

7-1-1997

## Condominiums, Reform, and the Unit Ownership Act

Robert G. Natelson  
*University of Montana School of Law*

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 Mont. L. Rev. (1997).  
Available at: <https://scholarship.law.umt.edu/mlr/vol58/iss2/5>

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

# CONDOMINIUMS, REFORM, AND THE UNIT OWNERSHIP ACT

Robert G. Natelson\*

## I. INTRODUCTION

This article is the first published assessment of the Montana Unit Ownership Act (UOA), the condominium statute adopted over thirty years ago that serves as the legal basis for hundreds of land developments throughout Montana. This assessment relies on the text of the UOA, new empirical investigation, and prior national condominium research by many scholars, including myself.<sup>1</sup>

---

\* Professor of Law, University of Montana; J.D., Cornell University; A.B., Lafayette College. The author gratefully acknowledges the valuable assistance of Professor Andrew P. Morriss, Case Western Reserve University Law School; Professor Richard Stroup, Department of Economics, Montana State University; Professor Fred S. McChesney, Emory University School of Law; Professor Roger Meiners, Department of Economics, University of Texas at Arlington; Carol Hardy, Esq. of Billings, Montana, a practitioner of condominium law; Robert Verdon, Staff Legal Counsel for the Professional and Occupational Licensing Bureau, Department of Commerce, State of Montana; and Jerry Kenney and Howard Sumner, both real estate brokers in Billings, Montana.

1. Note on sources: sources cited more than once in this article, together with the short citation form used, are set forth below. The full citation is given in any footnote containing a source referenced only once.

See ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS (1989) [hereinafter NATELSON, POA]; ROBERT G. NATELSON, MODERN LAW OF DEEDS TO REAL PROPERTY (1992) [hereinafter NATELSON, DEEDS]; Paul H. Rubin, *Growing a Post-Communist Legal System*, in Terry L. Anderson & Peter J. Hill, eds., THE PRIVATIZATION PROCESS: A WORLDWIDE PERSPECTIVE 57 (1996) [hereinafter Rubin]; Yoram Barzel & Tim R. Sass, *The Allocation of Resources by Voting*, Aug. 1990 QUARTERLY J. ECON. 745 [hereinafter Barzel & Sass]; Andrew P. Morriss, "This State Will Soon Have Plenty of Laws"—Lessons from One Hundred Years of Codification in Montana, 56 MONT. L. REV. 359 (1995) [hereinafter Morriss]; Robert G. Natelson, *Comments on the Historiography of Condominium: The Myth of Roman Origin*, 12 OKLA. CITY L. REV. 17 (1987) [hereinafter Natelson, *Comments*]; Robert G. Natelson, *Consent, Coercion, and Reasonableness in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L. J. 41 (1990) [hereinafter Natelson, *Consent*]; Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17 (1990) [hereinafter Natelson, *Running*]; Shmuel Nitzan & Jacob Paroush, *Are Qualified Majority Rules Special?*, 42 PUBLIC CHOICE 257 (1984) [hereinafter Nitzan & Paroush]; Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261 (1991) [hereinafter Schill]; Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) [hereinafter Schwartz & Scott]; James Charles Smith, *Markets and Law Reform: The Tension Between Uniformity and Idealism*, 20 NOVA. L. REV. 1165 (1996) [hereinafter Smith]; Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988) [hereinafter Tollison]; James L. Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership*

This article is divided into six Parts. Part II sketches the nature and history of condominium ownership. Part III provides the history, organization, language and essential purpose of the UOA. Part IV offers a philosophy for reform and concludes that the Montana legislature ought to amend the UOA rather than replace it. Part V makes detailed recommendations for such reform. Finally, Part VI summarizes these conclusions.

## II. THE CONDOMINIUM CONCEPT

### A. *Nature of Condominium Ownership*<sup>2</sup>

A condominium is a real estate subdivision meeting all of the following four criteria: (1) separate ownership<sup>3</sup> of individual portions of the real estate; (2) undivided co-ownership of common property outside the separately owned portions, with each owner's fractional interest in the common property being appurtenant to ownership of his separately owned portion; (3) restrictions on partition that (a) require that ownership of common property remain appurtenant to ownership of separately owned portions and (b) forbid partition of the common property; and (4) a complicated scheme of servitudes to govern the subdivision. Although laypersons often refer to separately owned portions as condominiums, strictly speaking it is the entire property that is the condominium.<sup>4</sup>

Following is a more detailed examination of each of the four criteria of condominium ownership.

#### 1. *Separate Ownership of Individual Portions of the Real Estate*

The prevailing American custom is to denominate the separately owned portions as "units," a practice I follow in this Article.<sup>5</sup> Units may be owned by individuals or by co-tenants. The

Act, 27 WAKE FOREST L. REV. 353 (1992) [hereinafter Winokur, *Meaner*]; James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1 [hereinafter Winokur, *Mixed*].

2. Unless otherwise noted, the introductory material in this subpart is from NATELSON, POA, *supra* note 1, at 11-16.

3. In a leasehold condominium, the owners hold separate interests in a ground lease. See *infra* Part V(D).

4. The modern Latin word *condominium* means "co-ownership." The entire development, not individual portions, is held in co-ownership.

5. See, e.g., MONT. CODE ANN. § 70-23-102(15) (1995):

"Unit" means a part of the property including one or more rooms occupying one or more floors or a part or parts thereof intended for any type of inde-

owners of a unit enjoy exclusive use and possession of that unit.<sup>6</sup> The recording of an instrument called a "condominium declaration" creates the units by subdividing the legal estate (fee simple or leasehold) by which the land is held into units and appurtenant common properties.<sup>7</sup>

Most condominium units represent examples of "horizontal property"—parcels with boundaries defined by horizontal, as well as vertical planes.<sup>8</sup> "First generation" condominium statutes<sup>9</sup> were based on the assumption that all condominium units are defined by horizontal as well as vertical boundaries. Some state statutes still are based on this assumption.<sup>10</sup> However, most newer condominium laws permit separate ownership of lots even if the lots are defined by only vertical planes.<sup>11</sup>

pendent use and with a direct exit to a public street or highway or to a common area or area leading to a public street or highway.

Arguably, a better usage is to employ the term "unit" for each owner's entire property interest—including both the separately owned portion and its appurtenant share of the common properties. See NATELSON, POA, *supra* note 1, at 6.

6. See, e.g., MONT. CODE ANN. §70-23-402 (1995): "Exclusive ownership and possession of unit—joint ownership.

(1) Each unit owner shall be entitled to the exclusive ownership and possession of his unit.

(2) A unit may be jointly or commonly owned by more than one person."

7. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 Mont. 268, 915 P.2d 845 (1996); Jordan v. Elizabethan Manor, 181 Mont. 424, 593 P.2d 1049 (1979).

8. Horizontal property is not unique to condominium ownership. It is also a feature of mineral rights in "ownership in place" states, although the term "horizontal property" does not appear in mineral law. See RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS 29-31 (3d ed. 1991).

9. A "first generation" statute is one of that class of early condominium statutes that largely tracked Puerto Rican law and a Federal Housing Administration Model Statute based on Puerto Rican law. The UOA is a first generation statute. See *infra* text accompanying notes 33-44.

10. One of these is apparently Montana. See *infra* Part III(B). Several states denote their condominium statutes as "Horizontal Property Acts." See, e.g., ARK. CODE ANN. § 18-13-101 (Michie 1987 & Supp. 1995) ("Horizontal Property Act"); IND. CODE ANN. § 32-1-6-1 (Michie 1995) ("Horizontal Property Law").

11. See, e.g., UNIF. CONDOMINIUM ACT § 1-103(7), 7 pt.11.2 U.L.A. 215 (1997), which defines condominium so as not to require horizontal property: "Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions."

The Uniform Condominium Act (UCA) has been adopted in Alabama, Arizona, Maine, Minnesota, Missouri, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia and Washington. See 7 U.L.A. 335 (Supp. 1996).

The Uniform Common Interest Ownership Act (UCIOA), which sets forth a similar definition (§1-103(8)), has been enacted in one form or another in six states. See 7 U.L.A. 204, 316 (Supp. 1996).

In addition to these 18 states, the leading condominium jurisdiction, Florida,

## 2. Undivided Co-ownership of Certain Areas Outside the Units

In order for a real estate development to be a condominium, areas outside the units must be titled to unit owners, who hold in a form of co-tenancy similar to tenancy in common. In most states, these co-owned areas are called "common elements."<sup>12</sup> Common elements comprehend both general common elements, which are used by all owners, and limited common elements where use (but not ownership) is limited to owners of fewer than all units. Examples of limited common elements include a balcony attached to a unit outside the unit perimeter; a parking space on the common elements, but reserved for a specific owner(s); and a roof covering a single building in a multi-building condominium.<sup>13</sup> Without some common elements, there is no condominium.<sup>14</sup> I reiterate that in a condominium the common ele-

also has dispensed with the horizontal property requirement. See FLA. STAT. ANN. § 718.103(9),(24) (West Supp. 1996).

12. See, e.g., MONT. CODE ANN. § 70-23-102(3) (1995): "Common elements' means the general common elements and the limited common elements." See also MONT. CODE ANN. § 70-23-102(8) (1995):

"General common elements," unless otherwise provided in a declaration or by consent of all the unit owners, means:

- (a) the land on which the building is located, except any portion thereof included in a unit or made a limited common element by the declaration;
- (b) the foundations, columns, girders, beams, supports, mainwalls [sic], roofs, halls, corridors, lobbies, stairs, fire escapes, entrances, and exits of the building;
- (c) the basements, yards, gardens, parking areas, and outside storage spaces, private pathways, sidewalks, and private roads;
- (d) installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning, waste disposal, and incinerating;
- (e) the elevators, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use;
- (f) the premises for the lodging of janitors or caretakers of the property; and
- (g) all other elements of the building necessary or convenient to its existence, maintenance, and safety or normally in common use.

More modern statutes define common elements simply as the portions of the condominium outside the units. See, e.g., UNIF. CONDOMINIUM ACT § 1-103(4), 7 pt. 2 U.L.A. 215 (1997).

The term "common elements" is imported from civil law, being borrowed from the 1958 Puerto Rican statute. Ley Para establecer el Régimen de la Propiedad Horizontal [Law to establish the Horizontal Property Regime], art. 8, 1958 P.R. Laws 104 (elementos comunes [common elements]).

13. See, e.g., MONT. CODE ANN. § 70-23-102(9) (1995): "Limited common elements' means those common elements designated in the declaration or by agreement of all the unit owners as reserved for the use of a certain unit or number of units to the exclusion of the other units."

14. In *Country Club Towers*, the pioneering horizontal property apartment

ments are titled to the unit owners—not to the association. Although an association sometimes owns real estate in its own right, any such real estate is not part of the common elements.

### 3. *Restrictions on Partition*

In a condominium regime, each unit's appurtenant share of the common elements remains with that unit; no partition to the contrary is permitted. When the unit is sold, inherited, levied upon, or hypothecated, the appurtenant share of the common elements adheres to the unit.<sup>15</sup> The common elements may not be physically partitioned; they remain in co-tenancy of all unit owners.<sup>16</sup> In this respect, condominium tenancy differs from tenancy in common or joint tenancy: in those forms of concurrent ownership, partition is generally permitted.<sup>17</sup>

### 4. *A Complicated Scheme of Servitudes to Govern the Subdivision*

The final criterion of condominium ownership is a servitude regime to govern the subdivision. In most states, the condominium declaration establishes these servitudes, although the UOA contemplates their placement in the bylaws.<sup>18</sup> The servitudes usually include affirmative easements of access for maintenance and other purposes;<sup>19</sup> affirmative covenants imposing various obligations, such as the duty to maintain one's unit or to pay assessments; and restrictive covenants that limit property use. Less frequently, the servitudes include negative easements and

---

building in Great Falls, Montana, the common areas are titled to the association. See *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 90, 405 P.2d 432, 433 (1965). It is therefore not a condominium.

15. See, e.g., MONT. CODE ANN. § 70-23-404 (1995):

Common elements—undivided interest to remain attached to unit. The undivided interest in the common elements shall not be separated from the unit to which it appertains and shall be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument.

16. See, e.g., MONT. CODE ANN. § 70-23-405 (1995): "Common elements to remain undivided—partition prohibited. The common elements shall remain undivided, and no unit owner shall bring any action for partition or division of any part thereof except as provided in 70-23-805. Any covenant to the contrary is void."

17. ROGER A. CUNNINGHAM, WILLIAM B. STOEBOCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 223 (2d ed. 1993). *But see* MONT. CODE ANN. § 70-32-301 (1995) (limiting right of spouse to divide homesteaded property without consent of other spouse).

18. See *infra* text accompanying note 55.

19. See, e.g., MONT. CODE ANN. § 70-23-504(2) (1995).

reserved rents. Usually—in some states, always<sup>20</sup>—the servitudes establish a condominium association to administer the complex.<sup>21</sup> Many condominium declarations also create future interests that may wholly or partially defease property interests or change the nature of ownership. Examples include preemptive rights and provisions dealing with property destruction, obsolescence or eminent domain.<sup>22</sup>

### B. Historical Background<sup>23</sup>

Although antecedents of the condominium concept existed in Medieval times,<sup>24</sup> the first true condominium statute was adopted in Belgium in 1924. The notion soon spread to other Civil Law countries. In 1958, Puerto Rico became the first United States jurisdiction to enact a condominium statute, relying heavily on a 1952 Cuban law.

In 1961, Congress responded to a Puerto Rican lobbying effort by amending the Federal Housing Act to permit the Federal Housing Administration (FHA) to insure condominium mortgages. The FHA subsequently issued a Model Statute for the Creation of Apartment Ownership (FHA Model Statute),<sup>25</sup> which served as a highly influential model for “first generation” state statutes. Many first generation laws are essentially verbatim copies of the FHA Model Statute.

Unlike the civil law, the Anglo-American common law was fully adequate to create condominium ownership. Technically,

20. See, e.g., in Montana. See *infra* text accompanying note 54.

21. For sample materials with general treatment of the role of servitudes in condominiums and other covenanted subdivisions, see, e.g., Robert C. Ellickson, *Cities and Homeowner Associations*, 130 U. PA. L. REV. 1519 (1982); Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988); NATELSON, POA, *supra* note 1, at 37-64; Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982). For thoughtful competing analyses of how servitudes work in this context, see Gerald Korngold, *Reply: Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination*, 1990 WIS. L. REV. 513; Winokur, *Mixed*, *supra* note 1; James L. Winokur, *Rejoinder: Reforming Servitude Regimes: Toward Associational Federalism and Community*, 1990 WIS. L. REV. 537.

22. See *infra* Part V(H) for a discussion of the Montana law of condominium destruction, eminent domain, and obsolescence.

23. Except where otherwise indicated, information in this subpart is taken from NATELSON, POA, *supra* note 1, at 19-35.

24. A common tale throughout legal writings is that condominiums existed in ancient Rome. This tale is false. See Natelson, *Comments*, *supra* note 1.

25. It may be found in PATRICK J. ROHAN & MELVIN A. RESKIN, 1A CONDOMINIUM LAW AND PRACTICE Appendix B-3 (1994).

there was no need for authorizing statutes. Indeed, United States developers had created condominiums and entities similar to condominiums well before adoption of the first state condominium statute.<sup>26</sup> First generation statutes, however, served to reassure private drafters by offering "safe harbors"—statutory procedures that, if followed, guaranteed legal enforcement of the drafters' product. Such safe harbors are particularly important to developers seeking mortgage financing and title insurance.<sup>27</sup> Accordingly, all fifty states have enacted condominium statutes. Nevertheless, in most states common law rules and private drafting supplement condominium statutes and offer alternative paths for planners wishing to create subdivisions similar to condominiums.

### III. OVERVIEW OF THE MONTANA UNIT OWNERSHIP ACT

#### A. *The UOA as a Safe Harbor Statute*

Statutes usually are thought of as prescriptive in nature: laying down immutable rules to regulate or shape personal behavior. But statutes may serve alternative functions as well: checklists to aid private drafting, sources of default rules to resolve questions when the parties have not agreed to the contrary, optional "safe harbors" from legal uncertainty, and aids to good private decision-making. Statutes that aid private decision-making include those that ensure the parties have actual notice of all relevant material facts (e.g., disclosure statutes), those that protect exercise of volition (e.g., anti-duress statutes), and those that give legal force to private agreements.<sup>28</sup>

The UOA<sup>29</sup> serves all these functions in one way or another,<sup>30</sup> but its essence is as a "safe harbor" statute. A declarant

26. NATELSON, POA, *supra* note 1, at 55-60.

27. Telephone Interview with Carol Hardy, Esq., Billings, Mont. (Aug. 9, 1996).

28. This list is not necessarily exhaustive. For example, some statutes serve merely as statements of community values. *See, e.g.*, COLO. REV. STAT. ANN. § 18-6-501 (West 1990) (stating that adultery is illegal, but no penalty is provided by the statute).

29. *See* MONT. CODE ANN. §§ 70-23-101 to -1002 (1995).

30. *See, e.g.*, MONT. CODE ANN. § 70-23-102(8) (1995) (checklist and default rule functions); § 70-23-102(10) (1995) (default rule); §§ 70-23-201 to -206 (1995) (regulation and shaping); §§ 70-23-301, 70-23-305, 70-23-307 (1995) (regulation); § 70-23-308 (regulation and checklist); § 70-23-403(2) (1995) (aid to private decision making through enforcement of prior agreement); § 70-23-607(1) (regulation of mortgage priority); § 70-23-613 (1995) (aid to private decision making through disclosure); § 70-23-102(4)(b) (1995) (aid to private decision making by enforcing unit owners' agreement regarding common expenses); and §§ 70-23-401, 70-23-404, 70-23-601 (1995) (safe



voluntarily elects to submit property to the UOA; nothing requires such a submission.<sup>31</sup> The common law of Montana authorizes nonstatutory alternatives, and developers frequently opt to proceed outside the statute when creating subdivisions with compact units.<sup>32</sup> But if one does choose to follow the rules of the statute, one has greater security knowing that one's actions will be enforced.

### B. *Traces of the Puerto Rican Past*

The Montana legislature adopted the UOA in 1965. The text largely traces the FHA Model Statute, which reflects in turn the 1958 Puerto Rican enactment. The legislature has amended the UOA infrequently. The most notable amendments are the consumer protection provisions added in 1973 and 1983.<sup>33</sup>

If one with substantial condominium experience examines the original parts of the UOA, he gets the impression that the text and substance are out of place in the modern environment. For example, the section that describes the legal independence of units from each other refers to "juridic acts inter vivos or mortis causa . . ." <sup>34</sup>—terms hardly common in American law.<sup>35</sup> The

harbor for conveyances).

31. See MONT. CODE ANN. § 70-23-102(5) (1995): "Condominium' means the ownership of single units with common elements located on property submitted to the provisions of this chapter."

32. Such alternatives are based primarily on the common law of servitudes. See NATELSON, POA, *supra* note 1, at 55-60. Thus, the Montana Supreme Court validated and created rules of common law governing a prestatutory horizontal property regime in the *Country Club Tower* litigation: *Montana ex rel. Burris v. Tower Management Corp.*, 145 Mont. 448, 401 P.2d 575 (1965); *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965); *Thisted v. Tower Management Corp.*, 147 Mont. 1, 409 P.2d 813 (1966). For a non-horizontal property case, see *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987).

One of the most common non-statutory alternatives in Montana is the "town house community," used when row houses are held by a form of interdependent property ownership slightly different from condominium. See, e.g., *Declaration of Covenants, Conditions and Restrictions for Homestead Townhouses, microformed on Doc. No. 164355, Book 94 of Misc.*, p. 3979, Nov. 21, 1986 (Gallatin County, Montana, Clerk and Recorder's Office). Often the covenants and rules for such communities are very similar to those prevailing in condominiums. See, e.g., *Declaration of Covenants and Restrictions for Bridger Creek Subdivision, microformed on Doc. No. 301845, Book 151, p. 2890, Feb. 28, 1995* (Gallatin County, Montana, Clerk and Recorder's Office).

33. The 1973 additions are MONT. CODE ANN. §§ 70-23-201 to -206, 70-23-1001 and 70-23-1002. The 1983 addition was § 70-23-613. These provisions are discussed *infra* Part V(I).

