

**Senate Bill No. 502**

(By Senator Snyder)

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[Introduced February 6, 2014; referred to the Committee on  
Interstate Cooperation; and then to the Committee on the  
Judiciary.]

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11 A BILL to amend and reenact §36B-1-103, §36B-1-104, §36B-1-108,  
12 §36B-1-201, §36B-1-203, §36B-1-204, §36B-1-206 and §36B-1-207  
13 of the Code of West Virginia, 1931, as amended; to amend said  
14 code by adding thereto four new sections, designated  
15 §36B-1-115, §36B-1-116, §36B-1-208 and §36B-1-209; to amend  
16 and reenact §36B-2-103, §36B-2-105, §36B-2-106, §36B-2-109,  
17 §36B-2-111, §36B-2-112, §36B-2-113, §36B-2-116, §36B-2-117,  
18 §36B-2-118 and §36B-2-119 of said code; to amend said code by  
19 adding thereto two new sections, designated §36B-2-123 and  
20 §36B-2-124; to amend and reenact §36B-3-101, §36B-3-102,  
21 §36B-3-103, §36B-3-105, §36B-3-106, §36B-3-108, §36B-3-109,  
22 §36B-3-110, §36B-3-111, §36B-3-112, §36B-3-113, §36B-3-114,  
23 §36B-3-115, §36B-3-116, §36B-3-117 and §36B-3-118 of said

1 code; to amend said code by adding thereto five new sections,  
2 designated §36B-3-120, §36B-3-121, §36B-3-122, §36B-3-123 and  
3 §36B-3-124; and to amend and reenact §36B-4-101, §36B-4-102,  
4 §36B-4-103, §36B-4-108, §36B-4-109, §36B-4-112, §36B-4-113,  
5 §36B-4-114, §36B-4-116 and §36B-4-117 of said code, all  
6 relating to updating the Uniform Common Interest Ownership  
7 Act; and providing for applicability of the chapter.

8 *Be it enacted by the Legislature of West Virginia:*

9 That §36B-1-103, §36B-1-104, §36B-1-108, §36B-1-201,  
10 §36B-1-203, §36B-1-204, §36B-1-206 and §36B-1-207 of the Code of  
11 West Virginia, 1931, as amended, be amended and reenacted; that  
12 said code be amended by adding thereto four new sections,  
13 designated §36B-1-115, §36B-1-116, §36B-1-208 and §36B-1-209; that  
14 §36B-2-103, §36B-2-105, §36B-2-106, §36B-2-109, §36B-2-111,  
15 §36B-2-112, §36B-2-113, §36B-2-116, §36B-2-117, §36B-2-118 and  
16 §36B-2-119 of said code be amended and reenacted; that said code be  
17 amended by adding thereto two new sections, designated §36B-2-123  
18 and §36B-2-124; that §36B-3-101, §36B-3-102, §36B-3-103,  
19 §36B-3-105, §36B-3-106, §36B-3-108, §36B-3-109, §36B-3-110,  
20 §36B-3-111, §36B-3-112, §36B-3-113, §36B-3-114, §36B-3-115,  
21 §36B-3-116, §36B-3-117 and §36B-3-118 of said code be amended and  
22 reenacted; that said code be amended by adding thereto five new  
23 sections, designated §36B-3-120, §36B-3-121, §36B-3-122, §36B-3-123

1 and §36B-3-124; and that §36B-4-101, §36B-4-102, §36B-4-103,  
2 §36B-4-108, §36B-4-109, §36B-4-112, §36B-4-113, §36B-4-114,  
3 §36B-4-116 and §36B-4-117 of said code be amended and reenacted,  
4 all to read as follows:

5 **ARTICLE 1. GENERAL PROVISIONS.**

6 **§36B-1-103. Definitions.**

7 ~~In the declaration and bylaws (section one hundred six,~~  
8 ~~article three of this chapter), unless specifically provided~~  
9 ~~otherwise or the context otherwise requires, and in this chapter:~~

10 In this chapter:

11 (1) "Affiliate of a declarant" means any person who controls,  
12 is controlled by, or is under common control with a declarant. For  
13 purposes of this definition:

14 (A) A person "controls" a declarant if the person: (I) Is a  
15 general partner, officer, director or employer of the declarant;  
16 (ii) directly or indirectly or acting in concert with one or more  
17 other persons, or through one or more subsidiaries, owns, controls,  
18 holds with power to vote, or holds proxies representing, more than  
19 twenty percent of the voting interest in the declarant; (iii)  
20 controls in any manner the election of a majority of the directors  
21 of the declarant; or (iv) has contributed more than twenty percent  
22 of the capital of the declarant.

