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# The Minnesota Uniform Condominium Act: The View of Developers' Counsel

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# MINNESOTA UNIFORM CONDOMINIUM ACT: THE VIEW OF DEVELOPERS' COUNSEL

N. WALTER GRAFF†

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## I. INTRODUCTION

Considerable care and scholarship is evident both in the drafting of the 1977 Uniform Condominium Act<sup>1</sup> (UCA) and the modified version adopted as the Minnesota Uniform Condominium Act<sup>2</sup> (MUCA). Despite such care, practitioners in the field have encountered problems in the application of the MUCA. While the MUCA appears comprehensive at first reading, it does not contemplate all possible situations. This Article examines several problem areas from the viewpoint of the developers' counsel, who is charged with finding practical formulas that accommodate development objectives and workable frameworks for homeowner administration. Strategies are recommended to resolve each problem and several legislative amendments are proposed.

## II. TREATMENT OF PARKING SPACES AND GARAGES

While meticulous care is taken in drafting provisions on the difficult technical subjects of reconstruction and condemnation, the more mundane issues of garage and parking regulation deserve equal attention. Parking is likely to be a subject of interest to unit owners, because off-street parking usually is provided for condominium unit owners and their guests. This section discusses the creation and allocation of unit owners' regular parking spaces.<sup>3</sup>

### A. Goals of Allocation

The drafter's goal is to establish a system of parking space allocation to accomplish a number of objectives. First, unless the layout of the buildings requires a particular allocation, the drafter should provide the declarant with flexibility in allocating parking

1. UNIF. CONDOMINIUM ACT §§ 1-101 to 5-110, 7 U.L.A. 103-231 (1977) [hereinafter cited as U.C.A.].

2. MINN. STAT. §§ 515A.1-101 to 4-118 (1982).

3. For purposes of this Article, there is no need to distinguish between or among open-air parking spaces, separately enclosed garage stalls, and open parking stalls in an enclosed multi-stall basement-level garage. References to parking spaces mean the one or two spaces allocated to each unit for the occupant's regular parking. This Article does not discuss secondary or "guest" parking spaces, which the homeowners' association usually regulates by resolution.

spaces to specific units. This is usually achieved by allocation on a first-come, first-served basis. The second objective of the drafter, if desirable from a marketing viewpoint and appropriate to the physical layout, is to enable the declarant to "sell" parking spaces for an additional charge. This approach is particularly useful where there are more parking spaces than units. Third, the drafter should provide flexibility for future reallocations of parking spaces. Finally, the drafter should give unit purchasers and their successors rights in particular parking spaces that cannot be alienated against the purchaser's will. Under the MUCA, the creation and structuring of parking rights to serve these goals involve technical issues.

### *B. Available Mechanisms*

The MUCA provides three mechanisms by which parking spaces may be organized. Perhaps the simplest is to create each of the parking spaces as a separate condominium unit. The drafter designates each parking space on the floor plans as a separate unit, which is assigned a unit number with concomitant allocations of voting power, liability, and common element interest. A second mechanism is to designate the parking spaces as part of the common elements, subject to an assignment procedure specified in the declaration, by which the association can assign exclusive use of a particular parking space to a unit. A third mechanism is to designate each parking space as a limited common element for a unit.

None of the three mechanisms is entirely satisfactory. Designating a garage space as a limited common element for a particular residential unit creates a fixed connection with no possibility of flexibility at or subsequent to the time of the initial sale.<sup>4</sup> Nevertheless, this method may be appropriate if a space is logically used by only one particular unit. Drafters of documents for condominiums in which the appropriate allocation is not so obvious and flexibility in allocation is desirable should consider the mechanisms discussed below.

#### *1. Designation of Parking Space as a Unit*

Since the adoption of the MUCA, designating a parking space as a unit within the condominium has become common. Under

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4. The 1977 Uniform Condominium Act (UCA) sensibly provided for reallocation of limited common elements. U.C.A. § 2-109(b) (1977). The MUCA deleted this provision.

Minnesota's first condominium act<sup>5</sup> (the old Act), practitioners were concerned with whether the statutory definition of "apartment"<sup>6</sup> encompassed an unenclosed parking stall, the vertical boundaries of which extended from lines marked in the garage floor to the ceiling of the garage. The MUCA resolves this statutory construction problem by defining "unit"<sup>7</sup> and "unit boundaries"<sup>8</sup> in clear terms.

Designating parking spaces as separate units has the virtue of simplicity, because a parking space can thereafter be conveyed by deed just like any other unit. Consequently, unit owners can buy and sell garage units among themselves, thus providing considerable flexibility for the future. It may be economically unwise for the owner of a residential unit to sell his only parking space without buying another, since an urban residential unit without any parking rights may be less desirable than one with parking rights. Where appropriate the declaration may restrict ownership of garage units to owners of residential units.

An important disadvantage, however, follows from designating parking spaces as units. Parking space units are not excepted from the general allocation rule.<sup>9</sup> Thus, voting power and liability for assessments must be allocated to parking space units within one of the permitted patterns specified in the MUCA.<sup>10</sup> This may have undesirable effects.

### *i. Effect on Liability for Assessments*

The MUCA permits a reasonable degree of flexibility in allocating assessments. In the first instance, allocations may be made on

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5. MINN. STAT. §§ 515.01-29 (1982).

6. The definition of "apartment" is:

[A] part of the property, including one or more rooms or enclosed spaces located on one or more floors, or part or parts thereof, in a building, or a part of a parcel of real estate situated in a mobile home park upon which one or more mobile homes may be erected, and with a direct exit to a public street or highway or to a common area leading to such street or highway, intended for any type of independent use, including, but not restricted to, commercial, industrial, or residential use.

*Id.* § 515.02, subd. 2.

7. *Id.* § 515A.1-103(19); *see also id.* § 515A.2-110(b)(9), (10). Any remaining doubts are put to rest by the 1977 UCA comments which refer to "campsite" and "subdivision" condominiums, U.C.A. § 2-101 comment 9 (1977), and provide that a unit "may consist of unenclosed ground and/or airspace." *Id.* § 2-110 comment 2.

8. *See* MINN. STAT. § 515A.2-102 (1982).

9. *See id.* § 515A.2-108(a).

