies claim procedures and avoids disputes between competing insurers of units and common elements. The Act, however, does not require "total" association insurance in a condominium with vertical boundaries.

187. Regardless of fixture statutes, personal property that is easily moved must be owner-insured. However, any item installed, constructed, repaired, or replaced by the declarant in connection with the original sale of a stacked unit must be insured by the association as part of the unit. *See* UNIF. CONDOMINIUM ACT § 3-113 comment 3, 7 U.L.A. 286 (Supp. 1984).

the condominium must be repaired.¹⁸⁸ All available proceeds must be used for repairs. No proceeds are payable to mortgagees to ensure that proceeds are available to rebuild or repair.¹⁸⁹ In purely non-residential condominiums, the Act allows variation or waiver of the insurance provisions.¹⁹⁰

During the period of declarant control, the declarant is likely to pay all common expenses to avoid billing costs.¹⁹¹ Once the association makes an assessment, however, all units, including those owned by the declarant, are liable. Assessments may be made on a different basis than other allocations.¹⁹²

Under the Predecessor, failure to pay an assessment gave the association a lien, upon recording, which had priority over all other recorded and unrecorded liens except tax liens and prior recorded encumbrances on the owner's interest in the condominium. The association's lien maintained priority over subsequently recorded encumbrances.¹⁹³

Unlike homeowners or renters, condominium owners are uniquely dependent upon each other. A significant amount of a condominium owner's expense is the assessment for common expenses. Non-payment by owners may threaten the viability of the condominium, lower property value, or affect the community in general. Modifying the "first in time, first in right" premise, the Act affords high priority over other liens to the association assessment for common expenses. Under the Act, the association has a lien on any unit for any assessment or fine levied against or imposed on the unit owner.¹⁹⁴ This lien has priority over all encumbrances incurred before the recording of the declaration and tax liens or first mortgages recorded before the lien arises.¹⁹⁵ Analogous to a secured party with a "future advances" clause, the association is an involuntary creditor obligated to advance services to the owner in return for future payment. This priority protects the association from defaults of its "borrowers" which could impair the entire association.

The Act enforces the association's lien in a manner similar to a mortgage lien. Power of sale foreclosure is allowed.¹⁹⁶ Priority ensures prompt and efficient enforcement of the lien for unpaid expenses. The association is not precluded from exercising other statutory or common law remedies short of foreclosure.¹⁹⁷

Under the Act, a judgment lien against the association is not a lien on the common elements; it attaches to all units in the condominium.¹⁹⁸ The lien may

188. MO. REV. STAT. § 448.3-113.8 (Supp. 1984).

189. *Id.* § 448.3-113.5.

190. *Id.* § 448.3-113.9.

191. *Id.* § 448.3-115.1.

192. *See Id.* §§ 448.2-107, 448.080.

193. *Id.* § 448.080.2.

194. *Id.* § 448.3-116.1.

195. *Id.* § 448.3-116.2(1) to (3).

196. *Id.* § 448.3-116.

197. *Id.* § 448.3-116.6.

198. *Id.* § 448.3-117.1. The lienholder has no lien on common elements—they

be discharged by pro-rata payment to the lienholder from the unit owner.¹⁹⁹ The ability to discharge the lien by direct payment allows a unit owner to sell or encumber his interests prior to the discharge of the entire judgment lien, while providing the lienholder with sufficient leverage to ensure that members, faced with a threat of foreclosure, will see that the association promptly satisfies the lienholder.²⁰⁰

VII. DISCLOSURE REQUIREMENTS AND PROTECTION OF CONDOMINIUM PURCHASERS

The fourth section of the Act is a collection of disclosure requirements and consumer protection devices designed to ensure arms-length dealings between developer and purchaser. The *quid pro quo* given the consumer in return for developer flexibility under the Act is the unprecedented and unique consumer protection and disclosure provisions of the Act.²⁰¹ First generation legislation is virtually devoid of the disclosure safeguards found in the Act. Waiver of these provisions is only allowed in wholly non-residential developments, because these sophisticated purchasers can bargain for the level of protection they perceive necessary.²⁰² Waiver is otherwise prohibited despite the likelihood that the disclosure requirements will impose a substantial burden on the developer.²⁰³