23 (B) A person "is controlled by" a declarant if the declarant:

1 (I) Is a general partner, officer, director or employer of the  
2 person; (ii) directly or indirectly or acting in concert with one  
3 or more other persons, or through one or more subsidiaries, owns,  
4 controls, holds with power to vote, or holds proxies representing,  
5 more than twenty percent of the voting interest in the person;  
6 (iii) controls in any manner the election of a majority of the  
7 directors of the person; or (iv) has contributed more than twenty  
8 percent of the capital of the person; and

9 (C) Control does not exist if the powers described in this  
10 paragraph are held solely as security for an obligation and are not  
11 exercised.

12 (2) "Allocated interests" means the following interests  
13 allocated to each unit:

14 (A) In a condominium, the undivided interest in the common  
15 elements, the common expense liability, and votes in the  
16 association;

17 (B) In a cooperative, the common expense liability, ~~and~~ the  
18 ownership interest, and votes in the association; and

19 (C) In a planned community, the common expense liability and  
20 votes in the association.

21 (3) "Assessment" means the sum attributable to each unit and  
22 due to the association pursuant to section one hundred-fifteen,  
23 article three of this chapter.

1       ~~(3)~~ (4) "Association" or "unit owners association" means the  
2 unit owners association organized under section one hundred one,  
3 article three of this chapter.

4       (5) "Bylaws" means instruments, however denominated, that  
5 contain the procedures for conduct of the affairs of the  
6 association regardless of the form in which the association is  
7 organized, including any amendments to the instruments.

8       ~~(4)~~ (6) "Common elements" means:

9       (A) In the case of: (i) A condominium or cooperative, all  
10 portions of the common interest community other than the units; and

11       (ii) ~~in~~ a planned community, any real estate within a planned  
12 community which is owned or leased by the association, other than  
13 a unit; and

14       (B) In all common interest communities, any other interests in  
15 real estate for the benefit of unit owners which are subject to the  
16 declaration.

17       ~~(5)~~ (7) "Common expenses" means expenditures made by, or  
18 financial liabilities of, the association, together with any  
19 allocations to reserves.

20       ~~(6)~~ (8) "Common expense liability" means the liability for  
21 common expenses allocated to each unit pursuant to section one  
22 hundred seven, article two of this chapter.

23       ~~(7)~~ (9) "Common interest community" means real estate

1 described in a declaration with respect to which a person, by  
2 virtue of ~~his~~ the person's ownership of a unit, is obligated to pay  
3 for a share of real estate taxes, insurance premiums, maintenance,  
4 ~~or~~ improvement of, or service or other expenses related to, common  
5 elements, other units, or other real estate described in ~~a~~ the  
6 declaration: *Provided*, That any resort owner which, prior to the  
7 effective date of this article, began the development of a resort  
8 and imposed fees or assessments upon owners of real estate in the  
9 resort for maintenance and care of the roads, streets, alleys,  
10 sidewalks, parks, common areas and common facilities in and around  
11 the resort, for fire and police protection and for such other  
12 services as may be made available to owners of real estate, may  
13 also impose the same fees and assessments to be used for the same  
14 or similar purposes upon persons purchasing real estate in the  
15 resort after the effective date of this article without creating a  
16 common interest community. The term does not include an  
17 arrangement described in sections two hundred-nine and two  
18 hundred-ten of this article. For purposes of this paragraph,  
19 ownership of a unit does not include holding a leasehold interest  
20 of less than twenty years in a unit, including renewal options.

21 ~~(8)~~ (10) "Condominium" means a common interest community in  
22 which portions of the real estate are designated for separate  
23 ownership and the remainder of the real estate is designated for

1 common ownership solely by the owners of those portions. A common  
2 interest community is not a condominium unless the undivided  
3 interest in the common elements are vested in the unit owners.

4 ~~(9)~~ (11) "Conversion building" means a building that at any  
5 time before creation of the common interest community was occupied  
6 wholly or partially by persons other than purchasers and persons  
7 ~~who~~ that occupy with the consent of purchasers.

