

## Memorandum 2003-37

**Common Interest Development Law: Uniform  
Common Interest Ownership Act**

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The Commission is charged with recommending changes to the law of common interest developments (“CIDs”) to make it clear, consistent, and accessible. One possible approach to unifying California CID law in a coherent scheme would be to adopt the Uniform Common Interest Ownership Act (1994) (“UCIOA”), either as a partial or complete replacement for existing law. UCIOA is intended to provide “comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights.” Prefatory Note, UCIOA.

UCIOA would be useful to a state that has a relatively blank slate when it comes to statutory CID law. However, California is not writing on a blank slate. Existing law provides an elaborate set of statutes governing CIDs, including the Davis-Stirling Common Interest Development Act and elements of the Nonprofit Mutual Benefit Corporation Law and the Subdivided Lands Act. Adoption of UCIOA in California would raise difficult issues relating to coordination with existing law.

The attached article by Professor Katharine N. Rosenberry and Curtis G. Sproul provides a detailed comparison of California common interest development law and UCIOA. The article is useful in identifying the degree of difference and overlap between existing law and UCIOA.

## NUMEROUS DIFFERENCES

As the attached article indicates, there are numerous substantive differences between UCIOA and existing California law. A partial summary of the differences gives a general sense of their character and number:

- UCIOA and existing law have different rules for the creation and amendment of governing documents. See Exhibit pp. 19-22.
- UCIOA provides “special declarant rights” (e.g., it provides for a period of declarant control during which the declarant appoints all

members of the board). California law also provides special rights to the declarant, but there are many differences between the rights granted by existing law and by UCIOA. See Exhibit pp. 22-24, 45-46.

- UCIOA provides rules for the effect of eminent domain on a CID. See Exhibit p. 27.
- UCIOA provides rules for combining and subdividing separate interests. See Exhibit pp. 30-31.
- UCIOA provides rules for termination of a CID. See Exhibit pp. 34-35.
- UCIOA permits a CID to mandate, by operating rule, that CID disputes be submitted to nonbinding dispute resolution. Existing California law requires that ADR be offered, but does not require participation in ADR as a prerequisite to litigation. See Exhibit pp. 37-38.
- Under UCIOA, a homeowners association may limit the number of separate interests that are leased, and may enforce its governing documents against an absentee owner's tenant directly. If a violation of the governing documents is also a violation of the lease, the association may enforce the violated provision of the lease, as if it were the lessor (apparently including a right to bring an action for unlawful detainer). See Exhibit p. 38.
- UCIOA and existing law provide different rules for maintenance of an exclusive use common area appurtenant to an owner's separate interest. See Exhibit pp. 38-39.
- UCIOA and existing law provide different rules for setting and collecting assessments. For example, California law imposes caps on the amount that an assessment can increase from year to year. UCIOA does not. See Exhibit pp. 39-42. Recent changes to California law include an informal procedure for disputing an assessment. See Civ. Code § 1367.1(c). There is no similar procedure under UCIOA.
- UCIOA requires that an association maintain both property and liability insurance. California law does not require insurance, except as a precondition for limitation of the liability of owners, directors, and officers. See Exhibit pp. 43-45.
- Existing law provides owners with specific rights respecting open meetings. UCIOA does not. See Exhibit p. 45.
- UCIOA and existing law both provide for distribution of financial documents to the members, though the requirements differ significantly. See Exhibit p. 45.
- UCIOA and existing law provide slightly different rules for quorums and voting by proxy. See Exhibit pp. 49-51.
- UCIOA and existing law provide different standards of care for association directors. See Exhibit pp. 51-52.

- Existing law limits the liability of directors and officers for actions that meet the specified standard of care. UCIOA does not. See Exhibit pp. 53-54.
- On recommendation of the Commission, California now provides rules for association rulemaking. See 2003 Cal. Stat. ch. 557. UCIOA does not.
- Existing law overrides some types of use restrictions (e.g., Civ. Code §§ 1353.5 (flags), 1360.5 (pets)). UCIOA does not include these specific overrides.

### **Practical Difficulties**

The numerous differences between existing law and UCIOA could complicate enactment of UCIOA in California. Before recommending enactment of UCIOA, the Commission would need to analyze the substantive merits of each point of difference, in order to determine whether to adopt the UCIOA approach or preserve existing law. This could lead to significant delays before a modified UCIOA could be recommended to the Legislature. It also seems likely that one or more of UCIOA's innovations would prove controversial. If so, that might jeopardize enactment of the Act as a whole.

As a practical matter, it might be easier to address the various substantive issues in turn, with the more pressing issues taken up first. This would allow reforms to proceed incrementally, in order of their relative importance, rather than waiting until an entire package has been studied before any reform could be enacted. Incremental reform would also allow controversial issues to be studied separately, so that opposition to one reform does not threaten the entire reform project.

On the other hand, enactment of an entire package of reforms at one time would make it easier to improve the organization of CID law. Comprehensive revision of CID law would also provide an opportunity to reevaluate the overall policy direction of CID law in California. For example, should a CID more closely resemble a corporation (with nearly all management authority vested in the board of directors) or a municipal government (with significant democratic checks on board authority)? Should CIDs be given broad discretion to decide their own governance rules or should the law "micro-manage" CID governance in order to establish norms and further statewide uniformity? If the Commission were to recommend enactment of UCIOA it could attempt to address these types of broad policy questions in the choices that it makes regarding differences between UCIOA and existing law.

## **Interstate Uniformity**

One of the benefits of a uniform act is interstate uniformity. Laws that are uniform from state to state provide greater certainty and help reduce the cost of interstate transactions. The importance of interstate uniformity will vary depending on the subject of the law at issue. Interstate uniformity may be less important when dealing with real property, which by its nature is immovable, than when dealing with persons or relationships that can move or extend across state lines (e.g., the Uniform Child Custody Jurisdiction and Enforcement Act (1997)). That said, there are persons who own property in more than one state and developers who develop property in more than one state. Interstate uniformity in CID law would probably benefit such persons.

However, it seems likely that any implementation of UCIOA in California would be a qualified one, with many exceptions. In some cases, existing law might be preserved because it is superior to the approach taken in UCIOA. In other cases, it might be preserved because it is the result of a political compromise between the contending interest groups. The need to pick and choose which elements of UCIOA to adopt in California would undermine uniformity between the version of UCIOA adopted in this state and that adopted in other states.

## STABILITY

The attached article suggests that enactment of UCIOA in California would lead to greater statutory stability:

California community association law is in a constant state of flux. In some instances, it is extremely confusing. Thus, a significant problem exists for volunteer officers and directors, who are required to follow the law while managing common interest communities. It also presents problems for owners who cannot determine what rights they have.

Adopting a version of UCIOA may provide a solution to this problem because the California legislature is less likely to amend a uniform act than it is to amend Davis-Stirling. Since 1987, the California version of the Uniform Commercial Code has been amended twelve times, even though it contains 11,004 sections, whereas Davis-Stirling, with only twenty-seven sections, has been amended thirty-nine times.

See Exhibit p. 56.

The staff disagrees that enactment of UCIOA would reduce the frequency with which CID law is amended. Recent amendments to CID law are being driven by

issues that are not addressed by UCIOA. For example, 2003 saw enactment of bills addressing certification and education of property managers (2003 Cal. Stat. ch. 147), member access to association records (2003 Cal. Stat. ch. 375), management company fees for services relating to transfer of a separate interest (2003 Cal. Stat. ch. 393), association rulemaking procedures (2003 Cal. Stat. ch. 557), and restriction of the display of noncommercial signs (2003 Cal. Stat. ch. 774). The staff sees no reason to believe that advocates of these policy changes would have been deterred if UCIOA were the law of California, rather than the Davis-Stirling Act.

#### CONCLUSION

UCIOA provides a broad and carefully crafted body of CID law. If California had little in the way of statutory CID law, UCIOA would offer a simple and effective way to fill the gap. However, California already has a fairly comprehensive body of CID law. Rather than filling a gap, enactment of UCIOA in California would replace existing law with a similar, but different body of law.

It is likely that UCIOA is superior to existing law in some respects. However, it is not necessary to adopt UCIOA as a whole in order to implement its improvements. Improvements can be grafted onto existing law as part of an incremental program of reform.

Incremental reform offers three significant benefits over adoption of UCIOA as a whole: (1) it would be less disruptive to those who are familiar with existing law, (2) it would allow for reforms to be phased in over time, in order of relative importance, and (3) it would allow controversial changes to be pursued separately, so that opposition to one change does not jeopardize other unrelated changes.

On balance, the staff believes that the advantages of adopting UCIOA as a whole would be outweighed by the disadvantages. The staff recommends instead that the Commission make improvements to existing law, using UCIOA as a source of useful ideas.

Respectfully submitted,

Brian Hebert  
Assistant Executive Secretary

# A COMPARISON OF CALIFORNIA COMMON INTEREST DEVELOPMENT LAW AND THE UNIFORM COMMON INTEREST OWNERSHIP ACT

(38 Santa Clara L. Rev. 1009 (1998))

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## INTRODUCTION

On November 12, 1996, California State Senator Byron Sher held a hearing on the status of the Davis-Stirling Common Interest Development Act<sup>3</sup> (“Davis-Stirling” or “the Act”) and community association law.<sup>4</sup> At the hearing, a variety of opinions were expressed. Two consistent themes emerged. Many who testified expressed the opinion that the law was too confusing. Furthermore, it was noted that the problem was aggravated by the fact that the legislature has constantly changed the law.<sup>5</sup>

The opinion that the law is confusing is supported by the fact that the legislature has amended Davis-Stirling Act thirty-nine times since 1987, even though it only contains twenty-seven sections.<sup>6</sup> By comparison, during the same period, the legislature amended the California version of the Uniform Commercial Code only twelve times even though it contains 11,004 sections.<sup>7</sup> The fact that Davis-Stirling is confusing and constantly changing, has led some to believe that the California legislature should consider adopting the Uniform Common Interest Ownership Act,<sup>8</sup> (“UCIOA”), or, at least, portions of it. Certainty and predictability, which does not presently exist in the community association field, are necessary

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2. Curtis G. Sproul is a partner in the firm of Weintraub, Genshlea & Sproul, where he specializes in community association law. He is the former chair of the State Bar Committee on Nonprofit Corporations and Unincorporated Associations and the Real Property Section, Subcommittee on Common Interest Developments. The authors wish to thank Gurdon H. Buck, Carl Lisman, Mary Howell, and John Hecht for their thoughtful comments on this article and Julia Cline for her research assistance.

3. Cal. Civ. Code §§ 1350-1376 (West 1982 & Supp. 1998).

4. California Legislature, Common Interest Development Issues After “Nahrstedt”: The Summary Report from the Interim Hearing of the Senate Committee on Housing and Land Use (Nov. 12, 1996) [hereinafter Hearing].

5. Hearing, *supra* note 2.

6. Cal. Civ. Code. §§ 1350-1376 (West 1982 & Supp. 1998).

7. Cal. Com. Code §§ 1101-15104 (West 1964 & Supp. 1998).

8. Unif. Common Interest Ownership Act §§ 1-101 to 5-110 (1994), 7 pt. 1 U.L.A., 471-650 (1997).

so that associations are not forced to incur the expense of employing lawyers to attend every association meeting.<sup>9</sup>

Before one can decide, whether to advocate adoption of UCIOA, in whole or in part, it is necessary to know more about the Act. The purpose of this article is to give a brief history of UCIOA, to compare it to California law and to encourage further discussion of a comprehensive revision of Davis-Stirling. It is impossible to provide an in depth discussion of all relevant portions of UCIOA or California law within the confines of this article.<sup>10</sup> Nevertheless, this article will discuss many of the major similarities and differences between the acts.

## HISTORICAL BACKGROUND

Between 1977 and 1981, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Condominium Act, the Uniform Planned Community Act and the Model Real Estate Cooperative Act.<sup>11</sup> The Uniform Condominium Act, or parts of it, has been adopted by eighteen states.<sup>12</sup> The Uniform Planned Community Act has been adopted by Oregon and Pennsylvania;<sup>13</sup> and the Model Real Estate Cooperative Act, or parts of it, has been adopted in Virginia and Pennsylvania.<sup>14</sup>

Because each of these acts dealt with shared ownership or common interest communities, the national commissioners decided that they should be combined into a single act, dealing with all the forms of common interest ownership.<sup>15</sup> Therefore, in 1982 the Uniform Law Commissioners consolidated the various acts into the Uniform Common Interest Ownership Act.<sup>16</sup>

Numerous organizations participated in the preparation of these various acts, including: the National Association of Home Builders, the Veterans Administration, the Mortgage Bankers Association of America, the Resort Timesharing Council, the U.S. Department of Housing and Urban Development, the American Bar Association, American Land Title Association, American Insurance Association, Community Associations Institute, Federal Home Loan

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9. See Hearing, *supra* note 2, at 6-7 (testimony of Mary Howell).

10. See e. g., Jeffrey G. Wagner et al., California Condominium and Planned Development Practice (Continuing Educ. of the Bar eds., 1984 & Supp. 1997); Curtis Sproul & Katharine Rosenberry, Advising California Condominium and Homeowner Associations (Continuing Educ. of the Bar eds., 1991 & Supp. 1998), for a fuller discussion of the California law in this field.

11. Unif. Common Interest Ownership Act, Prefatory Note (1994), 7 pt. 1 U.L.A. 472 (1997).

12. *Id.* New Hampshire, Pennsylvania, West Virginia, Maine, Missouri, Nebraska, New Mexico, North Carolina, Rhode Island, Texas, Virginia, Washington, Washington, D.C., Arizona, Georgia, Louisiana, Michigan, and Wisconsin. Uniform Law Commission, Fact Sheet: A Few Facts About the Uniform Acts (Apr. 16, 1998) [hereinafter Fact Sheet] (on file with author).

13. Fact Sheet, *supra* note 10.

14. *Id.*

15. *Id.*

16. *Id.*

Mortgage Corporation, American Bankers Association, National Association of Realtors, American Land Development Association, the Urban Land Institute, and the National Association of Housing Cooperatives.<sup>17</sup> Consequently, the Acts, including UCIOA, are the product of a compromise of competing views.<sup>18</sup>

## I. OVERVIEW

### A. Philosophy

Two of the purposes of UCIOA are to simplify the law of common interest communities and to promote the flow of funds to common interest communities between states.<sup>19</sup> Thus, the Act provides that it shall be construed to effectuate a uniform law among the states.<sup>20</sup>

UCIOA also permits flexibility in the creation of common interest communities; to that end, it provides default provisions. If the declarant (usually a corporation) wishes to provide alternate provisions, it may do so.<sup>21</sup> For example, a declaration can determine whether the interest in a cooperative is real or personal property.<sup>22</sup> It may also prohibit the reallocation of limited common elements that otherwise would be permitted.<sup>23</sup> Thirty-seven provisions of UCIOA can be altered by the declarant.<sup>24</sup>

Although many of its provisions may be altered by the declarant, UCIOA provides two safeguards for consumers. First, some sections of UCIOA do not permit the declarant to alter them. For example, many of the consumer protection provisions can not be altered. Second, a declarant cannot use any device, such as obtaining a power of attorney from the owners, to evade the limitations or prohibitions of the Act.<sup>25</sup> In many jurisdictions, developers obtain powers of

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17. *Id.*

18. For additional information on these Uniform Acts and UCIOA, see Norman Geis, *Beyond the Condominium: The Uniform Common-Interest Ownership Act*, 17 *Real Prop. Prob. & Tr. J.* 757 (1982); Carl H. Lisman, *Evolution In The Law: Amendments to the Uniform Common Interest Ownership Act, in Drafting Documents for Condominiums PUD' & Golf Course Communities*, C924 ALI-ABA 379 (May 5, 1994).

19. *Unif. Common Interest Ownership Act* § 1-110 cmt. (1994), 7 pt. 1 U.L.A. 500 (1997).

20. To date six states have adopted the Act and five more introduced versions of UCIOA in their legislatures in 1997. Fact Sheet, *supra* note 10. States that have adopted UCIOA are: Alaska, Colorado, Connecticut, Minnesota, Nevada and West Virginia. States that introduced the act in the 1997 legislature are: Missouri, Nebraska, New Jersey, Vermont and West Virginia. *Id.*

21. *Unif. Common Interest Ownership Act* § 1-104 cmt. 1 (1994), 7 pt. 1 U.L.A. 490 (1997); see *Id.* cmt. 4 for sections that can be altered in the declaration.

22. *Id.* § 1-105(a), at 492.

23. *Id.* § 2-108, at 532.

24. *Id.* §§ 1-101 to 5-110, at 471-650.

25. *Id.* § 1-104, at 489-92.

attorney from the owners permitting the developer to unilaterally exercise rights that require 100% approval of the owners.<sup>26</sup> UCIOA prohibits such practices.<sup>27</sup>

The philosophy of Davis-Stirling is similar to that of UCIOA. It contains default provisions and provides consumer protection provisions that may not be altered by the declaration. The main difference, however, is that Davis-Stirling does not permit as many provisions to be altered.<sup>28</sup> Moreover, each year more provisions are amended or added that reduce flexibility. These provisions are discussed throughout the article.

Another important difference between the two Acts is their approach to commercial and industrial common interest developments. While Davis-Stirling exempts commercial and industrial common interest developments from some of its sections,<sup>29</sup> UCIOA permits declarants of these developments to exempt the community from the entire Act.<sup>30</sup> These exemptions are discussed below. Consequently, UCIOA permits greater flexibility than does California law.

## **B. Application of Acts**

It is important to note that UCIOA does not apply to all common interest communities, as does Davis-Stirling. UCIOA does not apply to some communities that existed on the date of its adoption. It also exempts some communities that are created even after adoption.

UCIOA uses a three-pronged approach to the problem of retroactivity. First, subject to some exceptions, discussed below, UCIOA applies to all common interest communities created after the Act becomes law.<sup>31</sup> Second, certain sections of the Act apply to all pre-existing communities, but only prospectively in a manner that does not invalidate provisions of the governing documents (as construed under the law in existence at the time UCIOA is adopted).<sup>32</sup> Examples of such provisions include: those relating to eminent domain, the description of the units, and merger and consolidation.<sup>33</sup> Third, owners may amend the

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26. See *Id.* cmt. 3, at 490.

27. *Id.*

28. Cal. Civ. Code §§ 1350-1376 (West 1982 & Supp. 1998).

29. See Cal. Civ. Code § 1373 (West 1982 & Supp. 1998).

30. Unif. Common Interest Ownership Act § 1-207(b) (1994), 7 pt. 1 U.L.A. 513-14 (1997). UCIOA also provides flexibility through the concept of development rights. For example, subject to restrictions provided in the act, the size and density of a project may be increased, the mix of units, common elements and limited common elements can be changed and the project can be reduced in size. See *Id.* § 1-103(14) cmt. 15, at 486-87.

31. *Id.* § 1-201, at 505.

32. *Id.* § 1-204, at 508-09.