Before any unit is offered to the public, the declarant must prepare an "original sale certificate" which is similar to a prospectus requirement in security transactions.²⁰⁴ The best consumer protection the law can provide to a purchaser is the assurance that he has an opportunity to acquire an understanding of the nature of the product he is purchasing.²⁰⁵ Although the complex nature of condominium rights and obligations may frustrate this goal, the Act strives to give the purchaser a comprehensive yet understandable explanation of the condominium.²⁰⁶ The sale certificate is a narrative document which is designed to explain the legal documents, such as the declaration, in layman's terms.²⁰⁷ It must contain a general description of the condominium, including a schedule for the commencement and completion of all amenities.²⁰⁸

cannot be sold independently in satisfaction of the debt.

199. *Id.* § 448.3-117.3 The net economic result is identical; the incorporated association with no assets will have to assess each unit owner an identical amount in order to raise funds to discharge the lien.

200. *See* UNIF. CONDOMINIUM ACT § 3-117 comment 2, 7 U.L.A. 291-92 (Supp. 1984).

201. Thomas, *supra* note 59, at 1371-72.

202. MO. REV. STAT. § 448.4-101.1 (Supp. 1984).

203. *Id.* § 448.4-101.2; *see id.* § 448.4-115.

204. *Id.* § 448.4-102.1. The Uniform Condominium Act calls it a "Public Offering Statement."

205. UNIF. CONDOMINIUM ACT § 4-103 comment 1, 7 U.L.A. 296 (Supp. 1984).

206. *See* MO. REV. STAT. § 448.4-103 to .4-106 (Supp. 1984).

207. *Id.* § 448.4-103.

208. *Id.* § 448.4-103.1(2).

The certificate must briefly describe or incorporate the significant features of the declaration, by-laws, rules, and any contract subject to owner avoidance under Missouri Revised Statutes section 448.3-105.²⁰⁹ Unfortunately, declarants, fearing non-disclosure liability, may avoid the risk of narrative description and opt to incorporate the legal documents rather than explain them.²¹⁰

Disclosure of association fees and expenses is a major aspect of the sale certificate. Despite the substantial monthly cost they represent, these fees will often be understated as a result of non-disclosure or "hidden systems." The Act requires the declarant to project an annual association budget, which includes any possible hidden costs.²¹¹ These estimations are further protection against understatement by the declarant.²¹² The declarant is prohibited from intentionally providing services during the initial sales period in an attempt to understate the association budget.²¹³ When these expenses become association expenses, they may substantially increase the common expenses shared by the unit owners.

The sale certificate must disclose any statutory or declarant-provided warranties, including significant limitations on enforcement and damages.²¹⁴ Insurance provided for the owners' protection must be described.²¹⁵ Any current or expected common element fee for use or admission, such as golf or pool fees, must be disclosed.²¹⁶ Disclosure of contingent financing arrangements gives the prospective purchaser the ability to determine the declarant's ability to carry out his obligations.²¹⁷

If the condominium is subject to development rights, the sale certificate must make full disclosure regarding how the exercise of such rights may affect a purchaser who acquires his interest before full exercise of such rights.²¹⁸ This will put the purchaser on notice as to how the exercise of these rights will alter the physical and legal aspects of the project.

In a residential condominium containing conversion buildings,²¹⁹ additional disclosure requirements regarding the physical condition of the building are necessary due to the inability of the purchaser to adequately ascertain the condition of an older, rehabilitated building.²²⁰ The certificate must describe

209. *Id.* § 448.4-103.1(4).