10. *See id.* This Article does not discuss allocation of common element ownership, which generally does not create any additional complexity on the garage issue.

the basis of area, volume, equality, or some combination of these factors.<sup>11</sup> Section 515A.3-114 authorizes the assessment of expenses relating to a limited common element against the benefited unit or units,<sup>12</sup> and allows allocation of common expenses "benefiting less than all of the units" against the units benefited.<sup>13</sup>

Some declarants feel that buyers will think it unreasonable if a garage unit, particularly an unenclosed stall, pays as much assessments pro rata as a residential unit. Others feel that the calculation of a garage unit assessment results in such a trivial figure that it would be far more convenient for future homeowners if garage units incurred no assessment. To treat garage units as non-assessable would be inconsistent with the language of the MUCA;<sup>14</sup> both the MUCA and the more permissive UCA require some allocation "to each unit."<sup>15</sup> In that context, subsection 515A.3-114(d) could not reasonably be construed to authorize non-assessable units.<sup>16</sup> As a matter of legislative policy, there is no public interest protected by a limitation on the manner of allocation, as long as the declarant is not unfairly benefited.<sup>17</sup> The MUCA's allocation provision should be modified to allow designation of some units as non-assessable.

### *ii. Effect on Voting Power*

A more troublesome issue is the allocation of voting power to garage units. The MUCA does not authorize non-voting units, and thus garage units must be included in an overall voting

11. *Id.* Compare the parallel provision of the UCA, which authorizes any allocations, so long as the "formula" is stated. U.C.A. § 2-108 (1977); see also Note, *Common Rights and Obligations Among Unit Owners Under the Minnesota Uniform Condominium Act*, 10 WM. MITCHELL L. REV. (1984).

12. MINN. STAT. § 515A.3-114(c) (1982).

13. *Id.* § 515A.3-114(d). There is an unexplained anomaly, not present in the UCA, between subsections 515A.3-114(c) and (d). Allocation of a limited common element expense is to be assessed in equal shares against the units to which that limited common element is assigned (and are therefore benefited by it), whereas a common expense designated by the declaration to benefit less than all of the units is to be allocated among those units "in proportion to their common expense liability." *Id.* § 515A.3-114(c), (d). The latter formula of allocations was added to the MUCA. This distinction does not seem to be a significant inconvenience in practice.

14. *Id.* § 515A.2-108(a).

15. U.C.A. §§ 2-105(8), 2-108(a) (1977); MINN. STAT. §§ 515A.2-105(8), .2-108(a) (1982).

16. An argument against allowing garage units to be designated as non-assessable, however, is that it is not fair that the owner of two garage units would pay no more toward the upkeep of garages than the owner of one or no garage unit.

17. See U.C.A. § 2-107(a) (1980).

scheme, allocating votes by area, volume, or equality.<sup>18</sup> This has two unfortunate results—abandonment of the one vote per unit structure and potential anomalies under Federal agency standards.

The presence of garage units generally dictates abandoning the one vote per unit structure since a garage unit with the same voting power as a residential unit conflicts with common notions of fairness. Equality is a common and practical manner of allocation of voting power among units. By way of comparison, townhouse or “Planned Unit Development” regimes universally allocate voting power on the basis of one vote per lot, except lots containing only a garage, which often are specified as non-voting. From an operational and functional viewpoint, townhouse projects and condominium projects are virtually indistinguishable. Developers have also observed that many buyers no longer feel that a larger unit should be entitled to a larger vote. The notion of one vote per unit seems fair and simple to most people, and many homeowner associations conduct their business on the one vote principle, sometimes in direct contravention of the terms of the governing declarations which require voting by a multi-place decimal percentage.

The choices for allocation of assessments and voting power authorized by the MUCA are too restrictive. The solution lies in amending the MUCA to provide a broader range of choices to the drafter. The language of the 1980 UCA is a significant improvement on these issues.<sup>19</sup> It retains and expands the concept of the 1977 UCA, allowing any method of allocation, provided that the formula is specified, and the allocations do not discriminate in favor of units owned by the declarant.<sup>20</sup> The 1977 UCA authorizes classes of voting power for certain issues, if the declarant’s units do not constitute a class per se.<sup>21</sup> Unfortunately, the 1980 UCA does not carry this flexibility to its logical end by expressly authorizing non-assessable units and non-voting units.

If these reforms were enacted, assessments and voting power for garage units could be allocated or withheld by the declaration in whatever manner suited the circumstances. A declarant could

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18. See MINN. STAT. §§ 515A.2-105(6), .2-108(a) (1982). Some condominium declarations of record in Minnesota specify non-voting garage units. In the opinion of this author, the language of the MUCA prohibits this practice. Subsections 515A.2-105(8) and .2-108(a) both require allocation of voting power “to each unit.” *Id.* §§ 515A.2-105(8), .2-108(a).

19. See U.C.A. § 2-107 (1980).

20. See *id.* § 2-108 (1977).

21. *Id.*

choose to exclude garage units from assessment, treating garage expense as if it were an assignable common element. If a declarant sought to establish a simple one vote per unit allocation, the garage units could be excluded to avoid the ludicrous effect of an allocation of equal voting strength among garage and residential units.

## 2. *Designation of Parking Space as a Common Element*

A common local pattern for the treatment of primary garage spaces developed under the old Act. The association, through its Board of Directors or management agent, was given the authority to assign specific garage spaces to each unit. The declaration characteristically provided that such assignments had a semi-permanent, vested character, and could not be changed by the association without the consent of the current benefited owner. The intent was to allow the declarant to make the initial assignments of garage spaces to each unit on a first-come, first-served basis. Since the assignment of a particular parking space was part of the negotiated sale of each unit, the consent required by the declaration assured the buyer that "his" parking space could not be taken away from him by the association. This pattern has been popular with declarants because it allows the flexibility of offering the initial buyer a choice of spaces, at least where the physical layout of the project does not make an obvious connection between units and parking spaces.

The enactment of the MUCA raises doubts as to the validity of this pattern of assignments. Section 515A.3-105 provides in relevant part:

If entered into prior to expiration of the period of declarant control pursuant to section 515A.3-103, (1) any management contract, employment contract, or lease of recreational or parking areas or facilities, . . . may be terminated without penalty by the association at any time after the expiration of declarant control upon not less than 90 days' notice to the other party

. . . .<sup>22</sup>

Subsection 515A.3-102(a)(7) further provides that unless limited by the provisions of the declaration, the association may "grant leases, licenses, and concessions *not to exceed one year* and utility easements through or over the common elements . . . ." <sup>23</sup>

22. MINN. STAT. § 515A.3-105 (1982).

23. *Id.* § 515A.3-102(a)(7) (emphasis added).