8 ~~(10)~~ (12) "Cooperative" means a common interest community in  
9 which the real estate is owned by an association, each of whose  
10 members is entitled by virtue of his or her ownership interest in  
11 the association to exclusive possession of a unit.

12 ~~(11)~~ (13) "Dealer" means a person in the business of selling  
13 units for his or her own account.

14 ~~(12)~~ (14) "Declarant" means any person or group of persons  
15 acting in concert who: ~~(i)~~ (A) As part of a common promotional  
16 plan, offers to dispose of ~~his or the~~ interest of the person or  
17 group of persons in a unit not previously disposed of; or ~~(ii)~~ (B)  
18 reserves or succeeds to any special declarant right.

19 ~~(13)~~ (15) "Declaration" means ~~any~~ the instruments, however  
20 denominated, that create a common interest community, including any  
21 amendments to ~~those~~ the instruments.

22 ~~(14)~~ (16) "Development rights" means any right or combination  
23 of rights reserved by a declarant in the declaration to: ~~(i)~~ (A)

1 Add real estate to a common interest community; ~~(ii)~~ (B) create  
2 units, common elements or limited common elements within a common  
3 interest community; ~~(iii)~~ (C) subdivide units or convert units into  
4 common elements; or ~~(iv)~~ (D) withdraw real estate from a common  
5 interest community.

6 ~~(15)~~ (17) "Dispose" or "disposition" means a voluntary  
7 transfer to a purchaser of any legal or equitable interest in a  
8 unit, but the term does not include the transfer or release of a  
9 security interest.

10 ~~(16)~~ (18) "Executive board" means the body, regardless of  
11 name, designated in the declaration or bylaws to act on behalf of  
12 the association.

13 ~~(17)~~ (19) "Identifying number" means a symbol or address that  
14 identifies only one unit in a common interest community.

15 ~~(18)~~ (20) "Leasehold common interest community" means a common  
16 interest community in which all or a portion of the real estate is  
17 subject to a lease, the expiration or termination of which will  
18 terminate the common interest community or reduce its size.

19 ~~(19)~~ (21) "Limited common element" means a portion of the  
20 common elements allocated by the declaration or by operation of  
21 subdivision (2) or (4), section one hundred two, article two of  
22 this chapter for the exclusive use of one or more but fewer than  
23 all of the units.



1       ~~(20)~~ (22) "Master association" means an organization described  
2 in section one hundred twenty, article two of this chapter, whether  
3 or not it is also an association described in section one hundred  
4 one, article three of this chapter.

5       ~~(21)~~ (23) "Offering" means any advertisement, inducement,  
6 solicitation or attempt to encourage any person to acquire any  
7 interest in a unit, other than as security for an obligation. An  
8 advertisement in a newspaper or other periodical of general  
9 circulation, or in any broadcast medium to the general public, of  
10 a common interest community not located in this state, is not an  
11 offering if the advertisement states that an offering may be made  
12 only in compliance with the law of the jurisdiction in which the  
13 common interest community is located.

14       ~~(22)~~ (24) "Person" means an individual, corporation, business  
15 trust, estate, trust, partnership, limited liability company,  
16 association, joint venture, public corporation, government,  
17 governmental subdivision, or agency, or instrumentality, or any  
18 other legal or commercial entity. In the case of a land trust, ~~the~~  
19 ~~corpus of which is real estate, however, "person" the term~~ means  
20 the beneficiary of the trust rather than the trust or the trustee.

21       ~~(23)~~ (25) "Planned community" means a common interest  
22 community that is not a condominium or a cooperative. A  
23 condominium or cooperative may be part of a planned community.

1       ~~(24)~~ (26) "Proprietary lease" means an agreement with the  
2 association pursuant to which a member is entitled to exclusive  
3 possession of a unit in a cooperative.

4       ~~(25)~~ (27) "Purchaser" means a person, other than a declarant  
5 or a dealer, ~~who~~ that by means of a voluntary transfer acquires a  
6 legal or equitable interest in a unit other than: ~~(i)~~(A) A  
7 leasehold interest (including renewal options) of less than twenty  
8 years; or ~~(ii)~~(B) as security for an obligation.

9       ~~(26)~~ (28) "Real estate" means any leasehold or other estate or  
10 interest in, over, or under land, including structures, fixtures  
11 and other improvements and interest that by custom, usage or law  
12 pass with a conveyance of land though not described in the contract  
13 of sale or instrument of conveyance. ~~"Real estate"~~ The term  
14 includes parcels with or without upper or lower boundaries, and  
15 spaces that may be filled with air or water.