33. Additional provisions of UCIOA that apply to existing common interest communities include section 1-205 (providing exceptions for small pre-existing cooperatives and planned communities), section 1-105 (relating to the separate taxation of units), section 1-106 (pertaining to local ordinances and state law requirements), section 2-103 (pertaining to the construction of declarations and bylaws), sections 3-102(a)(1) through (6) and (11) through (16) (pertaining to the powers of the association), section 3-111 (relating to tort and contract liability), section 3-116 (relating to assessment liens), section 3-118 (pertaining to

declaration and bylaws existing prior to the effective date of the act, even if the amendment would not have been permitted by previous law, so long as (1) the owners adopt the amendment consistent with procedures required by the previous law, and (2) the substance of the amendment does not violate UCIOA.

To illustrate this three-pronged approach, assume UCIOA becomes effective in California on January 1, 1999. With some exceptions, discussed below, the Act would apply to all common interest communities created on, or after, January 1, 1999. In addition, certain provisions would apply to all common interest communities, regardless of when the community was created, but only prospectively, and only if the provisions are consistent with the governing documents. Thus, if a city began condemnation proceedings after January 1, 1999, the eminent domain provision section 1-107 of UCIOA, would apply even to communities created prior to January 1, 1999, provided the provision was not inconsistent with the declaration or bylaws of the community.<sup>34</sup>

Finally, amendments to any declaration or bylaws occurring after January 1, 1999, could incorporate provisions of UCIOA, even if previous law would have prohibited the amendment. The procedures for adopting the amendment, however, must be consistent with the declaration and bylaws. For example, if the owners wished to amend the declaration to permit alteration of units in a manner prohibited by previous law, they could do so if they satisfied the procedures previously required for amending the documents. Thus, if the declaration provided that amendments were valid only upon approval of owners holding 75% of the votes in the association, 75% would have to approve the amendment, not the lower percentage permitted by UCIOA.<sup>35</sup>

When the legislature enacted Davis-Stirling, it intended to apply the Act to both new and existing common interest developments. To make its intention clear, Assemblyman Stirling introduced urgency legislation in 1986 which became effective immediately upon passage.<sup>36</sup> This legislation amended section 1352 of the California Civil Code to provide that Davis-Stirling applies “whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed provided” certain documents are recorded.<sup>37</sup>

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association records) section 4-109 (pertaining to resale of units), and section 4-117 (pertaining to attorney fees.) Unif. Common Interest Ownership Act §§ 1-105, 1-106, 1-205, 2-103, 3-102, 3-111, 3-116, 4-109, 4-117 (1994), 7 pt. 1 U.L.A. 492 et seq. (1997). In addition, section 1-103 provides that the definitions apply to the extent necessary in construing any of the sections of the act, but only to events occurring after enactment and to the extent the definitions do not invalidate the pre-existing governing documents. *Id.* § 1-204, at 509.

34. *Id.* § 1-107, at 497.

35. Unif. Common Interest Ownership Act § 2-117(a) (1994), 7 pt. 1 U.L.A. 546 (1997).

36. Act of Feb. 25, 1986, c. 9, 1986 Cal. Legis. Serv. 32 (West) (codified at Cal. Civ. Code § 1352).

37. Cal. Civ. Code § 1352 (West 1982 & Supp. 1998) (emphasis added). Because section 1352 provides that a common interest development is not created unless the declaration, final or parcel map and condominium plan if one exists are recorded an interesting question arises. What happens if the project is

Even before the legislature enacted Davis-Stirling, amendments to California condominium law applied to developments in existence on the date the statute was amended. In other words, the new law applied retroactively. For example, the provisions of the Condominium Act, pertaining to assessments<sup>38</sup> applied to all condominiums on the date of the statute's enactment. Because the legislature has applied Davis-Stirling and its amendments retroactively<sup>39</sup> to existing developments, it is likely that the legislature will apply future changes in the law of common interest developments to existing developments. Although one must consider potential constitutional challenges when applying amendments to existing developments,<sup>40</sup> it would confuse the public to have different laws applicable to different common interest developments.

As mentioned, UCIOA, unlike California law, exempts some developments from the Act. For example, common interest communities that contain no residences are exempt.<sup>41</sup> Also, common interest communities that are exclusively commercial or industrial are not subject to the Act unless the declaration provides otherwise.<sup>42</sup>

The declaration may provide either that the entire Act applies or that only the provisions on separate taxation, applicability of local ordinances, and eminent domain apply.<sup>43</sup> If the declaration applies the entire Act, then it can also require the continuation of certain contracts and leases after turnover of control, even though these contracts otherwise would be subject to cancellation.<sup>44</sup> Further, the declaration may contain provisions permitting the declarant to use proxies to obtain results that could not be accomplished under the Act.<sup>45</sup>

In contrast, Davis-Stirling provides only a limited exemption for commercial and industrial common interest developments. Section 1373 of the California Civil Code provides that section 1356 (pertaining to court ordered amendments), section 1365 (relating to financial disclosures), sections 1366.1 and 1363 (relating to assessments), and section 1363 (relating to budget preparation) are not applicable to commercial and industrial common interest developments.<sup>46</sup> The remaining provisions of Davis-Stirling are applicable to these developments.

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clearly a common interest development but the declarant forgets to record one of the required documents such as the condominium plan?

38. Former Cal. Civ. Code §§ 1350-1370 (repealed by stats. 1985 c. 874 § 13).

39. Cal. Civ. Code § 1352 (West 1982 & Supp. 1998).

40. See Katharine Rosenberry, *You Can't Raise Assessments. I Have A Contract! The Legislature & Impairment of Contract*, 8 Cal. Real. Prop. J. 1, 16 (1990).

41. Unif. Common Interest Ownership Act (1994).

42. Unif. Common Interest Ownership Act § 1-207(b) (1994), 7 pt. 1 U.L.A. 513 (1997).

43. *Id.* § 1-207(c), at 513.

44. *Id.* § 1-207(d)(1), at 513.

45. *Id.* § 1-207(d)(2), at 513. Note, however, the declaration may only include these provisions if they are not unconscionable. *Id.* § 1-207(d).

46. Cal. Civ. Code § 1373 (west 1982 & Supp. 1998).

The only reason Davis-Stirling applied to all common interest developments was to make California law consistent with the version of UCIOA in existence at the time. In 1994, UCIOA was amended to permit developers to exempt commercial and industrial developments from the entire Act.<sup>47</sup> Thus, it seems logical to amend Davis-Stirling to give commercial and industrial developers the same rights to exempt such communities.

Further, the legislature has amended Davis-Stirling since 1988, without also amending section 1373 of the California Civil Code. Also, commercial and industrial developments are not exempt from subsequently enacted provisions.<sup>48</sup> They should be. The consumer protection provisions in Davis-Stirling were not drafted for commercial and industrial developments.

Another distinction between the Acts is that UCIOA, unlike Davis-Stirling,<sup>49</sup> does not require some small communities to be governed by all of the provisions of the Act. For example, under UCIOA, cooperatives containing twelve or fewer units (separate interests) and no development rights are subject only to the provisions regarding eminent domain and the prohibition on governments treating identical structures differently.<sup>50</sup> If the declarant chooses, it may provide in the declaration that the entire Act applies.<sup>51</sup> If the declarant chooses to incorporate some, but not all, of the provisions of UCIOA it may do so.<sup>52</sup> UCIOA provides that those provisions are to be governed by contract law, not Davis-Stirling.<sup>53</sup>

A similar exception is provided for planned communities that have fewer than twelve units and an annual common expense liability for residential units (exclusive of optional fees and insurance premiums) of \$300, measured in 1979 dollars (now about \$500).<sup>54</sup> Such communities are only subject to the provisions dealing with taxation,<sup>55</sup> eminent domain<sup>56</sup> and state and local government discrimination based on the form of ownership.<sup>57</sup> An exemption also exists for

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47. Unif. Common Interest Ownership Act § 1-207 cmt. 1 (1994), 7 pt. 1 U.L.A. 514 (1997).

48. For example, they are not exempt from section 1375 of the California Civil Code relating to the filing of construction defect lawsuits. See Cal. Civ. Code § 1375 (West 1982 & Supp. 1998).

49. Although Davis-Stirling does not provide exemptions for small communities, the Subdivided Lands Act (which controls the initial sale of separate interests) does not apply to residential developments of four separate interests or less. See Cal. Bus. & Prof. Code §11000.1(a) (West 1987 & Supp. 1998).

50. Unif. Common Interest Ownership Act § 1-202 (1994), 7 pt. 1 U.L.A. 506 (1997). UCIOA, however, applies to all condominiums. *Id.* § 1-202, at 505.

51. *Id.*

52. *Id.* cmt. 2.

53. *Id.*

54. *Id.* § 1-203, at 507-08. UCIOA provides a formula for increasing this amount over time. See *Id.* § 1-115, at 503. Also, comments to UCIOA § 1-203 clearly provide that a declarant cannot low ball, or create artificially low assessments, merely to be exempt from the Act. *Id.* § 1-203 cmt. 2(a)-(b), at 507-08.

55. *Id.* § 1-105, at 492.

56. *Id.* § 1-107, at 497.

57. Unif. Common Interest Ownership Act § 1-106 (1994), 7 pt. 1 U.L.A. 495 (1997).

communities created before the effective date of UCIOA.<sup>58</sup> In order to qualify for exemption, the pre-existing cooperative or planned community must contain no more than twelve units and must not be subject to any development rights.<sup>59</sup> Finally, the Act exempts mixed-use projects, unless the residential units satisfy the definition of “common interest community” in section 1-103(7).<sup>60</sup>

The task force members who assisted in the drafting of Davis-Stirling were aware of the exemptions for small developments that existed in UCIOA. They considered proposing similar exemptions in Davis-Stirling. There was not sufficient time to work out the details, however, so these exemptions were not proposed.<sup>61</sup> Since 1985, several people have proposed exempting smaller developments. Section 1375 of the California Civil Code, which became effective in 1996, does exempt developments with fewer than twenty units.<sup>62</sup> The legislature should consider adopting the exemptions provided in UCIOA, with one exception.

There are no exceptions for small condominium projects in UCIOA. The reasons for the distinction are historical and are not based on differences between the communities.<sup>63</sup> Therefore, if California adopts the concept of exempting small developments from the provisions of Davis-Stirling, it should treat all common interest developments similarly, as it currently does.

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58. *Id.* § 1-205, at 510.

59. *Id.*

60. *Id.* § 1-103(7), at 479. Section 1-103(7) provides that:

“Common interest community” means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. “Ownership of a unit” does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.

*Id.*

Some of the public offering provisions of UCIOA, also, do not apply to out of state communities that are sold in state. *Id.* § 1-208, at 515. However, section 1-208 provides that sections 4-102 through 4-108 apply to contracts signed in the state adopting UCIOA unless exempt under section 4-101(b). Unif. Common Interest Ownership Act § 1-208 (1994), 7 pt. 1 U.L.A. 515 (1997).

61. Katharine Rosenberry was Senior Consultant to the California Select Assembly Committee on Common Interest Developments. In that capacity she was responsible for chairing two task forces that proposed provisions for Davis-Stirling and corresponding with all individuals that commented on the proposed Act, was the principle drafter of the Act, and attended all the committee meetings and the hearings of the Assembly and Senate pertaining to Davis-Stirling. Curtis Sproul was a member of one of the task forces and participated in drafting portions of the Act and was a member of a task force created by the State Bar of California to assist in drafting the 1980 amendments to the Nonprofit Corporation Code.

62. Cal. Civ. Code §§ 1375(d), 1375(h)(4)(i) (West 1982 & Supp. 1998).

63. Telephone interview with Carl H. Lisman, Chair of the Standby Committee, Common Interest Ownership Act (1994), the Committee that prepared UCIOA (1994) for the National Conference of Commissioners on Uniform State Laws (Sept. 21, 1997). Historically planned communities and cooperatives were created by the governing documents while condominiums were created by statute.

### C. Rules for Construction of Statute

UCIOA contains a provision similar to section 1-104 of the Uniform Commercial Code. It provides that UCIOA is a general act intended for unified coverage, and that no part of it shall be construed to be void if such construction can be avoided.<sup>64</sup> There is no similar provision in Davis-Stirling, but the legislature should not be opposed to adopting such a provision because it is consistent with the original purpose of the Davis-Stirling Act.

Other provisions in UCIOA, relating to statutory construction, include section 1-111 (which provides that the provisions of the Act are severable),<sup>65</sup> section 1-112 (which provide that the court can refuse to enforce a contract if it finds the contract unconscionable),<sup>66</sup> and section 1-113 (which implies in every contract an obligation of good faith in its performance or enforcement).<sup>67</sup> “Good faith” is defined in the Comments to section 1-113 as “‘honesty in fact’ and observance of reasonable standards of fair dealing.”<sup>68</sup> Sections 1-112 and 1-113 are patterned after similar provisions in the Uniform Commercial Code.<sup>69</sup> These provisions of the Uniform Commercial Code have been adopted in the California Commercial Code.<sup>70</sup>

If these sections are considered for adoption by Davis-Stirling, section 1-113 should be clarified. The provision was presumably intended to apply only to the contracts to which the association is a party, and not to the declaration; but the section does not make this clear.<sup>71</sup>

Section 2-103 of UCIOA is similar in purpose to section 1370 of Davis-Stirling. UCIOA provides that all provisions of the declaration and bylaws are severable<sup>72</sup> which encourages liberal construction; Davis-Stirling provides that the governing documents will be liberally construed. Both sections also provide that the Rule Against Perpetuities does not apply to invalidate provisions of the governing documents; however, UCIOA’s provision is slightly more restrictive.<sup>73</sup> UCIOA, unlike Davis-Stirling, specifically provides that if there is a conflict between the declaration and bylaws, the declaration controls. Although it is assumed by association practitioners in California that the declaration controls, it would be beneficial for a statute to so provide.

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64. Unif. Common Interest Ownership Act § 1-109 (1994), 7 pt. 1 U.L.A. 500 (1997).

65. *Id.* § 1-111, at 501.

66. *Id.* § 1-112, at 501.

67. *Id.* § 1-113, at 502.

68. *Id.*

69. U.C.C. §§ 2-302, 1-201 (1998).

70. Cal. Com. Code § 1203 (West 1964 & Supp. 1998).

71. Good faith is only one aspect of the duty the directors and officers owe under the declaration. See Unif. Common Interest Ownership Act § 3-103 (1994), 7 pt. 1 U.L.A. 575-77 (1997).

72. *Id.* § 2-103(a), at 520.

73. *Id.* § 2-103(b), at 520.

## II. TERMINOLOGY

### A. Similar Definitions: Association

Some of the definitions and terms used in UCIOA, such as the definition of “association,” are similar to those used in Davis-Stirling. Under both Davis-Stirling and UCIOA, the owners are members of the association, and the association is responsible for governing the community.<sup>74</sup> A potential difference, however, is that under UCIOA, the association must consist exclusively of owners.<sup>75</sup> In some California common interest developments the association also consists of “associate members” who are not owners.<sup>76</sup> This topic is discussed below.<sup>77</sup>

Another significant difference between Davis-Stirling and UCIOA, is that under UCIOA, the association can be incorporated as either a for-profit or nonprofit corporation.<sup>78</sup> While Davis-Stirling does not specifically state that the association must be incorporated as a mutual benefit nonprofit corporation, it implies as much. Again, this topic is discussed below.<sup>79</sup>

### B. Similar Definitions but Different Terms: Common Interest Community, Common Elements, Limited Common Elements and Unit

Other definitions in the two acts are very similar, but the terms used to describe them are slightly different. For example, “common interest community”<sup>80</sup> is UCIOA term for “common interest development,” “common elements”<sup>81</sup> is the term for “common area,” “limited common elements”<sup>82</sup> is the term for “exclusive use common area,” and “unit”<sup>83</sup> is the term for “separate interest.”<sup>84</sup> Thus, under UCIOA, a “lot” is a “unit.” In the discussion that follows, when a UCIOA term is used, which is different from the corresponding term in Davis-Stirling, the Davis-Stirling term will be placed in parenthesis.

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74. See Cal. Civ. Code §§ 1351(a), 1363 (West 1982 & Supp. 1998); Unif. Common Interest Ownership Act § 1-103(3) (1994), 7 pt. 1 U.L.A. 479 (1997); *Id.* § 3-101, at 571-72.

75. Unif. Common Interest Ownership Act § 3-101.

76. For example, within the boundaries of some California common interest developments there are golf courses operated as private clubs (rather than being association common facilities). Members of the club may be given rights in the Declaration to become non-voting associate members of the association with rights to use certain recreation facilities, such as a swimming pool or tennis courts.

77. See discussion *supra* Part V.A.1.

78. Unif. Common Interest Ownership Act § 3-101 (1994), 7 pt. 1 U.L.A. 571-72 (1997).

79. See discussion *supra* Part III.B.2.

80. Unif. Common Interest Ownership Act § 1-103(7) (1994), 7 pt. 1 U.L.A. 479 (1997).

81. *Id.* § 1-103(4), at 479.

82. *Id.* § 1-103(19), at 480.

83. *Id.* § 1-103(31), at 482.

84. The authors find the use of the term “unit” to apply to both “unit” and “lot” unnecessarily confusing.

### C. Similar Terms But Different Definitions: Types of Common Interest Developments

Finally, some terms in the two Acts are similar, but their definitions are different. The most significant differences between definitions in the two Acts relate to the definitions of the various common interest communities (developments). Both Acts specifically identify planned communities (developments), condominiums, and cooperatives as common interest communities (developments).<sup>85</sup> However, the definitions of “condominium” and “planned community” in the two Acts are different. UCIOA and Davis-Stirling both provide that in a condominium, an owner has a tenancy in common interest in the common area, coupled with a separate interest in a unit.<sup>86</sup> Both acts also permit the association to own property in its own name. UCIOA specifically provides that the association may own property that is not part of the common scheme and is not subject to the Act.<sup>87</sup> Davis-Stirling, on the other hand, does not state whether or not the association may own common area that is not subject to the provisions of Davis-Stirling.

Depending on the circumstances, there may be advantages to an association owning property that is not subject to the Act. For example, assume an association takes title to a unit through a foreclosure sale when its lien for delinquent assessments is foreclosed. Under UCIOA, the association would be able to sell the unit without having to go through the difficult process of selling common area. This flexibility is desirable.

Another significant difference occurs between the definition of “planned community” in UCIOA and “planned development” in Davis-Stirling. UCIOA’s definition is similar to all jurisdictions, except California’s. Under UCIOA, a planned community is one in which an association owns the common elements (area).<sup>88</sup> In a planned development in California, either the association may own the common area, or the owners may own it as tenants in common.<sup>89</sup> Thus, in California, a developer can create two physically identical projects in which the common area is owned as tenants in common and call one a condominium and the other a planned development.

This anomaly arose because at the time Davis-Stirling was enacted, some California local governments treated planned developments and condominiums differently based solely on the legal form of ownership, rather than on the physical characteristics of the development. Thus, the attorneys for developers

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85. Unif. Common Interest Ownership Act § 1-103(7), (8), (10), (23) (1994), 7 pt. 1 U.L.A. 479-88 (1997); Cal. Civ. Code § 1351(c) (West 1982 & Supp 1998).