While these provisions arguably are not intended to prohibit the customary pattern of parking space assignments, strictly read, they may do so.<sup>24</sup> The pressures of practicality have triumphed over this technical qualm, however, and after some decline in the use of such assignment provisions following enactment of the MUCA, they are once again common provisions of constituent documents.

The MUCA nonetheless should be amended to include specific authority for semi-permanent parking, storage locker assignments, and other types of licenses to units or their owners.<sup>25</sup> Section 3-105 and subsection 3-102(a)(7) should expressly exclude leases and licenses running from the association to a unit or unit owner.

### III. ANOMALIES IN APPLICATION TO NONRESIDENTIAL PROJECTS

Although some express references in the MUCA suggest that not all condominiums are residential,<sup>26</sup> they give the appearance of afterthoughts. It is not surprising that the drafters of both the UCA and the MUCA were primarily concerned with residential condominiums.<sup>27</sup> Nevertheless, the result is that several provisions of the MUCA are ill-suited to the commercial project.

The one year limitation that the MUCA imposes on all leases and licenses<sup>28</sup> is inappropriate in a nonresidential condominium. Licenses and leases, which run from the association to a unit or unit owner, should be permitted without time limitation. The owners of an established condominium may want to license an encroachment on a common roof or lawn, for example, to permit an owner to construct a sundeck, add a skylight or install a vent or compressor. An owner may be reluctant to incur the expense of only a one-year license. An additional argument against imposing time limitations on leases and licenses arises where a commercial tenant is willing to invest substantial capital in his leasehold, but

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24. The one year limitation in subsection 515A.3-102(a)(7) is an addition to the MUCA, not found in the UCA. The comments to the UCA suggest that the drafters' concern with references to "parking areas or facilities" was a lease between the association as tenant and the declarant as lessor, for a parking lot or ramp building. The concern was not with leases or licenses of individual parking spaces from the association as lessor or licensor to a unit owner as tenant or licensee. U.C.A. § 3-105 comments 1-3 (1977).

25. See *infra* notes 28-29 and accompanying text.

26. See, e.g., MINN. STAT. §§ 515A.4-101(a), 4-110(b), 4-113(b) (1982). Many of the comments to the UCA refer to commercial condominiums.

27. But see Lundquist, *Mixed Use Condominiums Under the Minnesota Uniform Condominium Act*, 10 WM. MITCHELL L. REV. (1984).

28. See MINN. STAT. § 515A.3-102(a)(7) (1982).

not without assurance of a fixed term to amortize the cost.<sup>29</sup>

Another ambiguity is found in subsection 515A.1-106(c) which permits a statutory or home rule charter city to prohibit or restrict condominium conversions, if the city adopts an ordinance or charter provision which meets the requirements of the MUCA.<sup>30</sup> While the ordinance or charter provision must be based on a finding of a "significant shortage"<sup>31</sup> of rental housing, the resulting ordinance may prohibit any type of condominium conversion, residential or otherwise. This anomaly has proved harmless in practice, but should be corrected by amendment of the MUCA.

Much of the MUCA is remedial in intent, and designed to protect consumers from real or potential abuses by declarants. In a nonresidential setting, however, most of these protections are unnecessary. While in some respects bargaining power weighs heavily in favor of the declarant even in a commercial setting, it is unnecessary and inappropriate for the state to impose protections for the benefit of nonresidential users. After all, bargaining power is typically unequal in shopping center and office building rentals as well. At least in theory, the marketplace tends to stabilize prices and terms at a fair balance. A fair market balance should result if commercial transactions are not subject to restrictions primarily designed to protect residential consumers. For example, a nonresidential condominium should not be subject to: (1) restrictions on the "period of declarant control of the association;"<sup>32</sup> (2) the one-year restriction on leases, licenses, and concessions;<sup>33</sup> and (3) the consumer protections.<sup>34</sup>

Another anomaly is found in Article 4 of the MUCA which states that its provisions may be "modified or waived by agreement of purchasers of units in a condominium in which all units are restricted to nonresidential use."<sup>35</sup> Given the likely increase in mixed use condominiums,<sup>36</sup> there is no compelling reason to restrict this authority for modifications or waivers to condominium projects which are entirely nonresidential. It is more appropriate to make the modification or waiver available to purchasers of non-

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29. See U.C.A. § 3-105 comment 2 (1980).

30. See MINN. STAT. § 515A.1-106(c) (1982).

31. *Id.*

32. *Id.* § 515A.3-103.

33. *Id.* § 515A.3-102(a)(7).

34. *Id.* §§ 515A.4-101 to 4-117.

35. *Id.* § 515A.4-101(a).

36. See generally Lundquist, *supra* note 27.

residential units without regard to whether the entire condominium is nonresidential in character.<sup>37</sup>

The notice of conversion required by the MUCA<sup>38</sup> is cumbersome and plainly directed to residential tenants. It requires attachment of the form of purchase agreement as an exhibit, although the purchase option specified in subsection 515A.4-110(b) will not apply to a nonresidential unit. The tenant protections of subsection 515A.4-110(a) should not apply to the commercial tenant. The MUCA should be amended to provide that this section applies only to residential tenants.<sup>39</sup>

A similar anomaly exists in subsection 515A.4-110(b), which establishes the purchase option for tenants in a conversion project. After establishing the purchase right, the right is qualified as inapplicable "to any unit in a conversion condominium if that unit will be restricted exclusively to nonresidential use or if the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion."<sup>40</sup> Subsection 515A.4-101(a) permits this provision to be modified or waived in the event that the *entire* condominium is restricted to nonresidential use.<sup>41</sup> These exceptions, however, fail to address the possibility, no longer hypothetical, of conversion of a nonresidential building such as an office or warehouse into a residential condominium. Thus, the MUCA arguably creates a statutory purchase option in favor of a nonresidential tenant, if the tenant's space is converted to residential purposes. Such a purchase option serves no useful function and should be eliminated.

