Article 3. Management of Condominium (Recodification Draft #1)

	Hawaii Condominium Law Recodification Draft #1 [Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]	Hawaii's Present Condominium Law Chapter 514A, Hawaii Revised Statutes (HRS) *(Compare with Proposed Recodified Condominium Law in left-hand column)*
		Condominium Recodification Attorney's Prefatory Note to Article 3 "Every [unit owners' association] has three functions – to serve as a business, a governance structure, and a community." *~ Community Associations Factbook (1999)* As explained in the *Community Associations Factbook (1999)*, the business, governance, and community functions of community associations (including associations of apartment owners/unit owners' associations) have evolved over time. Early in the history of community associations, "business" meant "austerity", "governance" meant "compliance", and "community" meant "conformity". As the movement matured, "business" has come to mean "prudence", "governance" has come to mean "justice", and "community" has come to mean "harmony". "Community/harmony" is obviously not something we can mandate by State law. Just as obviously, State law can help (or hinder) associations in their "business" and "governance" functions. We will keep these functions and principles in mind as we work on the provisions for management of condominiums. The philosophy guiding Recodification Article 3 continues to be **minimal government involvement** and **self-governance** by the condominium community. Essentially, this means that we must ensure that the condominium community (both owners and management) has the tools with which to govern itself. [Note: This does not mean that every problem and contingency should be addressed in State law (as happened too often in the past, resulting in our current need to recodify our condominium law). Addressing problems in State law is appropriate in some areas; others may more appropriately be handled in condominium governing documents or other private mechanisms.]
	TABLE OF CONTENTS **ARTICLE 3. MANAGEMENT OF CONDOMINIUM** 	**Condominium Recodification Attorney's Comment** The provisions of HRS Chapter 514A below are meant to be used for comparison with the provisions of Hawaii Condominium Law Recodification Draft #1. If you do not see a comparable recodification provision immediately to the left of the HRS provision, that means that we have chosen not to incorporate the HRS provision in our new law. [Note: Much work remains to be done integrating appropriate condominium management provisions of HRS Chapter 514A (and many good suggestions for improvement that we have received from various interested parties) into the recodification. Draft #1 provides a starting point and framework from which to work on specific problems and to continue our discussions.]

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	§ 3-113. Insurance § 3-114. Surplus Funds § 3-115. Assessments for Common Expenses § 3-115.1. Same; Budgets and Reserves § 3-116. Lien for Assessments § 3-117. Other Liens Affecting the Condominium § 3-118. Association Records § 3-119. Association as Trustee	
	ARTICLE 3. MANAGEMENT OF CONDOMINIUM	**PART V. CONDOMINIUM MANAGEMENT**
	§ 3-101. Organization of Unit Owners' Association. A unit owners' association must be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners or, following termination of the condominium, of all former unit owners entitled to distributions of proceeds under Section 2-118, or their heirs, successors, or assigns. The association shall be organized as a profit or nonprofit corporation or as an unincorporated association.	[*See*, §514A-82(a)(11) below, which reads: "The first meeting of the association of apartment owners shall be held not later than one hundred eighty days after recordation of the first apartment conveyance; provided forty per cent or more of the project has been sold and recorded. If forty per cent of the project is not sold and recorded at the end of one year, an annual meeting shall be called; provided ten per cent of the apartment owners so request;"]
	UCA (1980) Comment [UCIOA (1994) Comment essentially same] 1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium even during a period of declarant control reserved pursuant to Section 3-103(d). 2. The bracketed language preserves the flexibility existing under the vast majority of present condominium statutes to organize the association as a profit or non-profit corporation or as an unincorporated association. Although at least one state (Georgia) requires the organization of the association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.	
	§ 3-102. Powers of Unit Owners' Association.	
	(a) Except as provided in subsection (b), and subject to the provisions of the declaration and section 3-102.1, the association, even if unincorporated, may:	
	(1) adopt and amend bylaws and rules and regulations;	[Note: HRS §514A-82.2 (Restatement of declaration and bylaws) is incorporated in Recodification §2-117.1.]
	(2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;	
	(3) hire and discharge managing agents and other employees, agents, and independent contractors;	
	(4) institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or 2 or more unit owners on matters affecting the condominium;	**§514A-93 Actions.** Without limiting the rights of any apartment owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors on behalf of two or more of the apartment owners, as their

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		respective interests may appear, with respect to any cause of action relating to the common elements or more than one apartment. Service of process on two or more apartment owners in any action relating to the common elements or more than one apartment may be made on the person designated in the declaration to receive service of process. [*See also*, §514A-94 "Attorneys' fees, delinquent assessments, and expenses of enforcement" below.]
	(5) make contracts and incur liabilities;	**§514A-82.3 Borrowing of money.** Subject to any approval requirements and spending limits contained in the declaration or bylaws of the association of apartment owners, the board of directors may authorize the borrowing of money to be used by the association for the repair, replacement, maintenance, operation, or administration of the common elements of the project, or the making of any additions, alterations, and improvements thereto. The cost of such borrowing, including, without limitation, all principal, interest, commitment fees, and other expenses payable with respect to such borrowing, shall be a common expense of the project; provided that owners representing fifty per cent of the common interest and apartments give written consent to such borrowing, having been first notified of the purpose and use of the funds.
	(6) regulate the use, maintenance, repair, replacement, and modification of common elements;	
	(7) cause additional improvements to be made as a part of the common elements;	
	(8) acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to Section 3-112;	
	(9) grant easements, leases, licenses, and concessions through or over the common elements;	
	(10) impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in Section 2-102(2) and (4), and for services provided to unit owners;	
	(11) impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules, and regulations of the association;	Move to new "Limitations" section? It should not be necessary to include a provision such as this in State law. **[§514A-15.1] Common expenses; prior late charges.** No association of apartment owners shall deduct and apply portions of common expense payments received from an apartment owner to unpaid late fees (other than amounts remitted by an apartment owner in payment of late fees) unless it delivers or mails a written notice to such apartment owner, at least seven days prior to the first such deduction, which states that: (1) Failure to pay late fees will result in the deduction of late fees from future common expense payments, so long as a delinquency continues to exist. (2) Late fees shall be imposed against any future common expense payment

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		which is less than the full amount owed due to the deduction of unpaid late fees from such payment.
	(12) impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments;	
	(13) provide for the indemnification of its officers and executive board and maintain directors' and officers' liability insurance;	[*See*, §514A-86(b) below, which reads: "The association of apartment owners may purchase and maintain directors' and officers' liability insurance with minimum coverage in such amount as shall be determined by the board of directors. Premiums shall be common expenses."]
	(14) assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;	
	(15) exercise any other powers conferred by the declaration or bylaws;	
	(16) exercise all other powers that may be exercised in this State by legal entities of the same type as the association;	
	(17) exercise any other powers necessary and proper for the governance and operation of the association; and	
	(18) by regulation, subject to section 3-102.2, require that disputes between the executive board and unit owners or between two or more unit owners regarding the condominium must be submitted to nonbinding alternative dispute resolution in the manner described in the regulation as a prerequisite to commencement of a judicial proceeding.	[*See*, Part VII "Arbitration" below. We do not recommend incorporating arbitration provisions of HRS Chapter 514A. It is impractical and expensive in most cases. We need to adopt a simple, inexpensive (or at least cost-effective) means for the condominium community to settle disputes.]
	(b) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.	Move to new "Limitations" section?
	(c) Unless otherwise permitted by the declaration or this chapter, an association may adopt rules and regulations that affect the use of or behavior in units that may be used for residential purposes only to: (1) prevent any use of a unit which violates the declaration; (2) regulate any behavior in or occupancy of a unit which violates the declaration or ~~[adversely affects]~~ unreasonably interferes with the use and enjoyment of other units or the common elements by other unit owners; or (3) restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders who regularly lend money secured by first mortgages on units in common interest communities or regularly purchase those mortgages. Otherwise, the association may not regulate any use of or behavior in units.	[*See*, §514A-82(a)(10) below, which reads: (The bylaws shall provide for at least the following) "The restrictions on and requirements respecting the use and maintenance of the apartments and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective apartments and of the common elements by the several apartment owners."] [*See*, §514A-88 below, which reads: "Each apartment owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the declaration. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or, in a proper case, by an aggrieved apartment owner."]
	(d) If a tenant of a unit owner violates the declaration, bylaws, or rules and	

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	regulations of the association, in addition to exercising any of its powers against the unit owner, the association may: (1) exercise directly against the tenant the powers described in subsection (a)(11); (2) after giving notice to the tenant and the unit owner and an opportunity to be heard, levy reasonable fines against the tenant for the violation; and (3) enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease or which the association could lawfully have exercised directly against the unit owner, or both.	
	(f) Unless a lease otherwise provides, this section does not: (1) affect rights that the unit owner has to enforce the lease or that the association has under other law; or (2) permit the association to enforce a lease to which it is not a party in the absence of a violation of the declaration, bylaws, or rules and regulations.	
	UCA (1980) Comment 1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed. 2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-106. 3. Many state condominium statutes give the association the power to sue and be sued in its own name. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that the association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name. 4. Paragraph (8) refers to the power granted by Section 3-112 to sell or encumber common elements without a termination of the condominium upon a vote of the requisite number of unit owners. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners. 5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. These powers are intended to be in addition to any rights which the association may have under	**Condominium Recodification Attorney's Comment** 1.

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	other law. 6. Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration – for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem. 7. If the association is incorporated, it may, pursuant to paragraph (16), exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (16), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-108. **UCIOA (1994) Comment (relevant portions)** 8. The 1994 amendment to this section provides important new statutory authority to an association, but also states limits on the association's power. 9. New subsections (d), (e), and (f) enable the association to enforce directly against a tenant or other occupant of a leased unit all the powers which either the statutes or the project documents provide against that person. The section also provides the association all the powers the owner itself would have under the lease against the tenant, so long as the violation of the lease also violates the project documents. Finally, subsection (d) permits the association, landlord, and tenant to contract in the lease itself for powers beyond those granted by the statute. 10. New subsection (a)(18) permits the association to impose mandatory nonbinding arbitration or other non-judicial procedures to resolve disputes in the development before litigation commences. The drafters believe that non-judicial dispute resolution should be available to parties as an economical and efficient form of alternative dispute resolution. 11. Subsection (c) imposes clear limits on the association's power to control the use, occupancy, and leasing of units in residential projects. Basically, these amendments adopt the policy that unless the declaration otherwise provides, "use" restrictions must appear in the declaration in order to be enforceable by the association, and the association's regulatory power over "occupancy" activities is limited to those situations in which a unit owner's activities inside a unit affect other owners.	
		[§514A-82.1] Employees of condominiums; background check. The board of directors of an association of apartment owners or the manager of a condominium project, upon the written authorization of an applicant for employment as security guard or manager or for a position which would allow the employee access to the keys of or entry into the units in the condominium project or access to association funds, may conduct a background check on the applicant or direct another responsible party to conduct the check. Before initiating or requesting a check, the

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		board of directors or the manager shall first certify that the signature on the authorization is authentic and that the person is an applicant for such employment. The background check, at a minimum, shall require the applicant to disclose whether the applicant has been convicted in any jurisdiction of a crime which would tend to indicate that the applicant may be unsuited for employment as a condominium employee with access to association funds or the keys of or entry into the units in the condominium project, and the judgment of conviction has not been vacated. For the purpose of this section, the criminal history disclosure made by the applicant may be verified by the board of directors, manager, or other responsible party, if so directed by the board or the manager, by means of information obtained through the Hawaii criminal justice data center. Failure of an association of apartment owners or the manager to conduct or verify or cause to have conducted or verified a background check shall not alone give rise to any private cause of action against an association or manager for acts and omissions of the employee hired.
		[*See also*, §514A-95 "Managing Agents" below]
		[§514A-93.5] Disposition of unclaimed possessions. (a) When personalty in or on the common elements of a project has been abandoned, the board of directors may sell the personalty in a commercially reasonable manner, store such personalty at the expense of its owner, donate such personalty to a charitable organization, or otherwise dispose of such personalty in its sole discretion; provided that no such sale, storage, or donation shall occur until sixty days after the board complies with the following: (1) The board notifies the owner in writing of: (A) The identity and location of the personalty, and (B) The board of directors' intent to so sell, store, donate, or dispose of the personalty. Notification shall be by certified mail, return receipt requested to the owner's address as shown by the records of the association or to an address designated by the owner for the purpose of notification or, if neither of these is available, to the owner's last known address, if any; or (2) If the identity or address of the owner is unknown, the board of directors shall first advertise the sale, donation, or disposition at least once in a daily paper of general circulation within the circuit in which the personalty is located. (b) The proceeds of any sale or disposition of personalty under subsection (a) shall, after deduction of any accrued costs of mailing, advertising, storage, and sale, be held for the owner for thirty days. Any proceeds not claimed within this period shall become the property of the association of apartment owners.
		§514A-94 Attorneys' fees, delinquent assessments, and expenses of enforcement. (a) All costs and expenses, including reasonable attorneys' fees, incurred by or on behalf of the association for:

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		(1) Collecting any delinquent assessments against any owner's apartment; (2) Foreclosing any lien thereon; or (3) Enforcing any provision of the declaration, bylaws, house rules, and the Condominium Property Act; or the rules of the real estate commission; against an owner, occupant, tenant, employee of an owner, or any other person who may in any manner use the property shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association. (b) If any claim by an owner is substantiated in any action against an association, any of its officers or directors, or its board of directors to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an owner shall be awarded to such owner; provided that no such award shall be made in any derivative action unless: (1) The owner first shall have demanded and allowed reasonable time for the board of directors to pursue such enforcement; or (2) The owner demonstrates to the satisfaction of the court that a demand for enforcement made to the board of directors would have been fruitless. If any claim by an owner is not substantiated in any court action against an association, any of its officers or directors, or its board of directors to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an association shall be awarded to the association, unless the action was filed in small claims court or prior to filing the action in a higher court the owner has first submitted the claim to mediation, or to arbitration under part VII of this chapter, and made a good faith effort to resolve the dispute under any of those procedures. (c) Anyone contracted by the association of apartment owners to collect delinquent assessments against any owner's apartment shall not share in any portion of any penalties or late charges collected.
		Condominium Recodification Attorney's Comment 1. If it is incorporated, HRS §514A-94 should be clarified. According to DCCA condominium specialists, there have been numerous incidents where associations have appeared to improperly pass on legal fees to unit owners.
	§ 3-102.1. Limitations on Powers of Unit Owners' Association	
	[For discussion. *See*, Condominium Recodification Attorney's Comment to this section.]	**[§514A-82.5] Pets in apartments.** (a) Whenever the bylaws do not forbid apartment owners from keeping animals as pets in their apartments, the bylaws shall not forbid the tenants of the apartment owners from keeping pets in the