16       (29) "Record", used as a noun, means information that is  
17 inscribed on a tangible medium or that is stored in an electronic  
18 or other medium and is retrievable in perceivable form.

19       ~~(27)~~ (30) "Residential purposes" means use for dwelling or  
20 recreational purposes, or both.

21       (31) "Rule" means a policy, guideline, restriction, procedure,  
22 or regulation of an association, however denominated, which is not  
23 set forth in the declaration or bylaws and which governs the

1 conduct of persons or the use or appearance of property.

2 ~~(28)~~ (32) "Resort" means a destination location which consists  
3 of: ~~(i)~~ (A) One or more persons offering recreational facilities  
4 and services such as skiing, golf, tennis or boating to the general  
5 public and commercial facilities such as retail stores, restaurants  
6 and hotels or other lodging accommodations; and ~~(ii)~~ (B) at least  
7 one hundred residential units, a majority of which are used as  
8 vacation or second homes rather than primary residences.

9 ~~(29)~~ (33) "Resort owner" means any person owning or operating  
10 substantially all of the recreational facilities located within a  
11 resort, or the predecessor in title of any such person.

12 ~~(30)~~ (34) "Security interest" means an interest in real estate  
13 or personal property, created by contract or conveyance, which  
14 secures payment or performance of an obligation. The term includes  
15 a lien created by a mortgage, deed of trust, trust deed, security  
16 deed, contract for deed, land sales contract, lease intended as  
17 security, assignment of lease or rents intended as security, pledge  
18 of an ownership interest in an association, and any other  
19 consensual lien or title retention contract intended as security  
20 for an obligation.

21 ~~(31)~~ (35) "Special declarant rights" means rights reserved for  
22 the benefit of a declarant to:

23 ~~(i)~~ (A) Complete improvements indicated on plans and plans

1 filed with the declaration pursuant to section one hundred nine,  
2 article two of this chapter or, in a cooperative, to complete  
3 improvements described in the public offering statement pursuant to  
4 subdivision (2), subsection (a), section one hundred three, article  
5 four of this chapter;

6 ~~(ii)~~ (B) exercise any development right pursuant to section  
7 one hundred ten, article two of this chapter;

8 ~~(iii)~~ (C) maintain sales offices, management offices, signs  
9 advertising the common interest community, and models pursuant to  
10 section one hundred fifteen, article two of this chapter;

11 ~~(iv)~~ (D) use easements through the common elements for the  
12 purpose of making improvements within the common interest community  
13 or within real estate which may be added to the common interest  
14 community pursuant to section one hundred sixteen, article two of  
15 this chapter;

16 ~~(v)~~ (E) make the common interest community subject to a master  
17 association pursuant to section one hundred twenty, article two of  
18 this chapter;

19 ~~(vi)~~ (F) merge or consolidate a common interest community with  
20 another common interest community of the same form of ownership  
21 pursuant to section one hundred twenty-one, article two of this  
22 chapter; ~~or~~

23 ~~(vii)~~ (G) appoint or remove any officer of the association or

1 any master association or any executive board member during any  
2 period of declarant control pursuant to subsection (d), section one  
3 hundred three, article three of this chapter;

4 (H) control any construction, design review, or aesthetic  
5 standards committee or process;

6 ~~(ix)~~ (I) attend meetings of the unit owners and, except during  
7 an executive session, the executive board; or

8 (J) have access to the records of the association to the same  
9 extent as a unit owner.

10 ~~(32)~~ (36) "Time share" means a right to occupy a unit or any  
11 of several units during five or more separated time periods over a  
12 period of at least five years, including renewal options, whether  
13 or not coupled with an estate or interest in a common interest  
14 community or a specified portion thereof.

15 ~~(33)~~ (37) "Unit" means a physical portion of the common  
16 interest community designated for separate ownership or occupancy,  
17 the boundaries of which are described pursuant to subdivision (5),  
18 subsection (a), section one hundred five, article two of this  
19 chapter. If a unit in a cooperative is owned by a unit owner or is  
20 sold, conveyed, voluntarily or involuntarily encumbered or  
21 otherwise transferred by a unit owner, the interest in that unit  
22 which is owned, sold, conveyed, encumbered, or otherwise  
23 transferred is the right to possession of that unit under a

1 proprietary lease, coupled with the allocated interests of that  
2 unit, and the association's interest in that unit is not thereby  
3 affected.