#### IV. TENANTS' RIGHTS IN A CONVERSION

Generally, a declarant who wishes to convert a residential apartment into a residential condominium wants to sell as many units as possible to existing tenants.<sup>42</sup> In selecting a candidate for conversion, the declarant may give some consideration to the likelihood that the tenants will buy units. Few declarants wish to evade

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37. This author disagrees with the Commissioner's comment to the effect that interrelation of rights in mixed use condominiums requires that this restriction apply to nonresidential buyers in mixed use condominiums. See U.C.A. § 4-101 comment 1 (1980).

38. See MINN. STAT. § 515A.4-110(a) (1982).

39. The 1980 UCA makes this correction. See U.C.A. § 112(a) (1980).

40. MINN. STAT. § 515A.4-110(b) (1982).

41. *Id.* § 515A.4-101(a).

42. See generally Rohan & Furlong, *The No-Buy Pledge: A Potential Tool for Tenants in a Condominium Conversion*, 10 WM. MITCHELL L. REV. (1984).

the statutory provisions providing notice and purchase options for tenants in a conversion project.<sup>43</sup> Nonetheless, it is important that counsel advise declarants about the need to conform to the MUCA early enough to avoid an awkward period of time during which the notice or purchase option periods must be waited out.

### A. *Ambiguities in Section 515A.4-110*

Section 515A.4-110 requires a declarant of a conversion condominium to give all tenants and subtenants "notice of the conversion or the intent to convert no later than 120 days before the declarant will require them to vacate."<sup>44</sup> There are certain ambiguities in this provision which raise doubts concerning the obligations of the declarant. In addition, declarants sometimes arrive at programs which the drafters of the MUCA did not contemplate, and which do not easily fit within the scheme of section 515A.4-110.

#### 1. *"Intent to Convert"*

One issue which arises under section 515A.4-110 involves the requisite "intent to convert," which triggers the requirement of notice to vacate. The meaning of the phrase "intent to convert," inserted in the MUCA as an additional cause for notice, is ambiguous. It is unclear when such "intent" arises, and when notice need be given of a state of mind.<sup>45</sup> Assume a situation where the building owner plans to evacuate the building, gut each of the floors, completely rearrange private and public spaces, and eventually convert the product to a condominium. In this case, the purchase option is excluded because the boundaries of the new units "do not substantially conform to the dimensions of the residential unit before conversion."<sup>46</sup> The question remains whether the 120-day notice to vacate must be given to, for example, month-to-month tenants, merely because one year later the gutted and rehabilitated structure will be submitted to the MUCA.

#### 2. *"Declarant"*

Another issue involves the definition of "declarant" for purposes

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43. See MINN. STAT. § 515A.4-110 (1982).

44. *Id.* § 515A.4-110(b).

45. Compare U.C.A. § 4-112(a) (1977) with *id.* § 4-112(a) (1980).

46. See MINN. STAT. § 515A.4-110(b) (1982).

of section 515A.4-110.<sup>47</sup> Assume the hypothetical above, except that the present owner of the building merely agrees to sell a vacant building to the declarant who will then gut, rehabilitate, and submit the building to the MUCA. The question arises whether the declarant, who at this point may only have a vendee's interest in the building and no right of possession, must give the statutory notice before the owner may require tenants to vacate. The definition of "declarant" in the MUCA appears to exclude contract vendors "holding interests in the real estate solely as security for an obligation."<sup>48</sup> It is unclear whether this language includes or excludes the seller under an option or a purchase agreement with development contingencies. The definition contained in subsection 1-103(9) of the 1980 UCA specifies that the declarant refers to the offeror of units.<sup>49</sup> The MUCA should be amended to reflect this approach.

### 3. "Conversion"

Another issue concerns the relation of section 515A.4-110 to a conversion that takes place without any immediate intent on the part of the declarant to sell units. For example, a partnership or limited partnership may own the building and choose to convert to condominium format as a means of distributing assets in kind. Co-owners may decide to convert for the same reason, thus permitting some co-owners to generate cash by refinancing their units. Conversion into units would also facilitate the distribution of portions of a former partner or co-owner's prior interest, perhaps to children or grandchildren, or to a trust for estate planning purposes.

In another case, an owner might choose a "preemptive conversion," because he fears that a change in ordinance or state statute could restrict the right to convert the property to condominium status. Proposals for further protections of existing tenants or even media attention to persons displaced by a conversion may prompt conversion by an owner, although he has no immediate intent to sell any of the units.

### 4. Necessity of Notice and Purchase Option

Thus, the owner or declarant may convert the building to con-

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47. For the MUCA's definition of "declarant," see *id.* § 515A.1-103(9)(a).

48. See *id.*

49. U.C.A. § 1-103(9) (1980).

dominium status under the MUCA without an interest in having present tenants vacate, and perhaps with a positive disinclination to sell any of the units to anyone. Apparently notice under subsection 515A.4-110(a) need not be given solely because of conversion to condominium format, and the purchase option under subsection 515A.4-110(b) does not arise solely because of the conversion at that time.<sup>50</sup> The converted building may then continue as a rental property for years. During that interval, isolated sales may be made to a few tenants who wish to buy their units, or perhaps an occasional outside buyer will buy a unit that has been vacated by a prior tenant.

It is unclear at which point, if any, the statutory notice is required and whether the statutory purchase option arises under such circumstances. Arguably, tenants who rent units after the conversion has taken place have no rights to notice and to the purchase option. While such an interpretation does not offend the protective purposes of the statute, can an attorney safely advise his client to ignore the literal wording of the MUCA? In answering the question, would it matter whether the incoming tenant had actual knowledge of the conversion? It is doubtful that an acknowledgment of condominium status and waiver of notice and purchase rights signed by an incoming tenant would be effective, in view of the MUCA's blanket prohibition of waivers.<sup>51</sup> Most of these troublesome ambiguities could be corrected by: (1) abandoning "intent to convert" as an event requiring notice; (2) negating any occupancy or purchase rights for those tenants who are given notice of impending conversions prior to moving in; (3) permitting the declarant to give the notice to individual tenants at different times, and not necessarily to the entire building at one time; and (4) permitting written waivers of the notice or shortening the occupancy period of the notice.

### B. *Practical Interim Solution*

Pending clarification of the MUCA, a practical solution to some of the questions raised above would require the declarant or owner to give the 120-day notice and require vacation of the premises contemporaneously with submitting the property to the MUCA. The declarant could then offer to enter into month-to-month ten-

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50. See MINN. STAT. § 515A.4-110(b) (1982). The purchase option runs for 60 days from the delivery or mailing of the notice.