86. Unif. Common Interest Ownership Act § 1-103(8) (1994), 7 pt. 1 U.L.A. 479 (1997); Cal. Civ. Code § 1351(f) (West 1982 & Supp. 1998). Davis-Stirling does not specifically prohibit the creation of common area that is not subject to the Act, but it does not authorize the creation of such common area and it was assumed during the drafting and legislative process that Davis-Stirling would apply to all common area.

87. See Unif. Common Interest Ownership Act § 1-103 cmt. 7 (1994), 7 pt. 1 U.L.A. 483-84 (1997).

88. Unif. Common Interest Ownership Act § 1-103(23) (1994), 7 pt. 1 U.L.A. 481 (1997); see also *Id.* § 1-103(8), at 479-80; and *Id.* § 1-103(10), at 480 (defining condominium and cooperative respectively).

89. Cal. Civ. Code § 1351(k) (West 1982 & Supp. 1998).

argued that the definition of “planned development” should remain as it was so the developer could chose to identify the project based on whatever local and state regulation was the most lenient. Under UCIOA, this problem is resolved, in part, by section 1-106, which limits government’s ability to discriminate based on the form of ownership.<sup>90</sup>

UCIOA and Davis-Stirling also differ in that Davis-Stirling includes two types of common interest developments not specifically mentioned in UCIOA. UCIOA does not specifically mention limited equity housing cooperatives or community apartment projects as common interest communities (developments).<sup>91</sup> Both UCIOA and Davis-Stirling define a cooperative as a form of common interest community in which the association owns the development and the owners have a right to the exclusive possession of a unit.<sup>92</sup> However, under California law, a stock cooperative specifically includes a “limited equity housing cooperative” which is a cooperative organized for a public purpose to provide low and moderate income housing under the California Health and Safety Code.<sup>93</sup> UCIOA’s definition of cooperative would include a limited equity housing cooperative, but it is not specifically mentioned.<sup>94</sup>

Davis-Stirling also identifies community apartment projects as common interest developments. These are similar to cooperatives because, in each, the owner has the exclusive right to occupy a unit.<sup>95</sup> They differ, however, because in a community apartment project, the development is owned by the owners as tenants-in-common; whereas in a cooperative, the development is owned by a corporation. The term “community apartment” is not only foreign to UCIOA, but the authors are unaware of any jurisdiction, other than California, that recognizes it as a form of common interest development.

#### **D. Definitions Not Included in Davis-Stirling: “Master Association” and “Master Planned Community”**

While the two definitions discussed above exist in Davis-Stirling, and not UCIOA, other definitions exist in UCIOA and not in Davis-Stirling. One definition

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90. See discussion *infra* Part III.E.2.

91. Unif. Common Interest Ownership Act § 1-103(7) (1994), 7 pt. 1 U.L.A. 481 (1997) states: “‘Common interest community’ means real estate with respect to which a person, by virtue of is ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration.” This definition is sufficiently broad to include community apartment projects and limited equity housing cooperatives, but neither of these is specifically mentioned as are condominiums and planned communities. *Id.*

92. Unif. Common Interest Ownership Act § 1-103(10) (1994), 7 pt. 1 U.L.A. 480 (1997); Cal. Civ. Code § 1351(m) (West 1982 & Supp. 1998).

93. See California Condominium and Planned Development Practice §§1.25-1.26 (Continuing Educ. of the Bar eds., 1984 & Supp. 1998) for a discussion of limited equity housing cooperatives.

94. Unif. Common Interest Ownership Act § 1-103(10) (1994), 7 pt. 1 U.L.A. 480 (1997).

95. A community apartment project is a common interest development in which an undivided interest in land is coupled with the right to exclusive occupancy of a unit. See Cal. Civ. Code § 1351(d) (West 1982 & Supp. 1998).

existing in UCIOA, and not Davis-Stirling, is “master association.”<sup>96</sup> A master association is one which governs or manages more than one condominium, cooperative (stock cooperative) or planned community (development).<sup>97</sup> It may be established by either the initial declaration for a community, or the owners of two or more common interest communities (developments) may amend their declarations to delegate duties to a master association.<sup>98</sup> The owners can establish the master association as the only owners’ association, or as a separate association with each of the component common interest communities also having their own subassociations.<sup>99</sup>

Once the master association is established, provisions of UCIOA control its operation.<sup>100</sup> For example, a master association may only adopt budgets and collect assessments from unit owners to the extent expressly permitted in the declarations for the communities that are served by the master association, unless the master association is itself created as a single unit owners’ association.<sup>101</sup> Further, if the declaration of a common interest community provides that the board may delegate certain powers to a master association, the board members are not liable for the acts or omissions of the master association with respect to those powers following the delegations.<sup>102</sup>

Davis-Stirling does not have similar provisions. The Department of Real Estate (hereinafter DRE) Regulations,<sup>103</sup> enacted pursuant to the Subdivided Lands Act,<sup>104</sup> however, contain regulatory provisions relating to ‘master plan developments.’ ‘Master planned developments’ are defined as planned development subdivisions meeting the following criteria: (1) the master planned development must generally consist of 500 or more separate residential interests and one or more subdivisions, which may include time-share projects or other residential, recreational, commercial or mixed residential and non-residential projects; (2) it must be developed in two or more phases; and, (3) it must be managed by a master association ‘that is responsible for the maintenance and operation of areas and/or facilities affecting the Master Planned Development and

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96. Unif. Common Interest Ownership Act § 1-103(20) (1994), 7 pt. 1 U.L.A. 480 (1997).

97. Under UCIOA, a master association does not own common area. Unif. Common Interest Ownership Act § 1-103(20) (1994), 7 pt. 1 U.L.A. 480 (1997); *Id.* § 2-120, at 564-65.

98. *Id.* § 2-120 cmt. 3.

99. *Id.*

100. *Id.* § 2-120, at 564-65.

101. Unif. Common Interest Ownership Act § 2-120 (1994), 7 pt. 1 U.L.A. 564-65 (1997).

102. *Id.*

103. Cal. Code Regs. tit. 10, ch. 6 (1998).

104. Cal. Bus. & Prof. Code §§ 11000-11200 (West 1987 & Supp. 1998).

enforcement of use restrictions pertaining to the Master Planned Development.’<sup>105</sup>

The regulations address: voting rights, quorums for membership meetings, election of the governing board, length of time in which the declarant may exercise control, and the creation of subassociations to operate within various phases of the development.<sup>106</sup> These types of provisions are also set forth in UCIOA.<sup>107</sup>

Even though master associations are addressed in the DRE regulations, UCIOA provisions should be included in Davis-Stirling for several reasons. First, the Department of Real Estate Regulations have limited jurisdiction. They only apply to the initial declaration and continue only as long as the declarant is in control of the property.<sup>108</sup> Second, because UCIOA provides numerous ‘default provisions’ when the declaration is silent, its approach to master associations provides greater certainty in the law relating to the governance of these associations. Third, the definition of master association in UCIOA is more flexible, in that it does not specify a size requirement.<sup>109</sup> Finally, property rights should be created by the state legislature; not by administrative agencies. Therefore, the legislature should consider adopting the provisions of UCIOA pertaining to master associations.

### III. CREATION OF COMMON INTEREST COMMUNITIES

#### A. Time of Creation

Under UCIOA a common interest community is created ‘only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to the declaration to the association.’<sup>110</sup> The declaration must be recorded and indexed in the name of the common interest community. It must also be recorded in the name of each person executing the declaration, including the name of the lessor, if the common interest community is on leased property.<sup>111</sup>

Although a common interest community is not created until the above requirements have been satisfied, any project that satisfies the definition of common interest community in section 1-103(7) of UCIOA is subject to the act,

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105. Cal. Code Regs. tit. 10, § 2792.32(a) (1997) also provides if a subdivider can demonstrate specific facts indicating why the development is a Master Planned Subdivision even though it doesn’t meet these criteria the Department of Real Estate may still consider it such a subdivision.

106. *Id.*

107. Unif. Common Interest Ownership Act § 2-120(d) (1994), 7 pt. 1 U.L.A. 564-65 (1997).

108. Cal. Code Regs. tit. 10 § 2792.32(b) (1997), Cal. Code Regs. tit. 10 §2792.32(c)(f)(g) & (i) (1997).

109. Unif. Common Interest Ownership Act § 2-120(d) (1994), 7 pt. 1 U.L.A. 564-65 (1997).

110. *Id.* § 2-101, at 515-16.

111. *Id.* § 2-106, at 527-28.

even if the requirements have not been met.<sup>112</sup> Thus, a developer cannot avoid the Act by merely failing to record a declaration.

By contrast, in California, ‘a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed’ provided that a declaration, a condominium plan (if one exists), and a final or parcel map (if required), are recorded.<sup>113</sup> Thus, California law differs from UCIOA in that a common interest development is not created in California until an interest is conveyed, whereas under UCIOA, a common interest community is created when the declaration is recorded. Although it is unusual for a developer to record a declaration, and not convey units or lots,<sup>114</sup> under California law, a developer is permitted to unilaterally change the character of the project until the first unit is conveyed. Consequently, California law permits somewhat more flexibility.

California law also differs in that it does not require the declaration to be recorded under the association’s name or under the name of each person signing the declaration.<sup>115</sup> Having the project indexed under the association’s name, in particular, could make a title search easier. Therefore, the legislature should consider adopting this provision of UCIOA.

## **B. Governing Documents**

### *1. Declaration*

Davis-Stirling provides that governing documents include the declaration, the bylaws, and the articles of incorporation.<sup>116</sup> It also provides that a declaration recorded on or after January 1, 1986, must identify the type of development and contain a legal description of the development, the covenants, the name of the association and any other provisions the declarant or owners consider appropriate.<sup>117</sup>

In addition, the DRE regulations require the governing documents of those developments within its jurisdiction to contain ‘reasonable arrangements.’<sup>118</sup>

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112. *Id.* § 2-101 cmt. 3, at 516.

113. Cal. Civ. Code § 1352 (West 1982 & Supp. 1998).

114. It is not uncommon, however, for developers, who create apartment projects that have the potential for becoming condominiums, to record a declaration at the time the building is developed and not convey separate interests. This practice preserves the greatest flexibility for the developer by protecting against future moratoriums on the conversion of apartments to less affordable housing stock.

115. Cal. Civ. Code § 1353 (West 1982 & Supp. 1998).

116. Cal. Civ. Code § 1351(j) (West 1982 & Supp. 1998).

117. Cal. Civ. Code § 1353 (West 1982 & Supp. 1998).

118. The Subdivided Lands Act gives the DRE the authority to control, among other things, the sale of separate interests in residential common interest developments of five or more units. See Cal. Bus. & Prof. Code §§ 11000, 11000.1. (West 1987 & Supp. 1998). Pursuant to this authority the DRE enacted regulations which requires governing documents of common interest developments to contain “reasonable arrangements.” See Cal. Code Regs. tit. 10, §§2792.15-2792.28 (1997). These provisions address issues

UCIOA does not specifically define governing documents. Section 2-105, however, requires a declaration and is very specific about what must be contained in the declaration.<sup>119</sup> For example, the declaration must identify the following: the type of common interest community and the names of the community and association; the name of every county in which any part of the community is situated, a description of the boundaries; including the units (separate interests); common elements (areas) and limited common elements (exclusive use common areas); a description of rights reserved to the declarant; restrictions on alienation; including leasing, and provisions such as those relating to leasehold common interest communities (developments); allocated interests (assessment obligations, ownership interests, and voting rights,) and common elements (areas).<sup>120</sup>

UCIOA has special requirements if the community is on leasehold property. For example, section 2-106 of UCIOA provides that if the expiration of a lease will terminate or reduce the size of the community, the landlord must sign the declaration.<sup>121</sup> It also requires the declaration to provide the recording data for the lease, or a statement as to where the lease may be inspected, and the date the lease is scheduled to expire.<sup>122</sup> Once a declaration for a leasehold condominium or planned community is recorded, both the lessor and lessee of the ground lease are precluded from terminating the leasehold interest of any owner so long as that owner makes timely payment of his or her share of the rent and complies with the covenants.<sup>123</sup> Furthermore, the rights of any individual unit owner cannot be affected by the failure of other owners to pay rent or fulfill covenants.<sup>124</sup>

UCIOA also requires the declaration to deal with allocated interests, which include an owner's interest in the common area, assessment obligations and voting rights.<sup>125</sup> A significant difference between UCIOA and California law is that UCIOA provides for the allocation of voting rights, which cannot discriminate in favor of units owned by the declarant.<sup>126</sup> In other words the developer may not have more votes per unit (separate interest) or square footage than the other owners. In contrast, California declarants may have three votes for each separate interest owned during the initial phases of the project, a practice which is authorized by the DRE.<sup>127</sup>

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regarding the operation of common interest developments such as transfer of common areas, assessments, meetings and voting rights, as well as many others. See *Id.*

119. Unif. Common Interest Ownership Act § 2105 (1994), 7 pt. 1 U.L.A. 522-24 (1997).

120. *Id.* § 2-105(a), at 522-24.

121. *Id.* § 2-106(a), at 527.

122. *Id.* § 2-106(a)(1)-(2), at 527.

123. *Id.* § 2-106(b), at 527.

124. *Id.*

125. Unif. Common Interest Ownership Act § 2-107 (1994), 7 pt. 1 U.L.A. 529-30 (1997).

126. *Id.* § 2107(d), at 530.

127. See Cal. Code Regs. tit. 10, § 2792.18 (1997).

Although UCIOA does not permit weighted voting, it protects the declarant through the concept of “special declarant rights.”<sup>128</sup> UCIOA permits the declarant to retain, in the declaration, special declarant rights, including among other things the right to appoint members of the board until 75% of the units are sold, and to complete the development without interference. These special rights attach regardless of whether the board is controlled by the owners or by the declarant.<sup>129</sup> Special declarant rights are property rights, transferable by the declarant.<sup>130</sup>

Consequently, even though UCIOA does not permit weighted voting, it provides at least the same protection for declarants as does California law. In addition, UCIOA probably provides more flexibility. Under both Acts, the developer can retain control of the board until 75% of the units are sold.<sup>131</sup> UCIOA makes clear, however, that the declarant can retain the right to complete the development, in accordance with the governing documents, without interference from the owners, even if the declarant does not control the board.<sup>132</sup> Thus, under UCIOA, the declarant can transfer control of the association, thereby limiting the developer’s future liability for breach of fiduciary duty, and still complete the development without interference. In addition, the declarant can transfer all, or part, of the ‘special declarant rights.’<sup>133</sup>

Likewise, under UCIOA, the declaration must identify limited common elements (exclusive use common area) and the units (separate interests) that have the exclusive use of these limited common elements.<sup>134</sup> Once identified in the declaration, they cannot be reallocated without the consent of the affected owners.<sup>135</sup> While there is no provision in Davis-Stirling addressing the reallocation of assigned exclusive use common elements, California practitioners

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128. Unif. Common Interest Ownership Act §1-103(29) (1994), 7 pt. 1 U.L.A. 481-82 (1997),

129. Section 1-103 of UCIOA states:

“Special declarant rights” means rights reserved for the benefit of a declarant to (i)complete improvements indicated on plats and plans filed with the declaration (section 2-109) or, in a cooperative, to complete improvements described in the public offering statement pursuant to section 4-103(a)(2); (ii)exercise any development right (section 2-110); (iii)maintain sales offices, management offices, signs advertising the common interest community, and models (section 2-115); (iv)use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community (section 2-116); (v)make the common interest community subject to a master association (section 2-120); (vi) merge or consolidate a common interest community with another common interest community of the same form of ownership (section 2-121); or (vii) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (section 3-103(d)).

*Id.*

130. Unif. Common Interest Ownership Act §3-104 (1994), 7 pt. 1 U.L.A. 578-80 (1997).

131. *Id.* § 3-103(d), at 576; Cal. Code Regs. tit. 10 § 2792.32(f) (1997).

132. Unif. Common Interest Ownership Act §3-103(d) (1994), 7 pt. 1 U.L.A. 576 (1997).

133. See discussion *infra* Part III.D.1 for an additional discussion of the transfer of declarant rights.

134. Unif. Common Interest Ownership Act § 2-108 (1994), 7 pt. 1 U.L.A. 532 (1997).

135. *Id.* § 2-108(a), at 532.

generally follow the procedures outlined in UCIOA by assigning exclusive use area to specific separate interests in the declaration.

Occasionally, however, they do not. For example, on occasion, declarants create ‘floating’ parking spots which they assign at the time of sale. Because this flexibility may be necessary in some developments, the legislature should not prevent the declarant from creating unassigned, exclusive use common areas, provided the declarant assigns these areas in accordance with the governing documents.

While the acts are similar in what they require in the declaration, there are some significant differences. As discussed above, UCIOA provides more protection for owners of leasehold common interest communities, does not permit declarant weighted voting (but does provide declarant protection), and provides that limited common elements (exclusive use common areas) can not be reallocated without the consent of the affected owners.<sup>136</sup> The legislature should consider adopting these provisions of UCIOA for the following reasons: (1) the protections afforded declarants are as great using the concept of special declarant rights, as they are with weighted voting; (2) special declarant rights permit more flexibility; (3) the owners of leasehold common interest developments should be given protection; (4) it should be clear in Davis-Stirling, that once exclusive use common areas are assigned to particular separate interests, they cannot be taken away without the affected owner’s consent.

Another difference between the two acts is that UCIOA requires plats and plans to be part of the declaration of condominiums and planned communities and describes what must be included in those documents.<sup>137</sup> While plats and plans are not addressed in Davis-Stirling, they are covered by the California Subdivision Map Act and local ordinances pertaining to the parcel maps and subdivision maps.<sup>138</sup> Because these issues are adequately addressed by other statutes and established case law, it is unnecessary for California to adopt these provisions of UCIOA.<sup>139</sup>

## 2. *Bylaws*

UCIOA sets forth six required provisions for bylaws for community associations: (1) the number, qualifications, terms of office and duties of members of the board; (2) the election of officers by the board; (3) the qualifications, powers and duties of the board, and their terms of office; (4) the powers that can

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136. *Id.*

137. Unif. Common Interest Ownership Act § 2-107 (1994), 7 U.L.A. 533-35 (1997). UCIOA section 2-109 provides a detailed list of the matters that must be addressed in the plats and plans. *Id.* § 2-109, at 533-35.