34. MONT. CODE ANN. § 70-23-401 (1995):

Property status of the unit. While the property is submitted to this chapter,

reason for the oddity is that this section is almost a direct transliteration from the Puerto Rican text, which served a civil law, rather than a common law environment.<sup>36</sup>

Another peculiarity is the provision that defines "manager" as the "manager, board of managers, or other person in charge of the administration of or managing the property."<sup>37</sup> This usage is confusing because American condominiums are nearly always governed by a board of directors, which is never referred to as the "manager"; the board usually hires another entity as the "manager." Indeed, elsewhere the statute explicitly refers to this practice.<sup>38</sup> Unfortunately, the odd definition of "manager" raises the question of whether obligations the UOA imposes on the "manager"<sup>39</sup> are imposed on the hired manager or, as the latter section would suggest, on the board. It becomes clear that those duties are imposed on the board only after one discovers that the definition of "manager" is another relic of the Puerto Rican statute, which reflects a civil law tradition of entrusting condominium governance to a single person.<sup>40</sup>

Still another historical curiosity is the section that requires that each unit's interest in the common elements be founded on the "relation that the value of the unit at the date of the declaration bears to the then combined value of all the units having an interest in the particular common elements."<sup>41</sup> Outside Montana the applicable percentages and accompanying voting rules often are based on any of several measures, each selected to serve the needs of different kinds of condominiums.<sup>42</sup> Puerto Rican precedent dictated the Montana statutory language.<sup>43</sup> Yet, the Mon-

a unit in the building may be individually conveyed, leased, or encumbered and may be the subject of ownership, possession, or sale and of all types of juridic acts *inter vivos* or *mortis causa* as if it were sole and entirely independent of the other units in the building of which they form a part, and the corresponding individual titles and interests shall be recordable.

35. The term *mortis causa*, which refers to wills and intestate succession, should not be confused with the common law gift *causa mortis*.

36. *Ley Para establecer el Régimen de la Propiedad Horizontal* [Law to establish the Horizontal Property Regime], art. 4, 1958 P.R. Laws 104 ("y de toda clase de actos jurídicos *intervivos* o *mortis causa* . . . ." ["and every class of juridic act *intervivos* or *mortis causa* . . . ."]). A "juridic act *intervivos* or *mortis causa*" means a transfer by inheritance or will rather than among living people.

37. MONT. CODE ANN. § 70-23-102(11) (1995).

38. See MONT. CODE ANN. § 70-23-308(1) (1995).

39. See, e.g., MONT. CODE ANN. § 70-23-606 (1995) (record keeping).

40. Referred to as the *syndicat*. See NATELSON, POA, *supra* note 2, at 31.

41. MONT. CODE ANN. § 70-23-403(1) (1995).

42. See Barzel & Sass, *supra* note 1.

43. See *Ley Para establecer el Régimen de la Propiedad Horizontal* [Law to

tana statute adds a sentence not appearing in the Puerto Rican prototype: "Value need not conform to market value."<sup>44</sup> The result leaves one wondering just what the statute is supposed to mean.

Uncritical borrowing from civil law sources creates an anomalous role for condominium bylaws. In usual American practice, "bylaws" are rules for the internal governance of an association or corporation—more akin to statutes than to constitutive documents and more easily changed. The UOA, however, prescribes a constitutive role for the bylaws. The implications of this are discussed in Part V.<sup>45</sup>

### C. Organization of the UOA

The UOA contains nine Parts. Part 2, "Regulation of Unit Sales Prior to Construction," and Part 10, "Enforcement and Penalty," are consumer protection regulations added by the legislature in 1973 and are discussed in Part (V)(I) of this article.<sup>46</sup>

Part 1, "General Provisions," and Part 3, "Creation—Declaration and Bylaws," contain most of the rules for establishing a condominium. The UOA provides that a condominium is established by the execution, acknowledgement, and recording of a condominium declaration.<sup>47</sup> Only land described in

establish the Horizontal Property Regime], art. 8, 1958 P.R. Laws 104 ("El titular tendrá derecho exclusivo a su apartamento y a una participación con las demás titulares en los elementos comunes de inmueble, equivalente al porcentaje que represente el valor de su apartamento dentro del conjunto del inmueble." ["The owner will have the exclusive right to his apartment and a share with the other owners in the common elements of the realty, equivalent to the percentage that represents the value of his apartment within the whole of the real estate."]).

44. MONT. CODE ANN. § 70-23-403(1) (1995).

45. These problems are not unique; much confusion in the law of American property owners associations can be traced to inadequate legal work undertaken by federal authorities. See, e.g., NATELSON, POA, *supra* note 1, at 618-19 (problems in FHA Form 1401 for certain non-condominium subdivisions).

46. See *infra* Part V(I).

47. See MONT. CODE ANN. § 70-23-102(6) (1995): "Declaration' means the instrument by which the property is submitted to the provisions of this chapter." See also MONT. CODE ANN. § 70-23-103 (1995):

Applicability — submission by declaration required. In order to submit any property to the provisions of this chapter, the sole owner or sole lessee or all of the owners or all of the lessees thereof shall execute, acknowledge, and record a declaration in the office of the recording officer of the county in which the property is located. The declaration shall be executed in accordance with 70-23-301.

See also MONT. CODE ANN. § 70-23-305(1) (1995): "When a declaration is made and approved as required, it must, upon the payment of the fees provided by law, be recorded by the recording officer. The fact of recording and the date of recording

the declaration as covered thereby becomes part of the condominium.<sup>48</sup> Property previously held in condominium, but since released, may be resubmitted.<sup>49</sup>

The UOA further requires that the declaration include a land description, the name of the condominium, descriptions of units and of general common elements and of limited common elements, the use for which the condominium is designed, the name of an agent for service of process, and "any other details regarding the property that the person executing the declaration considers desirable."<sup>50</sup> The statute also permits, but does not require, recording of a preliminary declaration.<sup>51</sup> Floor plans are filed "with" the declaration, but unlike some other statutes, the UOA does not specify that the plans are part of the declaration.<sup>52</sup>

The bylaws serve a similar constitutive purpose, and are recorded with the declaration.<sup>53</sup> Their prescribed content in-

must be entered on the declaration."

48. See *Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc.*, 276 Mont. 268, 915 P.2d 845 (1996).

49. See MONT. CODE ANN. § 70-23-806 (1995).

50. MONT. CODE ANN. § 70-23-301 (1995):

Contents of declaration. A declaration shall contain:

- (1) a description of the land, whether leased or in fee simple, on which the building is or is to be located;
- (2) the name by which the property shall be known and a general description of the building, including the number of stories and basements, the number of units, and the principal materials of which it is constructed;
- (3) the unit designation, location, approximate area of each unit, and any other data necessary for proper identification;
- (4) a description of the general common elements and the percentage of the interest of each unit owner therein;
- (5) a description of the limited common elements, if any, stating to which units their use is reserved and in what percentage;
- (6) a statement of the use for which the building and each of the units is intended;
- (7) the name of a person to receive service of process in the cases provided in 70-23-901 and the residence or place of business of such person which shall be within the county in which the property is located;
- (8) any other details regarding the property that the person executing the declaration considers desirable.

51. See MONT. CODE ANN. § 70-23-302 (1995).

52. See MONT. CODE ANN. § 70-23-306 (1995). *But cf.* UNIF. CONDOMINIUM ACT § 2-109(a), 7 U.L.A. 256 (1997) (plans are part of declaration).

53. See MONT. CODE ANN. § 70-23-307 (1995):

Bylaws—adoption, recording, and amendment.

- (1) The unit owners of each property shall adopt bylaws to govern the administration of the property.

cludes the requirement of an owner's association, no matter how small the condominium.<sup>54</sup> The bylaws include not only corporate governance procedures expected in American bylaws, but also language that defines property rights, including running covenants for assessments and restricting land use.<sup>55</sup> The statute

---

(2) A copy of the bylaws, certified by the presiding officer and secretary of the association, shall be recorded simultaneously with the declaration of the property to which the bylaws relate.

(3) An amendment of the bylaws shall not be effective unless approved by 75% of the unit owners and until a copy of the bylaws, as amended, certified by the presiding officer and secretary of the association of unit owners, is recorded.

Before filing of the declaration, the "unit owners" who adopt the bylaws are the developer or other person who owns the land. See *Jordan v. Elizabethan Manor*, 181 Mont. 424, 593 P.2d 1049 (1979), discussed *infra* Part V(D).

54. See MONT. CODE ANN. § 70-23-102(1) (1995) ("Association of unit owners" defined as "all the unit owners acting as a group in accordance with the declaration and bylaws"); see also *Edgewater Townhouse Homeowner's Ass'n v. Holtman*, 256 Mont. 182, 845 P.2d 1224 (1993) (POA membership appurtenant to ownership of units).

55. See MONT. CODE ANN. § 70-23-308 (1995).

Contents of bylaws. The bylaws shall provide for:

(1) the election from among the unit owners of a board of directors, the number of persons constituting the board, and that the terms of at least one-third of the directors shall expire annually; the powers and duties of the board; the compensation, if any, of the directors; the method of removal from office of the directors; and whether or not the board may engage the services of a manager or managing agent;

(2) the method of calling meetings of the unit owners and the percentage, if other than a majority as defined by 70-23-102(10), that shall constitute a quorum;

(3) the election of a chairman, a secretary, and a treasurer;

(4) the maintenance, upkeep, and repair of the common elements and payment for the expense thereof, including the method of approving payment vouchers;

(5) the employment of personnel necessary for the maintenance, upkeep, and repair of the common elements;

(6) the manner of collecting from the unit owners their share of the common expenses;

(7) the method of adopting and of amending administrative rules governing the details of the operation and use of the common elements;

(8) such restrictions on and requirements respecting the use and maintenance of the units and the use of the common elements, not included in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners;

(9) the method of amending the bylaws subject to 70-23-307.

For the role of "restrictions on and requirements respecting the use and maintenance of the units" as running covenants and other kinds of servitudes, compare *Association of Unit Owners of Deer Lodge Condominium, Inc. v. Big Sky of Montana, Inc.*, 242 Mont. 358, 790 P.2d 967 (1990); *Association of Unit Owners of Deer Lodge Condominium v. Big Sky of Montana, Inc.*, 245 Mont. 64, 798 P.2d 1018 (1990);

provides that the Property Owners Association (POA) may adopt administrative rules in addition to the bylaws, and that both are binding on all unit owners.<sup>56</sup> At times, use restrictions expected only in recorded covenants appear in the administrative rules.<sup>57</sup>

Part 4 of the UOA, "Nature of the Ownership Interest," contains language (usual in condominium statutes) defining units as separately owned parcels of property with appurtenant common elements, with partition duly restricted.<sup>58</sup>

Part 5, "Rights and Duties Incidental to Unit Ownership," sets forth sketchy provisions related to condominium maintenance; requires owners to comply with the declaration, bylaws, and administrative rules; and invalidates unit owners' waivers of the costs and benefits of common elements.<sup>59</sup> One section<sup>60</sup> strongly implies what case law subsequently settled: that land use rules in condominium documentation are common law servitudes: mostly affirmative easements and covenants running with the land.<sup>61</sup>

Part 6, "Conveyances, Liens, and Common Expenses," is devoted primarily to liens, including those securing collection of maintenance assessments.<sup>62</sup> One section, however, governs the form of unit conveyances,<sup>63</sup> another authorizes insurance for the

*Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965).

56. See MONT. CODE ANN. § 70-23-506 (1995):

Compliance with bylaws, rules, and covenants required—action. Each unit owner shall comply with the bylaws and with the administrative rules adopted pursuant thereto and with the covenants, conditions, and restrictions in the declaration or in the deed to his unit. Failure to comply therewith shall be grounds for an action maintainable by the association of unit owners or by an aggrieved unit owner.

For administrative regulations, see MONT. CODE ANN. § 70-23-613(2) (1995).

57. See, e.g., Rules and Regulations for The Narrows Homeowners Ass'n, Inc., *microformed on Recep. No. 331110*, June 14, 1991 (Lake County, Montana, Clerk and Recorder's Office) (pertaining to pets and architectural restrictions, *inter alia*).

58. See MONT. CODE ANN. §§ 70-23-401 to -405 (1995).

59. See MONT. CODE ANN. §§ 70-23-501 to -506 (1995).

60. See MONT. CODE ANN. § 70-23-506 (1995).

61. See NATELSON, POA, *supra* note 1, at 58-60.

62. These sections are discussed *infra* Part V(E).

63. See MONT. CODE ANN. § 70-23-601 (1995):

Contents of deed or lease of unit. The deed or lease of a unit shall contain:

- (1) a description of the land, the name of the property, and the recording index numbers and date of recording of the declaration;
- (2) the unit designation of the unit;
- (3) the use for which the unit is intended;
- (4) the percentages of undivided interest in the common elements appertaining to the unit;
- (5) any further details the grantor and grantee or lessor and lessee may consider desirable.

condominium,<sup>64</sup> and still another requires certain disclosures to prospective unit purchasers.<sup>65</sup>

Part 7, mandating separate property taxation of individual units, was moved to the state tax assessment law in 1985, and is no longer part of the UOA.<sup>66</sup> Part 8, "Removal of Property From Unit Ownership Act," is devoted to termination of the condominium regime, and is discussed in greater detail in Part V(H) of this Article. Finally, UOA Part 9, "Actions and Process," deals with lawsuits by and against unit owners, and is discussed in Part V(G).

#### IV. APPROACHING REFORM

##### A. *Assessing the Functions of Statutes*

The extent to which one favors prescriptive statutes on a subject tends to mirror the extent to which one favors political regulation, rather than private regulation, of that subject. Prescriptive statutes are products of the political process, and represent the judgment of politicians as to what ought or ought not be done in particular circumstances. Because the usual course of private law is to promote and enforce bargains and hypothetical bargains, preference for common law often reflects a preference for private ordering.<sup>67</sup> Thus, analogies are drawn between codification and central planning on the one hand, and common law and free markets on the other.<sup>68</sup> Not surprisingly, as the role of centralized decision-making has grown throughout this century, so also has the role of statutes.

But the trend toward centralized decision-making recently has reversed—partly due to the dramatic collapse of centralized societies and partly due to a swelling tide of empirical research that implicates statism for ensuing stagnation and credits freedom for ensuing progress.<sup>69</sup>

64. See MONT. CODE ANN. § 70-23-612 (1995).

65. See MONT. CODE ANN. § 70-23-613 (1995). See *infra* Part V(I).

66. See MONT. CODE ANN. § 15-8-511 (1995).

67. For discussion of the role of common law, see NATELSON, DEEDS *supra* note 1, at 513-74. Of course, the statement in the text is subject to many qualifications. For example, David Dudley Field himself, the quintessential codifier, was also a classical liberal on economic questions. However, the proposition in the text is perhaps more true today than in Field's time.

Note also that statutes serve functions other than prescription. See *infra* text accompanying notes 73-75.

68. See, e.g., Rubin, *supra* note 1.

69. See Robert G. Natelson, *Tax and Spending Limits for Montana?*, 1994 INDE-

Accompanying the disillusionment with central planning has been a renewed skepticism toward prescriptive statutes and codification, in part because of the “knowledge problem”: the Hayekian observation that knowledge is too decentralized, and the world too complex and too ephemeral, for central planners to know enough or react fast enough to act efficiently. Thus, Professor Paul H. Rubin, in an article rejecting codification as a source of contract law in post-Communist nations, states:

For anyone or any group to be able to craft such a body of law is as likely as for a decision maker to be able to design a complex economy *de novo*. It is of course the impossibility of this latter task that has caused the current situation in the relevant economies.<sup>70</sup>

In addition to the “knowledge problem,” there is a realization that even when good data are available, policy-makers often ignore them because policy-makers face powerful incentives to do so.<sup>71</sup>

A more flexible alternative to the prescriptive statute is the default rule statute. However, even this approach may expect too much of the legislator. Inappropriate default rules can render drafting errors expensive, and when faulty rules are enshrined in statute, courts may feel powerless to mitigate them. Drafting, in any case, is not without costs, and until a few bad outcomes result, those preparing documents may not even think to draft around the default rule.<sup>72</sup>

Therefore, in many cases the “safe harbor” statute is preferable to either the prescriptive or default rule approach. If the safe harbor statute proves inapt, drafters can disregard it and courts can validate or invalidate their efforts, according to common law. The primary risks of the safe harbor statute are that the safe

---

PENDENCE INST. 10-94 (summarizing previous research connecting prior changes in tax levels and other measures of government with subsequent inverse changes in economic growth, and similar connections for Montana). THE ECONOMIST regularly summarizes new studies along the same line. See, e.g., *Of Liberty and Prosperity: Does Economic Freedom Help a Country Grow More Quickly?*, THE ECONOMIST, Jan. 13, 1996, at 21.

70. Rubin, *supra* note 1, at 61.

71. See Tollison, *supra* note 1 (introducing public choice studies of role of incentives and structure on legislation).

72. An example of a default rule with disastrous potential is the “equitable conversion” default rule prescribing that in an executory contract for the sale of real estate the risk is on the vendee. Today, parties almost universally contract to the contrary, but this takes paper, ink, and time. See also Smith, *supra* note 1, at 1184 (contracting out of default rule giving land vendor a right to specific performance).



harbor itself may not be justified as sound public policy and that the statute may inhibit innovation.

Other low-risk alternatives to the prescriptive statute are legislative checklists<sup>73</sup> and disclosure laws. The latter are designed to facilitate efficient agreements by ensuring that all parties have actual notice of relevant material facts. However, an unartfully drafted disclosure law may mandate either overdisclosure or underdisclosure. Overdisclosure imposes needless expense on both parties: one person must make and document the disclosure while the other must wade through useless information. Such a statute may inhibit, rather than encourage, desirable agreement. On the other hand, underdisclosure leaves at least one party with problems he did not bargain for. Without actual notice of serious undisclosed problems, the agreed-upon price cannot reflect the existence of those problems.<sup>74</sup>

Thus, in addressing the law of condominium, the legislature must take care not to do too much. Lawmakers should proceed incrementally. They should focus on providing legal security to those choosing the condominium form without unduly restricting freedom of contract or the market's (i.e., society's) ability to meet new challenges.

## *B. Assessing Codification*

### *1. The Urge to Codify*

The foregoing discussion on the limits of statutes affords some insight into resolving a natural question: If changes in Montana's condominium law are necessary, why not repeal the UOA altogether and enact a broader, better organized scheme—a code drafted for Montana, or the Uniform Condominium Act, or the Uniform Common Interest Ownership Act? In other words, why not codify?

Codification proponents argue that because codes set forth rules in statutory form rather than leaving them to successive litigation, codes increase the law's certainty, predictability and accessibility. Proponents further contend that it is often easier to adopt a new law rather than reform a current one.

Montana codification advocates have particularly favored uniform codes, such as the Field Code and, more recently, pro-

---

73. Cf. Morriss, *supra* note 1, at 445 ("Laws must answer the questions people ask, not questions from another time and place. . . .").

74. See NATELSON, DEEDS, *supra* note 1, at 522.

posals by the National Conference of Commissioners on Uniform State Laws. Codification advocates note that enacting a uniform law imports as persuasive authority existing court cases construing it. If a specific proposal has not been widely accepted elsewhere, they argue that the change will place Montana at the forefront of wise legal reform. If it has been widely accepted elsewhere, they contend that the change will ensure that our statutes are uniform with those of other states. Such arguments have a long history of success in Montana. Enactment of the Field Code has been followed by adoption of a great many uniform laws.<sup>75</sup> The time has come, however, to reappraise this devotion to codification, at least in the realm of private law; for there is growing evidence that the results have not been an unqualified success.

## 2. Results of Past Codification Efforts

Montana's long-standing penchant for codification of such private law areas as property, agency and contracts sharply diverges from the pattern in most other American states,<sup>76</sup> where the shaping of private law usually has been left to the courts, and legislative intervention has been of an ad hoc rather than a comprehensive nature.<sup>77</sup> This has been true particularly in real estate with its inherently local nature and multitudinous variations in practice,<sup>78</sup> although particular sections of the uniform acts sometimes have been influential in real estate law.<sup>79</sup>

---

75. The 1995 General Index to Montana Code Annotated at 2608-13 lists no fewer than 51 uniform laws adopted here.

76. The few states that have comprehensively codified private law are the civil law jurisdiction of Louisiana and the four states that adopted the complete Field Civil Code: California, the Dakotas, and Montana. A nineteenth century "codification" in Georgia was merely a collection and organization of that state's existing law. See Morriss, *supra* note 1, at 372 n.52.

77. Even the most widely adopted uniform laws tend to be of the *ad hoc* variety, including all of the Uniform Commercial Code except Article 9.

78. See Marion W. Benfield, Jr., *Wasted Days and Wasted Nights: Why the Land Acts Failed*, 20 NOVA L. REV. 1037 (1996). Not discussed in that article is the Uniform Residential Landlord and Tenant Act, promulgated nearly a quarter of a century ago, but adopted only in Montana and 14 other states. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7B U.L.A. 63 (Supp. 1996). Perhaps the most successful comprehensive uniform real estate laws have been (if considered together) the UCA and the UCIOA, but only 18 states have adopted either one or the other. See *supra* note 11. See also Schill, *supra* note 1, at 1300-04 (variations of conditions among states).