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		apartments rented or leased from the owners; provided that: (1) The apartment owner agrees in writing to allow the apartment owner's tenant to keep a pet in the apartment; (2) The tenants may keep only those types of pets which may be kept by apartment owners; (3) The bylaws may allow each owner or tenant to keep only one pet in the apartment; (4) The animals shall not include those described as pests under section 150A-2, or animals prohibited from importation under section 141-2, 150A-5, or 150A-6; (5) The bylaws may include reasonable restrictions or prohibitions against excessive noise or other problems caused by pets on the property; and (6) The bylaws may reasonably restrict or prohibit the running of pets at large in the common areas of the property. (b) Any amendments to the bylaws pertaining to pet restrictions or prohibitions which exempt circumstances existing prior to the adoption of the amendments shall apply equally to apartment owners and tenants.
		[§514A-82.6] Pets, replacement of subsequent to prohibition. (a) Any apartment owner who keeps a pet in the owner's apartment pursuant to a provision in the bylaws which allows owners to keep pets or in the absence of any provision in the bylaws to the contrary may, upon the death of the animal, replace the animal with another and continue to do so for as long as the owner continues to reside in the owner's apartment or another apartment subject to the same bylaws. (b) Any apartment owner who is keeping a pet pursuant to subsection (a) as of the effective date of an amendment to the bylaws which prohibits owners from keeping pets in their apartments shall not be subject to the prohibition but shall be entitled to keep the pet and acquire new pets as provided in subsection (a).
		Condominium Recodification Attorney's Comment Professor Susan F. French, Reporter for the *Restatement, Third, of Property (Servitudes)*, has proposed that common interest community developers include a "Homeowner's Bill of Rights" in the governing documents for their projects. (*See*, "The Constitution of a Private Residential Government Should Include a Bill of Rights," 27 *Wake Forest L. Rev.* 331 (1992).) As a starting point for discussion, we should consider Professor French's Proposed Provisions for a Homeowner's Bill of Rights. (We should also keep in mind that there are practical problems inherent in some of Professor French's provisions depending on circumstances.) More broadly, we need to consider what limitations are appropriate for general application in State law, and what limitations are more appropriately addressed in individual condominium governing documents.
	§ 3-102.2. Alternative Dispute Resolution.	**[PART VII. ARBITRATION; MEDIATION]**
	[Idea placeholder. We need to adopt a simple, inexpensive (or at least cost-effective) means for the condominium community to settle disputes. We do not	**[§514A-121.5] Mediation.** If an apartment owner or the board of directors requests mediation of a dispute involving the interpretation or enforcement of the association

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	recommend incorporating the arbitration provisions of HRS Chapter 514A. It is impractical and expensive in most cases.] If a unit owner or the executive board requests mediation of a dispute involving the interpretation or enforcement of the unit owners' association declaration, bylaws, or house rules, or involving this chapter, the other party in the dispute shall be required to participate in mediation. If an owner or the board refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorney's fees.	of apartment owners' declaration, bylaws, or house rules, or involving section 514A-82(b)(1) to (13), 514A-82.1, 514A-82.15, 514A-82.3, 514A-82.5, 514A-82.6, 514A-83, 514A-83.1, 514A-83.2, 514A-83.3, 514A-83.4, 514A-83.5, 514A-84, or 514A-84.5, the other party in the dispute shall be required to participate in mediation. If an owner or the board refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorney's fees in accordance with section 514A-94.
		§514A-121 Arbitration of disputes. (a) At the request of any party, any dispute concerning or involving one or more apartment owners and an association of apartment owners, its board of directors, managing agent, or one or more other apartment owners relating to the interpretation, application or enforcement of chapter 514A or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and the provisions of chapter 658; provided that the Condominium Property Regime Rules on Arbitration of Disputes of the American Arbitration Association shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658, chapter 658 shall prevail; provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect.
		(b) Nothing in subsection (a) shall be interpreted to mandate the arbitration of any dispute involving: (1) The real estate commission; (2) The mortgagee of a mortgage of record; (3) The developer, general contractor, subcontractors, or design professionals for the project; provided that when any person exempted by this paragraph is also an apartment owner, a director, or managing agent, such person shall, in those capacities, be subject to the provisions of subsection (a); (4) Actions seeking equitable relief involving threatened property damage or the health or safety of apartment owners or any other person; (5) Actions to collect assessments which are liens or subject to foreclosure; provided that an apartment owner who pays the full amount of an assessment and fulfills the requirements of section 514A-90(d) shall have the right to demand arbitration of the owner's dispute, including a dispute about the amount and validity of the assessment; (6) Personal injury claims; (7) Actions for amounts in excess of $2,500 against an association of apartment owners, a board of directors, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association of apartment owners or its board of directors would be unavailable because action by arbitration was

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		pursued; or (8) Any other cases which are determined, as provided in section 514A-122, to be unsuitable for disposition by arbitration.
		[§514A-122] Determination of unsuitability. At any time within twenty days of being served with a written demand for arbitration, any party so served may apply to the circuit court in the judicial circuit in which the condominium is located for a determination that the subject matter of the dispute is unsuitable for disposition by arbitration. In determining whether the subject matter of a dispute is unsuitable for disposition by arbitration, a court may consider: (1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute; (2) Problems referred to the court where court regulated discovery is necessary; (3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to chapter 514A; (4) The fact that the matter to be arbitrated is only part of a dispute involving other parties or issues which are not subject to arbitration under section 514A-121; (5) Any matters of dispute where disposition by arbitration, in the absence of complete judicial review, would not afford substantial justice to one or more of the parties. Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed $200.
		[§514A-123] Determination of insurance coverage. In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under section 514A-121(b)(7), any party to an arbitration may file a complaint for declaratory relief against the involved insurer or insurers for a determination of whether insurance coverage is unavailable due to the pursuit of action by arbitration. The complaint shall be filed with the circuit court in the judicial circuit in which the condominium is located. The insurer or insurers shall file an answer to the complaint within twenty days of the date of service of the complaint and the issue shall be disposed of by the circuit court at a hearing to be held at the earliest available date; provided that the hearing shall not be held within twenty days from the date of service of the complaint upon the insurer or insurers.
		[§514A-124] Costs, expenses and legal fees. Notwithstanding any provision in this chapter to the contrary, the declaration or the bylaws, the award of any costs, expenses, and legal fees by the arbitrator shall be in the sole discretion of the arbitrator and the determination of costs, expenses and legal fees shall be binding upon all parties.
		§514A-125 Award; confirming award. *[Section effective until June 30, 2002. For section effective July 1, 2002, see below.]* The award of the arbitrator shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and shall be served by the arbitrator on each of the parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court of the judicial circuit in which the condominium is located for an order confirming the award. The court shall grant the order confirming the award, unless the award is vacated, modified, or corrected, as provided in sections 658-9 and 658-10, or a trial de novo is demanded under section 514A-127, or the award is successfully appealed under section 514A-127. The record shall be filed with the motion to confirm award as provided for in section 658-13, and notice of the motion shall be served upon each other

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		party or their respective attorneys in the manner required for service of notice of a motion.
		§514A-125 Award; confirming award. *[Section effective July 1, 2002. For present provision, see above.]* The award of the arbitrator shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and shall be served by the arbitrator on each of the parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court of the judicial circuit in which the condominium is located for an order confirming the award. The court shall grant the order confirming the award pursuant to section 658A-22, unless the award is vacated, modified, or corrected, as provided in sections 658A-20, 658A-23, and 658A-24, or a trial de novo is demanded under section 514A-127, or the award is successfully appealed under section 514A-127. The record shall be filed with the motion to confirm award, and notice of the motion shall be served upon each other party or their respective attorneys in the manner required for service of notice of a motion.
		[§514A-126] Findings of fact and conclusions of law. Findings of fact and conclusions of law, as requested by any party prior to the arbitration hearing, shall be promptly provided to the requesting party upon payment of the reasonable cost thereof.
		[§514A-127] Trial de novo and appeal. (a) The submission of any dispute to an arbitration under section 514A-121 shall in no way limit or abridge the right of any party to a trial de novo. (b) Written demand for a trial de novo by any party desiring a trial de novo shall be made upon the other parties within ten days after service of the arbitration award upon all parties. (c) The award of arbitration shall not be made known to the trier of fact at a trial de novo. (d) In any trial de novo demanded under subsection (b), if the party demanding a trial de novo does not prevail at trial, the party demanding the trial de novo shall be charged with all reasonable costs, expenses, and attorneys' fees of the trial. When there is more than one party on one or both sides of an action, or more than one issue in dispute, the court shall allocate its award of costs, expenses and attorneys' fees among the prevailing parties and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity. (e) Any party to an arbitration under section 514A-121 may apply to vacate, modify, or correct the arbitration award for the grounds set out in chapter 658. All reasonable costs, expenses, and attorneys' fees on appeal shall be charged to the nonprevailing party.
		Condominium Recodification Attorney's Comment As previously mentioned, the current HRS Chapter 514A provision for arbitration of condominium disputes does not provide for a simple and inexpensive (or at least cost-effective) way to resolve such disputes. We need to start from scratch and adopt something that does. Finding an alternative dispute resolution mechanism that works for common interest communities is one of the initial priorities of the California Law Revision Commission's research into improving their common interest community law (the Davis-Stirling Act). We can build on their work. "Condo courts" and various government intervention mechanisms have been suggested. At this point, we are not considering or researching proposals that grow the size of government.

Article 3. Management of Condominium (Recodification Draft #1)

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		[Question: Is anyone in favor of keeping the current HRS Chapter 514A arbitration provisions?]
	§ 3-103. Executive Board Members and Officers.	
	(a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the executive board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the executive board appointed by the declarant shall exercise the degree of care and loyalty required of a trustee. Officers and members of the executive board not appointed by the declarant shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 415B [and successor non-profit corporation laws].	**[§514A-82.4] Duty of directors.** Each director shall owe the association of apartment owners a fiduciary duty in the performance of the director's responsibilities.
	(b) The executive board may not act on behalf of the association to amend the declaration (Section 2-117), to terminate the condominium (Section 2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (Section 3-103(f)), but the executive board may fill vacancies in its membership for the unexpired portion of any term.	
	(c) Within [30] days after adoption of any proposed budget for the condominium, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. Unless at that meeting a majority of all unit owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners must be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.	
	(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, [~~and except as provided in Section 2-123(g) (Master Planned Communities),~~] a period of declarant control terminates no later than the earlier of: (i) [60] days after conveyance of [75] percent of the units that may be created to unit owners other than a declarant; (ii) [2] years after all declarants have ceased to offer units for sale in the ordinary course of business; (iii) [2] years after any right to add new units was last exercised; or (iv) the day the declarant, after giving written notice to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event the declarant may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they	

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	become effective.	
	(e) Not later than [60] days after conveyance of [25] percent of the units that may be created to unit owners other than a declarant, at least one member and not less than [25] percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than [60] days after conveyance of [50] percent of the units that may be created to unit owners other than a declarant, not less than [33-1/3] percent of the members of the executive board must be elected by unit owners other than the declarant.	
	(f) Except as otherwise provided in Section 2-120(e), not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom must be unit owners. The executive board shall elect the officers. The executive board members and officers shall take office upon election.	
	(g) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant.	
	UCA (1980) Comment [with edits from UCIOA (1994)] 1. Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries *["trustees" in UCIOA (1994)]* of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant. *[Deleted in UCIOA (1994)]* Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board. 2. The provisions of paragraph (c) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect. 3. Subsection (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a condominium project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity. 4. Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration	**Condominium Recodification Attorney's Comment** 1.

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	of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner. 5. Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters. **UCIOA (1994) Comment (relevant portions)** 6. The 1994 amendment to subsection (a) is intended to conform the Act to expectations of owners, members of executive boards, and courts. The duty owed by an elected member of an executive board ought to parallel the standard imposed on directors of non-profit corporations. The original text set out a lesser standard. By making reference to the non-profit corporate model, members will also obtain the benefits of the business judgment rule, now commonly applied by courts in the non-profit context; see, for example, *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530 (1990). The change from "fiduciary" to "trustee" as the standard of care for declarant-appointed directors makes the standard of care more precise. The law contemplates many forms of fiduciary relationships; among them, the trustee's duty is the highest. 7. Subsection (d) has been amended in the 1994 amendment to add a new fourth category regarding voluntary relinquishment of retained rights to control any aspect of the affairs of the association. This category frequently has been written into declarations under the Act. The amendment incorporates this practice and is important in order to track the time when statutes of limitation involving the declarant begin to run. *See* Section 3-111.	
	§ 3-103.1. Mixed Use Property; Representation on the Executive Board. (a) The bylaws of a unit owners' association may be amended to provide that the composition of the executive board reflect the proportionate number of units for a particular use, as set forth in the declaration. For example, an unit owners' association may provide that for a nine-member board where two-thirds of the units are for residential use and one-third is for commercial use, sixty-six and two-thirds per cent of the nine-member board, or six members, shall be owners of residential use units and thirty-three and one-third per cent, or three members, shall be owners of commercial use units. (b) Any proposed bylaws amendment to modify the composition of the board in accordance with subsection (a) may be initiated by: (1) A majority vote of the board of directors; or (2) A submission of the proposed bylaw amendment to the board of directors from a volunteer unit owner's committee accompanied by a petition from twenty-five per cent of the unit owners of record. (c) Within thirty days of a decision by the board or receipt of a petition to initiate a	**[§514A-82.15] Mixed use property; representation on the board of directors.** (a) The bylaws of an association of apartment owners may be amended to provide that the composition of the board reflect the proportionate number of apartments for a particular use, as set forth in the declaration. For example, an association of apartment owners may provide that for a nine-member board where two-thirds of the apartments are for residential use and one-third is for commercial use, sixty-six and two-thirds per cent of the nine-member board, or six members, shall be owners of residential use apartments and thirty-three and one-third per cent, or three members, shall be owners of commercial use apartments. (b) Any proposed bylaws amendment to modify the composition of the board in accordance with subsection (a) may be initiated by: (1) A majority vote of the board of directors; or (2) A submission of the proposed bylaw amendment to the board of directors from a volunteer apartment owner's committee accompanied by a petition from twenty-five per cent of the apartment owners of record. (c) Within thirty days of a decision by the board or receipt of a petition to initiate a

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	bylaws amendment, the board of directors shall mail a ballot with the proposed bylaws amendment to all of the unit owners of record. For purposes of this section only, the bylaws may be initially amended by a vote or written consent of the majority (at least fifty-one per cent) of the unit owners; and thereafter by sixty-five per cent of all unit owners; provided that each of the requirements set forth in this section shall be embodied in the bylaws. (d) The bylaws, as amended pursuant to this section, shall be recorded in the bureau of conveyances or filed in land court, as the case may be. (e) Election of the new board of directors in accordance with an amendment adopted pursuant to this section shall be held within sixty days from the date the amended bylaws are recorded pursuant to subsection (d). (f) As permitted in the bylaws or declaration, the vote of a commercial unit owner shall be cast and counted only for the commercial seats available on the board of directors and the vote of a residential unit owner shall be cast and counted only for the residential seats available on the board of directors. (g) No petition for a bylaw amendment pursuant to subsection (b)(2) to modify the composition of the board shall be distributed to the unit owners within one year of the distribution of a prior petition to modify the composition of the board pursuant to that subsection. (h) This section shall not preclude the removal and replacement of any one or more members of the board pursuant to section 3-103(g). Any removal and replacement shall not affect the proportionate composition of the board as prescribed in the bylaws as amended pursuant to this section.	bylaws amendment, the board of directors shall mail a ballot with the proposed bylaws amendment to all of the apartment owners of record. For purposes of this section only and notwithstanding section 514A-82(b)(2), the bylaws may be initially amended by a vote or written consent of the majority (at least fifty-one per cent) of the apartment owners; and thereafter by sixty-five per cent of all apartment owners; provided that each of the requirements set forth in this section shall be embodied in the bylaws. (d) The bylaws, as amended pursuant to this section, shall be recorded in the bureau of conveyances or filed in land court, as the case may be. (e) Election of the new board of directors in accordance with an amendment adopted pursuant to this section shall be held within sixty days from the date the amended bylaws are recorded pursuant to subsection (d). (f) As permitted in the bylaws or declaration, the vote of a commercial apartment owner shall be cast and counted only for the commercial seats available on the board of directors and the vote of a residential apartment owner shall be cast and counted only for the residential seats available on the board of directors. (g) No petition for a bylaw amendment pursuant to subsection (b)(2) to modify the composition of the board shall be distributed to the apartment owners within one year of the distribution of a prior petition to modify the composition of the board pursuant to that subsection. (h) This section shall not preclude the removal and replacement of any one or more members of the board pursuant to section 514A-82(b)(1). Any removal and replacement shall not affect the proportionate composition of the board as prescribed in the bylaws as amended pursuant to this section. (i) This section shall be deemed incorporated into the bylaws of all properties subject to this chapter existing as of July 1, 1998, and thereafter.
		Condominium Recodification Attorney's Comment 1. Idea placeholder. 2. Although UCA/UCIOA generally does not require that bylaws be recorded, it seems to be appropriate here.
	§ 3-103.2. Managing Agents. [Idea placeholder.]	**§514A-95 Managing agents.** (a) Every managing agent shall: (1) Be licensed as a real estate broker in compliance with chapter 467 and the rules of the commission or be a corporation authorized to do business under article 8 of chapter 412; (2) Register with the commission prior to conducting managing agent activity through approval of a completed registration application, payment of fees, and submission of any other additional information set forth by the commission. The registration shall be for a biennial period with termination on December 31 of an even-numbered year. The commission shall prescribe a deadline date prior to the termination date for the submission of a completed reregistration application, payment of fees, and any other additional information set forth by the commission.