51. See *id.* § 515A.1-104.

ancies with present tenants beyond the 120 or 180-day limit required by section 515A.4-110. There are at least two disadvantages to this solution. First, conditions in the marketplace may be such that the landlord, tenant, or both may be unhappy with a mere month-to-month tenancy. Second, the MUCA provides that the purchase option arises from the 120-day notice to vacate,<sup>52</sup> but the building owner may not want to sell the units. If neither the month-to-month tenancy nor the sale of units is desirable, the owner then might be tempted to go through the motions of conforming to the MUCA by presenting the tenant with an outrageously high purchase price. Since the intention of the owner or declarant under such circumstances is legitimate and does not offend the protective purposes of the MUCA, the MUCA should be modified to accommodate these intentions without formalistic contortions.

#### V. DEFERRAL OF DECLARANT'S ASSESSMENTS

A legitimate and recurring problem in many condominium projects is that the declarant, in fairness, should not be required to pay the full assessments for incomplete or unoccupied units. Full payment is unfair because an unoccupied unit does not generate the same level of expense to the homeowners' association as do completed and occupied units. On the other hand, it is reasonable to consider a limit to payment reductions, and to recognize that even an unoccupied unit generates some common expense. Further, one may reasonably expect an unoccupied unit to contribute to the reserve component of the monthly assessments.

Various methods have evolved over the years to minimize this problem. One method, used with both condominiums and townhouses,<sup>53</sup> gives the declarant, in the constituent documents, the option of paying no assessments, or reduced assessments, for unoccupied units. Any reduction is accompanied by the declarant's obligation to make up any deficit in the association budget between the assessments received from occupied units and the actual ex-

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52. *Id.* § 515A.4-110(a).

53. In townhouse projects, the solutions are fairly easy. For example, one can provide for small phases or sections in the development, each phase or section consisting only of one building of two, four, or six living units. Even if the phases are larger, it is common in townhouse documents to provide for abated or reduced assessments for vacant lots or vacant or unsold units owned by the declarant. Financing guidelines, such as those promulgated by FHLMC, FNMA, or HUD/VA, may place limitations of time or amount on these abatements or reductions, but there is no statutory limit in the townhouse format.

penses. In the case of condominiums, however, the MUCA severely limits the use of these abatement or reduction measures. Subsection 515A.3-114(a) provides that “[u]ntil the association levies a common expense assessment, the declarant shall pay all accrued expenses of the condominium.”<sup>54</sup> Thus, the MUCA does not permit any allocations of assessment responsibility between the declarant and the occupying homeowners. This is even more restrictive than the limitations of the Federal National Mortgage Association:

The declaration should provide a clear definition of when assessments will begin. A reasonably reduced assessment may be allocated to unsold units if they are not occupied. In any event, all units should be allocated full assessments no later than 60 days after the first unit is conveyed. However, we will consider other arrangements if the declarant or sponsor is legally bound to cover any deficit or shortage that may arise in the project’s initial period of operation.<sup>55</sup>

The MUCA unnecessarily restricts alternative formulas for a reasonable allocation of assessments during the development period. First of all, the public has no legitimate interest in protecting the buyer of commercial space, and the declarant for nonresidential projects should be free to establish any allocation formula, without regard to standards of fairness or reasonableness. Second, residential projects should be permitted, after the first assessments, to elect to fund the operating deficit or pay a specified percentage of the full assessment for a limited period. If the declarant chooses to fund the deficit between assessments collected and the actual association expenses, the unit buyers will not suffer. Buyers would pay the same assessments if the entire project were sold and occupied. Bookkeeping will be simplified for the declarant, since it is often difficult to distinguish between construction costs and maintenance costs during development. The association’s budget must include a reserve component.

Therefore, by definition, if the declarant is funding the deficit, the reserve budget will be fully funded. If the declarant elects instead to pay a stated percentage of the unit assessment for units

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54. MINN. STAT. § 515A.3-114(a) (1982). The UCA expressly prohibits any reduced assessment allocations to declarants’ units other than this deferral until the first assessment. *See* U.C.A. § 2-107(a) (1980).

55. FEDERAL NATIONAL MORTGAGE ASS’N (FNMA), LENDING GUIDE Ch. 3, pt. 4, § 409.01 (1983). The FNMA standard also allows for administrative review of alternative proposals.



which are not substantially completed and ready for occupancy, the statute should fix the minimum proportion at the greater of twenty-five percent of a full assessment or the reserve fund component of the assessment. In either event, the public interest in protection of residential purchasers will be served by the disclosures already required by the MUCA.<sup>56</sup>

## VI. MISCELLANEOUS MATTERS

The following is a selection of peculiar aspects of condominium drafting, each a potential problem to the drafter faced with a particular set of objectives.

### A. *Mechanics' and Materialmen's Liens*

Owners of units in an earlier phase of a flexible condominium need protection from mechanics' liens arising out of work performed in a later phase. Subsection 515A.4-109(c) provides:

Labor performed or materials furnished for the common elements, if duly authorized by the association, shall be deemed to be performed or furnished with the express consent of each unit owner and shall be the basis for filing of a lien pursuant to the lien law against each of the units and shall be subject to the provisions of subsection (b) of this section.<sup>57</sup>

Labor or materials furnished for improvements during the second or later phase of a flexible condominium give rise to mechanics' and materialmen's lien rights.<sup>58</sup> If the improvements are commenced and for some reason the additional real estate is never added to the original phase condominium, the lien rights attach only against the improved parcels of real estate and do not affect the original phase. If, however, the improved portion of the additional real estate is joined to the existing condominium by the "expansion" process specified by the MUCA,<sup>59</sup> subsections (b) and (c) indicate that the lien, if not otherwise expired, would then be a lien against each of the units and its aliquot share of common elements.<sup>60</sup>

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56. See MINN. STAT. § 515A.4-102 (1982).

57. *Id.* § 515A.4-109(c). This subsection does not appear in the 1977 UCA.

58. The provisions for mechanics' and materialmen's liens are contained in Chapter 514 of the Minnesota Statutes. See *id.* §§ 514.01-17.