79. See Gerald Korngold, *Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts*, 20 NOVA L. REV. 1069 (1996); Norman Siebrasse & Catherine Walsh, *The Influence of the ULSIA on*

Montana legal scholars have long contributed their talents to state law reform, but until recently there was no scholarly discussion on whether Montana was benefitting from codification per se. The first break in a century of silence came inadvertently, with publication of my 1990 article on the Montana law of running covenants.<sup>80</sup> That project's initial purpose was simply to synthesize existing law, which is purportedly based on sections of the original Field Civil Code. However, the difficulty of finding order in this law forced me to re-assess the wisdom of the Code itself.

I concluded that instead of rendering the law more stable, more predictable and more fair—as its advocates had asserted—codification had done exactly the opposite. When confronted with statutes that were difficult to understand<sup>81</sup> and did not comport with local culture,<sup>82</sup> the Montana Supreme Court had often ignored or twisted them. The resulting mixture of ill-fitting statutes and aversive cases had become so difficult to understand, so contradictory, and so uneven of application that it could hardly be called “law” at all. Accordingly, I concluded that the code sections on running covenants had been a failure and urged the legislature to repeal them and allow a distinctively Montana common law to develop. As often occurs in the wake of suggested reforms to mere “lawyers’ law,” the legislature did nothing.<sup>83</sup>

In 1995, Professor Andrew P. Morriss of Case Western Reserve University published the results of his own study on the Montana Field Code provisions governing discharge from employment. He agreed that the courts had diverged from the Civil Code, and that this was the result of a hostile legal culture and

---

*the Proposed New Brunswick Land Security Act*, 20 NOVA L. REV. 1133 (1996). Despite my counsel in this article against wholesale adoption of uniform acts, I also recommend borrowing particular provisions where appropriate. See *infra* notes 277-84 and accompanying text.

80. See Natelson, *Running*, *supra* note 1.

81. Difficulties arose because of the language in the code and because its original premise was that it would be Napoleonic in nature—completely displacing, rather than coexisting with, common law. See Natelson, *Running*, *supra* note 1, at 37, 88-89.

82. See *id.* at 89-93.

83. This inattention may baffle those who cling to what public choice economists call the “romantic notion” of politics. See Tollison, *supra* note 1, at 362. The public choice explanation is that policy makers have stronger incentives to expand their power than to correct existing misapplications of it. The dominant incentives are created by organized interests that have learned to manipulate existing rules.

the Code's variance from local conditions.<sup>84</sup>

Moreover, Professor Morriss identified other unfortunate results from codification, including inducements for special interest lobbying:

When the Codes established a rule that previously did not exist (as opposed to simply rearranging existing Montana statutes), some interests benefitted from the new rule. Those interests now had a stake in defending the continued existence of the new rule, an interest they would not have had otherwise. By creating a rule, the legislature provided an incentive to organize the affected interests in the rule's defense, assisting in overcoming the collective action problems inherent in lobbying.<sup>85</sup>

Furthermore, he concluded that codification promoted needless political intervention in society, and excessive restrictions on personal freedom—generally to the benefit of those special interests with Helena lobbyists at the expense of the public at large:

Additionally, the lack of a comprehensive code would have eliminated the political legitimacy granted to interventionist legislation by the Codes' attempt to gather all of Montana society within their framework. Of course, legislators in states without codes have managed to serve special interests at the expense of the public and to pass statist legislation. Nevertheless, increasing the barriers to such actions would have served Montana well. . . .

The existence of the comprehensive Civil Code promoted the idea that the legislature's role legitimately included subjects such as limiting the freedom of individuals to contract for employment longer than two years or requiring licenses of the owners of stallions whose owners sold their breeding services. The codifiers created a system built around legislation rather than law. This left Montana with an interventionist government mindset that continues today.<sup>86</sup>

Professor Morriss' second two conclusions about the 1895 codification—that it encouraged special interest lobbying and excessive political intervention—are equally applicable to any codification, whether or not as extensive as the Field Code. This is because overarching statutory schemes tend to encourage

---

84. See Morriss, *supra* note 1, at 417-42.

85. See *id.* at 443 (citation omitted).

86. *Id.* at 443-44, 447 (citing anomalous Montana examples of state socialism and central regulatory control).

organization of special interests and legislative intervention on their behalf. One could argue, though, that the first conclusion—the purely legal problems of uncertainty and lack of local adaptation—might be avoided if the codification were of more modest scope, as a codification of condominium law would be.

The problems still would outweigh the benefits. If adapted perfectly to Montana on the date of enactment, such a code would soon become obsolete from increasingly rapid changes in conditions and innovation.<sup>87</sup> Moreover, it is highly unlikely that such a code would be adapted perfectly to Montana. The state legislative process is barely adequate for ad hoc intervention; it is simply not up to the job of comprehensive codification.

To grasp the latter point, one need only examine the defects in the procedure that induced the legislature to “bolt” the Field Codes wholesale without serious reflection, opposition or amendment, and utterly without consideration of their controversial history in New York and California.<sup>88</sup> All of these defects still plague the Montana legislative process, at least to some extent, more than a century later. For example:

### 1. Labor shortage

Although Montana’s statutes in 1895 were in defective condition, just as the UOA is today,<sup>89</sup> and although most members of the Montana Bar agreed the situation should be improved,<sup>90</sup> no one wanted to do the work of intelligently re-organizing existing statutes and court decisions.<sup>91</sup> Even the codification commission empaneled to adapt the Field Codes to Montana seems to have done little in that line.<sup>92</sup> As modern Montana law reformers know, the labor situation hasn’t changed much. Regular

87. See, e.g., Smith, *supra* note 1, at 1174 (private market for real estate warranties developed that might have been precluded by codification); see *id.* at 1176-78 (Uniform Simplification of Land Transfers Act fails to take into consideration development of title insurance market).

88. Most of these defects were identified in Morriss, *supra* note 1. In *Running*, I did not examine closely the decision making process that led to code enactment, except to note that Montana’s principal codification proponents were Easterners without substantial code practice experience. See Natelson, *Running*, *supra* note 1, at 91.

89. See Morriss, *supra* note 1, at 362, 381 & 446.

90. See *id.* at 362-63.

91. See *id.* at 374, 443 & n.55. This was a problem in California as well, before that state gave up efforts to re-organize its statutes and adopted the Field Code instead. See *id.* at 376. And no wonder: statutory revision is grueling labor.

92. On failure to adapt the Codes, see Morriss, *supra* note 1, at 405. The annotations also were inadequate. See *id.* at 433.

sessions of the legislature last only ninety days and meet only once every two years. There is a legislative drafting support staff, but its talents are uneven and it is often overworked, for the press of business is far greater than in 1895. Law reformers generally end up doing most of the work themselves.<sup>93</sup>

## 2. *Undue Concentration of Decision-Making Power*

Once a few key people had agreed that the Field Codes were a “done deal,” they were. As is true today, in 1895 Montana was a small state with a relatively uncomplicated economy, so unanimity among influential players could be more readily achieved than in larger polities.<sup>94</sup> But nothing is so likely to lead to error than premature consensus, which inevitably conceals undiscussed pitfalls. In the wake of the Field codification, Montanans discovered pitfalls galore and are still finding them.

## 3. *Inaccurate Promotion Campaign*

To sell the Field Codes to the general public, proponents resorted to tactics eerily familiar to modern observers of state politics. One such tactic was to appeal to Montanans’ pride by telling them that adoption of the Codes would put their state in the forefront of modern legal reform.<sup>95</sup> Another was simply to misrepresent the content of the codes—repeatedly and shamelessly. For example, even respected proponents testified that the Codes fit in well with the common law tradition and did little more than re-organize existing Montana law.<sup>96</sup> Sadly, Montana

---

93. Dean E. Edwin Eck reports that in a recent revision of Montana trust law, largely from a pre-existing California statute, “eight to ten” members of the Montana Bar participated in about six meetings over a three to four year period. Actual drafting fell mostly on Dean Eck. Telephone Interview with E. Edwin Eck, Dean of the University of Montana School of Law (July 30, 1996).

94. See Morriss, *supra* note 1, at 372-74 & n.55 (making a similar observation about Dakota Territory). On this point, compare James Madison, THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter, ed. 1961) (small polities more at risk from “factions” [special interests] than large ones because smaller polities have fewer factions; thus, factions have lower organization costs and can more readily “concert and execute their plans of oppression.”).

95. See Morriss, *supra* note 1, at 363.

96. See, e.g., *id.* at 363 (Code Commissioner Decius Wade claimed the imposition of Roman law in Britain was the key to the development of English common law); *id.* at 388 (Helena Daily Herald reported that a panel of lawyers told a joint meeting of the Montana Senate Judiciary Committee and the House Code Committee that the Codes were “made up, with the exception of about one hundred sections, of the present Montana laws. The only difference is that in the new code the laws, instead of being scattered broadcast throughout the volume, have been put in their

political decision-making still is afflicted with this sort of brazen misrepresentation, both to the public and to the legislature.<sup>97</sup>

#### 4. Information Breakdown

During the legislative process, information about constituent wants and needs should flow freely to lawmakers, who should then compare those data and their own knowledge with information about bills they must vote on. During the 1895 session, however, lawmakers did not have the resources, time or expertise necessary to examine the Field Codes, so the normal information-flow process broke down.<sup>98</sup>

Similar information blockages involving large bills remain common in the legislative process. For example, a major information blockage occurred during the 1993 general session with respect to the most critical of all measures—the state budget. For several reasons,<sup>99</sup> many lawmakers were under the impression that the budget bill reduced state spending when in fact it greatly increased spending. Admittedly, any condominium recodification scheme would not be as massive as the state budget

proper divisions under their proper heads.”); *id.* at 389 (Bar Association committee stated that “the changes are few and necessary”).

97. As chairman since 1993 of Montanans for Better Government, a statewide civic/watchdog group, it is part of my job to track Montana political misrepresentation. It is a substantial undertaking. Only a minority of these misrepresentations are reported in the press. Some examples include Bob Anez, *Truth Gets Back Seat in 2 Campaigns*, BILLINGS GAZETTE, June 30, 1996, at 3C (public misrepresentations by two statewide candidates for office); Mike Dennison, *Rhetorical Battle: How Racicot Sees the Issues*, GREAT FALLS TRIBUNE, Dec. 3, 1995, at 4A (extensive misrepresentations by governor).

98. See Morriss, *supra* note 1, at 363 (“The Codes also physically overwhelmed the Montana Legislature. Their sheer size and hurried passage meant that the usual mechanisms for review of legislation failed completely.”); see also *id.* at 387. There also was a failure to examine the record from New York: “The legislature willingly surveyed attorneys around the state, but apparently could not contact even a single attorney in New York.” *Id.* at 403.

99. One reason was that budget documents presented for legislative consideration apparently were misleading and confusing, and continued to be so even after the session was over. See, e.g., MONTANA OFFICE OF THE LEGIS. FISCAL ANALYST, APPROPRIATIONS REP.: 1995 BIENNIUM (1993) at Summary-4 (implying budget had been cut); letter from Marc Racicot, Governor of Montana, to Jim Donovan (Feb. 2, 1996) (on file with the author) (“According to Legislative and budget office figures, during the 1993 regular session, \$85 million in state spending reductions were approved and signed”). But see APPROPRIATIONS REPORT, *supra*, at Summary-2 to -4 (showing that budget “cuts” were made only in the House Bill 2 portion of the general fund, and consisted entirely of \$41 million in fund shifts and \$46 million in reductions in growth rate; growth outside the general fund accelerated); MONTANA OFFICE OF BUDGET & PLAN., ALL FUND BIENNIAL APPROPRIATIONS (1994) (showing spending increase, even after special session reductions, of nearly \$400 million).

or the Field Codes, but it would be large and would have to compete for legislative time with a far greater volume of bills, including bills of much more inherent interest to legislators.

### 5. *Legislative Incentives*

With respect to codification bills in particular, lawmakers were and remain subject to powerful incentives to accept these bills with relatively little critical examination. Professor Morriss noted that adoption of the Field Codes enabled legislators to create demand for their services.

By passing such a comprehensive set of laws, the Fourth Legislature created both the need for amendments to “fix” problem areas and the opportunity to provide such services. Additionally, amendments to the Codes were far more difficult for outsiders to decipher than laws written from scratch. Amendments required possession of the Codes to determine what was being amended because the titles to amendments typically provided no information regarding their contents.<sup>100</sup>

Furthermore, the party in control of the legislature is tempted to use codification as an opportunity to prove it can “accomplish something.”<sup>101</sup> Accordingly, it is discouraged from detailed examination of proposals, for examination entails a risk that such proposals may not be adopted at all, and may reveal splits within the controlling party.

Codes also create business for the recipients of legislative largess. The year 1895 represented an extreme example of this: the house of representatives decided to engross all 170 pounds of laws by hand, which justified continuation and expansion of a formerly embarrassing bloat in legislative staff.<sup>102</sup>

On the other hand, lawmakers, then and now, face disincentives to get too deeply into fine details when those details are not subjects of controversy or patronage. The Field Codes were adopted with far less scrutiny than bills involving county subdivision and school textbook selection.<sup>103</sup>

In sum: Montana may have been long married to codification, but the lessons of the past century strongly argue that the marriage was a mistake and a divorce long overdue. At the very

---

100. Morriss, *supra* note 1, at 363; *see also id.* at 408-09.

101. *See id.* at 408.

102. *See id.* at 446.

103. *See id.*



least, the traditional presumption in favor of codification should be reversed, with prospective codifiers bearing the burden of proving that less radical reform will not suffice, and bearing the further burden of tailoring any proposed codification to fit realistically with Montana conditions.

### C. Assessing the Uniform Acts

#### 1. Inherent Problems in Uniformity

Just as scholars are challenging codification and other forms of statutory governance, they are also demythologizing those most venerable of academic sacred cows: uniform state laws. One major study concludes that, far from being the product of dispassionate scholarship, uniform laws are largely the result of interest group politics.<sup>104</sup> Another study argues that codification through uniform acts is distinctly inferior as a method of balancing uniformity and diversity than ad hoc, decentralized, statutory development.<sup>105</sup> A third study concludes that, at least in real estate law, the costs of uniformity outweigh its benefits.<sup>106</sup> Fi-

104. See Schwartz & Scott, *supra* note 1. Obviously, these are national interest groups, and may not even reflect Montana special interests, much less the Montana public interest.

105. See Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 ECON. INQUIRY 464 (1996) (spontaneous legislative adoption of limited liability company statutes without federal or uniform law commission intervention shows that uniformity appears to extent efficient and diversity remains to extent efficient).

106. Michael H. Schill focuses on the advisability of federal intervention in the real estate finance field, but as he makes clear, many of his comments are equally applicable to uniform state laws. See Schill, *supra* note 1. Professor Schill concludes:

Economic efficiency rationales for federal preemption are quite weak. Spillovers attributable to different state mortgage laws are small and could be eliminated at modest cost. Transaction costs and lost scale economies are also likely to be quite small. Furthermore, differences among states justify customized legal rules with respect to the law governing the relationship between mortgagors and mortgagees . . . . [W]e should not automatically link the development of national markets to uniform national law. In some instances, the efficiency gains of uniform law may provide a strong justification for sacrificing diversity. In other instances, such as mortgage foreclosure law, uniformity will generate few benefits.

Diverse state laws often reflect the health of our political system, rather than its infirmity. Different state laws may demonstrate competition among jurisdictions for the set of public policies that will best meet the needs and aspirations of their citizens. Diversity may also reflect the flexibility and experimentation made possible by decentralized government institutions. Perhaps even more importantly, diverse state laws may demonstrate that states continue to function as meaningful forums for political participation and action.

nally, an analysis of two uniform land acts concludes that the acts were based on an inadequate understanding of the market and on empirically false assumptions.<sup>107</sup>

In light of such conclusions, the legislature should reconsider seriously before adopting additional uniform laws—at least in the area of real property.

## 2. *Specific Problems With the UCIOA and UCA*

What is true for uniform laws in general is especially true for the Uniform Common Interest Ownership Act (UCIOA) and the Uniform Condominium Act (UCA) in particular. Although those measures have some excellent provisions,<sup>108</sup> taken as a whole they are far too global and, with some exceptions,<sup>109</sup> too prescriptive.

For example, while the UOA is applicable only to those condominiums whose developers elect it, the UCIOA applies to all “common interest communities,” and the definition of the term “community(ies)” is exceedingly broad. Moreover, there is no right to opt out.<sup>110</sup> The UCA is less sweeping, but it still applies to all condominiums, and the definition of condominium is broader than in traditional statutes, for there is no horizontal property requirement.<sup>111</sup>

The hubris of the drafters left both uniform acts burdened by a horde of immutable or quasi-mutable rules, crafted to impose national uniformity without regard for local conditions.<sup>112</sup> Thus, under both laws, variation by agreement is prohibited unless the act specifically permits it—a disturbing reversal of the usual assumption in American private law.<sup>113</sup> Residential pur-

---

*Id.* at 1319-20.

107. See Smith, *supra* note 1.

108. I recommend that Montana enact some of them. See, e.g., *infra* text accompanying note 121.

109. Some of the provisions of the uniform acts are default rather than immutable rules. See, e.g., UNIF. COMMON INTEREST OWNERSHIP ACT § 2-105, 7 pt. 1 U.L.A. 522-24 (1997) (content of declaration); *id.* § 2-107, at 529-30 (common elements and voting); *id.* § 2-108, at 532 (limited common elements).

110. See UNIF. COMMON INTEREST OWNERSHIP ACT § 1-201, 7 pt. 1 U.L.A. 505 (1997). Cf. *id.* § 1-103(7), at 479 (defining “Common Interest Community”); *id.* § 1-103(23), at 481 (defining “Planned Community”).

111. See UNIF. CONDOMINIUM ACT § 1-103(7), 7 pt. 2 U.L.A. 215 (1997): “Condominium” means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions.”

112. Or worse: See Schwartz & Scott, *supra* note 1 (uniform laws crafted in defiance of local conditions to serve special interests).

113. See UNIF. COMMON INTEREST OWNERSHIP ACT § 1-104, 7 pt. 1 U.L.A. 489-90

chasers have no right to waive the public offering statement.<sup>114</sup> Escrow applies to all sales; there is no alternative course.<sup>115</sup> The uniform acts even presume to rewrite the warranty, disclaimer and punitive damage laws of adopting states.<sup>116</sup>

The uniform acts contain portions seemingly designed to be in aid of agreement rather than purely regulatory, but even those provisions are sometimes oppressive. For example, a nonmerchant unit owner reselling his home is subject, not merely to common law disclosure requirements, but must, without request, give the purchaser a massive amount of paperwork.<sup>117</sup> Such a requirement is almost certainly at odds with the tendency toward legal informality characteristic of Montana and many other western states.<sup>118</sup>

Professor James Charles Smith has made the following comments with respect to two other uniform real estate laws:

The drafters of the ULTA and the USLTA were ambitious, seeking to overhaul a good many long-embedded property law doctrines. They sought to purge the law of ancient rules perceived no longer to serve the needs of modern markets. In so doing, they went too far. Instead of focusing on a small number of revisions to rules that were both obsolete and harmful,<sup>119</sup> they painted with a broad brush, fashioning a code decreeing

(1997); UNIF. CONDOMINIUM ACT § 1-104, 7 pt. 2 U.L.A. 222 (1997).

114. See UNIF. COMMON INTEREST OWNERSHIP ACT § 4-101(a), 7 pt. 1 U.L.A. 610 (1997); UNIF. CONDOMINIUM ACT § 4-101(a), 7 pt. 2 U.L.A. 329 (1997).

115. See UNIF. COMMON INTEREST OWNERSHIP ACT § 4-110, 7 pt. 1 U.L.A. 626 (1997); UNIF. CONDOMINIUM ACT § 4-110, 7 pt. 2 U.L.A. 349 (1997); cf. MONT. CODE ANN. §§ 70-23-201 to -206 (1995).

116. See the standard warranty rules of UNIF. COMMON INTEREST OWNERSHIP ACT §§ 4-113 to -116, 7 pt. 1 U.L.A. 630-36 (1997), and UNIF. CONDOMINIUM ACT §§ 4-113 to -116, 7 pt. 2 U.L.A. 55-61 (1997). Such rules may squeeze out the healthy development of a private warranty market. See Smith, *supra* note 1, at 1174. The strict disclaimer provisions especially are at odds with the rules in some states, e.g., *Copland v. Nathaniel*, 624 N.Y.S.2d 514 (1995); *Tusch Enterprises v. Coffin*, 740 P.2d 1022 (Idaho 1987). See also UNIF. COMMON INTEREST OWNERSHIP ACT § 4-117, 7 pt. 1 U.L.A. 637 (1997) (special punitive damage provision); cf. MONT. CODE ANN. § 27-1-221 (1995) (applying different test).