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		Any managing agent who has not met the submission requirements by the deadline date shall be considered a new applicant for registration and subject to initial registration requirements. The information required to be submitted with any application shall include the name, business address, phone number, and names of association of apartment owners managed; (3) Obtain and keep current a fidelity bond in an amount equal to $500 multiplied by the aggregate number of apartments of the association of apartment owners managed by the managing agent; provided that the amount of the fidelity bond shall not be less than $20,000 nor greater than $100,000. Upon request by the commission, the managing agent shall provide evidence of a current fidelity bond or a certification statement from an insurance company authorized by the insurance division of the department of commerce and consumer affairs certifying that the fidelity bond is in effect and meets the requirement of this section and the rules adopted by the commission. The managing agent shall permit only employees covered by the fidelity bond to handle or have custody or control of any association of apartment owners funds, except any principals of the managing agent that cannot be covered by the fidelity bond. The fidelity bond shall protect the managing agent against the loss of any association of apartment owners' moneys, securities, or other properties caused by the fraudulent or dishonest acts of employees of the managing agent. Failure to obtain or maintain a fidelity bond in compliance with this chapter and the rules adopted pursuant thereto, including failure to provide evidence of the fidelity bond coverage in a timely manner to the commission, shall result in non-registration or the automatic termination of the registration, unless an approved exemption or a bond alternative is presently maintained. A managing agent who is unable to obtain a fidelity bond may seek an exemption from the fidelity bond requirement from the commission. The commission shall adopt rules establishing the conditions and terms by which it may grant an exemption or a bond alternative, or permit deductibles; (4) Act promptly and diligently to recover from the fidelity bond, if the fraud or dishonesty of the managing agent's employees causes a loss to an association of apartment owners, and apply the fidelity bond proceeds, if any, to reduce the association of apartment owners' loss. If more than one association of apartment owners suffers a loss, the managing agent shall divide the proceeds among the associations of apartment owners in proportion to each association of apartment owners' loss. An association of apartment owners may request a court order requiring the managing agent to act promptly and diligently to recover from the fidelity bond. If an association of apartment owners cannot recover its loss from the fidelity bond proceeds of the managing agent, the association of apartment owners may recover by court order from the real estate recovery fund established under section 467-16, provided that: (A) The loss is caused by the fraud, misrepresentation, or deceit of the managing agent or its employees; (B) The managing agent is a licensed real estate broker; and

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		(C) The association of apartment owners fulfills the requirements of sections 467-16 and 467-18 and any applicable rules of the commission; (5) Pay a nonrefundable application fee and, upon approval, an initial registration fee, and subsequently pay a reregistration fee, as prescribed by rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. A compliance resolution fee shall also be paid pursuant to section 26-9(o) and the rules adopted pursuant thereto; and (6) Report immediately in writing to the commission any changes to the information contained on the registration application or any other documents provided for registration. Failure to do so may result in termination of registration and subject the managing agent to initial registration requirements. (b) The commission may deny any registration or reregistration application or terminate a registration without hearing if the fidelity bond and its evidence fail to meet the requirements of this chapter and the rules adopted pursuant thereto. (c) Every managing agent shall be considered a fiduciary with respect to any property managed by that managing agent.
		Condominium Recodification Attorney's Comment 1. Provisions regarding managing agents should be refined and incorporated. 2. For Discussion: Provisions regarding property managers more generally.
		§514A-95.1 Association of apartment owners registration; fidelity bond. (a) Each condominium project or association of apartment owners having six or more apartments shall: (1) Secure a fidelity bond in an amount equal to $500 multiplied by the number of apartments, to cover all officers, directors, employees, and managing agents of the association of apartment owners who handle, control, or have custody of the funds of the association of apartment owners; provided that the amount of the fidelity bond required by this subsection shall not be less than $20,000 nor greater than $100,000. The fidelity bond shall protect the association of apartment owners against fraudulent or dishonest acts by persons, including any managing agent, handling the funds of the association of apartment owners. An association of apartment owners shall act promptly and diligently to recover from the fidelity bond required by this section. An association of apartment owners that is unable to obtain a fidelity bond may seek approval for an exemption or a bond alternative from the commission. The commission shall adopt rules establishing the conditions and terms for which it may grant an exemption or a bond alternative, or permit deductibles. Failure to obtain or maintain a fidelity bond in compliance with this chapter and the rules adopted pursuant thereto, including failure to provide current evidence of the fidelity bond coverage in a timely manner to the commission, shall result in non-registration or the automatic termination of the registration, unless an approved exemption or a bond alternative is presently maintained. Current evidence of a fidelity bond includes a certification statement from an insurance

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		company registered with the department of commerce and consumer affairs certifying that the bond is in effect and meets the requirement of this section and the rules adopted by the commission; (2) Register with the commission through approval of a completed registration application, payment of fees, and submission of any other additional information set forth by the commission. Beginning June 30, 1997, the registration shall be for a biennial period with termination on June 30 of an odd-numbered year. The commission shall prescribe a deadline date prior to the termination date for the submission of a completed reregistration application, payment of fees, and any other additional information set forth by the commission. Any condominium project or association of apartment owners that has not met the submission requirements by the deadline date shall be considered a new applicant for registration and subject to initial registration requirements. Any new condominium project or association of apartment owners shall register within thirty days of the association of apartment owners' first meeting. If the association of apartment owners has not held its first meeting and it is at least one year after the recordation of the purchase of the first apartment in the condominium project, the developer or developer's affiliate or the managing agent shall register on behalf of the unorganized association of apartment owners and shall comply with this section, except the fidelity bond requirement for association of apartment owners. The public information required to be submitted on any completed application form shall include but not be limited to evidence of and information on fidelity bond coverage, names and positions of the officers of the association, the name of the association of apartment owners' managing agent, if any, the street and the postal address of the condominium, and the name and current mailing address of a designated officer of the association of apartment owners where the officer can be contacted directly; (3) Pay a nonrefundable application fee and, upon approval, an initial registration fee and subsequently pay a reregistration fee, and the condominium management education fund fee, as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91; (4) Register or reregister and pay the required fees by the due date. Failure to register or reregister or pay the required fees by the due date shall result in the assessment of a penalty equal to the amount of the registration or reregistration fee; and (5) Report immediately in writing to the commission any changes to the information contained on the registration or reregistration application, the evidence of the fidelity bond, or any other documents set forth by the commission. Failure to do so may result in termination of registration and subject the condominium project or the association of apartment owners to initial registration requirements. (b) The commission may reject or terminate any registration submitted by a condominium project or an association of apartment owners that fails to comply with this section. Any association of apartment owners that fails to register as

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		required by this section or whose registration is rejected or terminated shall not have standing to maintain any action or proceeding in the courts of this State until it registers. The failure of an association of apartment owners to register, or rejection or termination of its registration, shall not impair the validity of any contract or act of the association of apartment owners nor prevent the association of apartment owners from defending any action or proceeding in any court in this State.
		Condominium Recodification Attorney's Comment 1. For Discussion: Should we keep the unit owners' association fidelity bond mandate in State law?
	§ 3-104. Transfer of Special Declarant Rights.	
	(a) A special declarant right (Section 1-103~~(29)~~) created or reserved under this chapter may be transferred only by [~~an~~] a recorded instrument evidencing the transfer [~~recorded in every [county] in which any portion of the common interest community is located~~]. The instrument is not effective unless executed by the transferee.	
	(b) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:	
	(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this chapter. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.	
	(2) If a successor to any special declarant right is an affiliate of a declarant (Section 1-103~~(1)~~), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the condominium.	
	(3) If a transferor retains any special declarant rights, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this chapter or by the declaration relating to the retained special declarant rights and arising after the transfer.	
	(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.	
	(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant or real estate in a condominium subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that property held by that declarant, or only to any rights reserved in the declaration pursuant to Section 2-115 and held by that declarant to maintain models, sales offices, and	

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	signs. The judgment or instrument conveying title must provide for transfer of only the special declarant rights requested.	
	(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of all interests in a condominium owned by a declarant:	
	(1) the declarant ceases to have any special declarant rights, and	
	(2) the period of declarant control (Section 3-103(d)) terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.	
	(e) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:	
	(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by this chapter or by the declaration.	
	(2) A successor to any special declarant right, other than a successor described in paragraph (3) or (4) or a successor who is an affiliate of a declarant, is subject to the obligations and liabilities imposed by this chapter or the declaration: (i) on a declarant which relate to the successor's exercise or nonexercise of special declarant rights; or (ii) on his transferor, other than: (A) misrepresentations by any previous declarant; (B) warranty obligations on improvements made by any previous declarant, or made before the condominium was created; (C) breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or (D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.	
	(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (Section 2-115), may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement and any liability arising as a result thereof, and obligations under Article 5.	
	(4) A successor to all special declarant rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all	

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	those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the executive board in accordance with Section 3-103(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, the successor declarant is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under Section 3-103(d).	
	(f) Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this chapter or the declaration.	
	UCA (1980) Comment [with edits from UCIOA (1994)] 1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a condominium. There are two parts to be problem. First, what obligations and liabilities to unit owners (both existing unit owners and persons who become unit owners in the future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest. No present condominium state adequately addresses these issues. 2. This section 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, especially persons such as mortgagees whose only interest in the condominium project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the condominium, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor over whom he has no control. Similarly, the section imposes obligations and liabilities arising after the transfer upon a non-affiliated successor to a declarant's interests, but absolves such a transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (*e.g.*, a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act. 3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a condominium project to a successor, without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any	**Condominium Recodification Attorney's Comment** 1.

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	period of declarant control. 4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing unit owners and persons who subsequently become unit owners) for all obligations and liabilities, including warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in Section 1-103(1)), the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b) and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor. 5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (e). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor whose interest in the project is solely for the protection of debt security) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which relate to the rights he holds. Such a transferee is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (e)(2)(ii). For example, because of the exclusions in (e)(2)(ii), a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however to complete improvements which the developer is obligated to complete under Section 4-119. 6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (e) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration. 7. The section handles the problem of certain successor declarants (*i.e.*, persons whose sole interest in the project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a security interest or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of **all** units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights then, under subsection (d), those special declarant rights cease to exist and any period of declarant control terminates. Second, any person who succeeds to special declarant rights as a result of the transfers	

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	just described, or by a conveyance in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (e), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who holds special declarant rights solely for transfer is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition. Third, paragraph (3) of subsection (e) provides that a successor who has only the right to maintain model units, sales offices, and signs does not thereby become subject to any obligations or liabilities as a declarant, except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act. Under Section 2-110, a declarant may reserve the right to create additional units in portions of a common interest community which were originally designated as common elements, even though, in a condominium, rights of unit owners have otherwise attached to the common elements, and even though, in a planned community or cooperative, the common elements have been conveyed to the association. The declarant, upon creation, becomes the owner of any units created. The right to create the units is an interest in land which may be sold or in which a security interest may be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d), the purchaser may limit his liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (e)(4) or may buy the rights under paragraph (c). **UCIOA (1994) Comment** 3. . . . . In a common interest community, a mortgage recorded prior to the recordation of the declaration would have priority over any rights of declarants or unit owners arising under the declaration. However, under Section 2-118(k) and (l), foreclosure of such a mortgage does not automatically terminate the effectiveness of a **condominium** or **planned community** declaration; the declaration becomes ineffective as to the land covered by the prior mortgage only if the purchaser at the foreclosure sale records an instrument excluding	

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	the real estate from the condominium or planned community. If the purchaser on the foreclosure of the prior mortgage elects to have the real estate remain in the condominium or planned community, it becomes a successor declarant subject to the general rules of this section, including those applicable to persons who acquire special declarant rights by virtue of foreclosure sales (subsection c).	
	§ 3-105. Termination of Contracts and Leases of Declarant. Except as provided in Section 1-207, if entered into before the executive board elected by the unit owners pursuant to Section 3-103(f) takes office, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office upon not less than [90] days' notice to the other party. This section does not apply to: (i) any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section, or (ii) a proprietary lease.	**§514A-84 Management and contracts; developer, managing agent, and association of apartment owners.** (a) If the developer or any affiliate of the developer acts as the first managing agent for the association of apartment owners following its organization, the contract shall not have a term exceeding one year and shall contain a provision that the contract may be terminated by either party thereto on not more than sixty days' written notice. The identity of the managing agent as the developer or the developer's affiliate shall be disclosed to the association of apartment owners no later than the first meeting of the association of apartment owners, which is when the association of apartment owners is organized. An affiliate of, or person affiliated with, a developer is a person that directly or indirectly controls, is controlled by, or is under common control with, the developer. (b) Any developer or affiliate of the developer or a managing agent, who manages the operation of the property from the date of recordation of the first apartment conveyance until the organization of the association of apartment owners, shall comply with the requirements of sections 514A-95.1, 514A-97, and 514A-132, with the exception of the fidelity bond requirement for the association of apartment owners. (c) The developer, affiliate of the developer, managing agent, and the association of apartment owners shall ensure that there is a written contract for managing the operation of the property, expressing the agreements of all parties including but not limited to financial and accounting obligations, services provided, and any compensation arrangements, including any subsequent amendments. Copies of the executed contract and any amendments shall be provided to all parties to the contract. Prior to the organization of the association of apartment owners, any apartment owner may request to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.
	UCA (1980) Comment [with edits from UCIOA (1994)] 1. This section deals with a common problem in the development of condominium projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity. The Act deals with this problem is two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.	**Condominium Recodification Attorney's Comment** 1.