138. Cal. Gov’t Code §§ 66410 to 66413.7, 66425 to 66500 (West 1997).

139. While other statutes deal with mapping of common interest developments and building plans, they do not require the declarant to turn over those maps and plans to the association. But see Cal. Code Regs. tit. 10 § 2792.23a(1) (1997). Because the association must maintain the common area, a statute should require the declarant to give these maps and plans to the association.

be delegated by the board; (5) who may execute amendments; and (6) a method for amending the bylaws.<sup>140</sup> Other provisions can be added to bylaws unless the declaration otherwise provides.<sup>141</sup>

Davis-Stirling contains no similar provision. This is primarily because the task force that assisted the Legislature in drafting Davis-Stirling concluded that California's Nonprofit Mutual Benefit Corporation Law adequately addressed the internal governance of community associations and the content of bylaws.<sup>142</sup> Further, even though some community associations are not incorporated, section 1363 of the California Civil Code states that unless the governing documents provide otherwise, an unincorporated association "may exercise the powers granted to a nonprofit mutual benefit corporation, as enumerated in section 7140 of the California Corporations Code."<sup>143</sup> It is unnecessary for Davis-Stirling to duplicate provisions of the Nonprofit Corporations Code. Thus, it is, unnecessary for the legislature to adopt these provisions of UCIOA.

### *3. Amendment of Governing Documents*

There are substantial differences between the provisions of UCIOA and Davis-Stirling regarding amendment of governing documents. Under UCIOA, with certain exceptions, a residential common interest community may only amend the declaration by a 67% vote.<sup>144</sup> The exceptions, discussed in greater depth in subsequent sections of this article, include the following:

(1) Reallocation of interests happens automatically in the case of eminent domain.<sup>145</sup>

(2) Certain unit boundary changes can occur upon the consent of the affected owners.<sup>146</sup>

(3) Declarant rights can not be increased, and the owner's percentage interest in the community can not be changed, without unanimous consent.<sup>147</sup>

(4) The time within which special declarant rights can be exercised may be extended by 80% of the votes including 80% of the votes held by owners other than the declarant.<sup>148</sup>

(5) Amendments that prohibit or materially restrict the permitted uses or behavior in the unit, or that restrict the number of people who may occupy the unit, require 80% approval.<sup>149</sup>

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140. Unif. Common Interest Ownership Act § 3-106 (1994), 7 pt. 1 U.L.A. 584-85 (1997).

141. *Id.* § 3-106(b), at 585.

142. Cal. Corp. Code §§ 7150-7153 (West 1990 & Supp. 1998).

143. Cal. Civ. Code § 1363(c) (West 1982 & Supp. 1998).

144. Unif. Common Interest Ownership Act § 2-117(a) (1994), 7 pt. 1 U.L.A. 546 (1997).

145. *Id.*

146. *Id.*

147. *Id.* § 2-117(d), at 546.

148. *Id.* § 2-117(g), at 547.

149. *Id.* § 2-117(f).

(6) Communities that are not residential may require a lower percentage to amend the declaration.<sup>150</sup>

Amendments must be recorded and are effective only upon recordation.<sup>151</sup> Actions challenging the validity of recorded amendments must be brought within one year of the recordation.<sup>152</sup>

California law is more flexible in permitting amendments to the declaration in many respects, but less flexible in others. As mentioned above, in order to sell a unit or lot in a residential common interest development of five or more units, a developer must obtain permission from the DRE which reviews the governing documents.<sup>153</sup> The DRE Regulations allow the declaration to contain a provision permitting the declaration to be amended by a bare majority of the votes (including at least a bare majority of the votes not owned by the declarant).<sup>154</sup> Thus, California law permits owners holding a bare majority of the votes to amend the declaration, whereas UCIOA requires 67% of the voting power to amend in most cases.<sup>155</sup>

The provisions in Davis-Stirling dealing with amendment also anticipate that, in many cases, owners holding fewer than 67% of the votes may amend the declaration. First, section 1356 of the California Civil Code provides that when a declaration requires more than a bare majority vote to amend the declaration, the owners may petition the court to reduce the percentage required in the declaration for approving an amendment.<sup>156</sup> In order to receive a court ordered amendment, the association, or owner requesting the amendment must do the following: satisfy specified procedural requirements; demonstrate that at least a bare majority approved the amendment; and show that the amendment is reasonable.<sup>157</sup> If the amendment impairs a security interest, the court cannot order such amendment without the approval of the percentage of the mortgages and beneficiaries specified in the declaration, if one is expressed.<sup>158</sup> If the declarant's rights are affected, the declarant must also consent, making this provision similar to that in UCIOA.<sup>159</sup>

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150. Unif. Common Interest Ownership Act § 2-117(a) (1994), 7 pt. 1 U.L.A. 546 (1997).

151. *Id.* § 2-117(c), at 546.

152. *Id.* § 2-117(b), at 546.

153. Cal. Bus. & Prof. Code §§ 11000-11200 (West 1987 & Supp. 1997).

154. See Cal. Code Regs. tit. 10 § 2792.24 (1997).

155. Cal. Bus. & Prof. Code § 11018.7 (West 1987 & Supp. 1998); Cal. Code Regs. tit. 10, § 2793 (1997); Unif. Common Interest Ownership Act §2-117 (1994), 7 pt. 1 U.L.A. 546 (1997). While the declarant is in control of the development all material amendments to the declaration must be approved by the DRE. Cal. Bus. & Prof. Code §11018.7 (West 1987 & Supp. 1998).

156. Cal. Civ. Code § 1356 (West 1982 & Supp. 1998).

157. *Id.*

158. It is noteworthy that the court can approve the amendment without approval of the lienholders unless the amendment would impair the security interest. Cal. Civ. Code § 1356(e)(3) (West 1982 & Supp. 1998).

159. Unif. Common Interest Ownership Act § 2-117(g) (1994), 7 pt. 1 U.L.A. 547 (1997).

A second provision, pertaining to amendments applies to older projects which do not contain any provisions regarding amendment of the governing documents. If a declaration does not contain amendment provisions, then the declaration can be amended if the following are satisfied: (1) specified procedural requirements are met; (2) more than a bare majority approve the amendment; and (3) the amendment has been recorded in every county in which the common interest development is located.<sup>160</sup>

Davis-Stirling also simplifies the amendment process in two different respects. First, it creates a simplified procedure for amending the governing documents to delete provisions pertaining to declarant rights after construction is completed.<sup>161</sup> Second, it simplifies the procedures for determining when an amendment is effective.<sup>162</sup> Finally, Davis-Stirling permits declarations that terminate on a specific date, and do not contain an extension provision to be extended if the requirements specified in the statute are satisfied.<sup>163</sup>

Thus, California law, in some respects, is much more receptive to the concept of amendment, than is UCIOA. California permits declarations to contain provisions requiring only a bare majority to amend the declaration, rather than the 67% required by UCIOA.<sup>164</sup> It also provides statutory relief for declarations that contain requirements for greater than a bare majority vote or no amendment provision.<sup>165</sup> Further, there are no special provisions requiring an 80% vote for amendments that prohibit or materially restrict the use or behavior in a unit, as there are in UCIOA.<sup>166</sup>

On the other hand, Davis-Stirling does not have provisions pertaining to amendment by eminent domain. It is more difficult to alter boundaries by amendment, under Davis-Stirling, than it is under UCIOA. Moreover, Davis-Stirling does not provide for termination of the community upon 80% approval, as does UCIOA.<sup>167</sup> All of these aspects will be discussed below in greater detail. Thus, in some respects, UCIOA's amendment provisions are more lenient than those of Davis-Stirling.

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160. Cal. Civ. Code § 1355(b) (West 1982 & Supp. 1998).

161. Cal. Civ. Code § 1355.5.

162. *Id.* § 1355(a). The section provides that an amendment is effective after the requisite approval is obtained, facts to that effect have been certified in writing and executed and acknowledged by a specified officer, and the writing has been recorded in each county in which the development is located. *Id.* This provision simplifies the process by, among other things, overriding declarations that require all owners and lienholders to sign the amendment. *Id.*

163. *Id.* § 1357.

164. Unif. Common Interest Ownership Act § 2-117 (1994), 7 pt. 1 U.L.A. 546 (1997).

165. Cal. Civ. Code § 1356(a) (West 1982 & Supp. 1998).

166. *Id.* §2-117(f), at 547.

167. Unif. Common Interest Ownership Act § 2-118 (1994), 7 pt. 1 U.L.A. 548-62 (1997).

### **C. Lender's Rights**

Under UCIOA, the declaration may require lender approval for specifications by the association, such as a sale of part of the common elements (area).<sup>168</sup> The declaration, however, cannot provide for lender approval which affects the general administrative affairs of the association, prevents the association or its board from commencing, intervening or settling litigation, or which prevents insurance trustees or the association from receiving and disbursing insurance proceeds.<sup>169</sup>

The only statutory provision in Davis-Stirling addressing lenders' rights in connection with amending the declaration is section 1356 of California Civil Code.<sup>170</sup> Section 1356 requires lender approval of court ordered amendments, when the amendment would impair a security interest.<sup>171</sup> Although this is the only statutory reference to lender's rights in Davis-Stirling, it is common for declarations in California to address lenders' rights and give them protections required by the secondary mortgage market.

### **D. Declarant Rights and Transfer of Declarant Rights**

#### *1. Declarant Rights*

UCIOA gives the declarant several rights.<sup>172</sup> For example, UCIOA permits a declarant of a planned community to amend the declaration to include additional real estate. The declarant may do so provided the following requirements are satisfied: the right is reserved in the declaration; the added property does not exceed 10% of the land described in the original declaration; the total number of units does not exceed the number stated in the original declaration; and, the declarant adds the real estate within the time specified in the original declaration.<sup>173</sup> The purpose of the right is to permit developers to subsequently incorporate small parcels of real estate into a "new town" planned community when such parcels could not have been acquired at the inception of the development.<sup>174</sup>

Davis-Stirling does not specifically give declarants the right to alter the development. Rights similar to those in UCIOA, however, are addressed in the

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168. Unif. Common Interest Ownership Act § 2-119 (1994), 7 pt. 1 U.L.A. 562-63 (1997).

169. *Id.*; see also *Id.* § 3-113, at 594-96.

170. Cal. Civ. Code § 1356 (West 1982 & Supp. 1998).

171. *Id.*

172. Unif. Common Interest Ownership Act § 1-103(14), 7 U.L.A. 480 (1997). Development rights (1994) as "any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a common interest community; (ii) create units, common elements, or limited common elements within a common interest community; (iii) subdivide units or convert units into common elements; or (iv) withdraw real estate from a common interest community." *Id.*

173. *Id.* § 2-122, at 568-69.

174. *Id.* § 2-122, at 569.

DRE Regulations.<sup>175</sup> Under DRE Regulations, if a declarant is planning on developing a large project in phases, the following criteria must be satisfied: (1) the right to annex property to the development must be reserved in the declaration; (2) it must be in accordance with a plan of phased development which is submitted with the first phase of the development; and (3) it must be approved by the DRE.<sup>176</sup> Because the DRE Regulations do not contain limitations on the percentage of land, or number of units that can be annexed, they are considerably less restrictive than the annexation provisions of UCIOA applicable to planned communities.

Under UCIOA, property can be annexed even if it does not meet the above criteria. In that case, however, the declaration must require approval of two thirds of the voting power of the association (not including the votes of the declarant) before such property can be annexed. This provision assures that proposals for unplanned annexations will be presented to the members for consideration, although the super-majority vote required may be difficult to achieve in a large scale development. Other rights that UCIOA gives the declarant include the right to: maintain sales offices; maintain models in the development; and maintain signs in the development, provided the declarant reserves these rights in the declaration.<sup>177</sup>

Although Davis-Stirling does not specifically give declarants similar rights, it is common for declarants to reserve these rights in the declaration. Further, section 1355.5 of the California Civil Code deals with amending documents to eliminate provisions designed to “facilitate the developer in the construction or marketing of the development.”<sup>178</sup> Thus, Davis-Stirling indirectly assumes such declarant rights exist. These rights, however, should be created by statute, rather than by regulation or implication. One difference between UCIOA and Davis-Stirling is that UCIOA provides that if the declarant reserves such rights, the declaration must provide detail as to the size and location of the facilities in order to provide notice to owners of the reserved rights. In California, the sales and management offices are generally built first. If, however, they are not, owners have a right to know if they are buying next to a sales office. Therefore, the legislature should consider clarifying the declarant rights in Davis-Stirling by adopting provisions similar to those in UCIOA.

UCIOA also grants the declarant an easement through the common areas, to the extent needed to perform the declarant’s obligations or exercise the declarant’s rights.<sup>179</sup> The declarant, however, is responsible for any damage caused to the

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175. Cal. Code Regs. tit. 10, § 2792.27 (1997).

176. *Id.* Until recently, the developer’ right to annex property pursuant to an approved plan of annexation, and without the necessity of owner approval, was limited in time. However, as of November 13, 1996 the time limit was removed so long as the annexation remains pursuant to an approved plan. *Id.*

177. Unif. Common Interest Ownership Act § 2-115 (1994), 7 pt. 1 U.L.A. 544 (1997).

178. Cal. Civ. Code § 1355.5 (West 1982 & Supp. 1998).

179. *Id.* § 2-116(a), at 545.

common area, and is obligated to make necessary repairs.<sup>180</sup> Davis-Stirling does not specifically grant the declarant an easement through the common areas to exercise declarant rights, but such right is commonly contained in declarations in California.

Under California general tort law, if the declarant damages the common area when using the easement, the declarant will generally be liable for the damage. Rarely, however, will general tort law create an obligation to repair. Thus, it would be clearer if these rights were declared by statute.

## 2. *Transfer of Declarant Rights and Special Declarant Rights*<sup>181</sup>

UCIOA sets forth rules whereby a declarant can transfer rights to others. Section 3-104 “strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant’s rights . . . .”<sup>182</sup>

Any transfer of special declarant rights must occur by an instrument recorded in each county where the development is located and be signed by the transferee of those rights. Once transferred, the transferor and transferee are liable only for their own actions, unless the successor is an affiliate of the transferor-declarant.<sup>183</sup> In other words, assuming the transferee is not an affiliate, once the transfer is made, the transferor is liable only for obligations, liabilities and warranties pertaining to the rights for periods prior to the transfer.<sup>184</sup> Similarly, the successor is not liable for the previous declarant’s misrepresentations, warranty obligations, breach of fiduciary duty or acts or omissions after transfer.<sup>185</sup>

In California it is unlikely that a declarant who has no affiliation with a successor declarant for all or a portion of the same development will be liable for misrepresentations, warranty obligations or acts or omissions of the successor. Similarly a successor declarant who has no affiliation with the declarant is unlikely to be liable for the predecessor’s breach of fiduciary duty or express warranties.<sup>186</sup> Whether a successor declarant is liable for the acts of a predecessor is an issue that most often arises in California in the context of construction defect litigation.<sup>187</sup> This will be discussed below.<sup>188</sup>

If a declarant’s interests in the common interest community (development) are foreclosed upon, UCIOA provides that the person acquiring the interests in foreclosure may, upon request, succeed to all special declarant rights pertaining to

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180. *Id.* § 4-119(b), at 639.

181. See also *supra* Part III.B.1 discussing special declarant rights.

182. Unif. Common Interest Ownership Act § 3-104 cmt. 2 (1994), 7 pt. 1 U.L.A. 580 (1997).

183. *Id.* § 3-104(b)(2), at 578.

184. *Id.* § 3-104 cmt. 4, at 581.

185. *Id.* § 3-104 cmt. 5, at 582.

186. See California Construction Contracts and Disputes (Continuing Educ. of the Bar, eds., 2d ed. 1990).

187. *Id.*

188. See *infra* Part IV.

the property. Such rights include the right to maintain models, sales offices and signs.<sup>189</sup> If the entire interest of a declarant is foreclosed upon, or sold in bankruptcy, the declarant ceases to have any further special declarant rights and the period of declarant control terminates, unless the judgment or instrument conveying title provides for the transfer of the special declarant rights.<sup>190</sup>

There is no similar law in California specifically dealing with declarant rights in the event of foreclosure. Davis-Stirling should clarify those rights by adopting this provision of UCIOA.

## **E. Governmental Regulation of Common Interest Developments**

### *1. Regulation of Public Report and State Administration and Regulation*

Article 4 of UCIOA deals predominately with the protection of purchasers. Article 5, which is considered an optional article, deals with the administration, and regulation, of common interest communities.<sup>191</sup> While many of these provisions are not included in Davis-Stirling, most are included in other areas of California law. It is extremely unlikely that the legislature would consider replacing the existing structure with the public reporting provisions in Article 4 of UCIOA or the administrative provisions in Article 5. Because the goal of UCIOA and California law is to protect purchasers, little is lost by failing to adopt these Articles. Therefore, with the exception of one provision appearing in Article 4 dealing with developer liability, these articles will not be discussed.

### *2. Statute and Local Ordinance Treating Like Projects Similarly*

Other provisions relating to governmental regulation include UCIOA section 1-106(a), which provides: “A building code may not impose any requirement upon any structure in a common interest community which it would not impose upon a physically identical development under a different form of ownership.”<sup>192</sup> For example, while a building code can impose a minimum fire wall rating in a high rise building, it cannot impose one standard for apartment buildings and a different standard for an identical building that is a common interest community.

Further, a state or local government may not impose a requirement on condominiums and cooperatives that it would not impose on a physically identical building. UCIOA, however, permits local governments to regulate planned communities differently from cooperatives and condominiums.<sup>193</sup> These

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189. Unif. Common Interest Ownership Act §3-105(c) (1994), 7 pt. 1 U.L.A. 544-45 (1997).

190. *Id.* § 3-105(d), at 445.

191. See *infra* Part V.

192. Unif. Common Interest Ownership Act § 1-106(a) (1994), 7 pt. 1 U.L.A. 495.

193. *Id.* §1-106 cmt. 3, at 496.

developments are treated differently because historically, most states have treated planned developments differently.<sup>194</sup>

California law is similar to UCIOA, but not identical. Section 1372 of the California Civil Code limits the extent to which local governments may discriminate against a development solely on the basis of its form of ownership.<sup>195</sup> The statute provides that local zoning ordinances are presumed to treat like structures in like manner unless the zoning ordinance clearly expresses a contrary intent.<sup>196</sup> Thus, under California law, while there is a presumption that zoning ordinances do not impose differing requirements on identical structures based on form of ownership, if a local government chooses to do so it may.

If governments were prohibited from discriminating in this manner, it would be unnecessary for the developer to elect to treat a development with common areas owned in common, as either a planned development or condominium, based on whether the government places heavier burdens on one of these forms of ownership--a rather ridiculous situation. Local governments should not discriminate solely on the basis of form of ownership. Therefore, it makes sense to amend section 1372 of the California Civil Code to bring it in conformance with the UCIOA provision, with one exception.

As mentioned, UCIOA permits local governments to impose different standards on planned developments.<sup>197</sup> This provision appears to assume that condominiums are attached housing, and planned developments are detached housing.<sup>198</sup> This is not necessarily the case in California. Therefore, all similar structures should be treated similarly.<sup>199</sup>

### 3. Eminent Domain

Finally, UCIOA addresses condemnation.<sup>200</sup> The intent of UCIOA is not to alter the law of eminent domain, but to supplement it.<sup>201</sup> The goal is to state specifically what happens in the event a governmental agency condemns an entire separate interest or common area, or any portion of a separate interest or common area, through eminent domain.<sup>202</sup> If eminent domain leaves the owner

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194. Telephone interview with Carl H. Lisman, Chair of the Standby Committee, Uniform Common Interest Ownership Act (1994), which prepared UCIOA for the National Conference of Commissioners on Uniform State Laws (Sept. 21, 1997).