117. See UNIF. COMMON INTEREST OWNERSHIP ACT § 4-109(a), 7 pt. 1 U.L.A. 623-25 (1997); UNIF. CONDOMINIUM ACT § 4-109(a), 7 pt. 2 U.L.A. 347 (1997). The POA provides some of this paperwork. See UNIF. COMMON INTEREST OWNERSHIP ACT § 4-109(b), 7 pt. 1 U.L.A. 625 (1997); UNIF. CONDOMINIUM ACT § 4-109(b), 7 pt. 2 U.L.A. 347 (1997).

118. See Natelson, *Running*, *supra* note 1, at 90; cf. MONT. CODE ANN. § 70-23-613 (1995) (much simpler disclosure requirements, enforced by right to cancel). Ironically, some other uniform laws pertaining to real estate adopt an anti-formalist bias. See Smith, *supra* note 1, at 1175. This may be explained by interest-group involvement in the drafting process. See generally Schwartz & Scott, *supra* note 1.

119. I.e., the specific reform process recommended in this article.

sweeping changes to the property laws of any state that chose enactment. . . .

In essence, the reformers aimed at too many targets. In two categories, ammunition was sent toward the wrong marks. First, they assumed that direct legislative action to solve a problem is preferable to market-based solutions, without making a careful examination as to the necessity for and costs of market intervention. The potential for solutions by other market institutions was overlooked. [For example w]ith respect to implied warranties of quality for the sale of new homes, the Acts mandated the use of a single standard, depriving the parties of the freedom of choosing to make their own bargain. This choice neglected the emerging response of the home-building industry in creating a system of private warranties, spearheaded by the HOW program. . . .

Second, in identifying problem areas, the Acts' architects disregarded the extent to which private ordering by parties, in written real property agreements, replace [sic] implied legal rules, greatly diminishing the importance of the implied rules.<sup>120</sup>

Every single one of those comments could be applied with equal force to the UCA and the UCIOA.

## V. REFORMING THE UOA

The basic approach of the present UOA—a safe harbor with a few prescriptive rules, default rules and disclosure requirements—is probably the correct approach. The statute offers security in an area in which security is prized (property rights), but in which there is relatively little Montana common law authority (condominium law). One measure of success is that despite Montana's sparse population, the condominium form has achieved surprising popularity in this state,<sup>121</sup> while the amount of reported litigation has been quite small.<sup>122</sup> Moreover,

---

120. Smith, *supra* note 1, at 1184-85.

121. The more heavily populated counties vary greatly in the number of condominiums. Gallatin County (pop. 50,463) has 188 condominium subdivisions, with Flathead County (pop. 59,218) not far behind with 159. On the other hand, Lake County (pop. 21,041) has only two; Ravalli County (pop. 25,010) has 15; and Missoula County, the state's second most populous (pop. 78,687) only 38. Confirming the success of the statute is one of Yellowstone County's leading condominium practitioners. Telephone Interview with Carol Hardy, Esq., (Aug. 8, 1996).

122. Cases on condominium law decided by the Montana Supreme Court, or where condominiums are parties, include *Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc.*, 276 Mont. 68, 915 P.2d 845 (1996); *Edgewater Townhouse Homeowner's Ass'n v. Holtman*, 256 Mont. 182, 845 P.2d 1224 (1993); *First Western*

the UOA has left developers free to craft somewhat different, though functionally similar, alternatives to meet evolving market demand.<sup>123</sup>

In this Part, I examine nine fundamental problems in the UOA. In each case, I state the nature of the problem, determine the reasons for the difficulty, explain the current meaning of the law, and recommend appropriate changes. The problems examined include: (A) the architectural structure of the condominium—whether units must be enclosed within walls; (B) the odd mandated structure of the governing documents; (C) whether, and how, the condominium declaration can be amended; (D) whether leasehold condominiums are permitted; (E) questions regarding association collection of common expenses; (F) questions regarding liens for debts owed to third parties; (G) association representation of unit owners in law suits; (H) questions pertaining to termination of the condominium regime; and (I) elimination of needless government regulation.

### A. Architectural Structure

When most people think of “condominium,” they think of apartment houses and other multiple-family dwellings. In the Puerto Rican prototype, this was the only kind of condominium permitted.<sup>124</sup> A similar limitation was carried over to the FHA Model Statute.<sup>125</sup> Technically, however, “condominium” is a form of ownership, not a form of use or architectural structure. Accordingly, the Montana drafters permitted condominium units devoted to any kind of independent use.<sup>126</sup> Today a fair number

---

Federal Sav. Bank v. Lence, 255 Mont. 7, 839 P.2d 1277 (1992); Board of Directors of Edelweiss Owners' Ass'n v. McIntosh, 251 Mont. 144, 822 P.2d 1080 (1991); Association of Unit Owners of Deer Lodge Condominium v. Big Sky of Montana, Inc., 245 Mont. 64, 798 P.2d 1018 (1990); State ex rel. Boyne USA, Inc. v. District Court, 228 Mont. 314, 742 P.2d 464 (1987); Jordan v. Elizabethan Manor, 181 Mont. 424, 593 P.2d 1049 (1979).

123. See, e.g., Declaration of Covenants, Conditions and Restrictions for Homestead Townhouses, *supra* note 32; Covenants and Restrictions for Bridger Creek Subdivision, *supra* note 32; Articles of Association of Borchers Resort Association of Area Three, *microformed on* Recep. No. 235627, July 22, 1977 (Lake County, Montana, Clerk and Recorder's Office).

124. Ley Para establecer el Régimen de la Propiedad Horizontal [Law to establish the Horizontal Property Regime], art. 2, 1958 P.R. Laws 104 (provisions of statute “aplicables sólo al edificio o casa de apartamentos . . . .” [“applicable only to the building or apartment house . . . .”]).

125. See FHA MODEL STATUTE, § 2(a) (1965) (referring to separately owned parts of the property as an “apartment”).

126. See MONT. CODE ANN. § 70-23-102(15) (1995).

of Montana condominiums serve purposes other than residential.<sup>127</sup> However, all of these purposes are served within walls.

In some states, condominiums include units that are not necessarily defined by walls: single family homes within air space blocks, mobile homes, boat slips, grain silos, and campsites.<sup>128</sup> Could Montana condominium units be wholly or partly out-of-doors? If not, outdoor uses are not permitted under the UOA, and horizontal property is a de facto condition of condominiums in Montana: units cannot be held *ab inferis usque ad coelum*, as they can in states with more modern statutes.<sup>129</sup>

An argument in favor of a less restrictive interpretation of the UOA's definition of unit is that the statutory language "including one or more rooms" may be optional: it does not require one or more rooms. Buttressing this position is the fact that the term "apartment" in the Model Act was changed to "unit" in the Montana version. Moreover, the statute implies that "land" can be within a unit.<sup>130</sup>

However, these observations are outweighed by several to the contrary. First, the phrase "including one or more rooms occupying one or more floors or a part or parts thereof" is a restrictive one; it is not set off by commas from "part of the property," as it is in the "apartment" definition in the Model Act. Thus, the reference to rooms limits the part of the property being de-

127. See, e.g., Declaration for the Auto Park Condominium, Phase 1, *microformed* on Doc. No. 193612, microfilm 104 of Misc., p. 2247, Jan. 6, 1989 (Gallatin County, Montana, Clerk and Recorder's Office) (storage rooms); Declaration for the Trades Guild Condominium, *microformed* on Doc. No. 145901, Book 89 of Misc., p. 3254, Oct. 8, 1985 (Gallatin County, Montana, Clerk and Recorder's Office) (commercial business purposes); Declaration and Bylaws for the Aircraft Condominium, *microformed* on Doc. No. 136619, Book 86 of Misc., p. 4377, Mar. 4, 1985 (Gallatin County, Montana, Clerk and Recorder's Office) (aircraft storage facility); Declaration and Bylaws for the Gilkerson Warehouses Condominium, *microformed* on Doc. No. 146658, Book 89 of Misc., p. 4315, Oct. 28, 1985 (Gallatin County, Montana, Clerk and Recorder's Office) (storage); Declaration of Unit Ownership and Statement of Covenants and Bylaws of Association of Unit Owners of 1993 Office Building Condominiums, *microformed* on Recep. No. 94187-09000, July 6, 1994 (Flathead County, Montana, Clerk and Recorder's Office) (professional office and commercial purposes); Bylaws and Declaration Under Unit Ownership Act Pertaining to The Palace Condominium Ass'n, *microformed* on Doc. No. 9426622, microfilm 429, p. 121, Nov. 16, 1994 (Missoula County, Montana, Clerk and Recorder's Office) (mixed commercial and residential); Declaration of Condominium for The Ashberry Condominium, *microformed* on Doc. No. 8907134, microfilm 293, p. 2249, May 19, 1989 (Missoula County, Montana, Clerk and Recorder's Office) (commercial, office, service or retail).

128. See NATELSON, POA, *supra* note 1, at 32.

129. See, e.g., FLA. STAT. ANN. § 718.103(10), (24) (West 1988 & Supp. 1997); UNIF. CONDOMINIUM ACT § 1-103(7), (25), 7 pt. 2 U.L.A. 215, 217 (1997)

130. See MONT. CODE ANN. § 70-23-102(8)(a) (1995).

scribed. Second, several other parts of the UOA clearly contemplate that there will be a building on every condominium property.<sup>131</sup> For example, all declarations are to be accompanied by floor plans,<sup>132</sup> and although a condominium may cover more than one building, those buildings are to be "multiple unit" buildings, not single family ones.<sup>133</sup> Thus, "land" within a unit must mean land within walls, such as a basement. Case authority from Ohio—admittedly construing a slightly more restrictive statute—supports the position that outdoor units are not possible in such circumstances.<sup>134</sup>

To this requirement that units be within walls, there seems to be one exception: When the declaration has been filed, but the contemplated apartment has not been constructed, a condominium is perceived to exist. In that event, the unit is apparently floating in the location where the potential apartment will be built.<sup>135</sup>

131. See, e.g., MONT. CODE ANN. § 70-23-102(8) (1995): "General common elements,' unless otherwise provided in a declaration or by consent of all the unit owners, means: (a) the land *on which the building is located*, except any portion thereof included in a unit or made a limited common element by the declaration . . . ." (emphasis added).

132. See MONT. CODE ANN. § 70-23-306 (1995):

Floor plans recorded with declaration—certification. (1) Floor plans of the building described in a declaration shall be recorded simultaneously with the declaration. The floor plans shall show the layout of each unit, including the unit designation, location and dimensions of each unit, and the common areas to which each has access.

133. See MONT. CODE ANN. § 70-23-102(2) (1995): "Building' means a multiple-unit building or buildings comprising a part of the property."

However, a number of horizontal duplex-residence condominiums exist in Montana, especially in Ravalli County. In that case, the unit exists within the residence and the adjacent yard is typically a limited common element. See, e.g., Declaration Under Unit Ownership Act for Canyon View Estates, *microformed on* Doc. No. 379736, Book 207 of Deeds, p. 873, Mar. 23, 1994 (Ravalli County, Montana, Clerk and Recorder's Office); Enabling Declaration Establishing a Plan for Condominium Ownership for Maplewood Court Condominiums, *microformed on* Doc. No. 380513, Book 208 of Deeds, p. 158, Apr. 12, 1994 (Ravalli County, Montana, Clerk and Recorder's Office); Enabling Declaration Establishing a Plan for Condominium Ownership for Foxfield Condominium, *microformed on* Doc. No. 357064, Book 198 of Deeds, p. 655, June 30, 1992 (Ravalli County, Montana, Clerk and Recorder's Office).

134. *Prestwick Landowners' Ass'n v. Underhill*, 429 N.E. 2d 1191 (Ohio 1980) (construing OHIO REV. CODE ANN. §§ 5311.01, 5311.03 (Banks-Baldwin 1980)).

135. Thus, under MONT. CODE ANN. § 70-23-301(1) (1995), a declaration may only be filed if it contains "a description of the land . . . on which the building is or is to be located . . ." (emphasis added). See also MONT. CODE ANN. § 70-23-306(2) (1995) (allowing floor plans to be filed before completion of construction); MONT. CODE ANN. § 70-23-201(1) (1995) (stating that units may be conveyed or leased prior to the completion of construction of the building within which such unit is located). Cf. *Fairways Villas Venture v. Fairway Villas Condominium Ass'n*, 815 S.W.2d 912

The statutory restriction to condominiums-within-walls seems to be inappropriate for Montana. The state's tourist industry, for instance, would seem to offer great potential for campground condominiums, boat slip condominiums, single family resort homes, and similar innovations. Further, the state's relative poverty argues for permitting mobile home condominiums.<sup>136</sup> The legislature can provide for such uses by amending the statutory definition of "unit" to delete references to floors and other interior features.<sup>137</sup> This change would end the horizontal property requirement. The condominium declaration and any incorporated plans would define the boundaries of units. Given the safe-harbor nature of the UOA, purported condominiums whose units are not defined by interior features may still qualify as valid common law subdivisions.<sup>138</sup>

### B. The Governing Documents

I think it is a safe guess that if a committee composed of a random selection of American lawyers were given the task of designing a condominium regime without benefit of statute, that committee would prepare the following documents:

---

(Tex. 1991) (units held to include unbuilt apartments). *See also* *Jordan v. Elizabethan Manor*, 181 Mont. 424, 593 P.2d 1049 (1979) (suggesting the same result).

136. Telephone Interview with Carol Hardy, Esq. (Aug. 9, 1996).

137. *See, e.g.*, UNIF. CONDOMINIUM ACT § 1-103(25), 7 pt. 2 U.L.A. 217 (1997): "Unit" means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 2-105(a)(5)." Under § 2-105(a)(5) of the Act, the declaration defines the boundaries of each unit.

Accompanying such a change should be an amendment of the Montana definition of "general common element" from a list of building characteristics (which it is now) to a simple statement such as "common elements means all portions of a condominium other than the units." *See* UNIF. CONDOMINIUM ACT § 1-103(4), 7 pt. 2 U.L.A. 215 (1997).

138. *See supra* note 27 and accompanying text. For an example of a subdivision now outside the UOA but one that might qualify as a condominium under a broader definition, see Articles of Association of Borchers Resort Association of Area Three, *supra* note 115 (resort buildings on microlots owned individually, surrounded by common properties, apparently owned in common). For an example of a purported Montana Condominium that includes land outside walls, see First Amended Declaration of Restrictions for Stanford Court Condominium, *microformed on* Doc. No. 1492125, Book 1324 of Misc., p. 2789, July 21, 1988 (Yellowstone County, Montana, Clerk and Recorder's Office). Developers use the latter sort of "condominium" in Yellowstone County to take advantage of a relaxed interpretation of state subdivision law by the Yellowstone County Commissioners. Telephone Interview with Carol Hardy, Esq., Aug. 9, 1996; Telephone Interview with Howard Sumner, real estate broker (Aug. 8, 1996).



- a set of covenants and other rules defining property rights, which would be recorded in the real estate records of each county;
- articles of incorporation or articles of association to govern the POA, which would be more or less along the lines contemplated for membership, mutual benefit corporations under a typical state non-profit corporation law; and
- a set of bylaws for the POA, also more or less along the lines contemplated for membership, mutual benefit corporations under the same state non-profit corporation law.

The committee would likely permit the board of directors of the association to issue housekeeping rules in addition to the foregoing.

In non-condominium subdivisions, this is pretty much the approach most lawyers take. Property rights are defined in documents called "Covenants, Conditions and Restrictions," recorded with other real estate records; the association is governed by articles and bylaws.<sup>139</sup>

However, the UOA did not originate in a random committee of American lawyers. It originated in the FHA Model Act, which in turn was essentially copied from then Puerto Rican horizontal property law. Accordingly, the UOA largely reflects the expectations, not of the common law tradition, but of the Puerto Rican civil law tradition—and of the traditions of civil law countries from which Puerto Rico borrowed the concept.<sup>140</sup>

Nowhere is this more apparent than in the odd configuration of the governing documents mandated by statute. The 1958 Puerto Rican Horizontal Property Act provided for recording of an *escritura pública*,<sup>141</sup> which was to set forth basic information about the regime's property structure. The organization of the association was to be outlined in a *Reglamento*, or set of rules, which would be inserted in or appended to the *escritura pública* and could be altered only by a three-quarters vote by association members.<sup>142</sup> Unfortunately, the FHA translated the term *Reglamento* as "bylaws" in its model statute, even though the *Reglamento* bore little relationship to corporate bylaws as that

---

139. See, e.g., the "townhouse" documents cited *supra* note 32.

140. See also *supra* Part III(B).

141. See P.R. LAWS ANN. tit. 31, § 1292 (1968).

142. See *id.* § 1293, 1293(a).

term is understood on the mainland United States.<sup>143</sup> The term was carried over into the UOA without taking into consideration the differences in United States corporate and organizational practice.<sup>144</sup>

Traces of the close connection between *escritura pública* and *reglamento* in the Puerto Rican law can be found in the contents the statute specifies for the declaration and bylaws. Thus, the UOA requires the declaration to define various matters of property, such as the description of the land and the location of the units, but also requires the declaration to specify the name of a person to receive service of process—an item American lawyers are more likely to place in corporate or association documents.<sup>145</sup> Similarly, the UOA authorizes the bylaws to define not merely association governance, but also various land covenants, such as the assessment covenant and land use restrictions.<sup>146</sup> In addition, the UOA sets a supermajority requirement for amendment of the bylaws—seventy-five percent of the unit owners (whether or not voting)<sup>147</sup>—so high that it is more appropriate for land covenants than for most corporate bylaws, which are usually rules of corporate procedure.<sup>148</sup> Moreover, the UOA makes no provision for the association to have articles of incorporation or association.

There are several difficulties with matters as they stand. One is that governing documents so different from what most American lawyers would expect are likely to be a fertile field for

---

143. The Puerto Rican *Reglamento* is more analogous to the *título constitutivo* of Spanish law than to “bylaws” as the term is understood in this country. (The provision in Spanish law may be found in *Sobre Propiedad Horizontal* [Regarding Horizontal Property], art. 5., 1969 P.R. Laws 49). However, any latent rigidities in the *título constitutivo* are compensated for by the fact that in Spain a simple majority has much fuller freedom to control its subdivision than under most American laws. See *id.*, art. 6. The Spanish law is set forth and discussed in MARIANO FERNÁNDEZ MARTÍN-GRANIZO, *LA LEY DE PROPIEDAD HORIZONTAL EN EL DERECHO ESPAÑOL* [HORIZONTAL PROPERTY LAW IN THE SPANISH LEGAL SYSTEM] 12-13 (1983).

144. See MONT. CODE ANN. § 70-23-307 (1995). For another criticism of recording bylaws and treating them as if they were constitutive documents, see Norman Geis, *Beyond the Condominium: The Uniform Common-Interest Ownership Act*, 17 REAL EST. L.J. 757, 770 (1982).

145. Compare MONT. CODE ANN. § 70-23-301 (1995) with MONT. CODE ANN. § 35-2-213(1)(c)(ii) (1995) (providing that the articles of incorporation of a nonprofit corporation must include the name of the registered agent).

146. See MONT. CODE ANN. § 70-23-308 (1995).

147. See MONT. CODE ANN. § 70-23-307(3) (1995).

148. Cf. MONT. CODE ANN. § 35-2-230 (1995) (requiring a majority of the membership to amend most nonprofit corporation bylaws or two-thirds of the votes cast, whichever is less).

confusion. Certainly, Montana practitioners seem uncertain about what belongs in the declaration and what belongs in the bylaws. In Flathead County, for example, most condominium developments are based on scanty declarations and more complete bylaws; the bylaws generally include the assessment covenant and use restrictions. In Gallatin County, on the other hand, the prevailing practice is for condominiums to be based on highly detailed declarations, filled with covenants and other property matters, supplemented with relatively modest bylaws. In Missoula County and other locales, one finds both approaches in the same community.<sup>149</sup> The Flathead County practice of a small declaration and larger bylaws probably reflects the intent of the UOA, but the Gallatin County practice is more consistent with that followed in other western states, such as Colorado, whence it may have been borrowed.<sup>150</sup>

Another difficulty with the current statute is that incorporated associations must comply with both the Montana nonprofit corporation law and with the quite different rules in the UOA. Other problems include the UOA's excessively high threshold for amendment of the bylaws,<sup>151</sup> and its failure to provide for amendment of the declaration by anything less than unanimity.<sup>152</sup>

The legislature should alter the sections of the UOA pertaining to governing documents. The legislature should be guided by the principle that matters likely to be more central to the unit

---

149. Compare Declaration of Condominium Under Unit Ownership Act Pertaining to the Clearview Village, *microformed on* Doc. No. 411164, microfilm 106, p. 1449, Oct. 28, 1977 (Missoula County, Montana, Clerk and Recorder's Office) (three page declaration, excluding exhibits) and Declaration under Unit Ownership Act Pertaining to The Palace, *supra* note 127 (text of declaration consumes two pages) with Declaration of Condominium for Panorama Park Condominiums, *microformed on* Doc. No. 9500798, microfilm 433, p. 11, Jan. 12, 1995 (Missoula County, Montana, Clerk and Recorder's Office) (48 page declaration) and Declaration of Condominium for The Ashberry Condominium, *supra* note 127 (40 pages).