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	2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the condominium and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a condominium project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (*i.e.*, any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party, or any contract or lease previously entered into by the declarant which is not *bona fide* or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing. 3. The last sentence of the section addresses the usual leasehold condominium situation where the underlying real estate is subject to a long-term ground lease which is then submitted to the Act. Because termination of the ground lease would terminate the condominium, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the condominium was to prevent termination of the lease, the lease may nevertheless be terminated. **UCIOA (1994) Comment (relevant portion)** 4. The 1994 amendment to this section tracks the greater flexibility given declarants of nonresidential common interest communities in Section 1-207.	
	§ 3-106. Bylaws.	**§514A-81 Bylaws.** The operation of the property shall be governed by bylaws, a true copy of which shall be recorded in the same manner as the declaration. No amendment to the bylaws is valid unless the amendment is duly recorded.
	(a) The bylaws of the association must provide:	**§514A-82 Contents of bylaws.** (a) The bylaws shall provide for at least the following:
		(1) Board of directors: (A) The election of a board of directors;
	(1) the number of members of the executive board and the titles of the officers of the association;	(B) The number of persons constituting the board; provided that condominiums with more than one hundred individual apartment units shall have an elected board of not less than nine members unless not less than sixty-five per cent of all apartment owners vote by mail ballot, or at a special or annual meeting, to reduce the minimum number of directors;

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	(2) election by the executive board of a president, treasurer, secretary, and any other officers of the association the bylaws specify;	(3) Election of a president from among the board of directors who shall preside over the meetings of the board of directors and of the association of apartment owners; (4) Election of a secretary who shall keep the minute book wherein resolutions shall be recorded; (5) Election of a treasurer who shall keep the financial records and books of account;
	(3) the qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and offices and filling vacancies;	(1) (D) The powers and duties of the board;
	(4) which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;	(1) (F) Whether or not the board may engage the services of a manager or managing agent, or both, and specifying which of the powers and duties granted to the board by this chapter or otherwise may be delegated by the board to either or both of them;
	(5) which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and	
		(1) (C) That for the initial term of office, directors shall serve for a term of three years or the term as specified by the bylaws or until their successors have been elected or appointed;
		(1) (E) The compensation, if any, of the directors; and
	(6) a method for amending the bylaws.	
	(b) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.	
		(2) Method of calling meetings of the apartment owners; what percentage, if other than a majority of apartment owners, constitutes a quorum; what percentage, consistent with this chapter, is necessary to adopt decisions binding on all apartment owners and that votes allocated to any area that constitutes a common element under section 514A-13(h) shall not be cast at any association meeting, regardless of whether it is so designated in the declaration;
		(6) Operation of the property, payment of the common expenses, and determination and collection of the common charges; (7) Manner of collecting common expenses, expenses, costs, and fees recoverable by the association under section 514A-94, and any penalties and late charges; (8) Designation and removal of personnel necessary for the maintenance, repair, and replacement of the common elements; (9) Method of adopting and amending administrative rules governing the details of the operation and use of the common elements; (10) The restrictions on and requirements respecting the use and maintenance of the apartments and the use of the common elements, not set forth in the

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		declaration, as are designed to prevent unreasonable interference with the use of their respective apartments and of the common elements by the several apartment owners; (11) The first meeting of the association of apartment owners shall be held not later than one hundred eighty days after recordation of the first apartment conveyance; provided forty per cent or more of the project has been sold and recorded. If forty per cent of the project is not sold and recorded at the end of one year, an annual meeting shall be called; provided ten per cent of the apartment owners so request; (12) All members of the board of directors shall be owners, co-owners, vendees under an agreement of sale, or an officer of any corporate owner of an apartment. The partners in a general partnership and the general partners of a limited partnership shall be deemed to be the owners of an apartment for this purpose. There shall not be more than one representative on the board of directors from any one apartment; (13) A director shall not cast any proxy vote at any board meeting, nor shall a director vote at any board meeting on any issue in which the director has a conflict of interest; (14) No resident manager of a condominium shall serve on its board of directors; (15) The board of directors shall meet at least once a year; (16) All association and board of directors meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order; (17) All meetings of the association of apartment owners shall be held at the address of the condominium project or elsewhere within the State as determined by the board of directors; and (18) Penalties chargeable against persons for violation of the covenants, conditions, or restrictions set forth in the declaration, or of the bylaws and administrative rules adopted pursuant thereto, method of determination of violations, and manner of enforcing penalties, if any.
		(b) In addition to the requirements of subsection (a), the bylaws shall be consistent with the following provisions: (1) At any regular or special meeting of the apartment owners, any one or more members of the board of directors may be removed by the apartment owners and successors shall then and there be elected for the remainder of the term to fill the vacancies thus created. The removal and replacement shall be in accordance with all applicable requirements and procedures in the bylaws for the removal and replacement of directors, including any provision relating to cumulative voting. If removal and replacement is to occur at a special association meeting, the call for the meeting shall be by the president or by a petition to the secretary or managing agent signed by not less than twenty-five per cent of the apartment owners as

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		shown in the association's record of ownership; provided that if the secretary or managing agent shall fail to send out the notices for the special meeting within fourteen days of receipt of the petition, then the petitioners shall have the authority to set the time, date, and place for the special meeting and to send out the notices for the special meeting in accordance with the requirements of the bylaws. Except as otherwise provided in this section, the meeting for the removal and replacement from office of directors shall be scheduled, noticed, and conducted in accordance with the bylaws of the association. (2) The bylaws may be amended at any time by the vote or written consent of sixty-five per cent of all apartment owners; provided that each one of the particulars set forth in this section shall be embodied in the bylaws always; and provided further that any proposed bylaws with the rationale for the proposal may be submitted by the board of directors or by a volunteer apartment owners' committee. If submitted by that committee, the proposal shall be accompanied by a petition signed by not less than twenty-five per cent of the apartment owners as shown in the association's record of ownership. The proposed bylaws, rationale, and ballots for voting on any proposed bylaw shall be mailed by the board of directors to the owners at the expense of the association for vote or written consent without change within thirty days of the receipt of the petition by the board of directors. The vote or written consent required to adopt the proposed bylaw shall not be less than sixty-five per cent of all apartment owners; provided that the vote or written consent must be obtained within one hundred twenty days after mailing. In the event that the bylaw is duly adopted, then the board shall cause the bylaw amendment to be recorded in the bureau of conveyances or filed in the land court, as the case may be. The volunteer apartment owners' committee shall be precluded from submitting a petition for a proposed bylaw that is substantially similar to that which has been previously mailed to the owners within one year after the original petition was submitted to the board. This subsection shall not preclude any apartment owner or voluntary apartment owners' committee from proposing any bylaw amendment at any annual association meeting. (3) Notices of association meetings, whether annual or special, shall be sent to each member of the association of apartment owners at least fourteen days prior to the meeting and shall contain at least: the date, time, and place of the meeting, the items on the agenda for the meeting, and a standard proxy form authorized by the association, if any. (4) No resident manager or managing agent shall solicit, for use by the manager or managing agent, any proxies from any apartment owner of the association of owners that employs the resident manager or managing agent, nor shall the resident manager or managing agent cast any proxy vote at any association meeting except for the purpose of establishing a quorum. Any board of directors that intends to use association funds to distribute proxies, including the standard proxy form referred to in paragraph (3), shall first post notice of its intent to distribute proxies in prominent locations within the project at least thirty days

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		prior to its distribution of proxies; provided that if the board receives within seven days of the posted notice a request by any owner for use of association funds to solicit proxies accompanied by a statement, the board shall mail to all owners either: (A) A proxy form containing the names of all owners who have requested the use of association funds for soliciting proxies accompanied by their statements; or (B) A proxy form containing no names, but accompanied by a list of names of all owners who have requested the use of association funds for soliciting proxies and their statements. The statement shall not exceed one hundred words, indicating the owner's qualifications to serve on the board and reasons for wanting to receive proxies. (5) A director who has a conflict of interest on any issue before the board shall disclose the nature of the conflict of interest prior to a vote on that issue at the board meeting, and the minutes of the meeting shall record the fact that a disclosure was made. (6) The apartment owners shall have the irrevocable right, to be exercised by the board of directors, to have access to each apartment from time to time during reasonable hours as may be necessary for the operation of the property or for making emergency repairs therein necessary to prevent damage to the common elements or to another apartment or apartments. (7) An owner shall not act as an officer of an association and an employee of the managing agent employed by the association. (8) An association's employees shall not engage in selling or renting apartments in the condominium in which they are employed except association-owned units, unless such activity is approved by an affirmative vote of sixty-five per cent of the membership. (9) The board of directors shall meet at least once a year. Whenever practicable, notice of all board meetings shall be posted by the resident manager or a member of the board in prominent locations within the project seventy-two hours prior to the meeting or simultaneously with notice to the board of directors. (10) Directors shall not expend association funds for their travel, directors' fees, and per diem, unless owners are informed and a majority approve of these expenses. (11) Associations at their own expense shall provide all board members with a current copy of the association's declaration, bylaws, house rules, and, annually, a copy of this chapter with amendments. (12) The directors may expend association funds, which shall not be deemed to be compensation to the directors, to educate and train themselves in subject areas directly related to their duties and responsibilities as directors; provided that the approved annual operating budget shall include these expenses as separate

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		line items. These expenses may include registration fees, books, videos, tapes, other educational materials, and economy travel expenses. Except for economy travel expenses within the State, all other travel expenses incurred under this subsection shall be subject to the requirements of paragraph (10). (13) A lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale foreclosure procedures authorized by chapter 667, as that chapter may be amended from time to time. The provisions of this subsection shall be deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date.
	UCA (1980) Comment [UCIOA (1994) Comment essentially same] 1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the condominium. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration. 2. The requirement, set forth in subsection (a)(5), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain), Section 2-106 (expiration of certain leases), Section 2-112 (Relocation of Boundaries Between Adjoining Units), and Section 2-113 (subdivision or conversion of units). Section 2-117(e) provides that, if no officer is designated for this purpose, it shall be the duty of the president.	**Condominium Recodification Attorney's Comment** 1. In contrast to UCA/UCIOA, HRS §514A-81 requires that bylaws be "recorded in the same manner as the declaration." 2. Much work remains to be done to integrate appropriate bylaws provisions of HRS Chapter 514A (along with the many good suggestions for improvement that we have received from various interested parties) into the recodification.
	§ 3-107. Upkeep of Condominium.	
	(a) Except to the extent provided by the declaration, subsection (b), or Section 3-113(h), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.	
	(b) In addition to the liability that a declarant as a unit owner has under this chapter, the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the condominium is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.	

Article 3. Management of Condominium (Recodification Draft #1)

	Hawaii Condominium Law Recodification Draft #1 [Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]	Hawaii's Present Condominium Law Chapter 514A, Hawaii Revised Statutes (HRS) *(Compare with Proposed Recodified Condominium Law in left-hand column)*
	UCA (1980) Comment [UCIOA (1994) Comment essentially same] 1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. *See* Section 1-103(16). As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units **benefitted**. *See* Comment 1 to Section 2-108. 2. Under Section 2-110, a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit owners. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate. As to real estate taxes, see Section 1-105(c).	**Condominium Recodification Attorney's Comment** 1.
	§ 3-108. Meetings. A meeting of the association must be held at least once each year. Special meetings of the association may be called by the president, a majority of the executive board, or by unit owners having 20 percent, or any lower percentage specified in the bylaws, of the votes in the association. Not less than [10] nor more than [60] days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove an officer or member of the executive board.	[*See*, §514A-82(a)(15) above, which reads: "(15) The board of directors shall meet at least once a year;"] [*See also*, §514A-82(a)(16) above, which reads: "(16) All association and board of directors meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order;"] [*See also*, §514A-82(a)(17) above, which reads: "(17) All meetings of the association of apartment owners shall be held at the address of the condominium project or elsewhere within the State as determined by the board of directors;"] [*See also*, §514A-82(b)(3) above, which reads: "(3) Notices of association meetings, whether annual or special, shall be sent to each member of the association of apartment owners at least fourteen days prior to the meeting and shall contain at least: the date, time, and place of the meeting, the items on the agenda for the meeting, and a standard proxy form authorized by the association, if any."]
		[*See also*, §514A-82(b)(1) above, which reads: "(1) At any regular or special meeting of the apartment owners, any one or more members of the board of directors may be removed by the apartment owners and successors shall then and there be elected for the remainder of the term to fill the vacancies thus created. The removal and replacement shall be in accordance with all applicable requirements and procedures in the bylaws for the removal and replacement of directors, including any provision relating to cumulative voting. If removal and replacement is to occur at a special association meeting, the call for the meeting shall be by the president or by a petition to the secretary or managing agent signed by not less than twenty-five per cent of the apartment owners as shown in the association's record of ownership; provided that if the secretary or managing agent

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		shall fail to send out the notices for the special meeting within fourteen days of receipt of the petition, then the petitioners shall have the authority to set the time, date, and place for the special meeting and to send out the notices for the special meeting in accordance with the requirements of the bylaws. Except as otherwise provided in this section, the meeting for the removal and replacement from office of directors shall be scheduled, noticed, and conducted in accordance with the bylaws of the association."]
		§514A-83.1 Board meetings. (a) All meetings of the board of directors, other than executive sessions, shall be open to all members of the association, and association members who are not on the board of directors may participate in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the board of directors votes otherwise. (b) The board of directors, with the approval of a majority of a quorum of its members, may adjourn a meeting and reconvene in executive session to discuss and vote upon personnel matters or litigation in which the association is or may become involved. The nature of any and all business to be considered in executive session shall first be announced in open session.
		Condominium Recodification Attorney's Comment 1. UCA (1980) and UCIOA (1994) do not have any official comments to §3-108 (Meetings). 2. Need to authorize Internet notice at option of unit owner.
	§ 3-109. Quorums.	
	(a) Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast [20] percent of the votes that may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.	
	(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast [50] percent of the votes on that board are present at the beginning of the meeting.	
	UCA (1980) Comment [UCIOA (1994) Comment essentially same] Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort condominiums where many owners may reside elsewhere, often at considerable distances, for most of the year.	**Condominium Recodification Attorney's Comment** 1. Specifically authorizing videoconferencing and other means of remote meetings may be desirable.
	§ 3-110. Voting; Proxies.	
	(a) If only one of several owners of a unit is present at a meeting of the association, that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement	

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	if any one of the owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.	
	(b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.	**§514A-83.2 Proxies.** (a) A proxy, to be valid, must: (1) Be delivered to the secretary of the association of apartment owners or the managing agent, if any, no later than 4:30 p.m. on the second business day prior to the date of the meeting to which it pertains; (2) Contain at least the name of the association of apartment owners, the date of the meeting of the association of apartment owners, the printed names and signatures of the persons giving the proxy, the apartments for which the proxy is given, and the date that the proxy is given; and
		(3) Contain boxes wherein the owner has indicated that the proxy is given: (A) For quorum purposes only; (B) To the individual whose name is printed on a line next to this box; (C) To the board of directors as a whole and that the vote be made on the basis of the preference of the majority of the board; or (D) To those directors present at the meeting and the vote to be shared with each board member receiving an equal percentage.
		(b) A proxy shall only be valid for the meeting to which the proxy pertains and its adjournments, may designate any person as proxy, and may be limited as the apartment owner desires and indicates; provided that no proxy shall be irrevocable unless coupled with a financial interest in the unit.
		(c) No board of directors or member of the board shall use association funds to solicit proxies except for the distribution of proxies as set forth in section 514A-82(b)(4); provided that this shall not prevent an individual member of the board from soliciting proxies as an apartment owner under section 514A-82(b)(4).
		(d) A copy, facsimile telecommunication, or other reliable reproduction of a proxy may be used in lieu of the original proxy for any and all purposes for which the original proxy could be used; provided that any copy, facsimile telecommunication, or other reproduction shall be a complete reproduction of the entire original proxy.
		(e) Nothing in this section shall affect the holder of any proxy under a first mortgage of record encumbering an apartment or under an agreement of sale affecting an apartment.
		§514A-83.3 Membership list. The resident manager or managing agent or board of directors shall keep an accurate and current list of members of the association of apartment owners and their current addresses and the names and addresses of the vendees under an agreement of sale, if any. The list shall be maintained at a place designated by the board of directors and a copy shall be available, at cost, to any member of the association as provided in the declaration or bylaws or rules and regulations or, in any case, to any member who furnishes to the resident

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		manager or managing agent or board of directors a duly executed and acknowledged affidavit stating that the list (1) will be used by such owner personally and only for the purpose of soliciting votes or proxies or providing information to other owners with respect to association matters, and (2) shall not be used by such owner or furnished to anyone else for any other purpose. No board of directors shall adopt any rule prohibiting the solicitation of proxies or distribution of materials relating to association matters on the common elements by apartment owners; provided that a board of directors may adopt rules regulating reasonable time, place, and manner of such solicitations or distributions, or both. A board of directors may prohibit commercial solicitations.
	(c) If the declaration requires that votes on specified matters affecting the condominium be cast by lessees rather than unit owners of leased units: (i) the provisions of subsections (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners. Unit owners must also be given notice, in the manner provided in Section 3-108, of all meetings at which lessees are entitled to vote.	
	(d) No votes allocated to a unit owned by the association may be cast.	
		§514A-83 Purchaser's right to vote. The purchaser of an apartment pursuant to an agreement of sale recorded in the bureau of conveyances or land court shall have all the rights of an apartment owner, including the right to vote; provided that the seller may retain the right to vote on matters substantially affecting the seller's security interest in the apartment, including but not limited to, the right to vote on: (1) Any partition of all or part of the project; (2) The nature and amount of any insurance covering the project and the disposition of any proceeds thereof; (3) The manner in which any condemnation of the project shall be defended or settled and the disposition of any award or settlement in connection therewith; (4) The payment of any amount in excess of insurance or condemnation proceeds; (5) The construction of any additions or improvements, and any substantial repair or rebuilding of any portion of the project; (6) The special assessment of any expenses; (7) The acquisition of any apartment in the project; (8) Any amendment to the declaration of condominium property regime or bylaws; (9) Any removal of the project from the provisions of this chapter; and (10) Any other matter which would substantially affect the security interest of the seller.