195. Cal. Civ. Code § 1372 (West 1982 & Supp. 1998).

196. *Id.*

197. See *infra* note 191.

198. Compare Unif. Common Interest Ownership Act § 1-106, cmt. 2 (1994), 7 pt. 1 U.L.A. 495-96 (1997), with *Id.* § 1-106 cmt. 3, at 496.

199. Adopting this provision would not preclude local governments from imposing stricter standards on planned developments that are detached housing than on planned developments that are attached housing. In this case the difference is based on the physical characteristics of the project and not the form of ownership.

200. Unif. Common Interest Ownership Act § 1-107 (1994), 7 pt. 1 U.L.A. 497 (1997).

201. *Id.* cmt. 1 at 498.

202. *Id.*

with no practical use of his or her property, then the condemning agency must compensate the owner for both the separate interest and the interest in common area, even if no common area is taken.<sup>203</sup> If there is a remnant of land, after condemnation, it becomes part of the common area.<sup>204</sup>

UCIOA also provides a default position when part of a unit or lot is taken and when part of the common area is taken.<sup>205</sup> It permits both the decree and declaration to alter some of the default positions in order to guarantee a just result.<sup>206</sup>

If the California legislature adopted this section, it would be supplementing, rather than changing the state's law of eminent domain, which is what the drafters of UCIOA intended. The legislature would be filling a gap in the law regarding common interest developments by clearly stating what happens when a governmental agency condemns a common interest development, or portions of it.

#### IV. BOUNDARIES: CREATION, ALTERATION AND TERMINATION

##### A. Creation

As mentioned above, both UCIOA and Davis-Stirling require the declaration to contain a legal description of the common interest community.<sup>207</sup> On occasion, however, a declaration does not state precisely which area is owned separately by the owner, which are common elements (areas) and which are limited common elements (exclusive use common areas). While there are minor differences in the two statutes, both have the same purpose--to create certainty when the declaration fails to do so. It is useful to know the precise boundaries for a variety of reasons, such as determining maintenance and insurance responsibilities. A default position is particularly important in attached housing.

Consequently, when the declaration is silent, UCIOA<sup>208</sup> and Davis-Stirling<sup>209</sup> provide that, unless the declaration provides otherwise, when walls, floors and ceilings are designated as boundaries, the interior surfaces are part of the unit; any other portion are part of the common area. Although there are minor differences, both acts provide a default position for determining when fixtures and bearing walls are exclusive use common area and when they are common area.<sup>210</sup>

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203. *Id.* § 1-107(b), at 497.

204. *Id.* § 1-107(a), at 497.

205. *Id.* § 1-107(b) & (c), at 497-98.

206. *Id.* § 1-107(a), at 497.

207. See *infra* Part III.B.

208. *Id.* § 2-102(1), at 519.

209. Cal. Civ. Code §1351(l) (West 1982 & Supp. 1998).

210. See *Id.* §§ 1351(I),(l); Unif. Common Interest Ownership Act §2-102(1)-(4) (1994), 7 pt. 1 U.L.A. 519 (1997).

Even if the declaration is clear, a problem in the legal description may arise if the physical boundaries of the buildings in the legal description do not precisely correspond to the actual physical boundaries of the buildings. Thus, section 2-114 of UCIOA provides that, where existing physical boundaries of a unit (separate interest) deviate from the legal description, the physical boundaries control.<sup>211</sup>

A similar provision exists in Davis-Stirling.<sup>212</sup> This section, however, applies only to condominiums.<sup>213</sup> The section was taken from the Condominium Act existing at the time Davis-Stirling was being drafted.<sup>214</sup> Because the same problems of vertical and lateral movement and minor deviations from the description in the declaration also can occur in attached planned developments and cooperatives, as well as condominiums, Davis-Stirling should be amended to apply to all forms of common interest developments.

### **B. Alteration of Boundaries**

This portion of the article deals with the following: alteration of walls within a separate interest; alteration of boundaries between separate interests; alteration of the boundaries of common areas and exclusive use common areas; and termination of the common interest development. Some declarations in California provide for any or all of the above. It is unclear, however, the extent to which some of these provisions, which ultimately change the extent of the owner's property interest without the owner's consent, may violate California law.

When a person buys a unit or lot in a common interest development, he or she receives a separate interest and either a tenancy-in-common interest in the common area or membership in the association that owns the common area. If the portions of the common area are sold or transferred to a particular owner, or if the development is terminated, the ownership interest of the individual is reduced. This presents the legal question whether these changes may occur without the owner's consent.

In *Posey v. Leavitt*,<sup>215</sup> a condominium owner brought an action alleging, among other things, that the adjoining unit owner did not have a right to build a deck that encroached upon the common area without the consent of all the owners. The court concluded that the plaintiff was correct.<sup>216</sup>

In *Posey*, the declaration stated that the association had the power to "sell, lease, transfer, dedicate for public use or otherwise dispose of real or personal property in connection with the affairs of the Association."<sup>217</sup> The defendants

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211. *Id.* § 2-114, at 543.

212. Cal. Civ. Code § 1371 (West 1982 & Supp. 1998).

213. *Id.*

214. Former Cal. Civ. Code §1356 (West 1982) (repealed by stats. 1985, c.874, § 13).

215. 280 Cal. Rptr. 568 (Ct. App. 1991).

216. *Id.* at 574.

217. *Id.* at 573.

argued that this power implied the power to grant an easement for the encroachment.<sup>218</sup> The declaration also provided that the owners had an easement over the common area, and that the percentage of ownership of the common area could not be changed without the consent of all the owners.<sup>219</sup>

The court concluded that because the encroachment impaired the easement rights of the owners, the declaration required unanimous consent.<sup>220</sup> Further, although the association owned the common area in question, this did not alter the fact that the plaintiff had a property interest in the common area, an easement.<sup>221</sup> This property interest could not be impaired without the owner's consent.<sup>222</sup>

Some argue that this holding should be confined to its facts; that is, unanimous consent is only needed to change an owner's percentage interest when the declaration requires it. They further argue that when the declaration specifically authorizes the association to dispose of the common area without unanimous consent, such action should be permitted.

Others argue that the issue of changing an owner's interest without consent is unresolved. They point to the fact that in other jurisdictions where the issue has been adjudicated, courts have concluded that owner's property interest can not be changed without his or her consent.<sup>223</sup>

Due to this uncertainty, the legislature should enact a statute that clarifies what conditions must exist for fewer than 100% of the owners to change an owner's interest in the property. UCIOA provides different statutory solutions depending on the situation.<sup>224</sup> Some of these solutions require an 80% vote.<sup>225</sup> When considering the various statutory solutions, discussed below,<sup>226</sup> the reader should consider what the appropriate balance is between permitting flexibility and ensuring that the owner's property interest will not be significantly changed without his or her consent.

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218. *Id.* at 574.

219. *Id.*

220. *Id.*

221. *Posey v. Leavitt*, 280 Cal. Rptr. 568, 574 (Ct. App. 1991).

222. *Id.*

223. See *Grimes v. Moreland*, 322 N.E.2d 699 (Ohio Misc. 1974); *Mackeever v Lyle*, 609 P.2d 1084 (Ariz. App. 1980); *Penny v. Ass'n of Apartment Owners of Hale Kaanapali*, 776 P.2d 393 (Haw. 1989); see also *Schaumburg State Bank v Bank of Wheaton*, 555 N.E.2d 48 (Ill. Ct. App. 1990) (describing circumstances under which an agreement did not reduce the percentage interest in the common area, and, thus, did not require unanimous approval); *Jarvis, II v. Stage Neck Owners Ass'n*, 464 A.2d 952 (Me. 1983).

224. Unif. Common Interest Ownership Act § 2-1111 (1994), 7 pt. 1 U.L.A. 497 (1997).

225. *Id.* § 2-218, at 548-62.

226. See discussion *infra* Part IV.B.1.

1. *Units (Separate Interests)*

a. *Owner Altering Unit (Separate Interest)*

UCIOA provides if the alteration of a unit (separate interest) does not impair the structural integrity or mechanical systems of the affected unit (separate interest), or lessen the support of any portion of the structure in which the unit (separate interest) is contained, the owner has the right to undertake an improvement or alteration, unless the declaration provides otherwise.<sup>227</sup> If the alteration will alter the appearance of the common elements (areas), or the exterior appearance of a unit (separate interest), or other portion of the common interest community (development), however, the project may only be undertaken with the permission of the association.<sup>228</sup>

Section 1360(a) of Davis-Stirling gives the owners similar rights to those granted by UCIOA.<sup>229</sup> In addition, section 1360(b) provides special rules for handicap access modification.<sup>230</sup> These have been pre-empted, however, by the California Fair Employment and Housing Act<sup>231</sup> and the Federal Fair Housing Act.<sup>232</sup>

b. *Owner Combining Units (Separate Interests)*

Subject to the provisions of the declaration, UCIOA permits an owner of two adjoining units (separate interests) to remove or alter any intervening partition, even if that partition is a common element (area), in order to join the two units (separate interests).<sup>233</sup> UCIOA provides, however, that the removal of partitions does not alter the boundaries of the units.<sup>234</sup> Comment 4 to section 2-113 explains that while the adjoining units (separate interests) may be used as one, they do not become a single unit (separate interest).<sup>235</sup> This becomes important when considering issues such as the allocation of assessments and votes.

There is no corresponding provision in Davis-Stirling. The legislature should consider including this type of flexibility. Again, the ease of combining units may be particularly important in commercial and industrial developments, but it, also, may be beneficial in some residential developments. The declaration can always preclude such alterations in developments where alterations would be unreasonable.

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227. Unif. Common Interest Ownership Act § 2-111 (1994), 7 pt. 1 U.L.A. 497 (1997).

228. *Id.*

229. Cal. Civ. Code § 1360(b) (West 1982 & Supp. 1998); Unif. Common Interest Ownership Act § 2-111 (1994), 7 pt. 1 U.L.A. 497 (1997).

230. Cal. Civ. Code § 1360(b) (West 1982 & Supp. 1998).

231. Cal. Gov't Code §§ 12900 to 12996 (West 1992 & Supp. 1998).

232. 42 U.S.C. §§ 3601-3631 (1994 & Supp. 1998).

233. Unif. Common Interest Ownership Act § 2-111(3) (1994), 7 pt. 1 U.L.A. 539-40 (1997).

234. *See Id.*

235. *Id.* § 2-113 cmt. 4, at 540.

*c. Owner Subdividing a Unit (Separate Interest)*

Under UCIOA, owners can subdivide their units, provided the subdivision is permitted in, and consistent with, the declaration.<sup>236</sup> UCIOA contemplates that the owner desiring to subdivide his or her unit will apply to the association, which is then obligated to prepare an amendment to the declaration.<sup>237</sup> The amendment must be prepared by the association, signed by the owner, assigned a new identifying number for each of the newly created units (separate interests) and have the voting and assessment rights “in any reasonable manner prescribed by the owner.”<sup>238</sup>

No similar provision exists in California law, other than the provisions of the Subdivision Map Act and local ordinances relating to boundary line adjustments and amendments to previously filed final subdivision maps.<sup>239</sup> It is common for the governing documents of residential common interest developments to prohibit the subdivision of separate interests. Subdivision may be undesirable because it could have an adverse impact on the association’s assessment base, the market value of the lots, parking congestion within the development or other aesthetic considerations of the neighborhood. UCIOA does not provide that the declaration must permit subdivision of units; it only provides that the declaration may do so.<sup>240</sup>

The right to subdivide the separate interest is particularly important in commercial and industrial developments, but also may be advantageous in some residential planned developments. Therefore, the legislature should permit this flexibility where the declarant or owners deem it advisable.

*d. Owners Changing Boundaries Between Units (Separate Interests)*

Unless prohibited by the declaration or local laws, UCIOA also permits adjoining unit owners to alter the boundaries between their units by applying to the association for an amendment to declaration.<sup>241</sup> In connection with the reallocation of boundaries, the owners may propose to the board of directors that the voting rights and assessments be altered; this would be appropriate where voting rights or assessments are based on square footage. Once a reallocation is proposed, the board has thirty days in which to determine whether the reallocations are reasonable.<sup>242</sup>

If the reallocations are approved, the association is obligated to prepare an amendment to the declaration that identifies the units involved and sets forth the

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236. *Id.* § 2-113, at 539-40.

237. *Id.*

238. *Id.* § 2-113(b).

239. See Cal. Gov’t Code §§ 66469 to 66472.1 (West 1997).

240. Unif. Common Interest Ownership Act § 2-113 cmt. 4 (1994), 7 pt. 1 U.L.A. 543 (1997).

241. *Id.* § 2-112, at 540-42.

242. *Id.* § 2-112 cmt. 2, at 541.

revised reallocations.<sup>243</sup> The amendment must be executed by the affected unit owners, contain records of conveyance between them, and be recorded.<sup>244</sup> The association also must prepare and record any other necessary documents which describe the altered boundaries of the affected unit, their dimensions, and their identifying numbers.<sup>245</sup> Again, Davis-Stirling does not contain similar provisions. The California legislature should consider permitting declarants and owners this flexibility.

*2. Limited Common Elements (Exclusive Use Common Areas)*

UCIOA also permits the owners, other than the declarant, to alter limited common elements (exclusive use common area) under certain circumstances.<sup>246</sup> UCIOA requires the declaration to specify to which unit (separate interest) or units, each limited common element (exclusive use area) is allocated.<sup>247</sup> Once that description is presented in the declaration, it cannot be altered without the consent of the owners whose units are affected.<sup>248</sup> If the affected owners agree, UCIOA permits the affected owners to reallocate their limited common elements and execute an amendment to the declaration.<sup>249</sup> They do not need the permission of the other owners to exercise this right.<sup>250</sup> The right to reallocate limited common elements (exclusive use common areas) may be restricted or denied in the declaration.<sup>251</sup>

No similar provision exists in California law. There is no reason, however, to deny a declarant or the owners the right to build this flexibility into the development. Therefore, the legislature should consider adopting this provision of UCIOA.

UCIOA also permits portions of the common elements to be reallocated as limited common elements by amendment. This may only be accomplished pursuant to provisions in the declaration.<sup>252</sup> There is no California statutory authority for changing common area into exclusive use common area and it may be desirable to permit this flexibility. For example, once a new garden wall or fence is extended into the common area, it is difficult to get a court to order removal. The association should have the flexibility to grant easements for such encroachments, and perhaps to require the owner who encroached on the

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243. *Id.* § 2-112(a), at 540.

244. *Id.*

245. *Id.*

246. *Id.*

247. Unif. Common Interest Ownership Act § 2-108(a) (1994), 7 pt. 1 U.L.A. 532 (1997).

248. *Id.*

249. *Id.* § 2-108(b), at 532.

250. *Id.*

251. *Id.*

252. *Id.* § 2-108(c), at 532.

common area to maintain the encroachment and indemnify the association, without needing unanimous consent.

### *3. Common Elements (Common Area)*

Finally, assuming there are no prohibitions in the declaration or local ordinance, UCIOA gives the owners the right to alter their units (separate interests) in ways which appropriate portions of the common area under certain circumstances.<sup>253</sup> To effectuate the appropriation of common elements (areas), the owner of the unit must apply to the association for an appropriate amendment to the declaration. The amendment must be approved by at least 67% of the votes in the association, excluding the votes of the declarant.<sup>254</sup>

A proposed amendment must describe any fees or charges payable by the owner in connection with the proposed boundary relocation.<sup>255</sup> Those fees are deemed to be assets of the association.<sup>256</sup> If the amendment is approved, it must be executed both by the unit owner whose boundary is being relocated, and by the association.<sup>257</sup>

No similar provision exists in California law. If this provision of UCIOA were adopted in California, the owners would have to consider the potential harm the development might suffer to the aesthetics of the project through piece-meal appropriations of common area. In some developments, however, the owners may prefer not to be assessed for common area that they do not use, and, thus, prefer to reallocate the common area and its maintenance responsibility to a single owner. For example, when garage doors, sliding doors, or windows are common area, the owners may decide they would prefer the individual owner, rather than the association, be responsible for maintaining the fixtures. Owners may, therefore, choose to make the fixtures exclusive use common area.

Once again, the declaration may prohibit such a practice in developments where it would be inadvisable. There is no reason, however, to assume this practice is undesirable in all common interest developments. Therefore, the legislature should consider adopting this provision and the flexibility it permits.

### *4. Termination*

#### *a. By Agreement of the Owners*

UCIOA addresses an important issue that is often not well addressed in California declarations: the circumstances under which a common interest community can be terminated by the owners.<sup>258</sup> This issue was critical following the Los Angeles earthquake of 1994. Major portions of some common interest

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253. Unif. Common Interest Ownership Act § 2-112 (1994), 7 pt. 1 U.L.A. 540-41 (1997).

254. *Id.* § 2-112(b), at 541.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* § 2-118, at 548-51.

developments were destroyed and no termination provisions existed in the governing documents.

Under UCIOA, the decision to terminate a common interest community (development) must be evidenced by an agreement signed by owners holding at least 80% of the voting power of the association (the declaration may provide for a higher percentage).<sup>259</sup> UCIOA also contemplates that lenders may require a greater than 80% vote to terminate a common interest development.<sup>260</sup>

The agreement must be executed by the requisite number of members “in the same manner as a deed,” and recorded in each county in which the development is located.<sup>261</sup> If the termination contemplates a sale of any real estate forming a part of the development, the agreement must set forth the minimum terms of the sale.<sup>262</sup>

When the property comprising the development is to be sold in connection with a termination of the project, the association acts as a trustee on behalf of the unit owners in effecting the sale and distributing the proceeds.<sup>263</sup> During the period prior to completion of the sale, the owners have the right to continue to occupy their units in the terminated development, unless the termination agreement provides otherwise.<sup>264</sup> During any period of continued occupancy, the owners remain liable for the payment of assessments to the association.<sup>265</sup>

If the property constituting the common interest community (development) is not to be sold and the community is a condominium or a planned community, title to all the real estate vests in the unit owners as tenants-in-common.<sup>266</sup> The interests of each unit owner following the termination are established by appraisal of the fair market value of each owner’s respective units; allocated interests (assessment obligations and voting rights); and, limited common elements (exclusive use common area) immediately prior to the termination.<sup>267</sup>

The only provisions in Davis-Stirling relating to termination appear in section 1359 of the California Civil Code.<sup>268</sup> This section applies only to condominiums and provides that the court can order a sale of the entire project if one of the following occurs: (1) more than three years prior to the filing of the partition action, the project was damaged or destroyed rendering a material portion unfit for its prior use, and the condominium has not been rebuilt; (2) three-fourths or

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259. Unif. Common Interest Ownership Act § 2-118 (1994), 7 pt. 1 U.L.A. 548-62 (1997).

260. *Id.*

261. *Id.*

262. *Id.* § 2-118(a)-(b), at 548.

263. *Id.* § 2-118(g).