210. *See id.* §§ 448.4-117.

211. *Id.* § 448.4-103.1(5).

212. *Id.* § 448.4-103.1(6); *see* UNIF. CONDOMINIUM ACT § 4-103 comment 4, 7 U.L.A. 296-97 (Supp. 1984).

213. *Id.* § 448.4-103.1(6).

214. *Id.* § 448.4-103.1(8).

215. *Id.* § 448.4-103.1(13).

216. *Id.* § 448.4-103.1(14).

217. *Id.* § 448.4-103.1(15).

218. *Id.* § 448.4-104.

219. A "conversion building", as distinguished from "convertible real estate", is an existing building that is restructured either physically or legally into a condominium.

220. MO. REV. STAT. §§ 448.4-106 (Supp. 1984).

any structural work done on the building and list any outstanding notices of uncured building code violations.²²¹ The drafters of the Uniform Condominium Act give this provision a literal interpretation. This means that disclosure of building code violations which do not affect structural components is not required unless the developer has received actual notice of the violation.²²² Given the stated purposes of the consumer protection section and the Act itself, it is unlikely the Missouri courts will read the provision to defeat the goal of purchaser protection and disclosure.

VIII. PURCHASERS' RIGHT TO CANCEL

Some first generation statutes provided a condominium purchaser with a statutory "cooling-off" period during which he could reconsider his purchase. Although the Predecessor had no such provision, the new Act does. A condominium purchaser may cancel his contract for the purchase of a unit from a declarant within ten days after the receipt of the original sale certificate or five days after the execution of the sale contract, whichever is longer. If the purchaser receives the sale certificate more than ten days before the signing of a sales contract, he will not have the right to cancel.²²³ Due to the sheer volume and expense of such sale material, it is unlikely that developers will attempt to negate the rescission right by freely distributing sales material to all inquiring persons. Distribution of the sale certificate will generally be contemporaneous with the execution of the sale contract, thus most purchasers will have between five and ten days to cancel the contract.²²⁴ Failure to deliver a sale certificate, however, does not afford a purchaser the statutory right to cancel once the conveyance occurs.²²⁵ The cooling-off period is designed to remedy any purchaser dissatisfaction resulting from differences in the actual unit and the unit described in the sale certificate. It does not purport to provide the condominium purchaser any greater protection than other real estate purchasers.

Disclosure provisions of the Act require that each purchaser be given an original sale certificate and any amendments. The amendments must be pro-

221. *Id.*; cf. UNIF. CONDOMINIUM ACT § 4-106, 7 U.L.A. 299 (Supp. 1984). The Uniform Condominium Act requires an independent architect to appraise the condition of the structure and estimate the cost of compliance. Missouri deleted this requirement, presumably to avoid the cost of compliance which would befall declarant converters.

222. UNIF. CONDOMINIUM ACT § 4-106 comment 4, 7 U.L.A. 300 (Supp. 1984).

223. MO. REV. STAT. § 448.4-108 (Supp. 1984); see *id.* § 448.4-103(9) (the original sale certificate must disclose this right).

224. If the certificate was received on January 1 and the contract also executed on January 1, the purchaser would have until January 10 to rescind. Execution of the contract between January 5 and January 10 would allow the purchaser five days from the date of execution to rescind.

225. Serious title problems might arise were cancellation allowed after closing. A buyer still has a remedy under § 448.4-117 and other state law for the seller's failure to disclose.

vided despite the expiration of the cooling-off period, but they do not extend the cooling-off period.²²⁶ Requiring distribution of these amendments assures that the purchaser will be apprised of any change in the condominium which may affect his sales contract.