See also Enabling Declaration Establishing a Plan for Condominium Ownership for Foxfield Condominium, *supra* note 133 (use restrictions in declaration) and Bylaws of Regency South Building Condominium, *microformed on* Doc. No. 343811, Book 193 of Deeds, p. 61, Apr. 12, 1991 (Ravalli County, Montana, Clerk and Recorder's Office) (use restrictions in bylaws).

150. A typical Colorado condominium declaration is cited *infra* note 167. The Gallatin County practice (as noted in the text, by no means limited to Gallatin County) is defended by a Yellowstone County practitioner on the grounds that property definitions should be the most difficult of matters to amend, and the declaration is often more, and always at least, as difficult to amend as the bylaws. Telephone interview with Carol Hardy, Esq. (Aug. 9, 1996).

151. See *supra* note 148 and accompanying text.

152. See *infra* Part V(C).

purchasers' bargain—generally those thought of as “property rights”—should be inserted in the declaration (which should be difficult to amend), while lesser matters should be placed in more easily amendable subsidiary documents. Thus, the statute should require the declaration to include property descriptions of units and common elements, the estate by which they are held, the purpose of the subdivision, any future interests, any servitudes (including the assessment covenant), an amendment procedure and the like—all matters generally recorded under good real estate practice. The statute should specify that subsidiary documents, such as the articles and bylaws, should designate corporate procedures and an agent for service of process—matters normally inserted in corporate articles and bylaws. Only the declaration should have to be recorded. Because of its property-oriented subject matter, the declaration is likely to be the longer document.

The bylaws, stripped of its property subject matter, should be governed by provisions of, or contain provisions closely analogous to those of the Montana Nonprofit Corporation Act,<sup>153</sup> which, of course, incorporated associations must comply with anyway. The UOA's additional requirements for POA bylaws are needlessly troublesome and should be repealed.<sup>154</sup>

### C. Amendment of Declaration and Bylaws

The UOA contains no procedure for amendment of the declaration. Yet the UOA does contemplate that the declaration shall be amendable. For example, there are provisions for amending the floor plans<sup>155</sup> and replacing the agent for service of process.<sup>156</sup> In the case of the latter, the amendment is to be made by “the association of unit owners,”<sup>157</sup> presumably by a majority

---

153. See MONT. CODE ANN. § 35-2-213 to -233 (1995). A revised UOA could require associations to be incorporated or allow unincorporated associations to exist, but require them to follow the internal procedures mandated by the Nonprofit Corporation Act.

154. See, e.g., MONT. CODE ANN. § 70-23-308(1) (1995) (requiring that the board consist of unit owners, which disqualifies non-owning spouses and dispassionate tie-breakers for small condominiums). See also MONT. CODE ANN. § 35-2-415 (1995) (stating that directors must be individuals, but articles or bylaws may prescribe other qualifications); MONT. CODE ANN. § 70-23-308(1) (1995) (limiting terms to three years); cf. MONT. CODE ANN. § 35-2-419 (1995) (permitting terms up to five years).

155. See MONT. CODE ANN. § 70-23-306(2) (1995).

156. See MONT. CODE ANN. § 70-23-902 (1995).

157. MONT. CODE ANN. § 70-23-902 (1995):

Change of agent for service of process. If the association of unit owners

vote.<sup>158</sup>

Several factors lead to the conclusion that under the current state of the law, condominium declarations can be amended only by a unanimous vote of the unit owners, at least in absence of a declaration clause to the contrary. First, a condominium declaration is a contract to which the declarant and all unit purchasers are parties. Of course, in absence of prior agreement to the contrary, all parties must agree before a contract can be altered.<sup>159</sup> The fact that some of the terms of the declaration are covenants running with the land only strengthens this conclusion.<sup>160</sup>

Moreover, the UOA specifically requires unanimous votes for altering certain specified terms of the declaration, including the percentage of each owner's interest in the common elements,<sup>161</sup> alterations to a unit that would impair the value of the property as a whole,<sup>162</sup> and additions to common expenses.<sup>163</sup>

Many declarations contain clauses permitting amendment by a margin less than unanimity. At common law, such clauses are permissible,<sup>164</sup> except as limited by statute.<sup>165</sup>

wishes to designate a person other than the one named in the declaration to receive service of process in the cases provided in 70-23-901, it shall record an amendment to the declaration. The amendment shall be certified by the presiding officer and the secretary of the association of unit owners and shall state the name of the successor with his residence or place of business as required by 70-23-301(7) and that the person named in the amendment was designated by resolution duly adopted by the association of unit owners.

158. Although the UOA does not explicitly state that association decisions are normally made by a majority, that is the implication of several provisions. *See, e.g.*, MONT. CODE ANN. § 70-23-102(10) (1995) (definition of majority), § 70-23-308(2) (quorum presumed to be majority), § 70-23-612(1) (majority may insure building), § 70-23-613 (disclosure when a single entity controls a majority), and § 70-23-613(1)(b) and (c) (adoption or repeal of bylaws and administrative regulations by majority).

159. *See* NATELSON, POA, *supra* note 1, at 611.

160. *See supra* note 61 and accompanying text.

161. *See* MONT. CODE ANN. § 70-23-403(2) (1995).

162. *See* MONT. CODE ANN. § 70-23-502 (1995):

Certain work on unit by owner prohibited. A unit owner shall make no repair or alteration or perform any other work on his unit which would jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement or hereditament unless the consent of all the other unit owners affected is first obtained.

163. *See* MONT. CODE ANN. § 70-23-102(4)(b) (1995).

164. *See, e.g.*, Taormina Theosophical Community, Inc. v. Silver, 140 Cal. App. 3d 964 (Cal. Ct. App. 1983).

165. *See supra* notes 162-64 and accompanying text (unanimity required if amendment changes unit boundaries, adds to common expenses, or allows structural unit alternations).

Condominium statutes in other jurisdictions specify supermajorities for amendment of the declaration, which may serve as immutable rules or merely as default rules when the declaration is silent.<sup>166</sup> The declaration may supplement approval by a supermajority of unit owners by requiring approval by supermajorities of the unit mortgagees.<sup>167</sup>

Despite the lack of statutory authorization, many Montana declarations purport to permit amendment by less than unanimity. The most common requirements are seventy-five percent of unit owners, or successive votes of a majority and seventy-five percent.<sup>168</sup> Still, some declarations have no amendment proce-

---

166. See, e.g., MD. CODE ANN. REAL PROP. § 11-103(c) (1996) (amendment must be approved in writing by a least 80% of ownership interests); OHIO REV. CODE ANN. § 5311.05(B)(9) (Banks-Baldwin 1980) (not less than 75%); UNIF. CONDOMINIUM ACT § 2-117(a), 7 U.L.A. 214 (1997) (67% or such larger majority as declaration specifies); FLA. STAT. ANN. § 718.110(1)(a) (West 1997) (default rule is two-thirds, but not more than four-fifths for condominiums created after April 1, 1992).

167. See, e.g., Declaration of Covenants, Conditions and Restrictions of the Majorca Condominiums, *microformed on* Doc. No. 030413, microfilm 1770, p. 328, Oct. 17, 1978 (Denver County, Colorado, Clerk's Office) § 31(b):

Any provision contained in this Declaration may be amended or additional provisions may be added . . . by the recording of a written instrument . . . executed by the Owners . . . of Units representing an aggregate ownership interest of seventy-five percent (75%), or more, of the General Common Elements and not less than one hundred percent (100%) of the first Mortgagees . . . .

*Cf.* FHA Form 1401, widely copied among drafters of the declarations of common interest subdivisions that do not qualify as condominiums (sets a figure of ninety percent approval to amend during the first twenty years, and seventy-five percent thereafter).

168. See, e.g., Declaration of Condominium for Panorama Park Condominiums, *supra* note 149 (75%); Amended Declaration of Condominium Under Unit Ownership Act for Missoula Community Physicians Center #2, *microformed on* Doc. No. 9021415, microfilm 322, p. 1774, Dec. 19, 1990 (Missoula County, Montana, Clerk and Recorder's Office) (75%); Declaration of Condominium Under Unit Ownership Act Pertaining to the Clearview Village, *supra* note 149 (35 of 46 units, viz., 75%); Declaration Under Unit Ownership Act Pertaining to The Palace, *supra* note 127 (75%); Declaration of Condominium for The Ashberry Condominium, *supra* note 127 (75%); Declaration Under Unit Ownership Act for Canyon View Estates, *supra* note 133; Declaration for the Auto Park Condominium, Phase I, *supra* note 127 (successive votes of majority and 75%); Declaration for the Willowbrook Condominium, *microformed on* Doc. No. 316248, microfilm 158 of Misc., p. 3787, Dec. 12, 1995 (Gallatin County, Montana, Clerk and Recorder's Office) (same).

*But see* Declaration of Unit Ownership of 1993 Office Building Condominiums, *supra* note 127 (unanimous vote of four unit owners); Enabling Declaration Establishing a Plan for Condominium Ownership for Maplewood Court Condominiums, *supra* note 133 (same); Enabling Declaration Establishing a Plan for Condominium Ownership for Regency South Building Condominium, *microformed on* Doc. No. 343810, Book 193 of Deeds, p. 60, Apr. 12, 1991 (Ravalli County, Montana, Clerk and Recorder's Office) (unanimous vote of three unit owners); Enabling Declaration Establishing a Plan for Condominium Ownership for Foxfield Condominium, *supra*

dure at all.<sup>169</sup>

Reducing the amendment requirement from unanimity to a supermajority does not invite an easy disregard of property rights. The necessary percentages usually are based upon the number of all owners, not upon the number of those in attendance at a particular association meeting. In practice it may be impossible to obtain any response—positive or negative—from many owners, even by mail or by proxy, especially where those owners are absentee landlords. Hence, an amendment may fail simply because some owners do not respond despite assiduous efforts to contact them.<sup>170</sup>

The UOA should be altered to allow the declaration to permit amendment by less than a unanimous vote. The UOA should set forth both a minimum supermajority, applicable irrespective of a declaration clause to the contrary, and a default rule applicable if the declaration is silent. It is difficult to state *a priori* what amendment percentages the statute should adopt. As to the default rule, seventy-five percent may be appropriate because

note 133 (unanimous vote of ten unit owners); Declaration of Unit Ownership of Harbor Village Condominium, *microformed on* Recep. No. 92289-11000, Oct. 15, 1992 (Flathead County, Montana, Clerk and Recorder's Office) (75 percent vote of owners followed by majority vote of Flathead County Commissioners); Declaration of Unit Ownership for Yellowstone Townhomes, *microformed on* Doc. No. 1675197, microfilm 1392, p. 1250, Mar. 17, 1993 (Yellowstone County, Montana, Clerk and Recorder's Office) (unanimous vote of 12 unit owners and mortgagees).

169. See, e.g., Revised Declaration of Unit Ownership of "The Narrows," *microformed on* Recep. No. 339937, July 9, 1992 (Lake County, Montana, Clerk and Recorder's Office) (consisting of six units).

170. California's Common Interest Development Act (which applies to condominiums), appearing at CAL. CIV. CODE § 1356(c) (West 1997), provides a mechanism for dealing with this situation. It permits the association, or "the owner of any separate interest" to "petition the superior court of the county in which the common interest development is located for an order reducing the percentage of the affirmative votes necessary for such an amendment." The statute further provides that the court may, but is not required to grant the petition if it finds all of the following:

- (1) The petitioner has given not less than 15 days written notice of the court hearing to all members of the association, to any mortgagee of a mortgage or beneficiary of a deed of trust who is entitled to notice under the terms of the declaration, and to the city, county, or city and county in which the common interest development is located that is entitled to notice under the terms of the declaration.
- (2) Balloting on the proposed amendment was conducted in accordance with all applicable provisions of the governing documents.
- (3) A reasonably diligent effort was made to permit all eligible members to vote on the proposed amendment.
- (4) Owners having more than 50 percent of the votes . . . voted in favor of the amendment . . .
- (5) The amendment is reasonable . . . .

CAL. CIV. CODE 1356(c) (West 1997).

this percentage represents the dominant practice in Montana, and existing practice is a good predictor of what a declarant would have done if he had thought about the issue.

On the other hand, the immutable minimum should be a good deal lower than seventy-five percent, to permit freedom of contract and encourage experimentation. A recent study concludes that the approval percentage best for optimal decision-making declines as the number of decision-makers rises—and that for groups of 120 or more, a supermajority requirement higher than sixty percent is never optimal.<sup>171</sup> On the other hand, risk aversion attendant on amending documents central to the condominium regime argues for high supermajorities.<sup>172</sup> Moreover, a study of numerous condominium documents from several other states found that supermajority thresholds for capital improvements tend to rise with the number of units.<sup>173</sup> Still other analyses suggest that optimal supermajorities are different for different kinds of condominiums<sup>174</sup> and for different kinds of owners.<sup>175</sup>

A reasonable alteration in the UOA, therefore, would be to permit the declaration to specify an amendment percentage of sixty percent or more of the total ownership interest (not merely of those present at a meeting), and to adopt as a default rule seventy-five percent of the total membership interest. Readers who fear that a sixty percent minimum is too low should recall the policing forces of the market: Both amendments and amendment procedures will be constrained by the judgment of prospective mortgagees as well as by the declarant and the unit owners.

As for the bylaws, the UOA specifies an amendment supermajority of seventy-five percent.<sup>176</sup> This figure can be jus-

---

171. See Nitzan & Paroush, *supra* note 1. The widespread use in Montana of default rules of 75% or higher is consistent with this thesis, because Montana condominiums tend to be small. Developments of more than 36 units are relatively rare. Telephone Interview with Carol Hardy, Esq. (Aug. 9, 1996).

172. For the effect of risk aversion on optimal majority rules, see Bengt-Arne Wickstrom, *Optimal Majorities for Decisions of Varying Importance*, 48 PUBLIC CHOICE 273 (1986).

173. See Barzel & Sass, *supra* note 1, at 767.

174. See *id.* (larger supermajorities used in residential condominiums than in commercial or resort condominiums, and where unit owners' interests are diverse [mixed use subdivisions; widely disparate units and assessments] than when they are relatively uniform).

175. See *id.* Similarly, I have argued that supermajorities among owners who reside in their units ought to be higher than among owner-landlords. See NATELSON, POA, *supra* note 1, at 623.

176. See MONT. CODE ANN. § 70-23-307(3) (1995).



tified insofar as the bylaws include property law matters but is unreasonably high for altering such procedural items as how to call membership meetings.<sup>177</sup> At least as to such items, the procedure needs to be made more flexible. As recommended above, property rights can be protected through legislation adopting the Gallatin County practice of placing property rules in the declaration.

One reasonable course would be to permit the bylaws themselves to specify how they shall be amended, which is the solution adopted by the Uniform Condominium Act.<sup>178</sup> A slightly stricter procedure would be to permit amendment by (i) the lesser of a majority of the membership voting power or two-thirds of all votes cast or (ii) by such higher majority as may be prescribed by the proposed amendment or by the condominium's constitutive documents. The latter approach has the merit of legislative approval for other Montana mutual benefit corporations.<sup>179</sup>

#### D. Are Leasehold Condominiums Permitted?

As noted earlier,<sup>180</sup> one of the functions of the condominium declaration is to shatter an estate in land into fragments: the units and appurtenant shares of the common elements. The estate in land so divided usually is a fee simple, but in most states it may be a leasehold as well. To create a leasehold condominium the fee owner of land conveys a long-term ground lease (perhaps ninety-nine years) to the developer. The developer then files a condominium declaration subdividing the leasehold into units. Conveyance of units is by assigning fractions of the ground lease.

Although several purported leasehold condominiums exist in Montana,<sup>181</sup> statutory language might lead one to conclude that they are not permitted. In this subpart, I shall examine that language. I conclude that, although the statute contains a con-

177. See MONT. CODE ANN. § 70-23-308(2) (1995).

178. See UNIF. CONDOMINIUM ACT § 3-106, 7 pt. 2 U.L.A. 301 (1997).

179. See MONT. CODE ANN. § 35-2-230(1) & (2) (1995).

180. See *supra* note 7 and accompanying text.

181. In a survey of Gallatin County Recordings, the author found four identified leasehold condominiums among a total of 188 active condominiums. The four were: Aircraft Condominium, *supra* note 127; Auto Park Condominium, Phase 1, *supra* note 127; Gallatin Field Car Keep Condominium, *microformed on* Doc. No. 146928, Book 89 of Misc., p. 4770, Nov. 4, 1985 (Gallatin County, Montana, Clerk and Recorder's Office); and Twenty-Seven East Main Condominium, *microformed on* Doc. No. 102943, Book 72 of Misc., p. 1374, Oct. 21, 1982 (Gallatin County, Montana, Clerk and Recorder's Office).

tradition on this point, the contradiction should be resolved in favor of permitting leasehold condominiums.

This problem arose, as so many problems arose, from incautious use of the Puerto Rican condominium statute as a model. Because the Anglo-American system of "estates in land" is a creature of common law, the Puerto Rican statute, developed in a civil law environment, contained no provision for leasehold condominiums.<sup>182</sup>

The drafters of the FHA Model Statute did not correct this deficiency. Instead, they provided that all units ("apartments") were to be held in fee simple. Thus, the FHA defined "apartment owner" as: "the person or persons owning an apartment in fee simple absolute and an undivided interest in the fee simple estate of the common areas and facilities in the percentage specified and established in the Declaration."<sup>183</sup> The Montana definition of "unit owner" similarly contemplates only fee simple ownership: "'Unit owner' means the person owning a unit in fee simple absolute individually or as co-owner in any real estate tenancy relationship recognized under the laws of this state . . . ."<sup>184</sup> The same section next provides for leases of units, by allowing the unit owner to delegate voting rights to the tenant if the lease is filed with the association chairman. But the context is such as to imply leases of already existing units—not of the initial creation of ground lease units.<sup>185</sup>

In opposition to that section is section 70-23-301, which lists the contents of the declaration.<sup>186</sup> Section 70-23-301 makes explicit provision for leasehold condominiums by requiring that the declaration contain "a description of the land, *whether leased or in fee simple*, on which the building is or is to be located. . . ."<sup>187</sup> Moreover, the italicized language represents an addition to the FHA Model Statute's original form,<sup>188</sup> apparently to accom-

182. See *Ley Para establecer el Régimen de la Propiedad Horizontal* [Law to establish the Horizontal Property Regime], art. 4, 1958 P.R. Laws 104.

183. FHA MODEL STATUTE, § 2(b) (1965). See also *id.* § 2(m) (defining property as the entire development "owned in fee simple absolute").

184. MONTANA CODE ANN. § 70-23-102(17) (1995) ("Tenancy" as used here of course refers to co-tenancy, not leases.).

185. The language reads: "However, for all purposes, including the exercise of voting rights, provided by lease filed with the presiding officer of the association of unit owners, a lessee of a unit shall be considered a unit owner." MONT. CODE ANN. § 70-23-102(17) (1995). MONT. CODE ANN. § 70-23-308(3) (1995) makes it clear that the legal title of the "presiding officer" is "chairman."

186. See MONT. CODE ANN. § 70-23-301(1) (1995).

187. MONT. CODE ANN. § 70-23-301(1) (1995) (emphasis added).

188. See FHA MODEL STATUTE § 11(1) (1965): "The declaration shall contain the

moderate leasehold condominiums. Several other sections of the UOA also contemplate leasehold condominiums.<sup>189</sup>

Short of statutory amendment, there is no way to eliminate entirely the contradiction between section 70-23-301, which explicitly contemplates leasehold condominiums, and section 70-23-102(17), which limits the definition of "unit owner" to one who holds in fee simple. Pending such amendment, however, the section in which the drafters clearly departed from their FHA model—i.e., section 70-23-301—should control. In that section, the drafters did provide for leasehold condominiums.

Unfortunately, for a lessee to be treated as a "unit owner" under section 70-23-102(17) of the Montana Code, his lease must be "filed with the presiding officer of the association of unit owners."<sup>190</sup> Under the rule of that section, the lessee is not treated as a unit owner before filing. But in a leasehold condominium, the only unit owners are lessees. If no lessees can be considered unit owners before their ground lease is filed, then there are no unit owners before that ground lease is filed. Ergo, before the ground lease is filed there can be no "association of unit owners," and ergo there can be no association presiding officer with whom to file it. Hence a dilemma: There can be no unit owners without filing, and no filing without unit owners.

The Montana Supreme Court considered an analogous problem in *Jordan v. Elizabethan Manor*,<sup>191</sup> where the plaintiff argued that certain condominium bylaws were invalid.<sup>192</sup> The plaintiff pointed out that the project developers had promulgated these bylaws only after issuing deeds to various units.<sup>193</sup> Under the circumstances, the plaintiff contended that the bylaws were

following particulars: (1) Description of the land on which the building and improvements are or are to be located."