59. See *id.* § 515A.2-111.

60. This is no different from a lien against a single tract of land which is then platted into lots and outlots. The lien then attaches to each of the lots and outlots. It is sometimes useful to conceptualize a condominium as a kind of three-dimensional plat.

Subsection 515A.4-109(b) sensibly provides that a lien, including a mechanic's lien, which "becomes effective against two or more units" shall be dischargeable by a pro rata payment in "the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien."<sup>61</sup> It is unclear whether this subsection applies to liens which arise by reason of labor and materials supplied solely to units (as opposed to units and common elements), or solely to common elements, but thereby inferentially to a "unit" to which an undivided portion of common elements adheres.<sup>62</sup> It is unlikely that this subsection is directed only to labor and materials supplied for two or more units and not the common elements which is relatively uncommon.

On the other hand, subsections (b) and (c) together could be construed to provide for alternative circumstances, the former for a lien arising solely against units, and the latter for liens arising against the common elements. Perhaps the proviso "if duly authorized by the association" in subsection (c)<sup>63</sup> is intended to limit the applicability of "undertaking" to the association. The declarant, however, often still controls the association at the time improvements are made to the second phase of a flexible condominium. The level of action or inaction by the association which may be deemed "authorization" for the improvements is unclear.<sup>64</sup>

In short, there is a real possibility of claims by a mechanic or a materialman against all of the units in a condominium, during the original as well as second phase, for labor and materials furnished in the development of the second phase.<sup>65</sup> Such a risk is commonly overlooked by counsel for purchasers in flexible condominiums. The only effective solution is an amendment to the MUCA specifi-

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61. MINN. STAT. § 515A.4-109(b) (1982).

62. The comment to the 1977 UCA provides work performed on the common elements as an example. U.C.A. § 4-109 comment 3 (1977).

63. MINN. STAT. § 515A.4-109(c) (1982).

64. Labor and materials may continue to be furnished to the second phase even after the addition of this segment to the condominium, in fulfillment of "MUST BE BUILT" requirements. *See id.* § 515A.4-117.

65. Neither the text nor the comments of the 1977 UCA are helpful on this issue. *See* U.C.A. § 4-109 (1977). The concept of the 1977 UCA is that liens on "withdrawable" real estate (a concept not included in the MUCA) would expire upon expiration of the option to withdraw. The 1980 UCA abandons this approach and simply mandates release of liens before conveyance to a unit buyer or the association. *Id.* § 4-111 (1980). This does not address the problem raised in the text of this Article.

cally negating any liability on the part of units in prior phases for liens on add-on phases. The owners of the original phase units would still bear the risk that the add-on common elements would be effectively "withdrawn" from the project if the liens were not paid.

### *B. Amendments Affecting Special Declarant Rights*

The MUCA provides unit owner protection from expansion of special declarant rights which might work to the disadvantage of the individual owners. Subsection 515A.2-119(c), which governs special declarant rights, provides that "[e]xcept to the extent expressly permitted or required by other provisions . . . no amendment may create or increase special declarant rights . . . in the absence of unanimous written agreement of the unit owners and holders of an interest as security for an obligation."<sup>66</sup> The MUCA should also contain a reciprocal prohibition against diminishing or terminating any special declarant rights without the consent of the declarant.

### *C. An Inappropriate Cross-Reference*

Subsection 515A.2-120(a) provides that "[e]xcept in the case of a taking of all the units by eminent domain (section 515A.1-107), a condominium may be terminated only by agreement"<sup>67</sup> of at least 80 percent of the association's voting strength. There is reference in this subsection to section 515A.1-107, which deals exclusively with three possibilities: (1) the taking of a unit or so much of a unit as to leave a useless remnant; (2) the taking of a part of a unit; and (3) a taking of a part of the common elements. The section at no point addresses the effect of a taking of all of the units by eminent domain. It would therefore be useful if the MUCA expressly addressed the effect of a taking of all the units.

### *D. The Certification of Completion*

The MUCA certification of completion requirement has caused some confusion among certifying engineers and architects. The applicable section provides:

A declaration, or an amendment to a declaration adding units to a condominium, may not be recorded unless all structural

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66. MINN. STAT. § 515A.2-119(c) (1982).

67. *Id.* § 515A.2-120(a).

components and mechanical systems serving more than one unit of all buildings containing or comprising any units thereby created are substantially completed consistent with the floor plans, as evidenced by certificate executed by a registered professional engineer or architect and recorded or attached to the floor plans.<sup>68</sup>

The form of certification required by the MUCA is intended and appropriate for new construction.<sup>69</sup> The typical residential apartment conversion, however, involves at most a few basic repairs and cosmetic upgrades. In conversions, therefore, the wording of the statutory certification is a *non sequitur*. It would be less confusing, and would better serve the public interest if the certifications described in subsections 515A.2-101(b) and (c) were not required in the case of conversion condominiums. If a conversion condominium is to be used for residential purposes, the interests of the public will be adequately served by the portion of the disclosure statement requiring a professional opinion prepared by an architect or engineer licensed in this state, describing the present condition of all structural components and mechanical and electrical installations of the condominium, and a statement by the declarant of the expected useful life of each item and that no representations are made.<sup>70</sup>

Additionally, some engineers and architects have informed this author that a reasonable reading of subsection 515A.2-101(b) requires them to certify that certain "structural components and mechanical systems" are "substantially completed consistent with the floor plans." Cautious and literal-minded engineers and architects can reasonably take the position that such a certification is impossible unless the structural components and mechanical systems are fully shown on the floor plans. This would require showing on the site plan the location of gas lines, water and sewer pipes, electrical conduits, and other utilities passing across the common ground. It would also require showing on the floor plans every pipe, wire, and heating duct that serves more than one unit. Site and floor plans would consequently be cluttered with unnecessary detail.<sup>71</sup> Additional detail on the floor plans would also add a material amount to their cost, perhaps a few hundred dollars per unit.

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68. *Id.* § 515A.2-101(b).

69. This is evident in the 1977 UCA. *See* U.C.A. § 2-101 comment 4 (1977).

70. *See* MINN. STAT. § 515A.4-104(a)-(b) (1982).

71. Presumably the association would have access to building plans which would show such detail for management purposes.

It can be argued to the contrary that such an interpretation of this subsection would, in effect, add a new and additional requirement to subsection 515A.2-110(b), which lists the items that floor plans must show. It is a reasonable interpretation, however, that subsection 515A.2-101(b) requires a showing of all the mechanical detail. An amendment to the MUCA should be adopted to eliminate the possibility of such an interpretation.