IX. RE SALE AND CONVERSION

When a private owner, non-declarant, or non-broker resells a condominium unit, there is no need to supply the purchaser with an original sale certificate.²²⁷ The resale purchaser should be provided information on some important facts, thus a resale certificate must be provided prior to the execution of the resale contract.²²⁸ While this obligation to provide information within ten days of a request rests on the unit owner, the association has an obligation to provide certain necessary information to the unit owner for distribution to the purchaser.²²⁹ The association may charge the unit owner for this information. Failure to provide the information will give the unit owner a cause of action against the association.²³⁰ Since the resale purchaser is dependent on the association to disclose any unpaid assessments against the unit to be purchased, the purchaser's liability for assessments underestimated or misstated by the association will be limited to the amount [mis]stated by the association in the resale certificate.²³¹

Numerous problems arise when an apartment building or other tenant-occupied building is "converted" to condominium ownership.²³² Opponents maintain that conversion allows the affluent to displace low and moderate income families in large urban areas at an attractive price to the developer. Proponents concede that conversion increases property values, but argue that it prevents further decline of the urban tax base by stabilizing and preserving a neighborhood. The burden of conversion does fall disproportionately on the elderly and low income segment of population.²³³ The Act seeks to strike an equitable balance between these competing interests. The Act even surpasses the highly innovative Uniform Condominium Act in its protection of low-income elderly and handicapped residents of conversion buildings.²³⁴

226. *Id.* § 448.4-108.

227. *Id.* § 448.4-109; *see id.* § 448.4-102.3.

228. *Id.* § 448.4-109.

229. *Id.* § 448.4-109.2.

230. *Id.*

231. *Id.* § 448.4-109.3.

232. "Conversion" is the process whereby an apartment building is purchased by a developer who then "converts" the building into condominiums by declaration. This forces existing tenants to purchase their "unit" or be displaced, often at great financial, physical, or philosophical burden.

233. *See* UNIF. CONDOMINIUM ACT § 4-112 comment 1, 7 U.L.A. 306 (Supp. 1984). This type of protection is what led the drive for adoption of the Uniform Condominium Act in Missouri.

234. *Cf.* UNIF. CONDOMINIUM ACT § 4-112, 7 U.L.A. 305 (Supp. 1984).

A declarant of a condominium containing conversion buildings must give tenants 120 days written, hand-delivered notice before eviction.²³⁵ The Act gives the rental tenant at least sixty days before eviction to purchase his leased unit on the declarant's terms.²³⁶ To discourage unreasonable offers, the declarant may not sell a unit in which a tenant has rejected an offer to purchase at a lower price or on better terms for 180 days. These preemptive rights do not apply to a non-residential condominium or to units in which the boundaries and dimensions will be substantially altered.²³⁷ Failure to provide such notice is not a defense in an action for possession by a bona fide purchaser for value, but the tenant may maintain an action for damages against the declarant.²³⁸

The Act provides unique protection to low or moderate income elderly and handicapped tenants facing conversion.²³⁹ The Act requires the declarant to apply on behalf of these residents for financial assistance from the Missouri Housing Development Commission, including a permanent loan for the acquisition, plans, rehabilitation, and development of such units.²⁴⁰ The declarant has no obligations and such tenants have no rights under Missouri Revised Statutes section 448.4-112²⁴¹ unless available Commission funds are sufficient to bring the monthly rent the tenant must pay to within thirty percent of the tenant's annual gross income. Rent charged non-purchasing tenants cannot exceed the developer's carrying costs, taxes and insurance expenses plus an additional ten percent return on his equity.²⁴² If money is available, the qualifying elderly tenant may occupy the "unit" for up to fifteen years without purchasing and the handicapped tenant for up to three years. When Commission money is unavailable or the developer has fewer than five units, conversion tenants must either relocate or purchase.²⁴³ The effectiveness of these displacement provisions obviously depends on the availability of Commission funds.

X. WARRANTIES

The Act addresses both express and implied warranties. Absent timely negotiation, actions by a declarant creating a particular expectation of the purchaser also creates an express warranty that the unit purchased will conform to those expectations.²⁴⁴ An express warranty may arise without specific intent to create such a warranty. Representations made by a declarant about the condominium property during the bargaining process are generally regarded

235. MO. REV. STAT. § 448.4-112.1 (Supp. 1984).

236. *Id.*

237. *Id.* § 448.4-112.4.