4 ~~(34)~~ (38) "Unit owner" means a declarant or other person ~~who~~  
5 that owns a unit, or a lessee of a unit in a leasehold common  
6 interest community whose lease expires simultaneously with any  
7 lease, the expiration or termination of which will remove the unit  
8 from the common interest community, but does not include a person  
9 having an interest in a unit solely as security for an obligation.  
10 In a condominium or planned community, the declarant is the owner  
11 of any unit created by the declaration. In a cooperative, the  
12 declarant is treated as the owner of any unit to which allocated  
13 interests have been allocated pursuant to section one hundred  
14 seven, article two of this chapter) until that unit has been  
15 conveyed to another person.

16 **§36B-1-104. No variation by agreement.**

17 Except as expressly provided in this chapter, ~~provisions~~  
18 ~~herein~~ the effect of its provisions may not be varied by agreement,  
19 and rights conferred by it may not be waived. Except as otherwise  
20 provided in section two hundred seven of this article, a declarant  
21 may not act under a power of attorney, or use any other device, to  
22 evade the limitations or prohibitions of this chapter or the  
23 declaration.

1 **§36B-1-108. Supplemental general principles of law applicable.**

2       The principles of law and equity, including the law of  
3 corporations, ~~and unincorporated associations~~ and any other form of  
4 organization authorized by the laws of this state, the law of real  
5 ~~property~~ estate, and the law relative to capacity to contract,  
6 principal and agent, eminent domain, estoppel, fraud,  
7 misrepresentation, duress, coercion, mistake, receivership,  
8 substantial performance, or other validating or invalidating cause  
9 supplement the provisions of this chapter, except to the extent  
10 inconsistent with this chapter.

11 **§36B-1-115. Severability.**

12       If any provision of this chapter or the application thereof to  
13 any person or circumstances is held invalid, the invalidity does  
14 not affect other provisions or applications of this chapter which  
15 can be given effect without the invalid provisions or applications,  
16 and to this end the provisions of this chapter are severable.

17 **§36B-1-116. Relation to Electronic Signatures in Global and**  
18 **National Commerce Act.**

19       This chapter modifies, limits and supersedes the federal  
20 Electronic Signature in Global and National Commerce Act, 15 U.S.C.  
21 section 7001, et seq., but does not modify , limit, or supersede  
22 section 101(c) of that act, 15 U.S.C. section 7001(c), or authorize  
23 electronic delivery of any of the notices described in section

1 103(b) of that act, 15 U.S.C. section 7003(b).

2 PART II. APPLICABILITY.

3 **§36B-1-201. Applicability to new common interest communities.**

4 Except as otherwise provided in in this article ~~sections 1-202~~  
 5 ~~and 1-203~~, this chapter applies to all common interest communities  
 6 created within this state after the effective date of this chapter.  
 7 The provisions of chapter fifty-three, Acts of the Legislature,  
 8 1963, chapter one hundred twenty-nine, Acts of the Legislature,  
 9 1980, and chapter thirty-eight, Acts of the Legislature, 1984, do  
 10 not apply to common interest communities created after the  
 11 effective date of this chapter. Amendments to this chapter apply to  
 12 all common interest communities created after the effective date of  
 13 this chapter or made subject to this chapter by amendment of the  
 14 declaration of the common interest community, regardless of when  
 15 the amendment to this chapter becomes effective.

16 **§36B-1-203. Exception for small and limited expense liability**  
 17 **planned communities.**

18 (a) If a planned community that is not subject to any  
 19 development right:

20 (1) Contains no more than twelve units; ~~and is not subject to~~  
 21 ~~any development rights~~ or

22 (2) Provides, in its declaration, that the annual average  
 23 common expense liability of all units restricted to residential



1 purposes, exclusive of optional user fees and any insurance  
2 premiums paid by the association, may not exceed \$300 as adjusted  
3 pursuant to section one hundred fourteen of this article  
4 (adjustment of dollar amounts), it is subject only to sections one  
5 hundred five of this article (separate titles and taxation), one  
6 hundred six of this article (applicability of local ordinances,  
7 regulations and building codes), ~~and~~ one hundred seven of this  
8 article (eminent domain), one hundred sixteen of article three  
9 (lien for sums due associations; enforcement), and one hundred  
10 seventeen of article four (effect of violation on rights of action:  
11 attorney's fees) unless the declaration provides that this entire  
12 chapter is applicable.