189. See, e.g., MONT. CODE ANN. § 70-23-205(1)(a)(i) (1995) (reference to "ground lease" payments as a possible cost of development); MONT. CODE ANN. § 70-23-602 (1995) (need to satisfy liens "[a]t the time of the first conveyance or lease of each unit following the recording of the declaration. . . ."); MONT. CODE ANN. § 70-23-201(1) (1995) (units conveyed or leased prior to the completion of construction of the building within which such unit is located).

190. MONT. CODE ANN. § 70-23-102(17) (1995):

"Unit owner" means the person owning a unit in fee simple absolute individually or as co-owner in any real estate tenancy relationship recognized under the laws of this state. However, for all purposes, including the exercise of voting rights, provided by lease filed with the presiding officer of the association of unit owners, a lessee of a unit shall be considered a unit owner.

191. 181 Mont. 424, 593 P.2d 1049 (1979).

192. See *Jordan*, 181 Mont. at 429, 593 P.2d at 1052.

193. See *id.* at 429-30, 593 P.2d at 1052-53.

not adopted by the "unit owners," as required by section 70-23-307(1) of the Montana Code.<sup>194</sup> In response, the court observed that when the bylaws were promulgated the developers had still not filed the declaration.<sup>195</sup> Without a declaration, there could be no conveyance of units; thus, despite the purported conveyances, the developers retained fee simple title.<sup>196</sup> "Until the final declaration is filed," the court concluded, "the fee owners of the project are the fee owners of the units and thus the 'unit owners.'<sup>197</sup>

This is a useful fiction:<sup>198</sup> The pre-declaration fee owners can be seen as constructive, not real unit owners. According to them that status offers a solution to the problem of how the owners of leasehold units can be treated as "unit owners" under section 70-23-102(17). Specifically, the fee owner of the land (constructive unit owner) should create the association, designate a presiding officer, and then file the ground lease with that officer. Anyone who takes a unit of that ground lease will then be a "unit owner" under the statute. By now it should be clear that amendment of section 70-23-102(17) of the Montana Code is needed to clarify that leasehold condominiums are valid beyond peradventure.

### *E. Association Collection of Common Expenses*

#### *1. Assessment Collection: An Overview*

Under the UOA, expenses of maintaining the common portion of a condominium are called "common expenses." The UOA identifies the following categories of common expenses:

- expenses of administration, maintenance, repair, or replacement of the common elements;<sup>199</sup>
- unpaid unit assessments rendered unrecoverable by reason of foreclosure of a first mortgage;<sup>200</sup>

---

194. See *id.*; see also MONT. CODE ANN. § 70-23-307(1) (1995): "The unit owners of each property shall adopt bylaws to govern the administration of the property."

195. See *Jordan*, 181 Mont. at 431, 593 P.2d at 1053.

196. See *id.* at 430-31, 593 P.2d at 1053.

197. *Id.* at 431, 593 P.2d at 1053.

198. The court acknowledged that filing a declaration was necessary to the establishment of a condominium, but did not explain how, without a condominium, there could be either condominium "units" or "unit owners." See *id.* at 430, 593 P.2d at 1053.

199. See MONT. CODE ANN. § 70-23-102(4)(a) (1995).

200. See MONT. CODE ANN. §§ 70-23-102(4)(c), 70-23-610 (1995).

- insurance premiums on the common elements,<sup>201</sup>
- expenses declared common by the declaration or the bylaws of the particular condominium,<sup>202</sup> and
- expenses agreed upon as common by all the unit owners.<sup>203</sup>

Proper collection, management, and disbursement of common expense money—like responsible management generally—is an official duty of association directors and officers.<sup>204</sup>

The UOA and existing common law (especially case law from other states) offer broad, and generally adequate, rules for management and disbursement of common expense funds. However, the UOA needs to be amended with respect to collection of such funds.

Most POAs, including condominium associations, raise all or nearly all of the money necessary for common expenses by imposing periodic assessments on each unit. Such assessments may be annual or monthly in form, but as a rule payment is due monthly.

The most common legal bases for collection are (1) a personal debt of the unit owner created by contract, (2) a personal debt

201. See MONT. CODE ANN. §§ 70-23-102(4)(c), 70-23-612 (1995).

202. See MONT. CODE ANN. § 70-23-102(4)(c) (1995); see also MONT. CODE ANN. § 70-23-301(8) (1995) (optional contents in declaration; however, no comparable provision exists for the bylaws).

203. See MONT. CODE ANN. § 70-23-102(4)(b) (1995).

204. See NATELSON, POA, *supra* note 1, at 477-84; see also *Thisted v. Tower Management Corp.*, 147 Mont. 1, 409 P.2d 813 (1966). The attempt of the drafters of one set of bylaws to devolve primary responsibility for common expenses to individual unit owners probably violates the UOA, which directs that such assessments shall be imposed according to the percentage of undivided interest in the common elements. See *Bylaws of Maplewood Court Condominiums, microformed on Doc. No. 380514, Book 208 of Deeds*, p. 159, Apr. 12, 1994 (Ravalli County, Montana, Clerk and Recorder's Office) (maintenance of common areas, apparently exclusively limited common elements, is the responsibility of individual owners, with POA to assess only in event maintenance is not adequate). *Cf.* MONT. CODE ANN. §§ 70-23-501, 70-23-102(4) (1995).

Management also includes the keeping of proper records, which are open to inspection by unit owners, according to MONT. CODE ANN. § 70-23-606 (1995):

Records of receipts and expenditures affecting common elements—inspection.

(1) The manager shall keep detailed accurate records in chronological order of the receipts and expenditures affecting the common elements, itemizing the maintenance and repair expenses of the common elements and any other expenses incurred.

(2) Such records and the vouchers authorizing the payments and receipts for payments shall be available for examination at the manager's place of business by the unit owners at convenient hours of weekdays.

of the unit owner created by statute, (3) a lien created by contract and enforceable against the unit in the event of nonpayment, or (4) a lien created by statute and similarly enforceable against the unit.<sup>205</sup> The first and third bases for enforcement are made viable by the common law of servitudes. The contractual personal debt is created by an affirmative covenant running with the land at law, which in most states is found in the declaration.<sup>206</sup> In Montana, there is no rule against placing an assessment covenant in the declaration,<sup>207</sup> but the expectation of the statute is that it be placed in the bylaws only.<sup>208</sup> Often drafters place it in both documents,<sup>209</sup> sometimes only in the declaration,<sup>210</sup> and occasionally in a set of covenants filed with the declaration and bylaws.<sup>211</sup> The contractual lien is created by a covenant running with the land in equity (equitable servitude)—generally the same covenant that creates the personal debt at law. The second and fourth bases for assessment collection—statutory debts and statutory liens—are imposed by state condominium acts.<sup>212</sup>

One might question why statutes providing for assessment

---

205. See NATELSON, POA, *supra* note 1, at 215-24, 231-35. Other, less commonly used bases for enforcement of assessments include a reserved "rent" or charge against the unit and restitution of unjust enrichment. See *id.* at 213-15, 224-31.

206. See, e.g., FLA. STAT. ANN. § 718.104(4)(g) (West 1997); UNIF. CONDOMINIUM ACT § 2-107, 7 U.L.A. 250 (1997).

207. See MONT. CODE ANN. § 70-23-§301(8) (1995).

208. See MONT. CODE ANN. § 70-23-308(6) (1995) (contents of bylaws to include "the manner of collecting from the unit owners their share of the common expenses"); see, e.g., Declaration of Unit Ownership and Statement of Covenants and Bylaws of Association of Unit Owners of 1993 Office Building Condominiums, *supra* note 127; Declaration of Condominium Under Unit Ownership Act Pertaining to Clearview Village, *supra* note 149; Bylaws of The Palace Condominium Ass'n, *supra* note 127; Bylaws of Maplewood Court Condominium, *supra* note 204.

209. See, e.g., Declaration for the Willowbrook Condominium, *supra* note 168; Enabling Declaration Establishing a Plan for Condominium Ownership for Regency South Building Condominium, *supra* note 168; Bylaws of Regency South Building Condominium, *supra* note 149.

210. See Declaration of Condominium for Panorama Park Condominiums, *supra* note 149 (accompanying bylaws include only references to assessment covenant).

211. See, e.g., Amended Statement of Restrictive Covenants of "The Narrows," *microformed on Recep. No. 339937*, July 9, 1992 (Lake County, Montana, Clerk and Recorder's Office).

212. Statutory schemes applicable to common interest subdivisions other than condominiums also provide for statutory liens. See, e.g., UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116, 7 pt. 2 U.L.A. 122 (1997) (creation of lien by statute applicable to most residential POAs). The original (1982) version of the UCIOA has been adopted in Alaska, Colorado, Minnesota, Nevada, and West Virginia. This uniform law was amended in 1994; the Act and the 1994 amendments have been adopted in Connecticut.

enforcement are necessary. For the most part, the common law of servitudes is sufficient to enforce unit owners' obligations,<sup>213</sup> and the common law usually has proved adequate for similar enforcement by noncondominium POAs.<sup>214</sup>

One reason for statutory supplementation is to reverse the traditional common law rule, viable in some states, that covenants at law do not survive foreclosure. Without statutory modification, this rule would destroy the association's ability to collect assessments at law against the owner of any unit that had gone through foreclosure.<sup>215</sup> Another reason for statutory supplementation specifically applicable to Montana is to modify Field Code statutes that commit Montana to jurisprudence borrowed from nineteenth century New York State—jurisprudence often inappropriate for condominiums.<sup>216</sup>

For example, suppose that after the developer sells all his interest in a condominium, the unit owners duly adopt an amendment to the declaration or bylaws that imposes additional maintenance assessments on unit owners. Under the Field Code, this amendment arguably is unenforceable at law because it violates the "horizontal privity" requirement that it be contained in a grant.<sup>217</sup>

A third reason for statutory supplementation is to clarify the judicial foreclosure procedure applicable to the assessment lien. Under the UOA, assessments are to be allocated among units according to the percentage of undivided interest each unit has in the common elements.<sup>218</sup> The share of the common interest

213. For a discussion of the law of servitudes and the modern POA, see NATELSON, POA, *supra* note 1, at 37-64. See also *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965).

214. The seminal case is *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Savings Bank*, 15 N.E.2d 793 (N.Y. Ct. App. 1938).

215. *O'Donnell v. McIntyre*, 23 N.E. 455 (N.Y. Ct. App. 1890). In *Neponsit*, the mortgage on the unit in question had been foreclosed. *Neponsit*, 15 N.E.2d at 793. This may be why the POA apparently sought enforcement only of its lien (in equity), not of the personal debt of the unit owner.

216. See *supra* Part IV(B).

217. See MONT. CODE ANN. § 70-17-203 (1995). For a discussion of horizontal privity and its history in Montana, see Natelson, *Running*, *supra* note 1, at 24, 50-51, 60-65. The state supreme court has evaded the horizontal privity requirement from time to time, but only when the covenant at issue is restrictive. See *id.*

Note that if the covenant imposes an assessment change that is sufficiently large or impacts some owners disproportionately, a court might rule that it is unreasonable and therefore invalid as to existing unit owners. See Natelson, *Consent*, *supra* note 1, at 68-71.

218. See MONT. CODE ANN. § 70-23-501 (1995): "Common profits and expenses. The common profits of the property shall be distributed among and the common

appurtenant to each unit is specified in the declaration,<sup>219</sup> and that share is to be proportional to each unit's "value."<sup>220</sup> The bylaws then determine "the manner of collecting from the unit owners their share of the common expenses. . . ." <sup>221</sup>

Although the bylaws could conceivably add other methods, the statute describes two collection tools for the association. The first is an action at law to enforce the personal liability of the unit owner, which liability cannot be avoided by failing to use the common elements.<sup>222</sup> Such an action may be commenced without foreclosing the lien.<sup>223</sup> The second statutory assessment collection tool is the statutory lien. To take advantage of this mechanism, the association must record a verified "claim" for unpaid assessments, which "claim" must describe the amount due, the unit, the name of the owner, and the common elements.<sup>224</sup> The POA "manager" (meaning in this case, the board

expenses shall be charged to the unit owners according to the percentage of undivided interest of each in the common elements."

Thus, a unit with a two percent undivided interest in the common elements pays two percent of the common expenses, a unit with a three percent interest pays three percent, and so on.

219. See MONT. CODE ANN. § 70-23-301(4) (1995).

220. See *supra* notes 41-44 and accompanying text.

221. MONT. CODE ANN. § 70-23-308(6) (1995).

222. See MONT. CODE ANN. § 70-23-505 (1995): "Abandonment or waiver of use not to effect exemption. No unit owner may exempt himself from liability for his contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit."

On liability, see also MONT. CODE ANN. § 70-23-611 (1995) (joint liability of unit grantor and grantee).

223. See MONT. CODE ANN. § 70-23-608(2) (1995): "An action to recover a money judgment for unpaid common expenses may be maintained without foreclosing or waiving the lien securing the claim for common expenses."

224. See MONT. CODE ANN. § 70-23-607 (1995):

Claim for common expenses—priority of lien—contents—recording.

(1) Whenever an association of unit owners acting through its manager furnishes to a unit any services, labor, or material lawfully chargeable as common expenses, the association of unit owners, upon complying with subsection (2) of this section, shall have a lien upon the individual unit and the undivided interest in the common elements appertaining to such unit for the reasonable value of such common expenses, and the lien shall be prior to all other liens or encumbrances upon the unit except:

(a) tax and assessment liens; and

(b) a first mortgage or trust indenture of record.

(2) An association of unit owners claiming the benefits of subsection (1) of this section shall record in the county in which the unit or some part thereof is located a claim containing:

(a) a true statement of the account due for such common expenses after deducting all just credits and offsets;

(b) the name of the owner of the unit or reputed owner, if known;

(c) a description of the property where the common expenses were furnished



of directors)<sup>225</sup> may then foreclose the lien in accordance with the rules for foreclosing construction liens,<sup>226</sup> which in turn largely rely on the Montana civil procedure statutes.<sup>227</sup> Additional provisions clarify that the association may bid and purchase at the foreclosure sale,<sup>228</sup> and that foreclosure purchasers are liable only for assessments coming due after they acquire title.<sup>229</sup>

These statutory collection tools are similar to procedures prevailing elsewhere, and do not contain any obvious deficiencies.

## 2. Assessment Collection: Reforming the Lien Priority Statute

More problematic are two other rules governing Montana condominium assessment liens—one that treats the association too shabbily, and another that treats the association too well.

Under the UOA, a proportionate share of the common elements is appurtenant to each unit and inseparable from it. A lender who extends credit with a condominium unit as securi-

and the designation of the unit, sufficient for identification.

(3) The claim shall be verified by the oath of some person having knowledge of the facts and shall be filed with and recorded by the recording officer in the book kept for the purpose of recording liens filed under Title 71, chapter 3, part 5. The record shall be indexed as deeds and other conveyances are required by law to be indexed.

225. See *supra* notes 37-40 and accompanying text.

226. See MONT. CODE ANN. § 70-23-608 (1995):

Foreclosure of lien under claim for common expenses—action without foreclosure.

(1) The proceedings to foreclose liens created by 70-23-607 shall conform as nearly as possible to the proceedings to foreclose liens created by Title 71, chapter 3, part 5. The lien may be enforced by the manager acting on behalf of the association of unit owners.

227. See MONT. CODE ANN. § 71-3-563 (1995) (referencing rules of practice of MONT. CODE ANN., tit. 25).

228. See MONT. CODE ANN. § 70-23-609(2) (1995): "The manager acting on behalf of the unit owners shall have power, unless prohibited by the declaration, to bid on the unit at the foreclosure sale and to acquire and hold, lease, mortgage, and convey the same."

229. See MONT. CODE ANN. § 70-23-610 (1995):

Purchaser at foreclosure sale not totally liable for prior common expenses. Where the purchaser of a unit obtains title to the unit as a result of foreclosure of the first mortgage or trust indenture, such purchaser, his successors, and assigns shall not be liable for any of the common expenses chargeable to such unit which became due prior to the acquisition of title to such unit by such purchaser. Such unpaid share of common expenses shall be a common expense of all the unit owners, including such purchaser, his successors, and assigns.

ty—who takes a mortgage on the property after the recording of the declaration—takes as collateral not only the unit itself, but the appurtenant share of the common elements. The association utilizes assessments imposed on units to repair, maintain and improve the common elements, and therefore to preserve and improve the lender's security. Just as a lender foreclosing on a single family home might use its own funds to maintain that home until sale, so one would think a lender would expect to pay the assessments that preserve and improve its security.

Yet the UOA, like virtually every other first generation condominium statute, grants priority over the assessment lien to any "first mortgage or trust indenture of record," even if the mortgage or trust indenture was entered into and recorded after the filing of the declaration and after the filing of the association's lien claim.<sup>230</sup>

It is not hard to find the reasons for this anomaly. In part, it is a carry-over from the Puerto Rican law that served as a model for the FHA Model Statute, and therefore indirectly, for the UOA.<sup>231</sup> The FHA Model Statute gave priority to first mortgagees in language similar to that of the UOA.<sup>232</sup> It also is a reflection of the lobbying power of lenders,<sup>233</sup> magnified through the FHA, which insures first mortgages, and has an interest in affording such mortgages a high priority.

Professor James Winokur has summarized well the compelling case for giving the assessment lien priority over subsequent mortgages.<sup>234</sup> As noted above, condominium assessments are used to bolster the lender's security; to permit the lender's mortgage to cut off those assessments is to bestow unjust enrichment of a kind not existing in other foreclosure settings, where the lender expects to spend money to protect his collateral. The cost of this enrichment is borne by the other unit owners, who are innocent of any wrongdoing.<sup>235</sup>

---

230. See MONT. CODE ANN. § 70-23-607(1) (1995): "[T]he lien shall be prior to all other liens or encumbrances upon the unit except: (a) tax and assessment liens; and (b) a first mortgage or trust indenture of record."

231. See Art. 40(c), 1958 P.R. Laws 104.

232. See FHA MODEL STATUTE, § 23(a) (1965).

233. Lending interests have usually, although not invariably, opposed granting the association lien priority over first mortgages. See Winokur, *Meaner*, *supra* note 1, at 389-90.

234. The arguments are derived from Winokur, *Meaner*, *supra* note 1, at 358-62. See also, NATELSON, POA, *supra* note 1, at 238-41.

235. See MONT. CODE ANN. § 70-23-610 (1995): "Such unpaid share of common expenses shall be a common expense of all the unit owners, including such purchaser, his successors, and assigns."

Moreover, under the current priority rules, mortgage foreclosures may leave associations with no equity remaining from which to collect their arrears. Over time, this can damage the association and the security of other lenders. Professor Winokur points out that it also can impede the delivery of public services, which POAs are increasingly assuming from local governments. Indeed, the position of the POA as a service provider argues for the condominium lien having superpriority comparable to a tax lien.

Additionally, lenders are in a far better position to protect themselves against default than is the POA. Unlike most POAs, lenders can choose with whom they will do business. The lender can obtain mortgage insurance. Lenders can insist on escrow arrangements for association assessments, just as they do now for taxes and insurance.

The UOA's policy of absolving lenders and foreclosure sale purchasers<sup>236</sup> from prior assessment responsibility is dramatically different from the policy the UOA applies to consensual transfers. Under the UOA, a consensual grantee becomes "jointly and severally liable with the grantor for all unpaid charges against the latter for his proportionate share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor."<sup>237</sup>

Section 3-116 of the UCA offers a modest compromise in this area.<sup>238</sup> It grants assessment priority over first mortgages when

236. See MONT. CODE ANN. § 70-23-610 (1995). See *supra* note 229 for text of statute.

237. MONT. CODE ANN. § 70-23-611 (1995).

238. UNIF. CONDOMINIUM ACT § 3-116, 7 pt. 2 U.L.A. 320 (1997) reads in part:  
Lien for Assessments.

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due . . . . If an assessment is payable in instalments [sic], the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. *The lien is also prior to the mortgages and deeds of trust described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding*

the assessments accrue no more than six months before commencement of the foreclosure action, so long as the assessments are "based on the periodic budget adopted by the association."<sup>239</sup> Section 3-116 also states that recording of the declaration is notice of any association assessment claim—there is no need, as in Montana, to record an additional document. At any time a lender or prospective lender can ensure the precise amount of any arrears by inducing the unit owner to obtain from the association a recordable statement setting forth the amount thereof. This statement is binding on the association.<sup>240</sup>

The merits and problems in the UCA approach have been explored fully elsewhere,<sup>241</sup> and I shall not repeat them at length. Suffice to say, the merits far outweigh the problems.<sup>242</sup> By limiting the priority to six months of periodic assessments levied pursuant to a budget, the approach encourages the association to enforce the assessment lien diligently and to budget periodically. The lender is not disadvantaged by sudden special assessments or by huge, unsuspected arrears. Lenders are almost invariably sophisticated enough to be on actual notice of recorded condominium declarations, so dispensing with lien claims reduces needless paperwork and recording. Use of estoppel certificates to ascertain the amount of any arrearages is already well established practice, and is authorized by the UOA.<sup>243</sup> The Montana legislature should amend the UOA to

---

*institution of an action to enforce the lien.* This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. . . .