238. *Id.* § 448.4-112.5.

239. *Id.* § 448.4-112.3(1); § 448.4-112.3(3).

240. *Id.* § 448.4-112.3(2).

241. (Supp. 1984).

242. *Id.* § 448.4-112.3(2).

243. *Id.* § 448.4-112.3.

244. *Id.* § 448.4-113; *cf.* UNIF. LAND TRANSACTIONS ACT § 2-308, 13 U.L.A. 607 (1980).

as part of the description of the condominium.²⁴⁵ The exact time of the representation is irrelevant. The sole issue is whether the language and other representations of the declarant can be fairly regarded as part of the contract.²⁴⁶ The warranty cannot be avoided through conveyance to a purchaser by a "shell" corporation, since the conveyance transfers all express warranties made by previous sellers.²⁴⁷

The common law doctrine of *caveat emptor* has generally been defeated by modern implied warranties of habitability.²⁴⁸ The Uniform Condominium Act restates the principle that an original seller impliedly warrants the unit and common elements to be suitable for the ordinary uses of real estate of a similar type and quality.²⁴⁹ The warranty does not extend to non-professional sellers; however, any common law duties to disclose imposed upon a seller of real estate will provide some protection to the purchaser.²⁵⁰ The implied warranty is sufficiently broad to impose liability for defects that do not actually render the condominium uninhabitable.²⁵¹ The declarant cannot avoid the warranty by contracting work out, and he is liable for any existing defects which violate building codes.²⁵² A voluntary or involuntary conveyance of the declarant's interest transfers to the purchaser all warranties of quality made by the declarant.²⁵³ The declarant remains liable after transfer for any warranty obligations, and a successor who is an affiliate of the declarant remains liable for the successor's warranties, despite the termination of the declarant-transferor's rights.²⁵⁴ A non-affiliate successor, such as a foreclosing lender, is not liable for breaches of the declarant's warranties, even if he is selling a declarant's original units, but he does warrant his improvements or descriptions.²⁵⁵

Implied warranties of quality may be disclaimed if the agreement is not unconscionable.²⁵⁶ Although oral disclaimers are allowed in non-residential settings, written disclaimers are required for residential condominiums.²⁵⁷ The

245. MO. REV. STAT. § 448.4-113.1(1)(2) (Supp. 1984) (whether an opinion or affirmation of fact is given may depend on the sophistication of the parties).

246. UNIF. CONDOMINIUM ACT § 4-113 comment 6, 7 U.L.A. 308 (Supp. 1984) (indicates the burden of proving non-reliance is on the declarants).

247. MO. REV. STAT. § 448.4-113.3 (Supp. 1984).

248. See *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973).

249. Mo. Rev. Stat. § 448.4-114.2 (Supp. 1984); cf. UNIF. LAND TRANSACTIONS ACT § 2-309, 13 U.L.A. 609 (1980). This is broader than an implied warranty of habitability since it applies to units, common elements, commercial condominiums, or new or used improvements.

250. MO. REV. STAT. § 448.4-114 (Supp. 1984).

251. *Id.* § 448.4-114.2(1)(2).

252. *Id.* §§ 448.4-114.2(2), -114.3, -114.5.

253. *Id.* § 448.4-114.6.