*E. Persons Entitled to Notice of Expansion of Flexible Condominiums*

Subsection 515A.2-111(b)(2) requires a declarant to "serve notice of his intention to add additional real estate . . . to the occupants of each unit by notice given" in writing.<sup>72</sup> It is unclear whether this subsection contemplates notice given only to occupants of the phase or phases of a previously constituted condominium (since only those phases would contain "units" within the statutory meaning), to occupants of that portion of the additional real estate then being added to the condominium by this amendment, or to both categories of occupants. In local practice, most practitioners deal with this doubt by giving notice to occupants of both the existing and the expanded portions of a condominium. The MUCA should be amended to resolve this doubt.

It is questionable whether the notice required by subsection (b) accomplishes any legitimate purpose, particularly in light of its burden. For reasons advanced earlier in this Article,<sup>73</sup> nonresidential projects should be exempted from this notice requirement. It is difficult to find justification for this notice in residential projects as well. The right of the declarant to add additional real estate, and the extent and conditions of that right, must be amply disclosed in the declaration<sup>74</sup> and in the disclosures made to purchasers.<sup>75</sup> Both the declaration and the disclosure statement must be provided to the purchaser in order to initiate the running of the purchaser's 15-day rescission right.<sup>76</sup> A purchaser therefore becomes bound to the purchase agreement and takes title, with full knowledge of the nature and extent of the declarant's reserved rights to add additional phases. Under these circumstances, no interest of the public or the purchaser is served by requiring actual

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72. MINN. STAT. § 515A.2-111(b)(2) (1982).

73. See *supra* notes 38-39 and accompanying text.

74. MINN. STAT. § 515A.2-106 (1982).

75. *Id.* § 515A.4-102.

76. *Id.* § 515A.4-106.

notice of the addition of the next phase. It may be of general interest to the owner in a prior phase, but that would not seem to justify the burden placed on the declarant by such notice.

The notice required by subsection (b) is not trivial. It requires careful scheduling of notice to the association and the occupants. These notices bear no logical relationship to the events themselves. In the event that notices are not given, whether by agreement or not, it is impossible to shorten or waive the time period because of the blanket prohibition of variation by agreement.<sup>77</sup> Any defect in the notices is an absolute bar to recording of the amended declaration and supplemental floor plans until the defect is cured. In the case of a condominium project that consists of a series of four or six-unit buildings, the scheduling of advance notices to add buildings is unduly burdensome. The subsection provides no useful protection to the public and should be deleted from the MUCA. It places an unnecessary burden on declarants and is a useless appendage to the MUCA.

#### *F. Must Earnest Monies Be Held in a True Escrow?*

Section 515A.4-108 provides that “[a]ny earnest money paid in connection with the purchase or reservation of a unit from a declarant shall be escrowed and held in this state in an account, savings deposit or certificate of deposit designated solely for that purpose in an institution whose accounts are insured by a governmental agency or instrumentality. . . .”<sup>78</sup> In local practice, “escrow” is a term of art referring to the deposit of funds or instruments with a third party escrow agent, against specific and limited instructions from the two principals. The 1977 UCA version of this section clearly indicates that the escrowed funds would be held by a title insurance company or escrow company.<sup>79</sup> Since this requirement was deleted in the MUCA, it seems that the Act’s drafters intended only that earnest monies be held in segregated accounts under the sole control of the declarant. Common local practice is to place such funds in a segregated account in the declarant’s name, instead of in a true escrow account. The latter would be a cumbersome way to handle earnest money deposits.<sup>80</sup>

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77. *See id.* § 515A.1-104.

78. *Id.* § 515A.4-108.

79. U.C.A. § 4-108 (1977); *see also id.* § 4-110 (1980).

80. Another question regarding section 515A.4-108 is whether it conflicts with the requirement placed upon real estate brokers, if they are involved in the sale, to place all such earnest monies in their trust accounts. *See* MINN. STAT. § 82.24(1) (1982).

Another departure from the language of the 1977 UCA is the substitution of the term "earnest money" for "deposit."<sup>81</sup> Assuming the substitution to be deliberate and meaningful, any funds which are not earnest money should be safely exempt from this escrow requirement. For example, a deposit paid on a reservation agreement, despite the phrase "or reservation" in this section, does not usually constitute earnest money until the purchase agreement is offered and accepted. Also, a purchase agreement or an amendment to a purchase agreement will often require an additional deposit to partially cover the cost of an expensive or unusual option or fixture. This deposit is intended to protect the seller in the event the sale does not close. The seller then bears the risk of recovering the cost of an unusual or unusually expensive option from the eventual buyer of the unit. For that reason, the additional deposit is usually non-refundable, or is refundable at the option of the seller. A non-refundable deposit of this type is consistent with an escrow agreement, and easier to administer without a formal escrow.

The changes made by the MUCA with respect to this section are practical and sensible. Such changes, however, were effected by simple deletion and substitution of words susceptible to various interpretations. Clarification of this section would ensure a clear understanding of Minnesota's intent. First, the references to "escrow" or "escrowed" should be deleted in favor of clear language that the funds must be held by the declarant, unless the parties agree on another holder, in a segregated or trust account, and not commingled with the other funds of the declarant. If, on the other hand, a true escrow is intended by this section, the MUCA should specify the acceptable categories of escrow holders, and allow the parties to designate deposits other than earnest money which may remain free of the escrow.

### *G. Failure of Disclosure*

Subsection 515A.4-106(c) provides that:

If a declarant fails to provide a purchaser to whom a unit is conveyed with a disclosure statement and all amendments thereto as required by subsections (a) and (d), that purchaser, in addition to any rights to damages or other relief, is entitled to receive from the declarant an amount not to exceed five per-

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81. See U.C.A. § 4-108 (1977).

cent of the sales price of the unit.<sup>82</sup>

This subsection appears outrageously unfair to many declarants. Yet experience under the old Act provided that declarants often ignored a disclosure requirement without a penalty. The old Act required furnishing of specific disclosures to purchasers, but the only consequence for failure to comply was that the purchaser's statutory right to rescind the transaction continued until the moment of closing.<sup>83</sup> The statute provided that the disclosure rights could not be waived, but "if any purchaser proceed[ed] to closing, his right under this section to rescind [was] terminated."<sup>84</sup>

In practice, and during the "good times" of the local real estate market in the late 1970's, some declarants found the tradeoff acceptable: if no disclosures were made, sales were rescindable until the moment of closing, but there was always another buyer. There was usually no malicious intent in a declarant's failure to issue the statutory disclosure statement; issuance of the statement often was a nuisance, and easier to ignore. Therefore, the drafters of the MUCA undoubtedly believed that if disclosure statements were required as a matter of public policy, declarants would have real incentives to comply.