264. *Id.*

265. Unif. Common Interest Ownership Act § 2-118(e) (1994), 7 pt. 1 U.L.A. 549 (1997).

266. *Id.* § 2-118(f), at 549-50.

267. *Id.* § 2-118(j), at 550-51.

268. Cal. Civ. Code § 1359 (West 1982 & Supp. 1998).

more of the project is destroyed, and the owners holding more than 50% interest in the common area oppose repair or restoration of the project; (3) the project has existed for over fifty years, is obsolete, and owners holding more than 50% of the interest in the common area oppose restoration of the project; or (4) the sale is made in accordance with the governing documents.<sup>269</sup> This code section applies only to condominiums, not the other forms of common interest developments.<sup>270</sup>

Some planned development governing documents address this issue, but others do not. Even those that provide for termination without unanimous approval, may violate California law.<sup>271</sup> Therefore, the legislature should consider adopting this section of UCIOA both because it permits a declarant, or owners, to determine that fewer than 100% can terminate a development, and because it provides a default provision. If the legislature considers this provision, it should consider whether the 80% vote requirement strikes the appropriate balance between permitting change in response to changing conditions, and protecting an owner's property interest.

*b. By Foreclosure of Lien Against the Entire, or Portion of, the Community*

UCIOA addresses the unlikely prospect of the foreclosure of a lien or encumbrance against the entire common interest development, and the more common prospect of a foreclosure of a lien against only a portion of the development, such as a unit (separate interest).<sup>272</sup> In both instances, the foreclosure does not withdraw the foreclosed property from the development unless the foreclosure relates to "withdrawable real estate,"<sup>273</sup> or is a foreclosure of an encumbrance created by the association.<sup>274</sup> In the latter case, the person acquiring the property can require the association to amend the declaration to exclude the property from the development.<sup>275</sup>

While foreclosure of blanket liens is not addressed in Davis-Stirling, such liens are addressed in section 1108.5(a)(2) of California Business and Professions Code and section 2792.3 in title 10 of California Code of Regulations, which require that common areas and common facilities be conveyed to the owners' association free of any liens or encumbrances.<sup>276</sup> The sections do not address what happens if the owners subsequently encumber the common area.

UCIOA further provides that, in a condominium or planned community, if there is a lien or encumbrance against a portion of the development that has priority

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269. *Id.*

270. *Id.*

271. See *supra* Part IV.B regarding changing an owners interest without his or her consent.

272. Unif. Common Interest Ownership Act § 2-118(k)-(l) (1994), 7 pt. 1 U.L.A. 550-51 (1997).

273. See *Id.* § 2-105(a)(8), at 523; and *Id.* § 2-110(d), at 537-38.

274. *Id.* § 2-118(k)-(l), at 551.

275. *Id.*

276. Cal. Bus. & Prof. Code § 1108.5(a)(2) (West 1987 & Supp. 1998); Cal. Code Regs. tit. 10, § 2792.3 (1990).

over the declaration, and that lien is foreclosed, the foreclosing parties may record an instrument excluding the acquired property from the common interest development.<sup>277</sup> Again, there is no similar provision in Davis-Stirling and the issue should be addressed.

## V. GOVERNANCE

### A. Organization of Association

#### 1. Creation and Membership

Both UCIOA and Davis-Stirling require common interest communities to create an association by the date the first unit (separate interest) is conveyed.<sup>278</sup> UCIOA, however, requires that the association be exclusively comprised of the owners within the development.<sup>279</sup> While all owners in California must be members of the association, some California governing documents permit associate members who have the right to use recreational facilities, but do not have voting rights. Some argue that section 7331 of the California Corporations Code, which permits two classes of membership if the articles or bylaws so provide,<sup>280</sup> authorizes this arrangement. Others argue, however, that there is no clear statutory authority for this arrangement, and that there should be.

#### 2. Association Rights and Obligations

Section 3-102 of UCIOA sets forth an extensive list of powers that may be exercised by the owners' association, regardless of whether it is incorporated or unincorporated.<sup>281</sup> There is no similar provision in California law, but it is customary for the bylaws of the association to set forth a list of powers quite similar to those found in UCIOA. In addition, section 1363(c) of the California Civil Code states that if an owners' association for a California common interest development is organized as an unincorporated association, that association is deemed to have all of the powers of a nonprofit mutual benefit corporation, as set forth in section 7140 of the California Corporations Code.<sup>282</sup>

##### a. Standing

Under UCIOA, the association's standing to bring a lawsuit is broader than it is under California law. UCIOA gives the association standing to "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest

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277. Unif. Common Interest Ownership Act § 2-118(1) (1994), 7 pt. 1 U.L.A. 551 (1997).

278. *Id.* § 3-101, at 571-72; Cal. Civil Code § 1363 (West 1982 & Supp. 1998); Cal. Civ. Code Regs. tit. 10, § 2792.8 (1997).

279. Unif. Common Interest Ownership Act § 3-101 (1994), 7 pt. 1 U.L.A. 571 (1997).

280. Cal. Corp. Code § 7331 (West 1982 & Supp. 1998).

281. Unif. Common Interest Ownership Act § 3-102 (1994), 7 pt. 1 U.L.A. 572-74 (1997).

282. See, Cal. Code Regs. tit. 10, § 2792.21(b) (1997) which controls the content of the initial governing documents, imposes limitations on the authority of the Board to exercise certain powers without prior approval of the members. Cal. Civ. Code § 1363(c) (West 1982 & Supp. 1998).

community.”<sup>283</sup> Section 383 of the California Code of Civil Procedure is similar in that it provides that the association has standing to: institute, defend, and participate in administrative proceedings; arbitrate and mediate in its own name; enforce the governing documents; and recover for damage to the common area, areas which the association is obligated to maintain or repair, and separate interests integrally related to damage to the common area.<sup>284</sup>

It is difficult to determine the extent to which UCIOA and California law differ because there are no reported California decisions interpreting the standing provisions. However, there is clearly one significant difference. UCIOA gives the association standing to enforce the governing documents against a tenant.<sup>285</sup> This is discussed below.

*b. Engaging in Alternative Dispute Resolution*

One of the powers listed in section 3-102(a)(18) of UCIOA is the power to adopt regulations which would mandate that disputes between the board of directors and unit owners or between two or more unit owners, regarding the common interest community, must be submitted to nonbinding alternative dispute resolution in accordance with the regulation. This must be done as a prerequisite to commencing a judicial proceeding.<sup>286</sup> California law imposes this obligation by statute rather than giving the association the power to decide whether to adopt alternative dispute regulations.<sup>287</sup>

Under section 1354(b) of the California Civil Code, persons engaged in most disputes involving enforcement or interpretation of the governing documents of a common interest development must first endeavor to resolve those disputes through some form of alternative dispute resolution (“ADR”).<sup>288</sup> The parties are given a period of time to agree upon the mode of ADR they wish to use; it may be either binding or nonbinding.<sup>289</sup> It is unlikely that the legislature will eliminate this provision and leave it up to the association to decide whether it wishes to engage in ADR as does UCIOA.

*c. Controlling Absentee Owners and Tenants*

UCIOA presents some beneficial empowering language regarding the authority of the association to adopt rules and regulations affecting the use, or behavior, of occupants within residential units.<sup>290</sup> Among the authorized regulations, are those that restrict the leasing of units (separate interest) “to the extent that those

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283. Unif. Common Interest Ownership Act § 3-102(4) (1994), 7 pt. 1 U.L.A. 572 (1997).

284. Cal. Civ. Proc. Code § 1354(b) (West 1982 & Supp. 1998).

285. *Id.* § 3-102(4), at 573-74.

286. Unif. Common Interest Ownership Act § 3-102(a)(18) (1994), 7 pt. 1 U.L.A. 573 (1997).

287. Cal. Civ. Code § 1354(b) (West 1982 & Supp. 1998).

288. *Id.*

289. *Id.*

290. Unif. Common Interest Ownership Act § 3-201(c) (1994), 7 pt. 1 U.L.A. 573 (1997).

rules are reasonably designed to meet underwriting requirements of institutional lenders.”<sup>291</sup> This language is intended to authorize, for example, restrictions which limit the total number of units (separate interests) that can be leased at any given time. Many institutional lenders making loans on common interest properties follow guidelines which restrict the total number of leased units, currently set at 20%.<sup>292</sup>

UCIOA further authorizes the association to take action directly against tenants who violate the development’s governing documents. This includes, the authority to enforce rights against a tenant, including bringing an unlawful detainer action, and rights which the association could have exercised directly against the owner.<sup>293</sup> Evidently, these are not powers which can be limited by appropriate provisions in the declaration because there is no qualifying language to that effect.

If such a provision were adopted in California, the legislature should consider whether to permit the declarant and the owners to determine if the association should have this power. Such a power would solve many problems with tenants violating the rules. In some developments, however, it may discourage those who wish to rent units (separate interests). The owner has some protection because UCIOA conditions the Association’s authority to initiate disciplinary action against a tenant upon providing notice and an opportunity to be heard to both the tenant and landlord.<sup>294</sup>

*d. Maintenance*

Both UCIOA and Davis-Stirling provide that the association is responsible for maintaining the common elements (areas).<sup>295</sup> When the declaration is silent as to who has the responsibility for maintaining limited common elements (exclusive common area), however, there is conflict. Both UCIOA and Davis-Stirling provide default provisions to address this problem; but those provisions are different.<sup>296</sup>

Both Acts permit the declaration to alter the statutory default position. <sup>297</sup> Both Acts also provide that maintenance and repair of the unit is the responsibility of the owner.<sup>298</sup> They differ, however, in that UCIOA provides that the association is responsible for maintenance, repair and replacement of the common elements including the limited common elements.<sup>299</sup> Section 1364 of the California Civil

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291. *Id.*

292. 24 C.F.R. § 234.26(e)(2) (1993).

293. *Id.* § 3-102(d), at 573-74.

294. *Id.* § 3-102(e), at 574.

295. Unif. Common Interest Ownership Act § 3-107 (1994), 7 pt. 1 U.L.A. 585-86 (1997); Cal. Civ. Code § 1364 (West 1982 & Supp. 1998).

296. Unif. Common Interest Ownership Act § 3-107; Cal. Civ. Code § 1364.

297. Unif. Common Interest Ownership Act § 3-107; Cal. Civ. Code § 1364.

298. Unif. Common Interest Ownership Act § 3-107; Cal. Civ. Code § 1364.

299. Unif. Common Interest Ownership Act § 3-107.

Code, provides that, unless the declaration states otherwise, the owner is responsible for the maintenance and repair of any exclusive use common area appurtenant to the owner's unit.<sup>300</sup>

One reason for placing the maintenance obligation of the exclusive use common areas on the association is that the association can better control the timing, quality and aesthetic appropriateness of the repairs. Therefore, the legislature should consider adopting the UCIOA provision.

*e. Assessments and Liens*

*i. Regular and Special Assessments*

UCIOA parallels section 1366 of the California Civil Code in setting forth certain statutory rules pertaining to the authority of community associations to impose assessments.<sup>301</sup> The rules set forth in UCIOA, however, are less specific than those in Davis-Stirling. UCIOA provides that until the association makes a common expense assessment, the declarant shall pay all common expenses.<sup>302</sup> After an assessment has been made by the association, the assessments shall be imposed at least annually pursuant to a budget which provides for the allocation of assessments in accordance with the formula set forth in the declaration. This allocation is subject to the following exceptions, if required by the declaration: (1) assessments pertaining to expenses for limited common elements or benefiting fewer than all the units are allocated to those benefited units; (2) insurance assessments are allocated in proportion to the risks that are being insured; (3) utility assessments are allocated according to the usage of the utilities; and (4) assessments to recover expenses resulting from the misconduct of an owner are allocated to that owner.<sup>303</sup> If assessments are past due the board can impose an interest rate, sometimes as high as 18%.<sup>304</sup>

Assessment provisions under California law are much less flexible. Davis-Stirling requires the association to levy regular and special assessments sufficient to perform its functions. Annual increases in regular assessments, however, may not occur unless one of two conditions is met: (1) the board has complied with section 1365 of the California Civil Code, (which requires budgets to be prepared in accordance with detailed provisions),<sup>305</sup> and section 1366 (which requires distribution of the budget within specified times);<sup>306</sup> or (2) the board has obtained

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300. Cal. Civ. Code § 1364.

301. Unif. Common Interest Ownership Act § 3-115 (1994), 7 pt. 1 U.L.A. 598-99 (1997); Cal. Civ. Code § 1366 (West 1982 & Supp. 1998).

302. Unif. Common Interest Ownership Act § 3-115(a) (1994), 7 pt. 1 U.L.A. 598-99 (1997).

303. *Id.*

304. *Id.*

305. Cal. Civ. Code § 1365 (West 1982 & Supp. 1998).

306. *Id.* § 1366.

the approval of a majority of the voting power of owners constituting a quorum.<sup>307</sup>

In addition, except in emergencies,<sup>308</sup> the board may not increase regular assessments more than 20% over the prior year's regular assessment; nor may it impose special assessments that, in the aggregate, exceed 5% of the total budgeted gross expenses for the year in which the assessment is imposed, unless a majority of the voting power of owners constituting a quorum of 50% of the owners approve the increase.<sup>309</sup>

The original section dealing with imposing assessments was a compromise. After its enactment in 1986, the assessment provision was amended in 1987, 1990, 1991 and 1992, again, as a result of negotiation and compromise among industry interest groups.<sup>310</sup> It is unclear whether the legislature would be willing to revisit the issue, in order to give declarants and owners more flexibility in determining when and how much assessments may be increased, is uncertain.

*ii. Assessment Liens*

UCIOA contains some beneficial rules regarding the authority of community associations to collect delinquent assessments through lien and foreclosure remedies.<sup>311</sup> Under UCIOA, recordation of the declaration creates a statutory lien, without the necessity of recording a Notice of Delinquent Assessment, as is required to create a lien under Davis-Stirling.<sup>312</sup> Both acts provide that the lien include not only the amount of the delinquent assessment, but also fees, charges, late charges, fines and other reasonable costs of collection.<sup>313</sup>

Under UCIOA, the lien is in place prior to any delinquency. Thus, UCIOA contemplates that a delinquent owner, prospective purchaser of a unit, or a foreclosing lender will receive information regarding a specific delinquency by making a request to the association for information regarding unpaid assessments.

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307. *Id.* A quorum, under section 1366 of the California Civil Code is more than fifty percent of the owners.

308. Section 1366(b) of the Civil Code identifies emergency situations as: (1) extraordinary expenses required by court order; (2) situations creating threats to safety; (3) expenses the association could not reasonably have foreseen; and (4) expenses associated with certain earthquake insurance surcharges. Cal. Civ. Code § 1366(b).

309. Cal. Code Regs. tit. 10, §§ 2792.16, 2792.22 (1997) (ensuring that the original declaration will include consistent provisions).

310. Participating in the legislative process were the Department of Real Estate, the California Association of Realtors, the Community Associations Institute, the Executive Council of Owners Associations and others.

311. Unif. Common Interest Ownership Act § 3-116 (1994), 7 pt. 1 U.L.A. 600-04 (1997).

312. *Id.*; Cal. Civ. Code § 1367(b) (West 1982 & Supp. 1998).

313. See Unif. Common Interest Ownership Act §§ 3-102(a), 3-116(a) (1994), 7 pt. 1 U.L.A. 572-73, 601 (1997).

Unit owners are then obligated to provide the information to prospective purchasers, which is similar to California law.<sup>314</sup>

A significant difference exists, however, between UCIOA and Davis-Stirling. Under UCIOA, the association's lien is prior to all other liens and encumbrances, other than the following: (1) liens and encumbrances recorded prior to the declaration, and not subordinated; (2) first security interests on the unit recorded prior to the date when the assessments became delinquent, but not as to assessments accrued within the six months prior to the lender initiating action to enforce the lien; and (3) liens for real property taxes and other governmental obligations.<sup>315</sup> In California, by contrast, community association assessment liens are subordinate to any lien or encumbrance recorded prior to the association's notice of delinquent assessment. The declaration may, and usually does, contain provisions making the lien subordinate to first trust deeds, even if recorded after the association's lien.<sup>316</sup>

The UCIOA provision, giving association assessment liens priority over first security interests in the amount of six months' of assessments, is intended to strike a balance between the interests of the development and those of the lender.<sup>317</sup> Lenders can protect themselves at the time of issuing a loan by factoring in the possibility of the inability to collect an amount equivalent to six months' assessments at foreclosure. Moreover, lenders are harmed if the association cannot afford to maintain the development because of its inability to collect assessments. Therefore, the legislature should consider adopting this provision.

Under UCIOA, any action by a community association to enforce its assessment lien must be commenced within three years from the time the assessment becomes delinquent.<sup>318</sup> The process can be a foreclosure pursuant to a power of sale.<sup>319</sup> The Davis-Stirling Act contains no specific limitations period. Actions on written contracts and books of account, however, must be commenced within four years.<sup>320</sup>

Finally, UCIOA confirms that the association may seek to have a receiver appointed to assist in the collection of delinquent assessments.<sup>321</sup> While not

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314. See section 4-109(a)(2) of UCIOA, *Id.* § 4-109(a)(2), which is similar to section 1368 of the Civil Code. Cal. Civ. Code § 1368 (West 1982 & Supp. 1998).

315. Unif. Common Interest Ownership Act § 3-116(b) (1994), 7 pt. 1 U.L.A. 600 (1997).

316. See Cal. Civil Code § 1367(d) (West 1982 & Supp. 1998).

317. Unif. Common Interest Ownership Act § 3-116 (1994), 7 pt. 1 U.L.A. cmt. 2, 601 (1997).

318. *Id.* § 3-116(e), at 601.

319. *Id.* § 3-116(j), at 601.

320. Cal. Civ. Proc. Code § 337 (West 1982 & Supp. 1998).

321. Unif. Common Interest Ownership Act § 3-116(l) (1994), 7 pt. 1 U.L.A. 601-03 (1997).

stated in the Davis-Stirling Act, similar remedies would be available under California law.<sup>322</sup>

*f. Other Liens*

UCIOA provides that, unless the association has encumbered the common areas of a development with a lien or security interest, (requiring approval of at least by 80% of the members)<sup>323</sup> a judgment for money against the association cannot become a lien on the common areas of the development. Instead, it becomes a lien against all the units in the common interest community at the time the judgment is entered.<sup>324</sup> The lienholder may look only to each owner's unit (separate interest), (and not to any other property of the owner) to satisfy his or her claim.<sup>325</sup> If the association has granted a valid security interest in the common areas to a creditor, that creditor must first resort to his or her rights against the common elements before attempting to enforce a lien against an individual owner's unit.<sup>326</sup>

If two or more units are subject to a lien, other than a deed of trust or mortgage, the owner of any of the affected units may pay the lienholder the unit owner's proportionate share of the total indebtedness. The unit owner, thereby, receives a release of the lien with respect to that owner's unit (separate interest).<sup>327</sup> Once such a payment is made, the association is prohibited from assessing or having a lien against that owner's unit for any portion of the common expenses incurred in connection with the lien.<sup>328</sup>

This provision could be applied, for example, to a situation where an association obtains a bank loan to finance the replacement of roofs and secures the payment of that obligation with a pledge of the proceeds that will be obtained by levying a special assessment. In that circumstance, UCIOA permits an owner to pay his or her proportionate share of the special assessment; thereby, alleviating any future liability on that assessment.<sup>329</sup> This could be important to an owner desiring to sell his unit free of past special assessment lien obligations.