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	UCA (1980) Comment [UCIOA (1994) Comment essentially same] Subsection (c) addresses an increasingly important matter in the governance of condominiums: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the condominium community.	**Condominium Recodification Attorney's Comment** 1. Electing association directors is usually the most important decision of the unit owners. Real and perceived unfairness in voting for directors comes up often in complaints to the Commission. (*See*, HRS Chapter 514A Recodification "Stakeholders Comments and Recommendations" on the Commission's website, http://www.state.hi.us/hirec/.) We need to determine which matters are appropriate to address in State law. 2. In addition to being fundamentally fair, voting processes should be practical. To that end, it may be desirable to explicitly allow voting by electronic means (with proper security – already available through many providers on the mainland), cumulative voting, and voting by acclamation (i.e., without a formal ballot vote, e.g., when the number of candidates and vacancies are the same). 3. The *Restatement, Third, of Property (Servitudes)*, has three sections related to voting. They read as follows: § 6.16 Representative Government Except as otherwise provided by statute or the governing documents, an association in a common-interest community is governed by a board elected by its members. The board is entitled to exercise all powers of the community except those reserved to the members. § 6.17 Voting Rights Except as otherwise provided by statute or the declaration, votes are allocated to members on the basis of the number of lots or units owned that are currently subject to an obligation to pay assessments or dues. One vote is allocated to each such lot or unit. Unless a contrary interpretation is required by statute or by the governing documents, a requirement for approval by a certain percentage of "owners" means approval by that percentage of votes. § 6.18 Meetings and Elections Except to the extent the association is properly controlled by the developer under § 6.19, and subject to reasonable procedures set forth in the governing documents or adopted by the association, members of a common-interest community have the right to vote in elections for the board of directors and on other matters properly presented to the members, to attend and participate in meetings of the members, and to stand for election to the board of directors. Except when the board properly meets in executive session, members of the association are entitled to attend meetings of the board of directors and to a reasonable opportunity to present their views to the board.
	§ 3-110.1. Same; Conflicts of Interest. [Idea placeholder.]	**Condominium Recodification Attorney's Comment** 1. *See, e.g.*, the following provisions of HRS §514A-82: (4) No resident manager or managing agent shall solicit, for use by the manager or managing agent, any proxies from any apartment owner of the association of owners that employs the resident manager or managing agent, nor shall the resident manager or managing agent cast any proxy vote at any

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		association meeting except for the purpose of establishing a quorum. Any board of directors that intends to use association funds to distribute proxies, including the standard proxy form referred to in paragraph (3), shall first post notice of its intent to distribute proxies in prominent locations within the project at least thirty days prior to its distribution of proxies; provided that if the board receives within seven days of the posted notice a request by any owner for use of association funds to solicit proxies accompanied by a statement, the board shall mail to all owners either: (A) A proxy form containing the names of all owners who have requested the use of association funds for soliciting proxies accompanied by their statements; or (B) A proxy form containing no names, but accompanied by a list of names of all owners who have requested the use of association funds for soliciting proxies and their statements. The statement shall not exceed one hundred words, indicating the owner's qualifications to serve on the board and reasons for wanting to receive proxies. (5) A director who has a conflict of interest on any issue before the board shall disclose the nature of the conflict of interest prior to a vote on that issue at the board meeting, and the minutes of the meeting shall record the fact that a disclosure was made. [Note: If we incorporate the provisions of HRS §514A-82(4) and (5) in the recodification, we should consider the following changes that have been suggested by various stakeholders: • Also prohibit managing agents, rental agents, and any employees of associations from serving on the boards of those associations. • Also prohibit managing agents, rental agents, their spouses, and their employees from soliciting proxies or casting proxy votes except for the purposes of establishing a quorum. • Eliminate the 100 word limit to proxy solicitation statements and instead provide that the association will mail a single-sided 8 ½" x 11" proxy solicitation at the association's expense. This is consistent with the intent of limiting the cost of producing large amounts of information for an owner at the association's expense. • Make it clear that directors have the right to attend any committee meetings, whether they sit on the committee or not, unless they have a conflict of interest on the subject matter.] 2. It may also be desirable to add a general "Conflicts of Interest" section to cover matters such as HRS §§514A-82(b)(7) and (8).
	§ 3-111. Tort and Contract Liability; Tolling of Limitation Period.	
	(a) A unit owner is not liable, solely by reason of being a unit owner, for an injury or damage arising out of the condition or use of the common elements. Neither the	

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	association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain.	
	(b) An 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. If the wrong occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner for (i) all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) all costs that the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association.	
	(c) Except as provided in Section 4-116(d) with respect to warranty claims, any statute of limitation affecting the association's right of action against a declarant under this chapter is tolled until the period of declarant control terminates. A unit owner is not precluded from maintaining an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by Section 3-117 (Other Liens Affecting the Condominium).	
	UCA (1980) Comment 1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association. 2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subsection (a) provides that the association or any unit owner shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control. 3. If a suit based on a claim which accrued during the period of developer control is brought against the association after control of the association has passed from the	**Condominium Recodification Attorney's Comment** 1.

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	developer, reasonable notice to, and grant of an opportunity to the developer to defend, are conditions to developer liability. If, however, suit is brought against the association while the developer is still in control, obviously the developer cannot later resist a suit by the association for reimbursement on the grounds of failure to notify. **UCIOA (1994) Comment (relevant portions)** 4. This draft makes clear what the drafters of the Uniform Condominium Act and the first version of this Act intended: that the form in which common elements are owned – whether in a condominium, planned community or cooperative – should not impose joint and several personal liability on condominium owners, when no such liability exists for owners in planned communities. Thus, the 1994 amendment to Section 3-111(a) rejects the decision in *Ruoff v. Harbor Creek Community Association*, 10 Cal.App.4th 1624, 13 Cal. Rptr 2d 755 (Cal.App. 1992). Rather, the result under both this section and Section 3-117 – which imposes liability on unit owners for unsatisfied judgments against the association in proportion to their common expense liabilities – is consistent with the decision in *Dutcher v. Owens*, 647 S.W.2d 948 (Texas 1983). 5. The 1994 amendment to new subsection (b) of this section makes clear that no period of limitation regarding an association's claim against the declarant, including a limit appearing in this or any other section of this Act, begins to run against the association until the period of declarant control terminates. This would include warranty claims for common elements arising under Section 4-116, unless a declarant elects to permit an independent unit owner review as described in that section. *See* Section 4-116(d) and Comments. Thus, for example, the six-year – or two-year – limitation period within which a claim for breach of warranty must be brought under Section 4-116(a) would not commence until the earlier of either: (a) the date on which the period of declarant control terminates by operation of law (*see* Sections 3-103(d) and 3-111(b)), or the date the declarant empowers an independent executive board committee to evaluate and enforce warranty claims. (*See* Section 4-116(d).)	
	§ 3-112. Conveyance or Encumbrance of Common Elements.	
	(a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but all owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses. Proceeds of the sale are an asset of the association, but the proceeds of the sale of limited common elements must be distributed equitably among the owners of units to which the limited common elements were allocated.	
	(b) An agreement to convey common elements or subject them to a security interest must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners.	

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	The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof [~~must be recorded in every [county] in which a portion of the condominium is situated, and~~] is effective only upon recordation.	
	(c) The association, on behalf of the unit owners, may contract to convey an interest in a condominium pursuant to subsection (a), but the contract is not enforceable against the association until approved pursuant to subsections (a) and (b). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.	
	(d) Unless made pursuant to this section, any purported conveyance, encumbrance, judicial sale, or other voluntary transfer of common elements is void.	
	(e) A conveyance or encumbrance of common elements pursuant to this section does not deprive any unit of its rights of access and support.	
	(f) Unless the declaration otherwise provides, if the holders of first security interests on 80 percent of the units that are subject to security interests on the day the unit owners' agreement under subsection (b) is recorded consent in writing: (1) a conveyance of common elements pursuant to this section terminates both the undivided interests in those common elements allocated to the units and the security interests in those undivided interests held by all persons holding security interests in the units; and (2) an encumbrance of common elements pursuant to this section has priority over all preexisting encumbrances on the undivided interests in those common elements held by all persons holding security interests in the units.	
	(g) The consents by holders of first security interests on units described in subsection (f), or a certificate of the secretary affirming that those consents have been received by the association, may be recorded at any time before the date on which the agreement under subsection (b) becomes void. Consents or certificates so recorded are valid from the date they are recorded for purposes of calculating the percentage of consenting first security interest holders, regardless of later sales or encumbrances on those units. Even if the required percentage of first security interest holders so consent, a conveyance or encumbrance of common elements does not affect interests having priority over the declaration, or created by the association after the declaration was recorded.	
	UCA (1980) Comment 1. Subsection (a) provides that, on agreement of unit owners holding 80% of the votes in the association, parts of the common elements may be sold or encumbered. (80% is the percentage required for termination of the condominium under Section 2-118.) This power may be exercised during the period of declarant control, but, in order to be effective, 80% of non-declarant unit owners must approve the action. The ability to sell a portion of the common elements without termination of the	**Condominium Recodification Attorney's Comment** 1.

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	condominium gives the condominium regime desirable flexibility. For example, the unit owners, some years after the initial creation of the condominium, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates. 2. Subsection (b) requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite majority of the unit owners. The agreement then must be recorded in the land records. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full power to execute a deed or mortgage. Under subsection (c), it is contemplated that the association will execute the actual instrument of conveyance. Under subsection (e), a conveyance or encumbrance of common elements may not deprive a unit owner of rights of access and support. 3. Under the condominium form of ownership, each unit owner owns a share of the common elements as an appurtenant interest to his unit and, when the unit owner mortgages his unit, he also mortgages his appurtenant interest. The unit owner himself cannot convey his unit separately from its interest in the common elements nor can he convey his common element interest separately from the unit. Therefore, if there is a mortgage or other lien against any unit, the problem arises as to whether the association under this section can convey a part of the common elements free from the mortgage interest of the unit mortgagee. Subsection (f) answers that question **no**. Therefore, a sale or encumbrance of common elements under this section would be subject to the superior priority of any prior mortgagee on the unit unless the mortgagee releases his interest therein. The bracketed introductory language to subsection (f) is intended to permit an enacting state to choose whether or not the declaration could vary the rule of subsection (f). If the bracketed language is included, the declaration might provide, for example, that any subsequent conveyance of specified portions of the common elements would be free of prior security interests. In that case, the security interest in the common elements held by unit mortgagees would be cut off. Since the loss of the security interest in the common elements could significantly affect mortgagees, states considering inclusion of the bracketed language probably should consult mortgagee groups. If limited to particular common element real estate such as portions of recreational area land, and if protections are provided for lender interests, the ability to convey free of prior security interests could contribute significantly to the continued economic viability of a project. Therefore, lenders may be favorable to inclusion of the bracketed language. The declaration could protect lender interests in connection with a conveyance free of the security interests in a number of ways. For example, the declaration might provide for payment of a specified percentage of the sales price to unit mortgagees or it might provide	

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	that a specified percentage of the mortgage debt be paid to them. Also, the declaration might provide that no sale or encumbrance of common elements would be effective without the approval of a specified percentage of lenders. There are, no doubt, other devices which could afford substantial protection to lenders. **UCIOA (1994) Comment (relevant portions)** 3. As originally written, subsection (g) was intended to cut off the interests of unit lenders whose lien extended to the owner's undivided interest, in the case of a condominium, or beneficial interest, in the case of a cooperative or planned community, in the common elements. The 1994 revision simply clarifies this intent, and states precisely the procedure needed to accomplish the desired result. To the extent that a lien on a unit (whether in the nature of a security interest, tax lien, attachment, or construction lien) also reaches the owner's interest in the common elements, this amendment makes clear that a proper vote of unit owners and first mortgage holders cuts off that lien. This section does not affect the interests of persons who hold a direct lien on the common elements nor does it affect the priority or validity of any interest with respect to the unit itself. 4. The introductory clause, "unless the declaration otherwise provides," contemplates the possibility that the declarant or his construction lender may desire to completely prohibit the conveyance or encumbrance of common elements, may require unanimous consent of first mortgagees, or may require another outcome which varies the result of the default rule of this section. Nonetheless, the drafters believe that the default rule strikes an appropriate balance between the interests of security holders and the interests of the association. A rule which requires the consent of every holder of every interest in every unit in a common interest community imposes unreasonable transaction costs for an otherwise rational economic transaction. On the other hand, the association ought not be able to dispose of its assets automatically and in all cases to the detriment of persons who have made loans to unit owners in reliance on the value of the common elements, without the consent of those persons. Thus, a default rule requiring the consent of a super-majority of first mortgagees should ensure that in the usual case, the interests of all lenders will be adequately protected without unduly restricting the needs of the association. 5. The effect of foreclosure of security interests granted pursuant to this section is governed by Section 2-118 (Termination).	
	§ 3-113. Insurance.	**§514A-86 Insurance.**
	(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:	
	(1) property insurance on the common elements and, in a planned community, also on property that must become common elements, insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion	(a) The association of apartment owners shall purchase and at all times maintain insurance which covers the common elements and, whether or not part of the common elements, all exterior and interior walls, floors, and ceilings, in accordance

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	building, against fire and extended coverage perils. The total amount of insurance after application of any deductibles must be not less than 80 percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations, and other items normally excluded from property policies; and	with the as-built condominium plans and specifications, against loss or damage by fire sufficient to provide for the repair or replacement thereof in the event of such loss or damages. Flood insurance shall also be provided under the federal Flood Disaster Protection Act if the property is located in an identified flood hazard area as designated by the federal Department of Housing and Urban Development. Exterior glass may be insured at the option of the association of apartment owners. The insurance coverage shall be written on the property in the name of the association of apartment owners. Premiums shall be common expenses. Provision for the insurance shall be without prejudice to the right of each apartment owner to insure the owner's own apartment for the owner's benefit.
	(2) liability insurance, including medical payments insurance, in an amount determined by the executive board but not less than any amount specified in the declaration, covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements.	
		(b) The association of apartment owners may purchase and maintain directors' and officers' liability insurance with minimum coverage in such amount as shall be determined by the board of directors. Premiums shall be common expenses.
	(b) In the case of a building containing units having horizontal boundaries described in the declaration, the insurance maintained under subsection (a)(1), to the extent reasonably available, must include the units, but need not include improvements and betterments installed by unit owners.	
	(c) If the insurance described in subsections (a) and (b) is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it considers appropriate to protect the association or the unit owners.	
	(d) Insurance policies carried pursuant to subsections (a) and (b) must provide that: (1) each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association; (2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household; (3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and (4) if, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.	