. . . .

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

. . . .

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

*Id.* (emphasis added).

239. UNIF. CONDOMINIUM ACT § 3-116(h), 7 pt. 2 U.L.A. 321 (1997).

240. *See id.*

241. *See, e.g.,* Winokur, *Meaner, supra* note 1.

242. For example, one problem identified by Professor Winokur is that the Act requires a POA seeking priority to begin an action for judicial foreclosure even in states which permit foreclosure by sale. *See id.* This is not an issue in Montana, where lien foreclosure can be performed only judicially. *See* MONT. CODE ANN. § 70-23-608 (1995).

243. *See* MONT. CODE ANN. § 70-23-611 (1995):

grant to condominium association liens a priority at least comparable to that offered by the UCA.

### 3. *Assessment Collection: Substituting Assessments for Rent*

Just as the lien priority statute treats the condominium association too shabbily, the rule governing foreclosure treats the association too well. This is the provision permitting the bylaws to specify that the POA may collect rent from the debtor-unit owner between default and eviction.<sup>244</sup>

This provision is radically different from the rules governing a closely allied area: mortgage foreclosure. Under Montana mortgage law, a debtor who personally resides on foreclosed property is entitled to possession during the entire statutory redemption period for one year after the sale.<sup>245</sup> Because possession is a matter of right for the debtor, it follows that the mortgagee is entitled neither to collection of rent during that period nor, unless the security is threatened, to the appointment of a receiver.<sup>246</sup> The policy protecting homeowner possession is so strong that the right to debtor possession may not be altered by a previous agreement between creditor and debtor.<sup>247</sup>

When, however, foreclosure stems from failure to pay condominium assessments, the bylaws may authorize the association to collect rent from the unit owner, presumably from the time of default. The association also is entitled to appointment of a receiver to collect that rent.<sup>248</sup> This is not only inconsistent with pro-homeowner policy in the mortgage realm, it also overcompensates the association at the expense of the debtor and at the expense of junior lienors.

The better way to protect the association's interest is to amend the UOA to give the POA assessment lien priority over

---

[U]pon request of a prospective purchaser, the manager shall make and deliver a statement of the unpaid charges against the prospective grantor, and the grantee in that case is not liable for nor is the unit when conveyed subject to a lien filed thereafter for any unpaid charges against the grantor in excess of the amount therein set forth.

The Uniform Act mandates that the unit owner request the statement, not the prospective purchaser. The Uniform Act approach ensures that the association need respond only to its own members rather than to anyone who deems himself a "prospective purchaser."

244. See MONT. CODE ANN. § 70-23-609(1) (1995).

245. See MONT. CODE ANN. §§ 71-1-229, 25-13-802 (1995).

246. See MONT. CODE ANN. § 27-20-102(2) (1995).

247. See MONT. CODE ANN. § 71-1-229 (1995).

248. See MONT. CODE ANN. § 70-23-609(1) (1995).

subsequently recorded first mortgages, as suggested above. During the period between default and eviction, the debtor should continue to be liable for condominium assessments, but not for rent.

*F. Someone to Lien on: Other Third Party Priorities*

A recurring question in condominium jurisprudence is the extent to which a lien encumbering part of the development affects other parts of the development. The lien in question is usually a construction or mechanics lien. Such a lien may arise (1) because of work requested by an individual unit owner or by the association acting as the owner's agent in an emergency, (2) because of work on the common elements ordered by the association or by the developer after filing of the declaration, or (3) because of work done in original construction before the declaration was filed. The UOA includes several provisions designed to deal with these issues. However, the UOA scheme is imperfect in several respects.

Sections 70-23-603 and 604 of the Montana Code are targeted at work on a particular unit ordered by a unit owner or by the association acting as the owner's agent in an emergency. Section 70-23-603 provides that after recording of the declaration—and the resulting division of the development into units—"no lien shall arise or be effective against the property."<sup>249</sup> Instead, liens "shall arise or be created only against each unit" and its appurtenant common elements.<sup>250</sup> The phrasing of the section is odd, because under the UOA the "property" includes the units, so liens cannot arise against units without arising against some portion of the "property."<sup>251</sup> Apparently, section 70-23-603 means that liens are not to be enforced against the property as a

---

249. MONT. CODE ANN. § 70-23-603 (1995):

Lien allowable against unit not against the property. Subsequent to recording a declaration and while the property remains subject to this chapter, no lien shall arise or be effective against the property. During such period liens or encumbrances shall arise or be created only against each unit and the undivided interest in the common elements appertaining thereto, in the same manner and under the same conditions as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership.

250. MONT. CODE ANN. § 70-23-603 (1995).

251. See MONT. CODE ANN. § 70-23-102(13) (1995): "Property' means the land, all buildings, improvements, and structures thereon and all easements, rights, and appurtenances belonging thereto which are submitted to the provisions of this chapter."

single parcel. In other words, a unit owner ordering work can encumber his own unit only, not that of his neighbors. Thus, under section 70-23-604, his nonconsenting neighbors are free of any resulting lien. The same section states that the same rule applies when the work is constructively ordered by the unit owner, i.e., when the association orders repairs on a unit in an emergency.<sup>252</sup>

Another provision of the UOA, section 70-23-605, targets cases where the lien arises from work on the common elements ordered by the association or developer after the property has been divided into units. Any such lien is treated as divisible: in effect, there are as many liens as there are units encumbered. Accordingly, any unit owner can clear or disencumber his unit by paying his proportionate share of the total debt.<sup>253</sup>

Section 70-23-602 of the Montana Code is designed to deal with liens incurred by the condominium developer, whether incurred before or after the declaration is recorded. This section states:

**LIENS TO BE SATISFIED OR RELEASED AT TIME OF FIRST CONVEYANCE.** At the time of the first conveyance or lease of each unit following the recording of the declaration, every mortgage and other lien affecting such unit, including the undivided interest of the unit in the common elements, shall be paid and satisfied of record or the unit being conveyed or leased and its interest in the common elements shall be released therefrom by partial

---

252. See MONT. CODE ANN. § 70-23-604 (1995):

Construction or materialman's lien—no effect on nonconsenting owner—exception. No labor performed or materials furnished with the consent or at the request of a unit owner, his agent, contractor, or subcontractor shall be the basis for the filing of a construction or materialman's lien against the unit of any other unit owner not consenting to or requesting the labor to be performed or the materials to be furnished, except that consent shall be considered given by the owner of any unit in the case of emergency repairs thereto performed or furnished with the consent or at the request of the manager.

253. See MONT. CODE ANN. § 70-23-605 (1995):

Lien effective against two or more units—release from. If a lien becomes effective against two or more units, the owner of each unit subject to such a lien shall have the right to have his unit released from the lien by payment of the amount of the lien attributable to his unit. The amount of the lien attributable to a unit and the payment required to satisfy such a lien, in the absence of agreement, shall be determined by application of the percentage established in the declaration. Such partial payment, satisfaction, or discharge shall not prevent the lienor from proceeding to enforce his rights against any unit and the undivided interest in the common element appertaining thereto not so released by payment, satisfaction, or discharge.

release duly recorded.<sup>254</sup>

In other words, its solution to the problem of developer liens is to require that the developer clear them from each unit before he conveys that unit.

But what happens if the developer does not clear a unit prior to conveyance? As noted above, if the lien attached after filing of the declaration, then the unit owner can free his unit by paying off only his share of the debt. But what if the lien was filed before the declaration? Is each unit encumbered to the full extent of the debt? This was the problem the Montana Supreme Court faced in *Hostetter v. Inland Development Corp.*<sup>255</sup>

*Hostetter* arose out of the development of the Glacier Condominium at Big Sky. A subcontractor, Dutch Touch, agreed to construct ceramic bathroom enclosures in each individual unit, and shortly thereafter commenced work.<sup>256</sup> Under the rule existing then (and now), Dutch Touch's construction lien attached at the commencement of work.<sup>257</sup> Four months later the declaration was filed, thereby dividing the property into individual units.<sup>258</sup> Over the ensuing three months the developer sold eighteen of sixty-four units, but did not clear those units from the subcontractor's lien.<sup>259</sup> When Dutch Touch did not receive full payment, it recorded its lien statement and sought to foreclose against all units, including those previously sold.<sup>260</sup>

Although Dutch Touch's entire argument is not set forth in the opinion, that argument should run as follows: The subcontractor's contract was indivisible. A single lien secures a single debt—that was the bargain. Dutch Touch was not a party to the subsequent filing of the declaration, so that filing could not prejudice Dutch Touch's rights. But unit purchasers are on notice of possible unrecorded construction liens; those purchasers should not have accepted title to their units without the appropriate releases. That they did is unfortunate. They may have a cause of action against the developer or its prime contractor—but that is not the concern of Dutch Touch, which is entitled to be paid by the parties who benefitted from the subcontractor's work. The court essentially acknowledged that this would be the case

---

254. MONT. CODE ANN. § 70-23-602 (1995).

255. 172 Mont. 167, 561 P.2d 1323 (1977).

256. See *Hostetter*, 172 Mont. at 169, 561 P.2d at 1324.

257. See *id.* at 172-73, 561 P.2d at 1326-27.

258. See *id.* at 169, 561 P.2d at 1324-25.

259. See *id.*

260. See *id.* at 169, 561 P.2d at 1325.



in absence of the UOA.<sup>261</sup>

To continue Dutch Touch's argument: section 70-23-603 of the Montana Code does not change this situation. That section is targeted at liens arising only after recording of the declaration. Applying the section to pre-existing liens could have the effect of invalidating them entirely ("no lien shall . . . be effective against the property"). In view of the legislative policy of protecting those who supply labor and material to a construction site, one cannot assume—as the trial court did—that the legislature wished to allow a developer to unilaterally and completely invalidate pre-existing construction liens by filing a declaration. Therefore, the section should be construed as tailored only to liens arising after recording of the declaration.

The Montana Supreme Court held that section 70-23-603 did change the pre-existing law—not by invalidating the lien entirely, as the trial court concluded, but by shattering the lien into shares proportionate to each unit.<sup>262</sup> In effect, the court held that "property" in the statute<sup>263</sup> means "property as a whole." This would require Dutch Touch to foreclose against each unit.

If the court had gone no farther, such a conclusion would have left unit purchasers vulnerable to Dutch Touch's claim. However, this would have been contrary to a tacit judicial policy of protecting those who, while on constructive notice, have no actual notice of a potential claim.<sup>264</sup> Accordingly, the court held that "[e]quity demands" that Dutch Touch proceed first against units retained by the developer.<sup>265</sup> Only if those units prove insufficient to pay the debt, should the subcontractor be permitted to levy on units owned by purchasers.<sup>266</sup> In effect, the court applied a marshalling doctrine closely analogous to the "inverse order of alienation" rule.<sup>267</sup>

261. *See id.*

262. *See id.* at 174, 561 P.2d at 1327.

263. *See supra* note 251 and accompanying text.

264. The court stated that the purchasers were "charged with constructive, if not actual, notice" of the lien. *Hostetter*, 172 Mont. at 175, 561 P.2d at 1328. For examples of the tacit policy of protecting those without actual notice, even if on constructive notice, see *Natelson, Running, supra* note 1, at 72-75.

265. *See Hostetter*, 172 Mont. at 176, 561 P.2d at 1328.

266. *See id.*

267. This rule holds that if O, owning Blackacre subject to a lien, conveys parcels to successive purchasers with a promise to hold them harmless from the lien, then on foreclosure the lienor must proceed first against any parcels retained by O, and only then against purchasers in inverse order of alienation—that is, latest conveyance first. *See* GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* 741 (3d ed. 1993).

The result of *Hostetter* seems just, but the contortions necessary to reach it strongly suggest the need to clarify the statute. An amendment should ensure that the term "property" in section 70-23-603 of the Montana Code means only "property as a whole." The legislature also should address more clearly the fate of blanket construction liens when the property to which they attach subsequently becomes subject to the condominium law.

### G. Association Suits on Behalf of Unit Owners

Prominent in the nation's courts over the past few years have been lawsuits by condominium purchasers against condominium developers.<sup>268</sup> The most common claims arise from alleged construction defects, mismanagement of the condominium during the developer's period of control, and developer misrepresentation to the association or to unit purchasers.<sup>269</sup> Less common claims stem from alleged anti-trust violations, securities law violations, and other statutory offenses.

When claims arise from alleged breaches of duty to the association or from defects in the common elements, the association often seeks to act as a party plaintiff. The courts generally permit this as to breaches of duty to the association, but several courts have held that, in absence of a statute to the contrary, the association cannot maintain common element lawsuits because it does not own the common elements—it merely administers them. These courts require that common element suits be maintained by the unit owners as class actions.<sup>270</sup>

Class actions are administratively clumsy and, it would

---

268. A detailed discussion of this subject appears in NATELSON, POA, *supra* note 1, at 308-20, 337-410.

269. For a Montana case of alleged misrepresentation, see *Association of Unit Owners of Deer Lodge Condominium, Inc. v. Big Sky of Montana, Inc.*, 242 Mont. 358, 790 P.2d 967 (1990).

270. NATELSON, POA, *supra* note 1, at 309-20 identifies several different kinds of developer-litigation cases for standing purposes:

A1: Debt or breach of duty to the POA;

A2: Loss to or defects in POA-owned property;

A3: Loss to or defects in property maintained, but not owned, by the POA;

B1: Cases involving both loss for which the POA can assess and unique loss to individuals;

B2: Cases involving only unique loss to individuals.

*See id.* The author argues that the association should have standing in any of the "Class A" cases but not in B2 cases. The answer to the question of who are proper plaintiffs in "B1" cases depends on the individual facts.

The major area of uncertainty noted in the text is in A3 cases, where some courts refuse to grant standing to the POA.

seem, needlessly so when there is an existing entity (the POA) whose very purpose is to represent the owners' common interests. Accordingly, there is a trend toward allowing associations to maintain common element suits without requiring class certification.<sup>271</sup>

At first glance, the applicable Montana statute would seem to have settled the matter. Section 70-23-901(1) of the Montana Code states that the "manager" of the condominium (meaning usually the board of directors)<sup>272</sup> may bring an action "with respect to any cause of action relating to the common elements or more than one unit." The Utah Supreme Court has relied on a similar statute in holding that the POA has the power to bring common element lawsuits.<sup>273</sup>

But in *State ex rel. Boyne USA, Inc. v. District Court*,<sup>274</sup> the Montana Supreme Court refused to allow the association to represent the owners and held that a class action was necessary.<sup>275</sup> The court distinguished the Utah precedent by stating that in the case before it, unlike the precedent, there was substantial unit owner dissent from the association's decision to bring suit.<sup>276</sup> A number of unit owners had not turned in "post-card consents" for the POA to represent them.<sup>277</sup> Others had stated on their consents that they reserved the right to take further action on their own.<sup>278</sup> One of the developers, Boyne USA, Inc., was both a defendant and the owner of twenty-seven percent of the condominium units.<sup>279</sup> The court held that the proper vehicle for suit was a class action, so that Boyne and other dissenters could withdraw from the class.<sup>280</sup>

The holding in *Boyne* is contrary to the plain meaning of the statute, contrary to precedent, and contrary to reason. It is contrary to the plain meaning of the statute because that statute

271. See, e.g., UNIF. CONDOMINIUM ACT § 3-102(4), 7 pt. 2 U.L.A. 288 (1997). A collection of such statutes as of 1987 appears in Robert G. Natelson, *Mending the Social Compact: Expectancy Damages for Common Property Defects in Condominiums and Other Planned Communities*, 66 OREGON L. REV. 109, 117-18 n.36 (1987). For a collection of cases so holding, see NATELSON, POA, *supra* note 1, at 316 n.22.

272. See *supra* notes 37-40 and accompanying text.

273. See *Brickyard Homeowners' Ass'n v. Gibbons Realty*, 668 P.2d 535 (Utah 1983).

274. 228 Mont. 314, 742 P.2d 464 (1987).

275. See *Boyne*, 228 Mont. at 320, 742 P.2d at 468.

276. See *id.* at 318, 742 P.2d at 466-67.

277. See *id.*

278. See *id.*

279. See *id.* at 315-16, 742 P.2d at 464-65.

280. See *id.* at 320, 742 P.2d at 468.

specifically says that the association may sue “with respect to any cause of action relating to the common elements or more than one unit.”<sup>281</sup> There is nothing in the statute that limits the POA’s power to bring causes of action where no significant minority objects. The holding in *Boyne* is contrary to precedent in that every other court that has considered the matter has sustained the association’s power to sue over the objections of some owners. Moreover, it has been held repeatedly that developers who are simultaneously defendants and unit owners must pay any assessments duly imposed on them, even if the proceeds are to be used for litigation against them.<sup>282</sup>

*Boyne* is contrary to reason in that it cripples associations from suing whenever a substantial minority objects, especially if the minority includes a defendant. In *Boyne*, the court noted that a defendant developer still retained twenty-seven percent of the units. Yet, it is a characteristic of such suits that they often involve subdivisions where the developer retains a substantial interest. Partly, this is because such suits often involve claims of mismanagement while the developer was in control of the POA, and suit cannot properly be delayed until the developer has wholly sold out. Partly, it is because the same sort of problems that give rise to the claims can be the same sort of problems that have retarded the developer’s sales—shoddy construction, for example.

Another point must be considered. If *Boyne*’s reasoning were sound when the association is a plaintiff, then it would also be sound when the association is a defendant. If a person or group holding a substantial number of units were to sue the POA in tort,<sup>283</sup> for example, consistency with *Boyne* would require that the association not respond, and instead leave the defense to a class consisting of those who wished to defend. Such a result would further undermine both the UOA’s statutory scheme<sup>284</sup>

---

281. MONT. CODE ANN. § 70-23-901(1) (1995) (emphasis added).

282. See, e.g., *Owens v. Tiber Island Condominium Ass’n*, 373 A.2d 890 (D.C. Ct. App. 1977) (POA could bring suit although minority objected; minority compelled to help finance suit); *Brickell Biscayne Corp. v. Palace Condominium Ass’n*, 526 So.2d 982 (Fla. Dist. Ct. App. 1988) (holding that defendant developer must pay assessments to finance litigation against it, and citing three additional Florida cases as precedents).

283. POAs can be liable in tort to members and their guests. See, e.g., *Simchuk v. Angel Island Community Ass’n*, 253 Mont. 221, 833 P.2d 158 (1992). For a general treatment, see NATELSON, POA, *supra* note 1, at 320-25.

284. The association is subject to suit under MONT. CODE ANN. §§ 70-23-901(2), -902 (1995).

and the fundamental purpose of the association as a central agent for common decision-making.<sup>285</sup>

Even without *Boyne*, unit owners who object to POA lawsuits already have considerable protection. The decision to sue, like other POA decisions, is subject to judicial review on several grounds, including compliance with proper procedures, sufficient authority, and "reasonableness."<sup>286</sup> Moreover, where claims are unique to particular owners and the association has no obligation to repair the damage, a court can rule that class or individual actions would be more appropriate than POA representation.<sup>287</sup>

### H. Terminating the Condominium

Any of several events may end, or set the stage for ending, a condominium regime. A termination date may be set in the declaration. The property may be taken by eminent domain. The unit owners may opt for termination. The property may become obsolete. The property may be destroyed. The UOA contains provisions designed to deal with some, but not all, of these events.<sup>288</sup>

For many years, it was common for covenants governing noncondominium homeowner associations to state that they

285. See the oft-cited language of *Hidden Harbour Estates v. Norman*:

It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

309 So. 2d 180, 181-82 (Fla. Dist. Ct. App. 1975).

286. See NATELSON, POA, *supra* note 1, at 411-84; Natelson, *Consent*, *supra* note 1. For Montana examples of procedural review, see *Edgewater Townhouse Homeowner's Ass'n v. Holtman*, 256 Mont. 182, 845 P.2d 1224 (1993) and *Thisted v. Tower Management Corp.*, 147 Mont. 1, 409 P.2d 813 (1966). For a Montana case involving both procedural and "reasonableness" review, see *Trieweiler v. Spicher*, 254 Mont. 321, 838 P.2d 382 (1992).

287. See NATELSON, POA, *supra* note 1, at 318-20. See also *River Birch Assocs. v. City of Raleigh*, 388 S.E.2d 538 (N.C. 1990) (association did not have standing to pursue individuals' fraud and unfair trade practices claims); *Vaughn v. Dame Constr. Co.*, 272 Cal. Rptr. 261 (Cal. 1990) (former owner had the right to pursue her unique claim separately from the association).