California has no analogous statutory provision. As the number of aging common interest developments increases, the need for bank financing for critically needed repairs and restoration work, for which there are not adequate reserves, is becoming increasingly common. In California, many lenders will not take a security interest in the common area for fear that it will be difficult, if not impossible, to obtain clear title and a marketable asset in the event of a default by the association. The main alternative is to obtain a security interest in future

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322. See Cal. Ct. R. §§ 349-355 (West 1996 & Supp. 1998).

323. See Unif. Common Interest Ownership Act § 3-112 (1994), 7 pt. 1 U.L.A. 591-92 (1997).

324. *Id.* § 3-117, at 605-06.

325. See *Id.* § 3-117(a)(1), at 605.

326. See *Id.* § 3-117(a)(2), at 605.

327. *Id.* § 3-117(a)(3), at 606.

328. *Id.*

329. See Unif. Common Interest Ownership Act § 3-117 (1994), 7 pt. 1 U.L.A. 605-06 (1997).

assessment revenues. Conservative lenders typically require that owners approve a special assessment, payable in installments, in an amount sufficient to timely amortize the loan.

UCIOA could provide California lenders and associations an alternative form of financing. Therefore, the legislature should adopt at least portions of these provisions of UCIOA.

*g. Insurance*

UCIOA's approach to insurance requirements is more comprehensive and consistent than California's. Section 3-113(a) of UCIOA requires an association to maintain both property and liability insurance to the extent it is reasonably available, after the conveyance of the first unit.<sup>330</sup> The Act specifies that the property insurance must cover at least 80% of the actual cash value.<sup>331</sup>

In communities with horizontal boundaries, the property insurance must include the units, but need not include improvements made by the owner.<sup>332</sup> The comments to UCIOA note that requiring the association to insure both the unit and common area, in cooperatives and horizontal or stacked communities, is a departure from the existing practice in the majority of states.<sup>333</sup> The drafters thought it preferable to insure the entire building since it simplifies claims procedures, particularly, where part of both the common elements and the unit have been destroyed.<sup>334</sup>

Each association insurance policy must provide the following: (1) each owner is insured with respect to liability arising out of his or her interest in the common area or membership in the association; (2) the insurer waives its right to subrogation under the policy against an owner; (3) no act or omission by an owner, outside the scope of his or her authority on the behalf of the association, will void the policy; and (4) if the owner has other insurance covering the same risk at the time of loss, the association's policy must provide the primary insurance coverage.<sup>335</sup>

UCIOA also requires the association to repair or replace any portion of the property for which insurance is required, unless the owners terminate the common interest community, or 80% of the owners, (including 100% of those owners whose limited common elements will be affected), agree.<sup>336</sup> Finally, UCIOA

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330. *Id.* § 3-113(a), at 594.

331. *Id.*

332. *Id.* § 3-113(b).

333. *Id.* § 3-113 cmt. 2, at 596.

334. *Id.*

335. Unif. Common Interest Ownership Act § 3-113(d) (1994), 7 pt. 1 U.L.A. 594-95 (1997).

336. See *Id.* § 3-113(h), at 595-96. Cf. Cal. Civ. Code § 1359 (West 1982 & Supp. 1998). Section 1359 of the Civil Code deals with partition in which an owner does not wish to repair or rebuild a damaged project; this has some relevance to section 3-113(h) of UCIOA. Section 1359 of the Civil Code, however, is more restrictive than section 3-113(h). See Cal. Civ. Code § 1359; and Unif. Common interest ownership act §3-113(h) (1994), 7 pt. 1 U.L.A. 595-96 (1997).

requires the association to promptly notify all the owners if insurance is not readily available.<sup>337</sup>

Unlike UCIOA, Davis-Stirling does not require associations to maintain insurance. Davis-Stirling, however, has provisions relating to insurance. If the association wishes to limit the liability of owners, directors, and officers, then it must satisfy certain insurance requirements in accordance with sections 1365.7 and 1365.9 of the Civil Code.<sup>338</sup> While these requirements will be discussed in greater detail below,<sup>339</sup> it is important to note that the amount of insurance required by these sections is inconsistent. Such amounts should be made consistent.

The other insurance requirement in Davis-Stirling is contained in section 1365(e) of the Civil Code.<sup>340</sup> This section requires associations to provide a summary of the association's property, general liability, earthquake and flood insurance policies. This summary must include the name of the insurer, the type of insurance, the policy limits, and the amount of any deductibles.<sup>341</sup> The association must also notify the owners of any significant changes in coverage.<sup>342</sup>

There are additional requirements in both Acts but the discussion above demonstrates that the insurance requirements in UCIOA are different than those in Davis-Stirling. The major differences may be summarized as follows. First, UCIOA requires associations to maintain a variety of insurance coverage, where

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First, section 1359 only applies to condominiums because this section was incorporated directly from the previous Condominium Act which only applied to condominiums. Second, section 1359 provides that the court may order partition only if one of the following is found:

(1) More than three years prior to the filing of the action, the project was damaged or destroyed rendering, so that a material part was rendered unfit for its prior use, and the condominium project has not been rebuilt or repaired substantially to its state prior to the damage or destruction.

(2) Three-fourths or more of the project is destroyed or substantially damaged and owners of separate interests holding in the aggregate more than a 50 percent interest in the common areas oppose repair or restoration of the project.

(3) The project has been in existence more than 50 years, is obsolete and uneconomic, and owners of separate interests holding in the aggregate more than a 50-percent interest in the common area oppose repair or restoration of the project.

(4) The conditions for such a sale, set forth in the declaration, have been met.

Cal. Civ. Code § 1359(b) (West 1982 & Supp. 1998).

337. Unif. Common Interest Ownership Act § 3-113(c) (1994), 7 pt. 1 U.L.A. 594 (1997).

338. Cal. Civ. Code §§ 1365.7, 1365.9 (West 1982 & Supp. 1998).

339. See *infra* Part VI.

340. Cal. Civ. Code § 1365(e) (West 1982 & Supp. 1998).

341. *Id.*

342. While these are the only insurance provisions that exist in Davis-Stirling, other California statutes and common law impose insurance requirements. For example, if the association has automobiles the association will have to comply with Cal. Veh. Code § 16431 (West 1982 & Supp. 1998) if it has employees it will have to maintain workers compensation insurance Cal. Lab. Code § 3700 (West 1982 & Supp. 1998) and the fiduciary duty the directors and officers owe the association presumably includes the obligation to buy both property and liability insurance when it is reasonable to do so. Cal. Veh. Code § 16431 (West 1982 & Supp. 1998); Cal. Labor Code § 3700 (West 1982 & Supp. 1998).

reasonably available.<sup>343</sup> While Davis-Stirling requires the association to disclose the coverage it has and to maintain insurance if it wishes to gain limited immunity for its owners, directors, and officers, it does not require associations to maintain insurance.<sup>344</sup> Second, UCIOA's insurance provisions apply more consistently than do those in California; and they do not vary when dealing with director and officer liability, and owner liability as they do in California.<sup>345</sup>

*h. Rights and Obligations Found in Davis-Stirling and Not in UCIOA*

Davis-Stirling covers many topics not mentioned in UCIOA. For example, sections 1365 and 1365.5 of the California Civil Code impose detailed requirements on community associations regarding the following: the content and distribution of annual budgets and year-end financial reports; the periodic evaluation of the adequacy of reserve accounts; and the obligation of association boards to conduct a quarterly review of the association's fiscal performance in comparison to the budget.<sup>346</sup> Section 1363.05 of the Civil Code imposes meeting requirements and section 1375 imposes numerous requirements in connection with filing a construction defect lawsuit to name a few.<sup>347</sup> Many should be simplified and made more easy to understand or eliminated.

*3. Board Members and Officers*

*a. Election*

UCIOA authorizes the declaration to include a period of declarant control, subject to limitation, during which the declarant may appoint and remove all directors and officers of the association.<sup>348</sup> It further provides that there must be at least 1%, but not less than 25%, of director positions filled by vote of the owners other than the declarant, once 25% of the units (separate interests) in the development have been sold.<sup>349</sup>

Davis-Stirling does not address the issue of appointment of directors and officers by the declarant. The DRE Regulations, however, prescribe that "reasonable arrangements" be included in the declaration which include providing termination dates for declarant control.<sup>350</sup> Further, the declaration must

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343. Unif. Common Interest Ownership Act § 3-113 (1994), 7 pt. 1 U.L.A. 595-96 (1997).

344. The doctrine of fiduciary duty may require California association' to maintain insurance, but it would be better to have a statute that is clear and consistent determine the insurance requirements. See discussion *infra* Part V.

345. See Unif. Common Interest Ownership Act § 3-113 (1994), 7 pt. 1 U.L.A. 595-96 (1997).

346. Cal. Civ. Code §§ 1365, 1365.5 (West 1982 & Supp. 1998).

347. Cal. Civ. Code §§ 1363.05, 1375 (West 1982 & Supp. 1998).

348. Unif. Common Interest Ownership Act § 3-103(e) (1994), 7 pt. 1 U.L.A. 575-77 (1997). With the exception of master planned communities, the period of declarant control, however, must end no later than the earlier of the following: (1) 60 days after conveyance of 75% of the units; (2) two years after all declarants have stopped selling units; (3) two years after the declarant last exercises rights to add units (separate interests); (4) the day the declarant voluntarily surrenders control. *Id.*

349. *Id.* § 3-103(e), at 575-77.

350. Cal. Code Regs. tit. 10, § 2792.18 (1997).

establish a special procedure to assure that, from the time of the first election, at least 20% of the directors shall be elected solely by the votes of owners, other than the declarant, as long as the declarant maintains control.<sup>351</sup> In this respect, UCIOA is similar to California law.

UCIOA also provides that directors may only be removed from office on the affirmative vote of a two-thirds majority of a quorum of the members.<sup>352</sup> Directors elected by the declarant may only be removed by the declarant.<sup>353</sup> In California, the removal of directors from office is governed by sections 7221 and 7222 of the Corporations Code<sup>354</sup> and section 2792(b), title 10, of the California Code of Regulations.<sup>355</sup> The cumulative voting provisions provided in these regulations are designed to afford the opportunity for a significant minority bloc among owners to gain and maintain representation on the board. However, cumulative voting provisions make it is practically impossible to remove directors from office, unless the recall is directed at all directors, in which case the protective rules concerning cumulative voting rights do not apply. Also, the provisions are difficult to understand. The legislature should consider the simplified voting procedures presented by UCIOA.

*b. Powers*

The powers given to the board are also similar under the two acts. UCIOA provides that the board may act on behalf of the association, except as limited by the declaration, bylaws, or other sections of the Act.<sup>356</sup> Section 7210 of the California Corporations Code is similar in that it provides that all powers are vested in the board, except where that member approval is required either by state law or the governing documents.<sup>357</sup>

Not all powers given to the board under the two acts are similar, however. UCIOA addresses the obligation of the executive board to provide members with a summary of the budget within a specified period of time. The budget is then subject to member ratification.<sup>358</sup> If the members refuse to ratify the budget, the budget from the previous fiscal period continues until ratification is obtained.<sup>359</sup>

In contrast, under section 1365 of the California Civil Code, community associations are obligated to provide detailed budget information to their members, not less than forty days, or more than sixty days, prior to the beginning

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351. *Id.* § 2792.19(c)(1).

352. Unif. Common Interest Ownership Act § 3-103(g) (1994), 7 pt. 1 U.L.A. 577 (1997).

353. *Id.*

354. Cal. Corp. Code §§ 7220, 7221 (West 1990 & Supp. 1998).

355. Cal. Code Regs. tit. 10 § 2792(b) (1997).

356. Unif. Common Interest Ownership Act § 3-103(a) (1994), 7 pt. 1 U.L.A. 575 (1997).

357. Cal. Code Regs. tit. 10 § 2792(b) (1997).

358. Unif. Common Interest Ownership Act § 3-103(c) (1994), 7 pt. 1 U.L.A. 576 (1997).

359. *Id.*

of the fiscal year.<sup>360</sup> Unless the budget proposes assessment increases which require member approval under section 1366 of the Civil Code,<sup>361</sup> budgets are not required to be approved by the members. The absence of such an approval requirement is consistent with the overall concept of corporate governance contemplated by the California Corporations Code in which the board of directors have a fiduciary obligation to manage the affairs of the corporation. This approach is preferable to that of UCIOA.

Another difference is that UCIOA provides that once declarant control has ended in residential common interest communities, the successor board, has the right to terminate the following contracts within 90 days: (1) any management contract, employment contract, or lease of recreational or parking areas or facilities; (2) any lease or contract entered into between an association and the declarant; and (3) any contract that is not bona fide or was unconscionable when made.<sup>362</sup> The authority to terminate contracts, however, does not extend to the termination of any lease that would result in a termination of the development or reduce its size.<sup>363</sup> In nonresidential communities, the declaration can permit contracts with the declarant to continue after the declarant control has ended.<sup>364</sup>

In California, while these issues are not addressed in Davis-Stirling, they are addressed in the DRE Regulations which control the content of the initial governing documents and generally limit the duration of contracts with the association to a period of one year.<sup>365</sup> This section should be thoroughly considered before adoption. Permitting management and employment contracts to be terminated upon ninety days notice, following transition from developer control could make it difficult for the association to secure stable contractual relationships with managers and employers, particularly toward the end of the developer control period. On the other hand, the provision may prevent abuse by declarants. Such abuse occurred in Florida, where declarants made the association enter into ninety-nine year recreational leases that were detrimental to the association.

#### *4. Meetings of the Association*

UCIOA requires community associations to conduct at least one membership meeting per year and permits other special meetings to be called by the president, by a majority of the executive board, or by unit owners representing at least 20% of the voting power of the association, unless a smaller percentage is specified in the bylaws.<sup>366</sup> It also provides minimum requirements for the timing of notice of

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360. Cal. Civ. Code § 1365 (West 1982 & Supp. 1998).

361. Cal. Civ. Code § 1366 (West 1982 & Supp. 1998).

362. Unif. Common Interest Ownership Act § 3-105 (1994), 7 pt. 1 U.L.A. 583 (1997).

363. *Id.*

364. *Id.* § 1-207, at 513.

365. Cal. Code Regs. tit. 10, § 2792.21 (1997).

366. Unif. Common Interest Ownership Act § 3-108 (1994), 7 pt. 1 U.L.A. 587 (1997).

member meetings and requires that the notice include “the items on the agenda.”<sup>367</sup> The section does not specifically restrict action to the items identified on the agenda, although that limitation is implied.

Matters of internal governance of community associations in California are governed primarily by the Nonprofit Mutual Benefit Corporation Law.<sup>368</sup> For example, the California Corporations Code requires a regular meeting of the members to be held in any year in which directors are to be elected. It permits as few as 5% of the voting power of the members, as well as the president and board of directors, to call special meetings of the members.<sup>369</sup>

In spite of the reluctance of the original drafting task force to address matters of internal community association governance in the Davis-Stirling Act, in the years since the Act’s adoption in 1985, numerous provisions have been added to address matters that are either already covered in the California Corporations Code or which are customarily addressed in corporate bylaws. For example, section 1365(e) of the California Civil Code provides that notices of meetings must specify the matters the board intends to present for action by the members. Other authorized matters, however, may also be presented for action at the meeting.<sup>370</sup> That rule is similar to the rule found in section 7511(b) of the Corporations Code requiring notice of regular membership meetings.<sup>371</sup> One advantage of adopting a Uniform Law is that it would minimize the enactment of duplicative or inconsistent statutes.

*a. Quorums*

UCIOA presents quorum rules for both member and board meetings.<sup>372</sup> In the case of membership meetings, the minimum quorum permitted is 20% of the voting power, determined at the inception of the meeting, unless the bylaws provide otherwise.<sup>373</sup> For board meetings, the minimum quorum is the presence, at the inception of the meeting, of directors entitled to cast 50% of the votes on the board.<sup>374</sup>

In California, with the exception of votes on increases in assessments requiring member approval under Davis-Stirling,<sup>375</sup> the minimum quorum permitted for

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367. *Id.*

368. Cal. Corp. Code §§ 7110-8910 (West 1990 & Supp. 1998).

369. *Id.* § 7510(b), (e), at 236-37.

370. Cal. Civ. Code § 1365(e) (West 1982 & Supp. 1998).

371. *Id.*; Cal. Corp Code § 7511(b) (West 1990 & Supp. 1998); see generally Cal. Civ. Code §§ 1363, 1363.05 (West 1982 & Supp. 1998) for other Davis-Stirling provisions relating to the conduct of meetings.

372. Unif. Common Interest Ownership Act § 3-109 (1994), 7 pt. 1 U.L.A. 587 (1997).

373. *Id.*

374. *Id.*

375. For votes on assessment increases, section 1366(b) of the Civil Code establishes a minimum quorum for the vote at 50% of the owners of the association. Cal. Civ. Code §1366(b) (West 1982 & Supp. 1998).

members meetings is one-third of the voting power unless the governing documents provide otherwise.<sup>376</sup> In order to provide a measure of assurance that a very low quorum percentage will not be abused, the Corporations Code states that if the quorum for membership meetings is fixed at a percentage less than one-third of the members, and less than one-third of all members attend the meeting, action may be taken only on those matters that were identified in the notice of the meeting.<sup>377</sup>

In the case of director meetings, a majority of the number of directors authorized in the articles or bylaws constitutes a quorum of the board, unless otherwise provided in the articles or bylaws. The law does not permit a quorum that is less than 20% of the directors authorized, or less than two, whichever is larger.<sup>378</sup>

As to both member and director meetings, the California law parallels UCIOA in stating that if a person leaves a meeting after the quorum is established, the meeting may nevertheless continue.<sup>379</sup> For both board and member meetings, valid action requires approval by a majority of the members required to constitute the quorum.<sup>380</sup>

*b. Voting and Proxies*

There are a few significant differences between the way UCIOA and California law handle voting and proxies. UCIOA addresses three issues regarding membership voting: (1) the casting of votes allocated to units (separate interests) owned by more than one person; (2) proxy voting; and (3) the rights of persons leasing units to vote in lieu of the owner or owners.<sup>381</sup> The manner in which votes allocated to units (separate interests) owned by more than one person is similar in the two acts. The manner in which proxy voting and lessees' voting rights are treated, however, is different.

Section 3-110(a) of UCIOA is similar to the rule stated in section 7612 of the California Corporations Code. Both provide that when memberships are held in two or more names, the vote of any one of the co-members is binding upon all.<sup>382</sup> However, if more than one co-member seeks to exercise the voting rights of the membership, the vote of a majority of the co-members binds all.<sup>383</sup>

Some of the rules in UCIOA regarding proxies are similar to California law; others are more restrictive. Section 7613 of the Corporations Code and section 3-

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376. Cal. Corp. Code § 7512(a) (West 1984 & Supp. 1998).