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	(e) Any loss covered by the property policy under subsections (a)(1) and (b) must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any holder of a security interest. The insurance trustee or the association shall hold any insurance proceeds in trust for the association, unit owners, and lien holders as their interests may appear. Subject to the provisions of subsection (h), the proceeds must be disbursed first for the repair or restoration of the damaged property, and the association, unit owners, and lien holders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the condominium is terminated.	
	(f) An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.	
	(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner or holder of a security interest. The insurer issuing the policy may not cancel or refuse to renew it until [30] days after notice of the proposed cancellation or non-renewal has been mailed to the association, each unit owner and each holder of a security interest to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.	(c) Any insurance policy providing the coverage required by subsections (a) and (b) shall contain a provision requiring the insurance carrier, at the inception of the policy and on each anniversary date thereof, to provide the board of directors with a written summary, in layperson's terms, of the policy. The summary shall include the type of policy, a description of the coverage and the limits thereof, amount of annual premium, and renewal dates. The board of directors shall provide this information to each apartment owner.
	(h) Any portion of the condominium for which insurance is required under this section which is damaged or destroyed must be repaired or replaced promptly by the association unless (i) the condominium is terminated, in which case Section 2-118 applies (ii) repair or replacement would be illegal under any state or local statute or ordinance governing health or safety, or (iii) [80] percent of the unit owners, including every owner of a unit or assigned limited common element that will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire condominium is not repaired or replaced, (i) the insurance proceeds attributable to the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the condominium, and (ii) except to the extent that other persons will be distributees (Section 2-105(a)(12)(ii)), (A) the insurance proceeds attributable to units and limited common elements that are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lien holders, as their interests may appear, and (B) the remainder of the proceeds must be distributed to all the unit owners or lien holders, as their interests may appear, in proportion to the common element interests of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations.	

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	(i) The provisions of this section may be varied or waived in the case of a condominium all of whose units are restricted to non-residential use.	
	UCA (1980) Comment [UCIOA (1994) Comment essentially same] 1. Subsections (a) and (b) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive. 2. Subsection (b) represents a significant departure from the present law in virtually all states by requiring that the association obtain and maintain property insurance on **both** the common elements **and** the units within buildings with "stacked" units. *See* Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit condominium situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy. The Act does not mandate association insurance on units in town house or other arrangements in which there are no stacked units. However, if the developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units. 3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Section 1-103(4) and (25) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, the provisions of Section 2-102 apply. In summary, Section 2-102 provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited common element (*see* definition in Section 1-103(16)), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements. This treats and defines ownership of all portions of the electrical, plumbing and mechanical systems serving the building not entirely within the boundaries of a unit. All spaces, interior partitions, electrical, plumbing and mechanical systems, and all	**Condominium Recodification Attorney's Comment** 1. Clifford J. Treese, CPCU, ARM (and past president of the CAI Illinois Chapter and CAI Research Foundation), has stated that the UCA/UCIOA insurance provisions are "woefully weak." We will work with Cliff and other interested parties to strengthen §3-113 as appropriate.

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	other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit. Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of a stacked unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If installed by the unit owner, the item should be insured by the unit owner. Those items, installed by the unit owner and not covered by the association policy, are called "improvements and betterments". 4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor. 5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many condominium documents require insurance in an amount equal to **100% of the replacement cost** of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost. 6. Subsection (a)(2) covers only the liability of the association, and unit owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit. 7. Clause (i) of the third sentence of subsection (h) would operate as follows: (1) if the condominium consists of campsites, restoration after fire damage might consist of merely resodding the area damaged; (2) if the condominium consists of separate gardentype buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the condominium consists of a single highrise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the condominium" would be damaged and unrestored. 8. The scheme of this section, as set forth in subsection (h), is that any damage or destruction to any portion of the condominium must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the condominium or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (e) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the condominium that may be required.	

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	[Added in UCIOA (1994)] If units or limited common elements are not rebuilt, insurance proceeds are to be distributed to lienholders or owners of units unless the declaration provides that such payments are to go to some other person. 9. In the case of commercial or industrial condominiums, unit owners may prefer to act as self-insurers or make other arrangements with respect to property insurance. Accordingly, subsection (i) provides that the insurance requirements of this section may be varied or waived in the case of a condominium all of the units of which are reserved exclusively for non-residential use. Such waiver or modification is not possible in the case of a mixed-use condominium, some of the units of which are used for residential purposes.	
	§ 3-114. Surplus Funds. Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves must be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.	
	UCA (1980) Comment [UCIOA (1994) Comment same] Surplus funds of the association are generally used first for the pre-payment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (*e.g.*, the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.	
	§ 3-115. Assessments for Common Expenses.	
	(a) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After an assessment has been made by the association, assessments must be made at least annually, based on a budget adopted at least annually by the association.	
	(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to Section 2-107(a) and (b). Any past due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding [18] percent per year.	
	(c) To the extent required by the declaration: (1) any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides; (2) any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefitted; and (3) the costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.	
	(d) Assessments to pay a judgment against the association (Section 3-117(a))	

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	may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense liabilities.	
	(e) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.	
	(f) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due must be recalculated in accordance with the reallocated common expense liabilities.	
	UCA (1980) Comment [UCIOA (1994) Comment essentially same] 1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability. 2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs. 3. If additional units are added to a condominium after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added. 4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision or conversion of units).	**Condominium Recodification Attorney's Comment** 1.
	§ 3-115.1. Same; Budgets and Reserves. (a) The budget required under section 3-115(a) must include at least the following: [Idea placeholder.]	**§514A-83.6 Associations of apartment owners; budgets and reserves.** (a) The board of directors of each association of apartment owners shall prepare and adopt an annual operating budget and distribute it to the apartment owners. At a minimum, the budget shall include the following: (1) The estimated revenues and operating expenses of the association; (2) Information as to whether the budget has been prepared on a cash or accrual basis; (3) The total replacement reserves of the association as of the date of the

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		budget; (4) The estimated replacement reserves the association will require to maintain the property based on a reserve study performed by the association; (5) A general explanation of how the estimated replacement reserves are computed; (6) The amount the association must collect for the fiscal year to fund the estimated replacement reserves; and (7) Information as to whether the amount the association must collect for the fiscal year to fund the estimated replacement reserves was calculated using a per cent funded or cash flow plan. The method or plan shall not circumvent the estimated replacement reserves amount determined by the reserve study pursuant to paragraph (4). (b) The association shall assess the apartment owners to either fund a minimum of fifty per cent of the estimated replacement reserves or fund one hundred per cent of the estimated replacement reserves when using a cash flow plan; provided that a new association created after January 1, 1993, need not collect estimated replacement reserves until the fiscal year which begins after the association's first annual meeting. For each fiscal year, the association shall collect the amount assessed to fund the estimated replacement for that fiscal year reserves, as determined by the association's plan, except: (1) The commission shall adopt rules to permit an existing association to fund its estimated replacement reserves in increments after January 1, 1993 and prior to January 1, 2000; and (2) The commission shall adopt rules to permit an association to fund in increments, over three years, estimated replacement reserves that have been substantially depleted by an emergency. (c) The association shall compute the estimated replacement reserves by a formula which is based on the estimated life and the estimated capital expenditure or major maintenance required for each part of the property. The estimated replacement reserves shall include: (1) Adjustments for revenues which will be received and expenditures which will be made before the beginning of the fiscal year to which the budget relates; and (2) Separate, designated reserves for each part of the property for which capital expenditures or major maintenance will exceed $10,000. Parts of the property for which capital expenditures or major maintenance will not exceed $10,000 may be aggregated in a single designated reserve. (d) No association or apartment owner, director, officer, managing agent, or employee of an association who makes a good faith effort to calculate the estimated replacement reserves for an association shall be liable if the estimate subsequently proves incorrect.

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		(e) The commission may request a copy of the annual operating budget of the association of apartment owners as part of the association's registration with the commission under section 514A-95.1. (f) A board may not exceed its total adopted annual operating budget by more than twenty per cent during the fiscal year to which the budget relates, except in emergency situations. Prior to the imposition or collection of an assessment under this paragraph, the board shall pass a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment. (g) The requirements of this section shall override any requirements in an association's declaration, bylaws, or any other association documents relating to preparation of budgets, calculation of reserve requirements, assessment and funding of reserves, with the exception of: (1) Any provisions relating to the repair and maintenance of property; (2) Any requirements in an association's declaration, bylaws, or any other association documents which require the association to collect more than fifty per cent of reserve requirements; or (3) Any provisions relating to upgrading the common elements, such as additions, improvements, and alterations to the common elements. (h) Subject to the procedures of section 514A-94 and any rules adopted by the commission, any apartment owner whose association board fails to comply with this section may enforce compliance by the board. In any proceeding to enforce compliance, a board which has not prepared an annual operating budget and reserve study shall have the burden of proving it has complied with this section. (i) The commission may adopt rules to implement this section. (j) As used in this section: "Capital expenditure" means an expense that results from the purchase or replacement of an asset whose life is greater than one year, or the addition of an asset that extends the life of an existing asset for a period greater than one year. "Cash flow plan" means a minimum twenty-year projection of an association's future income and expense requirements to fund fully its replacement reserves requirements each year during that twenty-year period, except in an emergency; provided that it does not include a projection of special assessments or loans during that twenty-year period, except in an emergency. "Emergency situation" means any extraordinary expenses: (1) Required by an order of a court; (2) Necessary to repair or maintain any part of the property for which the association is responsible where a threat to personal safety on the property is discovered;

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		(3) Necessary to repair any part of the property for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget; or (4) Necessary to respond to any legal or administrative proceeding brought against the association that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget. (5) Necessary for the association to obtain adequate insurance for the property which the association must insure. "Major maintenance" means an expenditure for maintenance or repair that will result in extending the life of an asset for a period greater than one year. "Replacement reserves" means funds for the upkeep, repair, or replacement of those parts of the property, including, but not limited to roofs, walls, decks, paving, and equipment, that the association is obligated to maintain.
		Condominium Recodification Attorney's Comment 1. The budget and reserves section must be refined and incorporated into the recodification. 2. It has been strongly recommended that only accrual basis accounting be allowed. 3. There may be potential to use community facilities district bond financing in some situations. (*See*, HRS §46-80.1.) We will research this further. 4. The philosophical basis for bond financing of public facilities is that those who use such facilities should pay for them. When government builds a public facility, money is borrowed through the sale of bonds secured by the full faith and credit of the governmental body. The bond is repaid with tax dollars over a period of time that roughly corresponds to the life of the public facility. The bottom line is that taxpayers are paying for the public facility during the time they are using the facility.
		§514A-91 Joint and several liability of grantor and grantee for unpaid common expenses. In a voluntary conveyance the grantee of an apartment is jointly and severally liable with the grantor for all unpaid assessments against the latter for the grantor's share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. However, any such grantor or grantee is entitled to a statement from the manager or board of directors setting forth the amount of the unpaid assessments against the grantor, and except as to the amount of subsequently dishonored checks mentioned in such statement as having been received within the thirty-day period immediately preceding the date of such statement, the grantee is not liable for, nor is the apartment conveyed subject to a lien for, any unpaid assessments against the grantor in excess of the amount therein set forth.
		Condominium Recodification Attorney's Comment 1. Is this provision necessary?

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		§514A-92 Waiver of use of common elements; abandonment of apartment; conveyance to board of directors. No apartment owner may exempt himself from liability for his contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of his apartment. Subject to such terms and conditions as may be specified in the bylaws, any apartment owner may, by conveying his apartment and his common interest to the board of directors on behalf of all other apartment owners, exempt himself from common expenses thereafter accruing.
		Condominium Recodification Attorney's Comment 1. [Find comparable section in UCA/UCIOA.]
		§514A-92.1 Designation of additional areas. Designation of additional areas to be common elements or subject to common expenses after the initial filing of the bylaws or declaration shall require the approval of ninety per cent of the apartment owners; provided that if the developer discloses to the initial buyer in writing that additional areas will be designated as common elements pursuant to an incremental or phased project, this requirement shall not apply as to those additional areas.
		§514A-92.2 Notification of maintenance fee increases. The manager or board of directors shall notify the apartment owners in writing of maintenance fee increases at least thirty days prior to such an increase.
		Condominium Recodification Attorney's Comment 1.
		§514A-97 Association of apartment owners funds; handling and disbursement. (a) The funds in the general operating account of the association of apartment owners shall not be commingled with funds of other activities such as lease rent collections and rental operations, nor shall a managing agent commingle any association funds with the managing agent's own funds.
		(b) For purposes of subsection (a), lease rent collections and rental operations shall not include the rental or leasing of common elements that is conducted on behalf of the association or the collection of ground lease rents from individual apartment owners of a project and the payment of such ground lease rents to the ground lessor; provided that: (1) The collection is allowed by the provisions of the declaration, bylaws, master deed, master lease, or individual apartment leases of the project; (2) If a management contract exists, it requires the managing agent to collect ground lease rents from the individual apartment owners and pay the ground lease rents to the ground lessor; (3) The system of lease rent collection is approved by a majority vote of all apartment owners at a meeting of the association; and (4) No managing agent or association shall pay ground lease rent to the

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		ground lessor in excess of actual ground lease rent collected from individual apartment owners.
		(c) All funds collected by an association, or by a managing agent for any association, shall be: (1) Deposited in a financial institution, including a federal or community credit union, located in the State and whose deposits are insured by an agency of the United States government; (2) Held by a corporation authorized to do business under article 8 of chapter 412; (3) Held by the United States Treasury; or (4) Purchased in the name of and held for the benefit of the association through a securities broker that is registered with the Securities and Exchange Commission, has an office in the State, and the accounts of which are held by member firms of the New York Stock Exchange or National Association of Securities Dealers and insured by the Securities Insurance Protection Corporation. All funds collected by an association, or by a managing agent for any association, shall be invested only in: (1) Demand deposits, investment certificates, and certificates of deposit; (2) Obligations of the United States government, the State of Hawaii, or their respective agencies; provided that those obligations shall have stated maturity dates no more than ten years after the purchase date unless approved otherwise by a majority vote of the apartment owners at an annual or special meeting of the association or by written consent of a majority of the apartment owners; or (3) Mutual funds comprised solely of investments in the obligations of the United States government, the State of Hawaii, or their respective agencies; provided that those obligations shall have stated maturity dates no more than ten years after the purchase date unless approved otherwise by a majority vote of the apartment owners at an annual or special meeting of the association or by written consent of a majority of the apartment owners; provided that before any investment longer than one year is made by an association, the board must approve the action; and provided further that the board must clearly disclose to owners all investments longer than one year at each year's association annual meeting. Records of the deposits and disbursements shall be disclosed to the commission upon request. All funds collected by an association shall only be disbursed by employees of the association under the supervision of the association's board of directors. All funds collected by a managing agent from an association shall be held in a client trust fund account and shall be disbursed only by the managing agent or the managing agent's employees under the supervision of the association's board of directors. The commission may draft rules governing the handling and disbursement of condominium association funds.

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		(d) A managing agent or board of directors shall not transfer association funds by telephone between accounts, including but not limited to the general operating account and reserve fund account.
		(e) A managing agent shall keep and disburse funds collected on behalf of the condominium owners in strict compliance with any agreement made with the condominium owners, chapter 467, the rules of the commission, and all other applicable laws.
		(f) Any person who embezzles or knowingly misapplies association funds received by a managing agent or association of apartment owners shall be guilty of a class C felony.
		Condominium Recodification Attorney's Comment 1. The Hawaii Bankers Association recommends that "funds be deposited in a financial institution located in the State whose deposits are insured by an agency of the United States government." They question "the ability or authority of credit unions in receiving such deposits from the AOAO." (*See*, May 18, 2001 letter from Hawaii Bankers Association to Gordon M. Arakaki.) 2. It has been suggested that State law explicitly allow a prudent percentage of the unit owners' association funds to be invested in higher yielding instruments. 3. The treasurer of a condominium association suggests the following language: (1) Deposited in a financial institution, including a federal or community credit union, whose deposits are: a. Insured by an agency of the United States government, and; b. Maintain a Community Reinvestment Act (U.S. Code, Title 12, Chapter 30) evaluation of "Outstanding" or "Satisfactory", and; c. Maintain a Moody's Investors Service: i. Long-Term Bank Deposit Rating of "Baa" or better, or; ii. Short-Term Bank Deposit Ratings of "Prime-3" or better, or; iii. Bank Financial Strength Rating of "C" or better; or (2) Held by a corporation authorized to do business under article 8 of chapter 412 meeting the provisions of this section; . . .
	§ 3-116. Lien for Assessments.	**§514A-90 Priority of lien.** [Repeal and reenactment on December 31, 2003. L 2000, c 39, §4.]
	(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.	