254. See *id.* § 448.3-104.2(1)(2); § 448.4-114.5.

255. See *id.* § 448.3-104.4(2); see also UNIF. LAND TRANSACTIONS ACT § 2-310, 13 U.L.A. 612 (1980).

256. MO. REV. STAT. § 448.4-115 (Supp. 1984).

257. *Id.* § 448.4-115.2. This assumes parol evidence problems can be avoided.

disclaimer must be specific and in a separate writing to assure that the purchaser receives and understands the disclaimer and considers its effect on the bargain. Although the declarant may make a "laundry list" disclaimer, Missouri Revised Statutes section 448.4-115.2²⁵⁸ requires him to bring each item to the purchaser's attention. The Act does not allow a disclaimer of the implied warranty of habitability.²⁵⁹

The Act establishes a statute of limitations in which to bring an action based on warranty. Purchasers must bring suit for breach within six years after the cause of action accrues. The parties may agree to reduce this period to two years if unconscionability does not result. Reductions in the statute of limitations for residential condominiums must be executed in a separate instrument in order to alert the purchaser.²⁶⁰ The cause of action arises at possession, except for breach of warranty of quality for a specific duration or future performance. The statute is not tolled for non-discovery or inability to discover the breach.²⁶¹

The plat and plan requirement of Missouri Revised Statutes section 448.2-109²⁶² requires a developer to execute a plat as part of the declaration with contemplated improvement labeled either "shall be built" or "need not be built." The statute outlines the declarant's obligation to complete a labeled improvement. While the plat and plan need not be given to a purchaser, any promotional material must be labeled similar to the plat/plan—shall be built/need not be built scheme.²⁶³ The purchaser is thereby protected from any declarant deception regarding contemplated improvement, or discrepancies between promotional material and recorded plat/plans.

XI. LIABILITY FOR FAILURE TO COMPLETE/RESTORE

The declarant is obligated to complete any "shall be built" improvements as denoted in the plat or plan under Missouri Revised Statutes section 448.2-109,²⁶⁴ while "need not be built" improvements, although contemplated, may be built at the developer's option.²⁶⁵ Any exercise of declarant rights under Missouri Revised Statutes sections 448.2-110 to .2-116²⁶⁶ (Development Rights, Easement for Sales Purposes) obligates him to make prompt restoration and repair to any portion of the condominium affected.²⁶⁷

The Act prevents transfer of any interest in a unit prior to substantial

258. (Supp. 1984).

259. *Id.* § 448.4-115 (only implied warranties of *quality* may be disclaimed); *see id.* § 448.4-114.2(1)(2).

260. *Id.* § 448.4-116.1.

261. *Id.* § 448.4-116.2; *id.* § 448.4-116.3.

262. (Supp. 1984).

263. *Id.* § 448.4-118.

264. (Supp. 1984).

265. *See id.* § 448.4-119; *id.* § 448.3-104.

266. (Supp. 1984).

267. Section 448.4-119.2.

completion as evidenced by a recorded certificate.²⁶⁸ Violation of this requirement subjects the declarant to liability under Missouri Revised Statutes section 448.4-117,²⁶⁹ thereby assuring compliance with this requirement.²⁷⁰ Specific relief is granted by the Act for violations of the disclosure provisions in the Act²⁷¹ and any other provision of the Act. In addition, the injured party may seek attorney's fees, punitive damages, or any other appropriate relief.

XII. CONCLUSION

The new Missouri Uniform Condominium Act is true second generation legislation. The Act balances the competing needs of developers and purchasers. It is a comprehensive and thorough attempt at equitable allocation and assessment of relevant rights and obligations. The resulting uniformity and clarity in condominium law should make condominium ownership an attractive alternative for the developer, purchaser, and financier of any type of property. The inherent developer flexibility and resulting consumer protection should bring the concept of condominium ownership in harmony with modern real estate ownership alternatives.

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268. *Id.* § 448.4-120; *cf. id.* § 448.4-110 (transfer of money from escrow to the declarant is also prohibited until substantial completion).

269. (Supp. 1984).

270. *Id.* Section 448.4-117 provides the statutory remedy necessary to make the Act enforceable against the declarant by the purchaser owner.

271. *Id.* §§ 448.4-101 to .4-120.

272. *Id.* § 448.4-117.