288. In general, drafters of condominium statutes and documents have paid insufficient attention to the termination issue. For a general discussion of the question, see NATELSON, POA, *supra* note 1, at 617-631.

would expire automatically at a certain time, such as twenty-five years after initiation.<sup>289</sup> However, the UOA contains no guidance on how the parties should proceed upon expiration of any similar period set forth in the condominium declaration. Fortunately, such provisions are exceedingly rare in condominiums. In leasehold condominiums, expiration of the term results in reversion of the present possessory interest to the landlord, who then makes all relevant decisions.

More serious is the lack of procedure to be followed if some or all of the condominium is taken by eminent domain. Given the current statute, the best one can do is to maintain that condemnation is "damage to or destruction of" the property, and therefore subject to section 70-23-803 of the Montana Code.<sup>290</sup>

However, the UOA does contain rules to deal with the other three possibilities: unit owner decision to terminate, obsolescence, and destruction. The relevant section on decision to terminate states simply that a property can be removed from condominium ownership by a recorded instrument if all unit owners and lienholders agree, in which case liens on each unit become liens on the owner's undivided interest.<sup>291</sup> After removal, ownership becomes one big tenancy in common,<sup>292</sup> and therefore

289. See NATELSON, POA, *supra* note 1, at 628.

290. See MONT. CODE ANN. § 70-23-803 (1995). Some declarations include contractual provisions designed to deal with eminent domain. See, e.g., Declaration of Unit Ownership for Yellowstone Townhomes, *supra* note 168 (POA to represent owners in proceedings with condemning authority and to take possession of funds from condemnation of common elements "to be held in trust for Unit Owners and their first mortgage holders as their interests may appear." However, any restoration after partial condemnation funds shall be "substantially in accordance with the Declaration and the original plans and specifications . . ."). *Query*: If under these clauses Unit 10, an end unit on a row of townhouses, holding a 1/10 interest in the common elements, is the only unit damaged by taking of common elements, is the award divided pro-rata among all unit owners, or is it devoted exclusively to restoration of the common elements around Unit 10? Or suppose the loss of common elements injures several units, but disproportionately damages Unit 10? These clauses are inadequate for such contingencies.

For another condemnation clause, see Bylaws of The Palace Condominium Ass'n, *supra* note 127.

291. See MONT. CODE ANN. § 70-23-801 (1995):

Removal from chapter—recorded instrument—consent of lienholders. All of the unit owners may remove a property from the provisions of this chapter by executing and recording an instrument to that effect if the holders of all liens affecting any of the units consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the undivided interest of the unit owner in the property after removal from the provisions of this chapter.

292. See MONT. CODE ANN. § 70-23-804 (1995):

Effect of removal—ownership in common—liens. If the property is removed

subject to partition.<sup>293</sup> If the owners desire, they can resubmit the property to condominium ownership.<sup>294</sup> These statutes add little to what the common law would be in absence of a statute.

With respect to obsolescence, the UOA does not attempt to define the word, but leaves the decision up to the unit owners at the time. The statute reads as follows:

**OBSOLETE PROPERTY—RESTORATION OR SALE—REMOVAL FROM CHAPTER.** Ninety percent of the unit owners may agree that the property is obsolete in whole or in part and whether or not it shall be renewed and restored or sold and the proceeds of sale distributed. If 90% of the unit owners agree to renew and restore the property, the expense thereof shall be paid by all the unit owners as common expenses. If 90% of the unit owners agree to sell the property, the property shall be considered removed from the provisions of this chapter.<sup>295</sup>

One flaw with this section is that the supermajority required—ninety percent—is simply too high to be optimal in any but the smallest condominiums.<sup>296</sup> The most likely and natural interpretation of this section is that once ninety percent of the owners can decide that the property is obsolete, then successive votes must be held until either (1) ninety percent vote for sale, with ownership converted to tenancy in common;<sup>297</sup> or (2) ninety percent vote for reconstruction. This dreadful procedure is a prescription for deadlock, prompting some condominium devel-

---

from the provisions of this chapter, as provided by 70-23-801 through 70-23-803, the property shall be considered owned in common by all the unit owners. The percentage of undivided interest of each unit owner in the property owned in common shall be the same as the percentage of undivided interest previously owned by such owner in the common elements. Liens affecting any unit shall be liens, in accordance with the then existing priorities, against the undivided interest of the unit owner in the property owned in common.

293. See MONT. CODE ANN. § 70-23-805 (1995):

Effect of removal—subject to partition—sale. If the property is removed from the provisions of this chapter, as provided in 70-23-801 through 70-23-803, it shall be subject to an action for partition at the suit of any unit owner. The net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and shall be divided among the unit owners in proportion to their respective undivided interests after first paying out of the respective shares of the unit owners, to the extent sufficient for the purpose, all liens on the undivided interest in the property owned by each unit owner.

294. See MONT. CODE ANN. § 70-23-806 (1995).

295. MONT. CODE ANN. § 70-23-802 (1995).

296. See Nitzan & Paroush, *supra* note 1.

297. See *supra* note 292.

opers to attempt the legally dubious procedure of drafting around it.<sup>298</sup>

In event of deadlock during the statutory obsolescence procedure, an owner might be tempted to break that deadlock by committing arson. This is because arson triggers the UOA provision on damage and destruction,<sup>299</sup> which offers a far easier resolution. In case of damage or destruction, the association—presumably by a bare majority vote—can elect to rebuild. If it does not so elect within sixty days, the regime is over, and condominium ownership is converted into a tenancy in common.<sup>300</sup> Interestingly enough, there is no requirement that the damage or destruction be substantial. Apparently any amount will do. The section offers intriguing trouble-making possibilities for disaffected unit owners who believe that their POA has not moved fast enough to repair minor damage. Accordingly, some declarations purport to change the statutory rule by requiring “substantial” damage and inadequacy of insurance before the condominium can be terminated.<sup>301</sup> The validity of such provisions is not certain.

Obviously, these statutes need reform. At the least, there should be some provision for eminent domain, a reduction in the awesome supermajorities required for action due to obsolescence, and a redrafting of the damage rules to make clear that damage must be substantial before the condominium qualifies for termination on that basis. Because condominium ownership is still relatively new and many problems cannot be foreseen, reform measures also should allow considerable private discretion, both *ex ante*—in drafting rules for a new subdivision, and *ex post*—in

---

298. See Declaration of Condominium for The Ashberry Condominium, *supra* note 127 (purporting to permit partition by a majority if the condominium is obsolete and more than 50 years old).

299. See MONT. CODE ANN. § 70-23-803 (1995):

Damage to property—decision not to repair or rebuild—removal from chapter. If within 60 days after the date of the damage to or destruction of all or part of the property the association of unit owners does not decide to repair, reconstruct, or rebuild, the property shall be considered removed from the provisions of this chapter.

300. See *supra* note 292.

301. See, e.g., Declaration of Unit Ownership for Yellowstone Townhomes, *supra* note 168 (insubstantial damage to be repaired; substantial damage to be repaired if cost not greater than 110% of insurance proceeds; otherwise, majority of owners to determine whether to repair); Bylaws of The Palace Condominium Ass'n, *supra* note 127 (repairs to be made unless 75% of building destroyed, in which case 75% of owners must opt to rebuild); Declaration of Condominium for The Ashberry Condominium, *supra* note 127 (repairs to be made if insurance proceeds are greater than \$5000 less than cost to repair; if less, then majority decides).



determining a course of action after the event.

The statutes of several other states contain sensible eminent domain procedures that could form the basis for reform in Montana. By way of example, the Utah statute<sup>302</sup> distinguishes between three kinds of takings—takings of common elements (in Utah, they are called “common areas and facilities”), takings of units, and takings of portions of units. In the event common elements are condemned, “the award . . . shall be allocated to the unit owners in proportion to their respective undivided interests.”<sup>303</sup> However, the Utah statute does not compensate fairly an owner of a unit who has suffered disproportionately due to governmental seizure of part of the common elements. A unit formerly overlooking a greensward may end up next to a busy street; the property seized may be limited common elements appurtenant to a particular unit. There is no provision for payment of consequential damages in such cases.<sup>304</sup>

The Utah statute also stipulates that if an individual unit is condemned, the court is to award to its owner just compensation for the loss, including the loss of an appurtenant interest in the common elements. That interest in the common elements is then to be redivided among the rest of the units. Thus, in Utah it may be said that at the filing of the declaration, each unit enjoys an executory interest (of a contingent kind) in the entire common elements—an interest which may ripen into possession (in whole or in part) in the event that other units are condemned. Such an executory interest, if not limited as to the time in which it must vest, would violate the common law rule against perpetuities. Accordingly, the Utah legislature has thoughtfully added a saving provision to its condominium statute.<sup>305</sup>

If a portion, but not all, of a unit is taken, matters become more complicated. If the unit is still usable, its share of the common elements is reduced in the same proportion as its fair market value is reduced, with appropriate reallocation of those common elements to other units. The owner then receives compensation for both the loss to the unit and the loss of part of the interest in the common elements. If the unit is no longer usable, then its entire portion of the common elements is allocated to other owners and the remainder of the air space becomes a common

---

302. See UTAH CODE ANN. § 57-8-32.5 (1996).

303. *Id.*

304. *Cf. Andrews v. City of Greenbelt*, 441 A.2d 1064 (Md. 1982) (holding that the award must include a sum for such “consequential damages”).

305. See UTAH CODE ANN. § 57-8-28 (1996).

element. The owner is compensated for the entire loss.

Maryland also has enacted a condominium condemnation statute.<sup>306</sup> Under Maryland law, the drafters of the declaration and bylaws may establish any scheme for allocation of the award, reapportionment of the common elements, or reconstruction or termination of the regime. In default of a provision in the declaration, any loss in the general common elements is allocated among units, as in Utah. Loss of limited common elements is reimbursed to the affected unit owners, which solves part of the consequential damage problem.

Loss of a unit, or any portion of one, entitles its owner "to the entire award for the taking of all or part of his respective unit and for consequential damages to his unit."<sup>307</sup> In Maryland, unlike Utah, reallocation of common elements as a result of partial taking of a unit is based upon reduction of a unit's floor area rather than upon the diminution in its market value.<sup>308</sup> Reallocation based on floor area avoids lengthy court disputes about the comparative market values of various units. Finally, the Maryland statute provides that liens on a unit superior to the owner's interest are to be paid off before any distribution is made to him.<sup>309</sup> While either of these two eminent domain models is preferable to the currently existing Montana law, the Maryland scheme offers several distinct advantages, including flexibility in declaration drafting, a readily calculable pay-off formula, and some compensation for consequential damages.

Rather than attempting to define "obsolescence," or "destruction" or "substantial," statutory reformers would be well advised to examine the policy of the UCA, which generally leaves the question of whether to terminate a condominium to the unit owners themselves. Thus, section 2-118 of the Act permits termination for any reason by eighty percent of the unit owners (or a higher proportion set in the declaration). That section also contains a special provision for condominium units defined in part by horizontal boundaries.

Similarly, section 3-113(h) of the UCA stipulates that damage or destruction "shall be repaired or replaced promptly by the association," with uninsured amounts being a common expense.

---

306. See MD. CODE ANN., REAL PROP. § 11-112 (1996).

307. See MD. CODE ANN., REAL PROP. § 11-112(c)(1) (1996).

308. See MD. CODE ANN., REAL PROP. § 11-112(e) (1996). See also MD. CODE ANN., REAL PROP. § 11-124(a) (1996) (prevents the rule against perpetuities from invalidating the resulting executory interests).

309. See MD. CODE ANN., REAL PROP. § 11-112(f) (1996).

However, reconstruction will not take place if it would offend state or local health or safety ordinances. Moreover, eighty percent of the owners may elect not to rebuild or to terminate the condominium. Any insurance proceeds attributable to any portion of the complex not rebuilt must be distributed to the lienholders and the owners of the units in that portion.

Several nonuniform statutes have comparable, although less elaborate, provisions. Most of these laws set the percentage of votes necessary to terminate at a figure less than eighty percent,<sup>310</sup> which as I have noted elsewhere is probably too high for optimal decision-making in many condominiums.<sup>311</sup> Any percentages established by statute ought to vary according to the number of owners who actually reside in their units, with higher percentages for complexes that are owner-occupied and lower figures for complexes with significant numbers of renters. This reflects the greater importance of the decision for resident owners, who are, of course, more attached to their units than are investors. It also reflects the fact that votes from investors can be difficult to procure. Thus, one option might permit termination of the condominium on approval by eighty percent of all owner occupants and sixty percent of all lessors.

### *I. Elimination of Needless Regulation*

Under the UOA, condominium ownership is subjected to economic regulation to which other subdivisions are not subject. For example, section 70-23-613 of the Montana Code imposes certain disclosure requirements and couples nondisclosure with a right to cancel.<sup>312</sup> The material to be disclosed includes infor-

---

310. See, e.g., OHIO REV. CODE ANN. § 5311.14 (Banks-Baldwin 1995) (75 percent); OR. REV. STAT. § 100.605(2) (1990) (60 percent). Florida retains the unanimity requirement as a default rule, but permits opt-out by declaration. It also contains a useful list of POA powers granted for the wrap-up of condominium affairs. See FLA. STAT. ANN. § 718.117 (West Supp. 1996).

311. See *supra* notes 171-75 and accompanying text.

312. See MONT. CODE ANN. § 70-23-613 (1995):

Disclosure by seller—seller to furnish documents—delay period.

(1) Whenever a person, corporation, or other legal entity constitutes a majority of the unit owners, the seller or his agent, prior to signing any buy-sell agreement, shall give to any person purchasing or expressing a desire to purchase one of the project units notice that: (a) the seller or other person constitutes a majority of the unit owners; (b) any bylaws and administrative regulations governing the operation of the development and the association, as adopted by the association, have been adopted by the seller or other person acting as a majority of the unit owners; and (c) any change in the bylaws or administrative regulations occurring while the seller or

mation pertaining to control of the association and copies of the governing documents. These disclosures are not burdensome and are likely to facilitate informed agreement among parties. If the courts find that additional disclosure is necessary to assure actual notice of relevant material facts, it can impose additional requirements as a matter of common law.

On the other hand, the UOA also includes regulation for which the empirical basis is questionable. Thus, there seems to be no real need for the requirement that declarations be approved by or filed with the Department of Revenue,<sup>313</sup> because that department can obtain condominium assessment information in the same way it obtains such information for other subdivisions, and approval of condominium names can be handled through the office of the secretary of state.

By far the most burdensome regulations are those in Part 2 of the UOA.<sup>314</sup> These regulations mandate extensive reporting and inspection procedures, administered by the state Department of Commerce, before earnest money deposits can be applied to construction.

It is difficult to justify these procedures empirically. There are no reported cases in Montana arising from misuse of earnest money deposits, either in condominiums nor in other subdivisions, where the statute is inapplicable. Moreover, the Department of Commerce official responsible for such filings stated that he had never heard of such cases either.<sup>315</sup> In my view the law should not regulate in the absence of proven abuse. About the best that can be said of the Part 2 procedures is that they are used very seldom.<sup>316</sup> One interpretation of why this is so is that

---

other person constitutes a majority of the unit owners may be made only with the approval of the seller or other person constituting a majority of unit owners.

(2) Upon the request of any person purchasing or expressing a desire to purchase one of the project units, the seller or his agent shall furnish to that buyer or prospective buyer, prior to signing any buy-sell agreement, a copy of the Unit Ownership Act, the bylaws of the association, and any administrative regulations governing the operation of the project or the association.

(3) Any buy-sell agreement shall provide that it is not effective until 72 hours after the prospective purchaser has received the documents required in subsection (2), and during that delay the prospective purchaser may withdraw his offer without penalty.

313. See MONT. CODE ANN. §§ 70-23-304, -305 (1995).

314. See MONT. CODE ANN. §§ 70-23-201 to -206 (1995).

315. Telephone Interview with Robert Verdon, Staff Legal Counsel for the Professional and Occupational Licensing Bureau, Department of Commerce, State of Montana (Aug. 8, 1996).

316. See *id.* (no state inspections or reports in 1995, one in 1994, none in 1993,

developers would rather not use earnest money deposits than comply with the procedures,<sup>317</sup> but in the absence of empirical support, this cannot be said with certainty.

These procedures should be repealed unless justified empirically. If abuse of earnest money deposits does occur, the legislature should substitute simpler procedures of either compulsory escrow<sup>318</sup> or an escrow-or-bonding option. In that event, the requirement should be extended to noncondominium subdivisions as well.

Elimination of UOA Part 2 should be coupled with repeal of one of the most disturbing parts of the law: the section granting an executive branch agency (the Department of Commerce) power to invent new crimes.<sup>319</sup>

## VI. CONCLUSION: RECOMMENDED REFORMS

Despite numerous drafting infelicities, the UOA has worked fairly well because its core philosophy is sound: a condominium statute should serve primarily as a safe harbor. The legislature should retain this philosophy and amend the statute to further it. The legislature should shun the temptation to overregulate. It should not adopt the UCA, the UCIOA or any other comprehensive codification. On the contrary, the legislature should repeal several bits of needless regulation now within the UOA.<sup>320</sup>

The legislature should undertake several technical reforms. Lawmakers should amend confusing statutory language carried over from civil law practice,<sup>321</sup> use a term other than "manager" to describe the POA governing authority,<sup>322</sup> explain that units do not need to be within walls,<sup>323</sup> and change the definition of "unit owner" to clarify that leasehold condominiums are permitted.<sup>324</sup> When units are not to be within walls, the requirement of floor plans should, of course, be waived.<sup>325</sup>

With respect to the basic documents of the condominium, the legislature should alter the statute so that only the declaration

---

and one in 1992).

317. *See id.*

318. As in UNIF. CONDOMINIUM ACT § 4-110, 7 pt. 2 U.L.A. 349 (1997).

319. *See* MONT. CODE ANN. § 70-23-1002 (1995).

320. *See supra* Part V(I).

321. *See supra* Part III(B).

322. *See id.*

323. *See supra* Part V(A).

324. *See supra* Part V(D).

325. *See* MONT. CODE ANN. § 70-23-306 (1995).

need be recorded. The declaration should include all the basic elements defining unit owners' property interests: description of units, future interests, covenants, and so forth. Floor plans should be made part of the declaration rather than merely filed with the declaration.<sup>326</sup>

The declaration should be allowed to specify each unit's share of the common elements without reference to "value."<sup>327</sup> Amendment procedure should be as specified in the declaration, with minimum required supermajority (probably around sixty percent) and a default rule for amendment (probably around seventy-five percent) if the instrument is silent on the subject.<sup>328</sup> The legislature also should provide that condominium covenants contained in a declaration (or in the bylaws, in the case of condominiums formed prior to statutory amendment) continue to run with the land even after foreclosure.<sup>329</sup> The legislature may also wish to include a list of items that, if inserted in the condominium declaration, will be legally enforceable. Among these are use of arbitration and other forms of alternative dispute resolution,<sup>330</sup> and a unit owner's bill of rights.<sup>331</sup>

The association should be governed by the statutes normally applicable to non-profit corporations. There should be no need to record instruments inferior to the declaration.<sup>332</sup>

The assessment lien ought to receive priority over first mortgages, at least to the extent set forth in the UCA.<sup>333</sup> The legislature also should adjust the statutory language governing blanket liens to comply with case law.<sup>334</sup>

Lawmakers should correct the Montana Supreme Court's

---

326. See *supra* Part V(B).

327. See *supra* notes 41-44 and accompanying text.

328. See *supra* Part V(B).

329. See *supra* note 215 and accompanying text.

330. Cf. FLA. STAT. ANN. § 718.1255 (West 1988). Such provisions, besides encouraging judicial economy, also encourage decentralized development of private law. See Rubin, *supra* note 1.

331. As noted by Professor French, there is a trend toward granting property owners associations more power. See Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 349 (1992). Professor Winokur has argued that there are significant dangers in that approach. See Winokur, *Mixed*, *supra* note 1. As a possible remedy, Professor French suggests provision for a voluntary unit owners' bill of rights. See French, *supra*.

332. The directors might wish to record these to increase chances that new owners have actual notice of them, for new owners without actual notice may not be bound by such rules. See Natelson, *Consent*, *supra* note 1.

333. See *supra* Part V(E)(2).

334. See *supra* notes 225-67 and accompanying text.

interpretation of the "standing to sue" statute by clarifying that the association may represent unit owners even when the defendants include other unit owners.<sup>335</sup> They also should adopt termination provisions similar to those in the UCA and eminent domain provisions similar to those in force in Maryland.<sup>336</sup>

The general approach behind the UOA has served Montana well for thirty years. Thoughtfully amended, it may offer even better service for the next thirty.

---

335. See *supra* Part V(G).

336. See *supra* Part V(H).