There are essentially three difficulties with the MUCA's disclosure section. First, there is no threshold of materiality. The disclosures required by the MUCA are lengthy and technical. It is certainly conceivable that a paragraph could be omitted, or a fact or figure misstated with no adverse effect to the purchaser. Second, the MUCA gives no standard or guidance by which a court could decide to award the purchaser five percent, or less than five percent, for violation of this subsection.<sup>85</sup> The MUCA does not require that the award be based upon proven damages, and does not give the court any guidance as to the proper basis for assessing a one percent as opposed to a five percent penalty against the declarant. Finally, in the event a defect in the disclosure is discovered, and assuming that the purchaser is agreeable to releasing any claims under the subsection, the MUCA prohibits any variation or

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82. MINN. STAT. § 515A.4-106(c) (1982); *cf.* U.C.A. § 4-106(c) (1977) (flat ten percent penalty).

83. *See* MINN. STAT. § 515.215-.29 (1982).

84. *Id.* § 515.215(4).

85. This is probably because the 1977 UCA imposed only a flat sum. *See* U.C.A. § 4-106(c) (1977).



waiver of its provisions and rights.<sup>86</sup> It is thus legally impossible for a willing purchaser and a willing declarant to resolve a potential claim under this subsection.

The five percent penalty provision of the MUCA needs a threshold of materiality, a standard to guide a court in assessing the percentage of the sale price penalty or a flat rate penalty, and some degree of flexibility to allow the parties to resolve disputes.

### *H. Prohibition of Rounding Percentages*

The MUCA requires that the percentages or fractions, by which allocations of assessments, common element interest, and voting power are allocated, equal 100 percent or one respectively.<sup>87</sup> Both the 1977 UCA and the 1980 UCA sensibly provide for "minor variations due to rounding."<sup>88</sup> Projects are encountered wherein a percentage allocation by area does not equal 100 percent, at least within ten or twelve decimal places. Under the present MUCA, the sum must be "forced," either by allocating slightly different percentages to identical units or by misstating area figures. The forced figures are typically disguised by nondisclosure of actual areas. Since areas are often difficult to compute from the floor plans, the defect is not easily ascertainable. Nevertheless, the defect is a technical violation of the MUCA and, therefore, a technical title deficiency. The MUCA should be amended to permit rounding as contemplated by the UCA. This would eliminate insignificant and entirely unnecessary technical defects.

### *I. Corrective Amendment Procedures*

Provision should be made to simplify corrective amendment procedures. One example illustrates the need. Assume an amendment to the declaration and supplemental floor plans, adding additional real estate under subsections 515A.2-111(a) and 515A.2-110(c), are recorded with an erroneous figure in the legal description. A reasonable procedure to correct this scrivener's error would be an additional amendment to the declaration, executed by the same party or parties to the original amendment.

Two objections may be raised under the MUCA. First, subsection 515A.2-111(a) constitutes a specific objection to the general

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86. MINN. STAT. § 515A.1-104 (1982). Read literally, this could prohibit settlement of the matter if it were litigated.

87. *Id.* § 515A.2-108(a).

88. *See* U.C.A. § 2-108(e) (1977); *id.* § 2-107(d) (1980).

rule for amendment by a proportion of unit owners and mortgagees.<sup>89</sup> The amendment may be executed solely by the owners and encumbrancers of the portion of the additional real estate being added. Upon filing such an amendment, there is no authority for an amendment to correct even a trivial error other than the usual procedure set out in subsection 515A.2-119(a). Second, no authority exists to correct an error in the supplemental floor plans, even a simple misquoted figure, by an amendment to the declaration. It would be sensible to amend the MUCA to authorize purely corrective amendments executed solely by the signatories of the instrument to be corrected, and to permit amendments of the text of floor plans by an amendment to the declaration.

### *J. Minutiae*

Some minor lapses in the MUCA, though rarely significant in themselves, should be clarified.

1. The MUCA should be amended to specifically authorize the declarant to include in the declaration as "additional real estate" land not then owned or controlled by the declarant.<sup>90</sup> The specification of additional real estate is nothing more than a reservation of a right to act, and creates no right or interest in, or lien or encumbrance on the additional real estate. Nevertheless, it occasionally causes confusion when a declaration reserves the right to have property not then owned or controlled by the declarant.

2. Subsection 515A.2-102(2) provides that if a pipe or other fixture lies partially within the boundaries of a unit, the portion serving only that unit shall be a limited common element for that unit. This subsection also provides that if a portion serves more than one unit, it shall be deemed a common element.<sup>91</sup> There is a flaw in this rationale. Any portion of such a pipe or fixture that serves more than one unit should be a limited common element for the units served. If a chimney flue which serves only one unit can be a limited common element for that unit, it makes little sense that a flue shared by two adjoining units cannot be a limited common element for those two units.

3. Although it is perfectly clear that a nonprofit corporation organized under Chapter 317 of Minnesota Statutes has legal capacity to hold title to real estate, the MUCA should expressly pro-

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89. See MINN. STAT. § 515A.2-119(a) (1982).

90. See *id.* § 515A.2-106(1).

91. *Id.* § 515A.2-102(2).

vide for this power.<sup>92</sup>

4. The MUCA should restore the prohibition contained in the 1977 UCA against changes in the appearance of common elements and the exterior appearance of a unit or the condominium, without permission of the association. Control of the exterior is fundamental to the condominium concept and should not be optional.

## VII. CONCLUSION

The early impression of the MUCA was that it constituted a virtual code by reason of its completeness and coherence. In practice, of course, nearly every "code" has material gaps and internal contradictions. This Article is offered to stimulate discussion about possible amendments to fill the gaps, to harmonize the contradictions, and to caution drafters in the meantime.

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92. The 1977 UCA expressly provided for this power. U.C.A. § 3-102(a)(8) (1977).