Article 3. Management of Condominium (Recodification Draft #1)

	Hawaii Condominium Law Recodification Draft #1 **[Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]**	**Hawaii's Present Condominium Law** **Chapter 514A, Hawaii Revised Statutes (HRS)** ***(Compare with Proposed Recodified Condominium Law in left-hand column)***
	(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for ~~[real estate taxes and other governmental assessments or charges]~~ taxes and assessments lawfully imposed by governmental authority against the unit. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. ~~[The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]~~	(a) All sums assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment constitute a lien on the apartment prior to all other liens, except: (1) Liens for taxes and assessments lawfully imposed by governmental authority against the apartment; and (2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association of apartment owners, and costs and expenses including attorneys' fees provided in such mortgages. The lien of the association of apartment owners may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board of directors, acting on behalf of the association of apartment owners, in like manner as a mortgage of real property. In any such foreclosure the apartment owner shall be required to pay a reasonable rental for the apartment, if so provided in the bylaws, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed. The managing agent or board of directors, acting on behalf of the association of apartment owners, unless prohibited by the declaration, may bid on the apartment at foreclosure sale, and acquire and hold, lease, mortgage, and convey the apartment. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.
	(c) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.	
	(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.	
	(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.	
	(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.	
	(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.	[*See*, §514A-94(a) above, which in pertinent part reads: "All costs and expenses, including reasonable attorneys' fees, incurred by or on behalf of the association for: (1) Collecting any delinquent assessments against any owner's apartment; (2) Foreclosing any lien thereon; . . . . against an owner, occupant, tenant, employee of an owner, or any other person who may in any manner use the property shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the

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		association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association."]
	(h) The association upon written request shall furnish to a unit owner a recordable statement setting forth the amount of unpaid assessments against the unit. The statement must be furnished within (10) business days after receipt of the request and is binding on the association, the executive board, and every unit owner.	[*See*, §514A-90(c) below, which in pertinent part reads: "An apartment owner who disputes the amount of an assessment may request a written statement clearly indicating: (1) The amount of common expenses included in the assessment, including the due date of each amount claimed; (2) The amount of any penalty, late fee, lien filing fee, and any other charge included in the assessment; (3) The amount of attorneys' fees and costs, if any, included in the assessment; (4) That under Hawaii law, an apartment owner has no right to withhold assessments for any reason; (5) That an apartment owner has a right to demand mediation or arbitration to resolve disputes about the amount or validity of an association's assessment, provided the apartment owner immediately pays the assessment in full and keeps assessments current; and (6) That payment in full of the assessment does not prevent the owner from contesting the assessment or receiving a refund of amounts not owed."]
	(i) The association's lien may be foreclosed as provided in this subsection: (1) The association's lien must be foreclosed in like manner as a mortgage on real estate by action or by nonjudicial or power of sale under chapter 667; (2) In the case of foreclosure under nonjudicial or power of sale under chapter 667, the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.	[*See*, §514A-90(a) above, which in pertinent part reads: "The lien of the association of apartment owners may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board of directors, acting on behalf of the association of apartment owners, in like manner as a mortgage of real property. In any such foreclosure the apartment owner shall be required to pay a reasonable rental for the apartment, if so provided in the bylaws, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed. The managing agent or board of directors, acting on behalf of the association of apartment owners, unless prohibited by the declaration, may bid on the apartment at foreclosure sale, and acquire and hold, lease, mortgage, and convey the apartment. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed."]
	(j) In an action by an association to collect assessments or to foreclose a lien for unpaid assessments, the court may appoint a receiver to collect all sums alleged to be due and owing to a unit owner before commencement or during pendency of the action. The receivership is governed by [insert state law generally applicable to receiverships]. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted	

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	by the association pursuant to Section 3-115.	
		(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of an apartment obtains title to the apartment as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or assessments by the association of apartment owners chargeable to the apartment which became due prior to the acquisition of title to the apartment by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the apartment owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the apartment shall be deemed to acquire title and shall be required to pay the apartment's share of common expenses and assessments beginning: (1) Thirty-six days after the order confirming the sale to the purchaser has been filed with the court; (2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser; or (3) Upon the recording of the deed, whichever occurs first.
		(c) No apartment owner shall withhold any assessment claimed by the association. An apartment owner who disputes the amount of an assessment may request a written statement clearly indicating: (1) The amount of common expenses included in the assessment, including the due date of each amount claimed; (2) The amount of any penalty, late fee, lien filing fee, and any other charge included in the assessment; (3) The amount of attorneys' fees and costs, if any, included in the assessment; (4) That under Hawaii law, an apartment owner has no right to withhold assessments for any reason; (5) That an apartment owner has a right to demand mediation or arbitration to resolve disputes about the amount or validity of an association's assessment, provided the apartment owner immediately pays the assessment in full and keeps assessments current; and (6) That payment in full of the assessment does not prevent the owner from contesting the assessment or receiving a refund of amounts not owed. Nothing in this section shall limit the rights of an owner to the protection of all fair debt collection procedures mandated under federal and state law.
		(d) An apartment owner who pays an association the full amount claimed by the association may file in small claims court or require the association to mediate to

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		resolve any disputes concerning the amount or validity of the association's claim. If the apartment owner and the association are unable to resolve the dispute through mediation, either party may file for arbitration under part VII; provided that an apartment owner may only file for arbitration if all amounts claimed by the association are paid in full on or before the date of filing. If the apartment owner fails to keep all association assessments current during the arbitration, the association may ask the arbitrator to temporarily suspend the arbitration proceedings. If the apartment owner pays all association assessments within thirty days of the date of suspension, the apartment owner may ask the arbitrator to recommence the arbitration proceedings. If the owner fails to pay all association assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The apartment owner shall be entitled to a refund of any amounts paid to the association which are not owed.
		(e) As an alternative to foreclosure proceedings under subsection (a), where an apartment is owner-occupied, the association of apartment owners may authorize its managing agent or board of directors to, after sixty days' written notice to the apartment owner and to the apartment's first mortgagee of the nonpayment of the apartment's share of the common expenses, terminate the delinquent apartment's access to the common elements and cease supplying a delinquent apartment with any and all services normally supplied or paid for by the association of apartment owners. Any terminated services and privileges shall be restored upon payment of all delinquent assessments.
		(f) Before the board of directors or managing agent may take the actions permitted under subsection (e), the board must adopt a written policy providing for such actions and have the policy approved by a majority vote of the apartment owners at an annual or special meeting of the association or by the written consent of a majority of the apartment owners.
		(g) Subject to this subsection, and subsections (h) and (i), the board of an association of apartment owners may specially assess the amount of the unpaid regular monthly common assessments for common area expenses against a person who, in a judicial or nonjudicial power of sale foreclosure, purchases a delinquent apartment; provided that: (1) A purchaser who holds a mortgage on a delinquent apartment that was recorded prior to the filing of a notice of lien by the association of apartment owners and who acquires the delinquent apartment through a judicial or nonjudicial foreclosure proceeding, including purchasing the delinquent apartment at a foreclosure auction, shall not be obligated to make, nor be liable for, payment of the special assessment as provided for under this subsection; and (2) A person who subsequently purchases the delinquent apartment from the mortgagee referred to in paragraph (1) shall be obligated to make, and shall be liable for, payment of the special assessment provided for under this subsection; provided that the association of apartment owners has filed a notice of lien against the delinquent apartment for the unpaid assessments for common area expenses

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		which form the basis of the special assessment, prior to the subsequent purchaser's acquisition of title to the delinquent apartment.
		(h) The amount of the special assessment assessed under subsection (g) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the six months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure, and for which the association of apartment owners had filed a notice of lien against the delinquent apartment pursuant to subsection (g)(2). In no event shall the amount of the special assessment exceed the sum of $1,800.
		(i) For purposes of subsections (g) and (h), the following definitions shall apply: (1) "Completion" means: (A) In a nonjudicial power of sale foreclosure, when the affidavit required under section 667-5 is filed; and (B) In a judicial foreclosure, when a purchaser is deemed to acquire title pursuant to subsection (b). (2) "Regular monthly common assessments" shall not include: (A) Any other special assessment, except for a special assessment imposed on all apartments as part of a budget adopted pursuant to section 514A-83.6; (B) Late charges, fines, or penalties; (C) Interest assessed by the association of apartment owners; (D) Any lien arising out of the assessment; or (E) Any fees or costs related to the collection or enforcement of the assessment, including attorneys' fees and court costs.
	UCA (1980) Comment 1. Subsection (a) provides that the association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens. In addition, if the use of a power of sale pursuant to a mortgage is permitted in a particular state, the bracketed language (with an appropriate statutory citation inserted) may be used to ensure that the association's lien for unpaid assessments may also be enforced through the power of sale device. The bracketed language requiring notice of foreclosure should be adopted only in states in which the power of sale statute does not require notice to junior lienholders. 2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first mortgages recorded before the date the assessment became delinquent. However, as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice,	**Condominium Recodification Attorney's Comment** 1. The Hawaii Bankers Association opposes the provisions of UCA/UCIOA §3-116. They maintain that the present HRS §514A-90 "should remain in the recodification until its repeal on December 31, 2003." (*See*, May 18, 2001 letter from Hawaii Bankers Association to Gordon M. Arakaki.) 2. At least 14 states (Alaska, Colorado, Connecticut, Florida, Massachusetts, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, Washington, Washington, D.C., and West Virginia) give unit owners' associations limited lien priority for their assessments. (Cliff Treese refers to such liens as "community association protection" liens.) I am unaware of any problems related to the limited lien priority in those states have adopted it. 3. It has been said that lenders: a) make no concerted effort to cure assessment defaults at the same time they cure mortgage defaults; b) wait as long as possible to take tile so they won't have to pay assessments; and c) have the benefit of having the community association maintain their asset until a new buyer is found (if the home was in a non-common interest ownership development, the lender would have to maintain and pay

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	the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary. 3. Subsection ~~(e)~~ *(f)* makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure. 4. In view of the association's powers to enforce its lien for unpaid assessments, subsection ~~(f)~~ *(h)* provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (a), currently levied against his unit. The statement is binding on the association, the executive board, and every unit owner in any subsequent action to collect such unpaid assessments. 5. Units may be part of a condominium and of a larger real estate regime (*see* the Uniform Planned Community Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1980, which would govern most associations with assessment powers). For example, a large real estate development any consist of a larger planned community which contains detached single family dwellings and town houses which are not part of any condominium and a highrise building which is organized as a condominium within the planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or become delinquent. **UCIOA (1994) Comment (relevant portions)** 1. Section 3-116(a) was amended in 1994 to delete the language "from the time the assessment or fine becomes due." The deleted clause was intended to make clear that the lien was enforceable at the time the assessment became due. Commentators have observed, however, that the language caused confusion with respect to priority issues. The intention of the statute, as demonstrated by the Comments, was that the inchoate statutory lien was the functional equivalent of real estate taxes except with respect to the special priorities identified in subsection (b) of the section. The deletion of the language as suggested makes clear that the lien arises immediately upon the effective date of the statute for old common interest communities and upon recording of the declaration for new common interest	for the asset). 4. We need to explore the limited lien priority along with other possible ways to address this imbalance. 5. For an excellent discussion of the issues involved with the UCA/UCIOA limited lien priority, *see*, Winokur, James L., "Meaner Lienor Community Associations: The 'Super Priority' Lien and Related Reforms Under the Uniform Common Interest Ownership Act," 27 *Wake Forest L. Rev.*353 (1992).

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	communities. As a result of this deletion, it is clear that in the absence of an exception in a title insurance policy for common charges, a title insurer would be liable for post-insurance obligations which have a priority established prior to the time the policy was issued. This, however, is no different than in other inchoate liens such as real estate taxes and mechanics liens, all of which have become standard exceptions in the title industry. 5. . . . In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the State rather than setting out a special faster method of foreclosure in the statute. 6. New subsection (l) *[Recodification subsection (j)]* makes clear that the courts have authority to appoint receivers upon request by associations to aid in collection of common charges.	
		[§514A-90.5 Unpaid common expenses; collection from tenants.] (a) If the owner of an apartment rents or leases the apartment and is in default for thirty days or more in the payment of the apartment's share of the common expenses, the board of directors, for as long as the default continues, may demand in writing and receive each month from any tenant occupying the apartment, an amount sufficient to pay all sums due from the apartment owner to the association, including interest, if any, but the amount shall not exceed the tenant's rent due each month. The tenant's payment under this section shall discharge that amount of payment from the tenant's rent obligation, and any contractual provision to the contrary shall be void as a matter of law.
		(b) Prior to taking any action under this section, the board of directors shall give to the delinquent apartment owner written notice of its intent to collect the rent owed. The notice shall: (1) Be sent both by first-class and certified mail; (2) Set forth the exact amount the association claims is due and owing by the apartment owner; and (3) Indicate the intent of the board of directors to collect such amount from the rent, along with any other amounts that become due and remain unpaid.
		(c) The apartment owner shall not take any retaliatory action against the tenant for payments made under this section.
		(d) The payment of any portion of the apartment's share of common expenses by the tenant pursuant to a written demand by the board is a complete defense, to the extent of the amount demanded and paid by the tenant, in an action for nonpayment of rent brought by the apartment owner against a tenant.