377. *Id.* § 7512(b), at 240.

378. *Id.* § 7211(a)(7), at 197.

379. See *Id.* §§ 7211(a)(8), at 197, 7512(c), at 240.

380. *Id.*

381. Unif. Common Interest Ownership Act § 3-110 (1994), 7 pt. 1 U.L.A. 588 (1997).

382. *Id.* § 3-110(a), at 588; Cal. Corp. Code § 7612 (West 1984 & Supp. 1998).

383. Supplementing this rule in the California statute is section 7517 of the Corporations Code which authorizes a person or persons counting ballots to accept a ballot signed by one of several co-members. Cal. Corp. Code § 7517(b) (West 1990 & Supp. 1998).

110(b) of UCIOA both authorize voting by proxy.<sup>384</sup> UCIOA provides that once a proxy has been issued, the owner of the unit to which the vote is appurtenant may only revoke the proxy by actual notice of revocation to the person presiding over the meeting.<sup>385</sup> In California, the owner who issued the proxy may revoke it by attending the meeting.<sup>386</sup> Under UCIOA, proxies terminate one year following their date of issuance, unless the proxy specifies a shorter term.<sup>387</sup> In California, if the proxy is not coupled with an interest, it is valid for eleven months from the date of issuance, unless a shorter term is stated.<sup>388</sup>

Under California law, association bylaws may restrict, or eliminate, the use of proxies all together.<sup>389</sup> Because California law permits action to be taken by written ballot, without a meeting,<sup>390</sup> (except in director election with cumulative voting) some California community associations have eliminated proxy voting all together in favor of voting provisions that require all owners to cast votes personally, either by attending a meeting or executing and returning a written ballot to the association.<sup>391</sup> UCIOA does not deal with proxy voting, presumably because this topic is generally covered by corporate law.

UCIOA and California practitioners deal with the issue of lessee voting differently. UCIOA permits a declaration to provide that certain specified matters must be voted on by lessees, rather than unit owners, as long as the unit owners also are given notice of any meeting at which the owner's lessee is entitled to vote.<sup>392</sup> Generally, governing documents in California provide for voting solely by owners of the separate interests. In some declarations, however, particularly those pertaining to properties in resort areas, where units are often leased, provisions are made for voting by long-term lessees on certain specified matters. The absence of lessee voting provisions in California is no doubt attributable both to the fact that the issue is a relatively new one, and to the fact that unit owners are extremely reluctant to provide lessees with any voice or authority with respect to important matters such as collection of assessments, discipline, or maintenance of common area.

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384. Cal. Corp. Code § 7613 (West 1990 & Supp. 1998); Unif. Common Interest Ownership Act §3-110 (1994), 7 pt. 1 U.L.A. 588 (1997).

385. Unif. Common Interest Ownership Act §3-110(b) (1994), 7 pt. 1 U.L.A. 588 (1997).

386. Cal. Corp. Code § 7613 (West 1990 & Supp. 1998). This section provides that the proxy is also terminated if the person issuing it dies and the corporation before the vote is counted, receives written notice of such death or incapacity. *Id.* § 7613(c).

387. Unif. Common Interest Ownership Act § 3-110(b) (1994), 7 pt. 1 U.L.A. 588 (1997).

388. Cal. Corp. Code § 7613 (West 1990 & Supp. 1998).

389. *Id.*

390. *Id.*

391. It should be noted that UCIOA does not prohibit voting by written ballot.

392. Unif. Common Interest Ownership Act § 3-110(c) (1994), 7 pt. 1 U.L.A. 588 (1997).

As discussed above, UCIOA gives the association significant power over tenants. This power is balanced by giving tenants more rights.<sup>393</sup> It would be interesting to know if there are fewer lessee problems in states that have adopted 1994 amendments to UCIOA.

## VI. LIABILITY

### A. Declarant Liability

#### 1. Breach of Fiduciary Duty

UCIOA clearly states that non declarant board members shall exercise the degree of care required by a director of a corporation. The declarant-appointed board members, however, “shall exercise the degree of care and loyalty required of a trustee.”<sup>394</sup> The comments to section 3-103 further state that UCIOA intentionally holds the declarant appointed board members to a higher standard of care.<sup>395</sup>

Section 7231 of the California Corporations Code does not distinguish between declarant appointed directors and officers and other directors and officers.<sup>396</sup> Neither is held to the standard of a trustee. Instead, section 7231 of the California Corporations Code requires all directors to exercise ordinary care. This includes acting in good faith, in a manner the director believes to be in the best interests of the corporation, and acting with the care of an ordinarily prudent person.<sup>397</sup>

Case law has supplemented the statutory law. In *Raven’s Cove Townhomes, Inc. v. Knappe Development Co.*,<sup>398</sup> the court reiterated that directors “may not make decisions for the association that benefit their own interests at the expense of the association and its members.”<sup>399</sup> In addition, the court implied that stricter standards apply while the declarant controls the project and “closer judicial scrutiny may be felt appropriate.”<sup>400</sup> Thus, while the Corporations Code does not hold the declarant appointed directors to a higher standard of care, case law may. This potential conflict should be clarified by statute.

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393. See *supra* Part V.A(4)(b).

394. Unif. Common Interest Ownership Act § 3-103(a) (1994), 7 pt. 1 U.L.A. 575 (1997).

395. *Id.* cmt. 6, at 577.

396. Cal. Corp. Code §7231 (West 1984 & Supp. 1998).

397. Cal. Corp. Code § 7231(b) (West 1984 & Supp. 1998). Section 7233 of the California Corporations Code is also relevant in that it permits the board of directors to approve transactions in which a director has a financial interest, but only if the transaction is just and reasonable to the corporation. *Id.* § 7233.

398. 171 Cal. Rptr. 334 (Ct. App. 1981).

399. *Id.* at 343.

400. *Id.*

## 2. Construction Defect

A thorough discussion of liability for construction defects is beyond the scope of this article.<sup>401</sup> Furthermore, this topic has been under review by the Lockyer Task Force for the past couple of years. It is unlikely that the task force or the legislature will propose that the provisions in UCIOA dealing with breach of warranty should replace California law. A short discussion of the difference between the two Acts, however, will demonstrate some differences.

UCIOA holds the declarant liable for both express and implied warranties.<sup>402</sup> A declarant impliedly warrants that a unit will be suitable for its intended purposes, is free from defective materials, and is constructed in accordance with the law and sound construction principles.<sup>403</sup> A successor of the declarant, assuming the successor is not an affiliate, is not liable for the misrepresentations of a previous declarant, warranty obligation on improvements made by a previous declaration, or any breach of fiduciary obligation by a previous declarant.<sup>404</sup>

Under California law, developers may be sued under the theories of implied warranty and strict liability. Strict liability covers the same types of conditions as implied warranties: defective materials, construction not in accordance with the law or sound construction principles. In some situations, however, an implied warranty theory may be the better theory. For example, if a plaintiff can not establish a defective condition, but can prove the lack of habitability or fitness for a particular purpose, an implied warranty theory is preferable. In other situations, strict liability may be a better option for a plaintiff. For example, when the plaintiff is a successive purchaser, he or she will probably not be able to recover under an implied warranty theory,<sup>405</sup> but may recover under a strict liability theory.<sup>406</sup>

With a noticeable absence of hard data to support the contentions of the debating parties, this area of law is currently hotly debated. The main issue--the extent to which developers, subcontractors and those involved in the construction process should be liable--is difficult to resolve. Thus, the legislature has enacted statutes that nibble around the edges of the problem. These statutes, such as section 1375 of the California Civil Code, which provides numerous requirements for pursuing construction defect litigation, often raise more problems

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401. See James Acret, *California Construction Law Manual* (5th ed. 1997 & Supp. 1998); Thomas E. Miller, *California Construction Defect Litigation* (1993 & Supp. 1997); see also, Curtis Sproul & Katharine Rosenberry, *Advising California Condominium and Homeowner Associations* ch. 11 (Continuing Educ. of the Bar eds., 1994 & Supp. 1997).

402. *Unif. Common Interest Ownership Act* §§ 4-113, 4-114 (1994), 7 pt. 1 U.L.A. 548-62 (1997).

403. *Id.* § 4-114, at 632; see also *Id.* § 4-113, at 630-31; *Id.* § 4-115, at 634; and *Id.* § 4-116, at 635-36.

404. *Id.* § 4-114 cmt. 8, at 633-34.

405. See *E. Hilton Drive Homeowners' Ass'n. v. W. Real Estate Exch., Inc.*, 186 Cal. Rptr. 267, 268 (Ct. App. 1982).

406. See Thomas E. Miller, *California Construction Defect Litigation* ch. 4 (1993 & Supp. 1997).

than they solve.<sup>407</sup> The legislature needs to enact comprehensive, easy to understand legislation in this area.

The statute of limitations for breach of warranty under UCIOA is six years, with some exceptions. The parties may agree, however, to reduce the statute of limitations to two years.<sup>408</sup> Under California law, the maximum statute of limitations for patent defects is four years.<sup>409</sup> For latent defects it is ten years. Shorter statutes may apply when the association was aware, or reasonably should have been aware, of the defect.<sup>410</sup> Thus, UCIOA provides the consumer greater protection in some respects, in others less.

### **B. Director and Officer Liability**

UCIOA provides that board members, not appointed by the declarant, must exercise the degree of care and loyalty required by the directors and officers of a corporation pursuant to local law.<sup>411</sup> It does not provide for immunity for directors who perform their duties in good faith.

Davis-Stirling, on the other hand, provides that volunteer officers and directors who serve in exclusively residential developments, shall not be personally liable for actions while serving on the board of an exclusively residential development, if the following conditions are met: (1) the director or officer was acting within the scope of his or her association duties; (2) the act was performed in good faith and was not willful, wanton or grossly negligent; and (3) the association maintained at the time of the claim of injury general liability, and director and officer liability insurance coverage in the amount of at least \$500,000 if the development consists of 100 or fewer separate interests and \$1,000,000 if the developer consists of more than 100 separate interests.<sup>412</sup> Therefore, Davis-Stirling provides more protection for directors and officers than does UCIOA.

### **C. Owners' Liability**

UCIOA provides that, “[a] unit owner is not liable, solely by reason of being a unit owner for an injury or damages arising out of the condition or use of the common elements.”<sup>413</sup> It further provides that, “[a]n action alleging a wrong done by the association, including an action arising out of the condition or use of the common elements, may be maintained only against the association and not against any unit owner.”<sup>414</sup>

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407. See Curtis Sproul & Katharine Rosenberry, *Advising California Condominium and Homeowner Associations* § 11.13 (Continuing Educ. of the Bar eds., 1994 & Supp. 1998).

408. Unif. Common Interest Ownership Act § 4-116 (1994), 7 pt. 1 U.L.A. 588 (1997).

409. Cal. Civ. Proc. Code § 337.1 (West 1982 & Supp. 1998).

410. *Id.* § 337.15.

411. Unif. Common Interest Ownership Act § 3-103(a) (1994), 7 pt. 1 U.L.A. 575 (1997).

412. Cal. Civ. Code § 1365.7 (West 1982 & Supp. 1998).

413. Unif. Common Interest Ownership Act § 3-111(a) (1994), 7 pt. 1 U.L.A. 589 (1997).

414. *Id.* § 3-111(b), at 589.

Under UCIOA, only the declarant is liable for the declarant's torts in connection with any of the common interest community that the declarant is obligated to maintain.<sup>415</sup> Further, if an alleged wrong occurred while the declarant was in control, and the association gives the declarant notice of a suit arising from such wrong and an opportunity to defend, the declarant is liable to the association or any unit owner for all tort losses not covered by insurance. This includes the association's attorneys fees and costs of litigation.<sup>416</sup>

Under California common law, individuals owning property as tenants-in-common are jointly and severally liable for injuries occurring on the premises.<sup>417</sup> Accordingly, each owner can be liable for the entire judgment, not just his or her proportional share. Prior to the enactment section 1365.9 of the California Civil Code,<sup>418</sup> this law applied to common interest developments in which owners owned the common area.

In *Davert v. Larson*,<sup>419</sup> a motorist and passenger brought an action against an individual, who owned a 1/2500 undivided interest in a ranch and recreational community, for injuries sustained when a horse which escaped from the community collided with their car.<sup>420</sup> The court held that even though the association was obligated to maintain the recreational community, the owners who owned the community as tenants-in-common were liable for damages caused by negligent maintenance.<sup>421</sup> The court further held that an owner of only a 1/2500 interest in the community could be sued for the entire amount of damages.<sup>422</sup>

This holding was followed in *Ruoff v Harbor Creek Community Ass'n*<sup>423</sup>--a case in which an elderly guest of an owner fell down a flight of stairs in the common area of a condominium complex. The stairs were part of the common area, owned by the unit owners as tenants-in-common, and the association had the obligation to maintain the common area.<sup>424</sup> Although the association maintained insurance, the plaintiffs were concerned that the insurance was not sufficient to cover the injuries and, therefore, also sued the owners as

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415. *Id.* § 3-111(a), at 589.

416. *Id.*

417. *Ruoff v. Harbor Creek Community Ass'n*, 13 Cal. Rptr. 2d 755 (Ct. App. 1992).

418. Cal. Civ. Code § 1365.9 (West 1982 & Supp. 1998).

419. 209 Cal. Rptr. 445 (Ct. App. 1985).

420. *Id.* at 446.

421. *Id.* at 448.

422. *Id.* at 447.

423. 13 Cal. Rptr. 2d 755 (Ct. App. 1992).

424. *Id.* at 758

individuals.<sup>425</sup> Consistent with established common law, the court in Ruoff held that the owners could be held jointly and individually liable for the injuries.<sup>426</sup>

Attorneys responded to the Ruoff decision by recommending that those who owned common area as tenants-in-common, in condominiums and planned development, transfer all of the common area except a small portion to the association. In order to satisfy the statutory definition of condominium, it is necessary for some of the common area to be owned as tenants-in-common. Some developers, however, have created condominiums where the area held as tenants in common was only a small portion of airspace.

The legislature also responded to the problem by adding, and later amending, section 1365.9 of the California Civil Code. While patterned after UCIOA, this section specifies particular insurance requirements.<sup>427</sup> Section 1365.9 provides that:

Any cause of action in tort against any owner of a separate interest arising solely by reason of an ownership interest as a tenant in common in the common area of a common interest development shall be brought only against the association and not against the owners of the separate interests,<sup>428</sup> provided the association has in effect for the cause of action at least \$2,000,000 in general liability insurance coverage and the condominium consists of 100 or fewer separate interests and \$3,000,000 when it consists of more than 100 separate interests.

Section 1365.9 limits only the liability exposure of individual unit owners; it does not provide complete immunity from tort liability covered by the statute.<sup>429</sup> If a judgment exceeds the policy limits specified in the statute, the question of whether the association has an obligation to levy an assessment against each owner to pay for the uninsured loss it is still unanswered.

## VII. TOPICS NOT COVERED BY UCIOA

This article has discussed most of the major topics covered by UCIOA. If the legislature were to consider adopting UCIOA, it would have to consider the topics which are covered by Davis-Stirling, but not UCIOA, to determine if these should be included in a comprehensive act. For example, Davis-Stirling has an Open Meeting Act,<sup>430</sup> procedures for paying assessments under protest,<sup>431</sup>

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425. *Id.*

426. *Id.* at 760.

427. See discussion *supra* Part VI. While UCIOA has insurance requirements it does not specify particular amounts in connection with the liability of either the directors and officers or units owners.

428. Cal. Civ. Code § 1365.9 (West 1982 & Supp. 1998).

429. *Id.*

430. *Id.* § 1363.05.

431. *Id.* § 1366.3.

detailed procedures for disputing liability for construction defects<sup>432</sup> rules regarding access to telephone wiring,<sup>433</sup> and rules regarding funds received by managing agents.<sup>434</sup>

Several of the provisions that are covered in Davis-Stirling, and not UCIOA, are piecemeal legislation. A legislator introduced the bill to solve the problems identified by a single constituent or interest group, rather than to solve a widespread problem. Therefore, if the legislature considers adopting a version of UCIOA, it should carefully evaluate whether each of the provision in Davis-Stirling, not covered by UCIOA, is necessary.

## CONCLUSION

California community association law is in a constant state of flux. In some instances, it is extremely confusing. Thus, a significant problem exists for volunteer officer and directors, who are required to follow the law while managing common interest communities. It also presents problems for owners who can not determine what rights they have.

Adopting a version of UCIOA may provide a solution to this problem because the California legislature is less likely to amend a uniform act than it is to amend Davis-Stirling. Since 1987, the California version of the Uniform Commercial Code has only been amended twelve times, even though it contains 11,004 sections, whereas Davis-Stirling, with only twenty-seven sections, has been amended thirty-nine times.

In addition to stability, UCIOA may also provide benefits to developers and people who own interests in common interest developments. For example, if the legislature adopted UCIOA as part of Davis-Stirling, small projects would be exempt, and developers would have the ability to exempt commercial and industrial developments.

Also, in the appropriate circumstances, owners would have the ability to alter boundaries within their separate interests, between their separate interests, and between common area and exclusive use common areas. It would be clear that where appropriate, common areas could be sold with less than unanimous consent. The courts would know how to distribute proceeds in a foreclosure sale involving common area, eminent domain proceedings, and bankruptcy proceedings. Those buying from a declarant in a foreclosure sale would know precisely which of the declarants' rights they were purchasing.

It would be easier for boards of directors to manage associations. For example, associations would have the same power as landlords in taking action against tenants who violate covenants. In a foreclosure sale, the association could collect up to six months of delinquent assessments. Insurance requirements also would

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432. *Id.* § 1375.

433. *Id.* § 1364.

434. Cal. Civ. Code § 1363.2 (West 1982 & Supp. 1998).

be clearer. The association could decide whether to use arbitration and mediation prior to filing a lawsuit.

On the other hand, in some instances existing California law provides more benefits to developers and owners than does UCIOA. For example, under California law, developers have greater flexibility in annexing property to the initial development, and it is easier for owners to amend the governing documents.

Whether the provisions relating to liability are better under UCIOA, depends on one's frame of reference. On the one hand, developers are held to a higher fiduciary standard under UCIOA. On the other hand, however, the Act does not recognize strict liability for construction defects. Regardless of one's perspective UCIOA does provide one significant benefit. It is much easier to understand because it does not attempt to micro manage disputes.

In effect, because existing California law provides some benefits that UCIOA does not, UCIOA should not be adopted uncritically. On the other hand, existing California law relating to common interest developments is confusing, unnecessarily micro manages these developments, and contains provisions that make the operation of these developments more expensive than necessary. Further, the law constantly changes. These problems force owners to incur unnecessary expenses in hiring lawyers to interpret the constantly changing law. Adopting a modified version of UCIOA should help solve these problems. Thus, the legislature should conduct a comprehensive review of the law in this field and enact comprehensive legislation that does not constantly change.

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