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		(e) The board may not demand payment from the tenant pursuant to this section if: (1) A commissioner or receiver has been appointed to take charge of the premises pending a mortgage foreclosure; (2) A mortgagee is in possession pending a mortgage foreclosure; or (3) The tenant is served with a court order directing payment to a third party.
		(f) In the event of any conflict between this section and any provision of chapter 521, the conflict shall be resolved in favor of this section; provided that if the tenant is entitled to an offset of rent under chapter 521, the tenant may deduct the offset from the amount due to the association, up to the limits stated in chapter 521. Nothing herein precludes the apartment owner or tenant from seeking equitable relief from a court of competent jurisdiction or seeking a judicial determination of the amount owed.
		(g) Before the board of directors may take the actions permitted under subsection (a), the board must adopt a written policy providing for the actions and have the policy approved by a majority vote of the apartment owners at an annual or special meeting of the association or by the written consent of a majority of the apartment owners.
		Condominium Recodification Attorney's Comment 1.
	§ 3-117. Other Liens Affecting the Condominium.	
	(a) Except as provided in subsection (b), a judgment for money against the association, if recorded [~~if docketed~~] [~~if (insert other procedures required under state law to perfect a lien on real property as a result of a judgment)~~], is not a lien on the common elements, but is a lien in favor of the judgment lienholder against all of the units in the condominium at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.	
	(b) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.	
	(c) Whether perfected before or after the creation of the condominium, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium), becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any	

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	portion of the common expenses incurred in connection with that lien.	
	(d) A judgment against the association must be indexed in the name of the condominium and the association and, when so indexed, is notice of the lien against the units.	
	UCA (1980) Comment [for condominiums, UCIOA (1994) essentially same 1. This section deals with the effect on unit owners of judgments against the association. The issue is not free from difficulty. Presently, in most states, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against the property of the association. On the other hand, if the association is organized as an unincorporated association, under the law of most states each unit owner would have joint and several liability on the judgment. This Act strikes a balance between the two extremes, making the judgment lien a direct lien against each individual unit, but allowing the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment. The judgment would also be a lien against any property owned by the association. 2. It should be noted that, while the judgment lien runs directly against unit owners, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated association only is liable for a judgment, it will, of course, have no assets to satisfy the judgment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnished by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That additional assessment would be in precisely the amount for which this Act gives a direct lien against the individual unit owners. Further, if an association which is without sufficient assets to satisfy a judgment refuses to make assessments from which the creditor can have his claim satisfied, it is very likely that a court, in a supplemental proceeding on the judgment, would direct the association to make the necessary assessments against the unit owners. Unpaid assessment made by the association constitute liens against units just as do judgments. Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay his proportionate share will end up with a lien against his unit. The differences, therefore, between the lien system established by Section 3-117 and the system which would be applicable if ordinary corporation rules were applied are these: (1) The unit owner can discharge his unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on his unit during the period between the time the	

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	judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien. (2) The judgment creditor through his ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment. Procuring an assessment through pressure on individual unit owners may be quicker and cheaper for the judgment creditor than using supplemental proceedings and having a judge order that the board of directors make the necessary assessment. In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units in the unit owners as tenants-in-common or otherwise, the National Conference of Commissioners on Uniform State Laws believes that that result is inappropriate, and that the unit in the condominium itself should be viewed as equity property of the association capable of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy the condominium association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well-being of society. The condominium association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of his home or for torts caused by his failure to adequately maintain the premises should not be able to entirely avoid that liability through the device of organizing with other homeowners into a condominium association. On the other hand, it is perhaps not fair to a unit owner in a condominium regime to have all of his assets at risk based on the contracts of the association over which he has little control and as to which he has only a fractional interest or benefit. It should be noted that, except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left to a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.	
	§ 3-118. Association Records. The association shall keep financial records sufficiently detailed to enable the association to comply with Section 4-109. All financial and other records must be made reasonably available for examination by any unit owner and his authorized agents.	**[§514A-83.5] Documents of the association of apartment owners.** (a) The association's most current financial statement and minutes of the board of directors' meetings, once approved, shall be available to any owner at no cost or on twenty-four hour loan, at a convenient location designated by the board of directors.
		(b) Minutes of meetings of the board of directors and the association for the current and prior year shall be available for examination by apartment owners at convenient hours at a place designated by the board. Minutes of meetings shall include the recorded vote of each board member on all motions except motions voted on in executive session. Copies of meeting minutes shall be provided to any owner upon the owner's request provided that the owner pay a reasonable fee for

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		duplicating, postage, stationery, and other administrative costs associated with handling the request.
		(c) Financial statements, general ledgers, the accounts receivable ledger, accounts payable ledgers, check ledgers, insurance policies, contracts, and invoices of the association of apartment owners for the current and prior year and delinquencies of ninety days or more shall be available for examination by apartment owners at convenient hours at a place designated by the board; provided: (1) That the board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interests of the association or its members or both; and (2) That owners pay for administrative costs in excess of eight hours per year. Copies of these items shall be provided to any owner upon the owner's request, provided that the owner pay a reasonable fee for duplicating, postage, stationery, and other administrative costs associated with handling the request.
		(d) Owners shall also be permitted to view proxies, tally sheets, ballots, owners' check-in lists, and the certificate of election for a period of thirty days following any association meeting; provided: (1) That the board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interest of the association or its members or both; and (2) That owners pay for administrative costs in excess of eight hours per year. Proxies and ballots may be destroyed following the thirty-day period. Copies of tally sheets, owners' check-in lists, and the certificates of election from the most recent association meeting shall be provided to any owner upon the owner's request, provided that the owner pay a reasonable fee for duplicating, postage, stationery, and other administrative costs associated with handling the request.
		(e) Owners may file a written request with the board to examine other documents. The board shall give written authorization or written refusal with an explanation of the refusal within thirty calendar days of receipt of the request.
		Condominium Recodification Attorney's Comment 1. UCA (1980) and UCIOA (1994) do not have any official comments to §3-118 (Association Records).
		§514A-83.4 Meeting minutes. (a) Minutes of meetings of the board of directors and association of apartment owners shall include the recorded vote of each board member on all motions except motions voted on in executive session. (b) Minutes of meetings of the board of directors and association of apartment owners shall be approved at the next succeeding meeting; provided that for board of directors meetings, no later than the second succeeding meeting.

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		(c) Minutes of all meetings shall be available within seven calendar days after approval and unapproved final drafts of the minutes of a meeting shall be available within sixty days after the meeting; provided that the minutes of any executive session may be withheld if their publication would defeat the lawful purpose of the executive session.
		§514A-84.5 Availability of project documents. An accurate copy of the declaration of condominium property regime, the bylaws of the association of apartment owners, the house rules, if any, the master lease, if any, a sample original conveyance document, all public reports and any amendments thereto, shall be kept at the managing agent's office. The managing agent shall provide copies of those documents to owners, prospective purchasers and their prospective agents during normal business hours, upon payment to the managing agent of a reasonable charge to defray any administrative or duplicating costs. In the event that the project is not managed by a managing agent, the foregoing requirements shall be undertaken by a person or entity, if any, employed by the association of apartment owners, to whom this function is delegated.
		§514A-85 Records; examination; disposal. (a) The managing agent or board of directors shall keep detailed, accurate records in chronological order, of the receipts and expenditures affecting the common elements, specifying and itemizing the maintenance and repair expenses of the common elements and any other expenses incurred. The managing agent or board of directors shall also keep monthly statements indicating the total current delinquent dollar amount of any unpaid assessments for common expenses. (b) All records and the vouchers authorizing the payments and statements shall be kept and maintained at the address of the project, or elsewhere within the State as determined by the board of directors. (c) A managing agent employed or retained by one or more condominium associations may dispose of the records of any condominium association which are more than five years old without liability if the managing agent first provides the board of directors of the condominium association affected with written notice of the managing agent's intent to dispose of the records if not retrieved by the board of directors within sixty days, which notice shall include an itemized list of the records which the managing agent intends to dispose of. (d) No person shall knowingly make any false certificate, entry, or memorandum upon any of the books or records of any managing agent or association. No person shall knowingly alter, destroy, mutilate, or conceal any books or records of a managing agent or association.
		§514A-96 Board of directors, audits, audited financial statement, transmittal. (a) The association of apartment owners shall require an annual audit of the association financial accounts and no less than one annual unannounced verification of the association's cash balance by a public accountant; provided that if the association is comprised of less than twenty owners, the annual audit and the annual unannounced cash balance verification may be waived by a majority vote of

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		all apartment owners taken at an association meeting. (b) The board of directors of the association shall make available a copy of the annual audit to each apartment owner at least thirty days prior to the annual meeting which follows the end of the fiscal year. The board shall provide upon all official proxy forms a box wherein the owner may indicate that the owner wishes to obtain a copy of the annual audit report. The board shall not be required to submit a copy of the annual audit report to the owner if the proxy form is not marked. If the annual audit has not been completed by that date, the board shall make available: (1) An unaudited year end financial statement for the fiscal year to each apartment owner at least thirty days prior to the annual meeting; and (2) The annual audit to all owners at the annual meeting, or as soon as the audit is completed, whichever occurs later. If the association's fiscal year ends less than two months prior to the convening of the annual meeting, the year to date unaudited financial statement may cover the period from the beginning of the association's fiscal year to the end of the month preceding the date on which notice of the annual meeting is mailed.
		Condominium Recodification Attorney's Comment 1. Access to association documents and records is a key to self-governance by the condominium community. 2. We need to authorize/encourage the provision of association documents and records on-line. This should end most access disputes. 3. A condominium unit owner suggests that the recodification should require that: a) boards distribute (as opposed to simply make available) year-end financial statements 30 days before annual meetings; b) budgets be distributed 30 days before the fiscal year (noting that maintenance fee increase notices must be sent 30 days before being imposed); and c) association records be maintained on the same island where the project is located (for review and copying by unit owners). [Note that the last suggestion would be unnecessary if records are available on-line and unit owners have access to computers. Note further that all public libraries have computers with Internet access.] 4. Much work remains to be done to integrate appropriate associations documents and records provisions of HRS Chapter 514A into the recodification.
	§ 3-119. Association as Trustee. With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquiry whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its	

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	capacity as trustee.	
	UCA (1980) Comment Based on Section 7 of the Uniform Trustees' Powers Act, this section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under Section 3-113 for insurance proceeds, or Section 2-118 following termination.	**Condominium Recodification Attorney's Comment** 1. UCIOA (1994) does not have any official comments to §3-119 (Association as Trustee).
		§514A-87 Personal application. (a) All apartment owners, tenants of such owners, employees of owners and tenants, or any other persons that may in any manner use property or any part thereof submitted to this chapter are subject to this chapter and to the declaration and bylaws of the association of apartment owners adopted pursuant to this chapter. (b) All agreements, decisions, and determinations lawfully made by the association of apartment owners in accordance with the voting percentages established in this chapter, the declaration, or the bylaws are binding on all apartment owners.
		Condominium Recodification Attorney's Comment 1.
		§514A-88 Compliance with covenants, bylaws, and administrative provisions. Each apartment owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the declaration. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or, in a proper case, by an aggrieved apartment owner.
		Condominium Recodification Attorney's Comment [*See*, UCA/UCIOA/Recodification §3-102(c). "Powers" section.]
		§514A-89 Certain work prohibited. No apartment owner shall do any work which could jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement or hereditament, nor may any apartment owner add any material structure or excavate any additional basement or cellar, without in every such case the consent of seventy-five per cent of the apartment owners, together with the consent of all apartment owners whose apartments or limited common elements appurtenant thereto are directly affected, being first obtained; provided that nonmaterial structural additions to the common elements, including, without limitation, the installation of solar energy devices, or additions to or alterations of an apartment made within such apartment or within a limited common element appurtenant to and for the exclusive use of the apartment shall require approval only by the board of directors of the association of apartment owners and such percentage, number, or group of apartment owners as may be required by the

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		declaration or bylaws. "Nonmaterial structural additions to the common elements", as used in this section, means a structural addition to the common elements which does not jeopardize the soundness or safety of the property, reduce the value thereof, impair any easement or hereditament, detract from the appearance of the project, interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of property, or directly affect any nonconsenting owner. For purposes of this section, "solar energy device" means any new identifiable facility, equipment, apparatus, or the like which makes use of solar energy for heating, cooling, or reducing the use of other types of energy dependent upon fossil fuel for its generation; provided that if the equipment sold cannot be used as a solar device without its incorporation with other equipment, it must be installed in place and ready to be made operational in order to qualify as a "solar energy device".
		Condominium Recodification Attorney's Comment 1.
		[§514A-90.6] Lease rent renegotiation. (a) Notwithstanding any provision in the declaration or bylaws of any property subject to this chapter, any lease or sublease of the property or of an apartment, or an undivided interest in the land to an apartment owner, whenever any lease or sublease of the property, an apartment, or an undivided interest in the land to an apartment owner provides for the periodic renegotiation of lease rent thereunder, the association of apartment owners shall represent the apartment owners in all negotiations and proceedings, including but not limited to appraisal or arbitration, for the determination of lease rent as a common expense of the association. (b) If some, but not all of the apartment owners have purchased the leased fee interest appurtenant to their apartments, all costs and expenses of the renegotiation shall be assessed to the remaining lessees in the same proportion that the common interest appurtenant to each lessee's apartment bears to the common interest appurtenant to all lessees' apartments. The unpaid amount of this assessment shall constitute a lien upon the lessee's apartment, which may be collected in accordance with sections 514A-90 and 514A-94 in the same manner as an unpaid common expense.
		Condominium Recodification Attorney's Comment HRS §514A-90.6 is incorporated in Recodification Draft #1 §2-106.1.
		§514A-98 False statement. It shall be unlawful for any person or person's agents to testify before or file with the commission any notice, statement, application, or other document required under this chapter that is false or untrue or contains any material misstatement of fact, or contains forgery. In addition to any sanctions or remedies as provided in this chapter, any violation of this section shall constitute a misdemeanor.
		Condominium Recodification Attorney's Comment If included at all, this provision should be moved under Article 5 – Administration and

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		Registration of Condominiums.
		§514A-99 Rules. The commission shall adopt, amend, or repeal such rules as it may deem proper to fully effectuate this chapter.
		Condominium Recodification Attorney's Comment Covered under Article 5 – Administration and Registration of Condominiums. [*See*, §5-107(a) ("General Powers and Duties of Agency").]
		Condominium Recodification Attorney's Miscellaneous Comments 1. Several practitioners, management companies, and unit owners have commented on the virtual impossibility of changing obsolete provisions (among others) contained in condominium declarations. For example, in one old condominium, the elevator was so small that no one could fit any furniture bigger than a love seat into the elevator. The majority of unit owners wanted to enlarge the elevator so they could move bigger pieces of furniture up to their apartments. However, the declaration contained an owner-approval requirement for spending more than $2,000. Since first and second floor owners and others (for various reasons, including apathy) didn't care to approve spending for enlarging the elevator, it was not possible to get the necessary 75% unit owners' consent. [HRS §514A-11(11) allows declarations to be amended if at least 75% of the unit owners consent.] Ultimately, while such "spending limit" provisions might have had appeal to a buyer (initially) or to a developer who believes that it is the right "democratic" thing to do, it makes little sense in the long run for the people who have to live in the condominium since it becomes virtually impossible to change the declaration (even with its outdated dollar figure limits). The *Restatement of the Law, Third, Property (Servitudes)*, recognizes this problem and addresses it in §6.12 – Judicial Power to Excuse Compliance with Requirements of the Governing Documents, which reads as follows: A court may excuse compliance with any of the following provisions in a governing document if it finds that the provision unreasonably interferes with the community's ability to manage the common property, administer the servitude regime, or carry out any other function set forth in the declaration, and that compliance is not necessary to protect the legitimate interests of the members or lenders holding security interests: (1) a provision limiting the amount of any assessment that can be levied against individually owned property; (2) a provision requiring that an amendment to the declaration be approved by lenders; (3) a provision requiring the approval of more than a majority of the voting power to adopt an amendment described in § 6.10(1)(a); (4) a provision requiring approval of more than two-thirds of the voting power to adopt an amendment described by § 6.10(1)(b) that is not subject to the requirements of § 6.10(2) or (3); (5) a requirement that an amendment to the declaration be signed by

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		members; (6) a quorum requirement for meetings of members. *[Note: §6.10 deals with the power to amend the declaration.]* In its comments to §6.12, the Restatement explains its rationale as follows: The public and the property owners have substantial interests in the long-term viability of the common-interest community. The declaration, the foundational document setting the parameters of the community's authority, is usually drafted by the developer for whom the project's immediate financial success is generally more important than creation of a community that will function successfully in the long term. Through ignorance, inadvertence, reliance on poorly drafted forms, or lack of foresight, many declarations include provisions that impair the ability of the community or its association to function over the long term. The resulting problems have sometimes been corrected or ameliorated by legislation. However, remedial legislation is not yet available in many states and may not apply to some common-interest communities. A court has a general dispensing power, under principles of equity jurisdiction, to excuse compliance with requirements that significantly impede the functioning of common-interest communities and their associations. The interests of property owners and lenders who relied on the provisions of the declaration are protected by the requirement that the court find that compliance with the provision in question is unnecessary to protect their legitimate interests. We should incorporate a similar provision in the recodification. It may be most appropriate to place such a provision in Article 2 (probably right under §2-117, Amendment of Declaration; and §2-117.1, Restatement of Declaration and Bylaws.)