13 (b) The exemption provided in subdivision (2), subsection (a)  
14 of this section applies only if:

15 (1) The declarant reasonably believes in good faith that the  
16 maximum stated assessment will be sufficient to pay the expenses of  
17 the planned community; and

18 (2) The declaration provides that the assessment may not be  
19 increased above the limitation in subdivision (2), subsection (a)  
20 of this section during the period of declarant control without the  
21 consent of all unit owners.

22 (c) If the exemption provided in subdivision (2), subsection  
23 (a) of this section was included in a declaration recorded prior to

1 the effective date of this amendment:

2 (1) The sum stated in that declaration shall adjust pursuant  
3 to section one hundred fourteen of this article (adjustment of  
4 dollar amounts);

5 (2) The annual average common expense liability of the units  
6 may exceed \$300, as adjusted pursuant to section one hundred  
7 fourteen of this article, if the limitation in the declaration  
8 prevents the association from: (i) Fulfilling any duty to maintain  
9 real estate owned or leased by the association or improvements  
10 thereto, or (ii) fulfilling any other duty imposed on the  
11 association by the declaration, articles, bylaws or applicable law;  
12 and

13 (3) If the declarant no longer owns any unit, the declaration  
14 may be amended by sixty-seven percent of the units to allow the  
15 association to meet its actual financial needs, notwithstanding any  
16 provision in the declaration to the contrary. An amendment made in  
17 accordance with this subsection will not cause the community to be  
18 subject to any greater provisions of this chapter than set forth in  
19 subdivision (2), subsection (a) of this section.

20 (d) Any declarant electing the exemption provided in  
21 subdivision (2), subsection (a) of this section shall record with  
22 the declaration the predevelopment budget which is the basis for  
23 its subdivision (2), subsection (c) of this section determination

1 of post-development annual average common expense liability.

2 **§36B-1-204. Applicability to preexisting common interest**  
3 **communities.**

4 (a) ~~Except as provided in section 1-205, Same; exception for~~  
5 ~~small preexisting cooperatives and planned communities, sections~~  
6 ~~1-105 (separate titles and taxation), 1-106 (Applicability of local~~  
7 ~~ordinances, regulations and building codes), 1-107 (Eminent~~  
8 ~~domain), 2-103 (Construction and validity of declaration and~~  
9 ~~bylaws), 2-104 (Description of units), 2-121 (Merger or~~  
10 ~~consolidation of common interest communities), 3-102(a) (1) through~~  
11 ~~(6) and (11) through (16) (Powers of unit owners' association),~~  
12 ~~3-111 (Tort and contract liability), 3-116 (Lien for assessments),~~  
13 ~~3-118 (Association records), 4-109 (Resales of units), and 4-117~~  
14 ~~(Effect of violation on rights of action; attorney's fees), and~~  
15 ~~section 1-103 (Definitions) to the extent necessary in construing~~  
16 ~~any of those sections, apply to all common interest communities~~  
17 ~~created in this state before the effective date of this chapter;~~  
18 ~~but those sections apply only with respect to events and~~  
19 ~~circumstances occurring after the effective date of this chapter~~  
20 ~~and do not invalidate existing provisions of the declaration,~~  
21 ~~bylaws or plats or plans of those common interest communities.~~  
22 Except for a cooperative or planned community described in section  
23 two hundred five of this article (Same-Exception for small

1 preexisting cooperatives and planned communities), or a  
2 nonresidential common interest community described in section two  
3 hundred seven (Same; Exception for small preexisting cooperatives  
4 and planned communities), the following sections apply to a common  
5 interest community created in this state before the effective date  
6 of this article:

7 (1) Section one hundred five of this article (Separate titles  
8 and taxation);

9 (2) Section one hundred six of this article (Applicability of  
10 local ordinances, regulations, and building codes);

11 (3) Section one hundred seven of this article (Eminent  
12 domain);

13 (4) Section two hundred six of this article (Amendments to  
14 governing instruments);

15 (5) Section one hundred two, article two of this chapter (Unit  
16 boundaries);

17 (6) Section one hundred three, article two of this chapter  
18 (Construction and validity of declaration and bylaws);

19 (7) Section one hundred four, article two of this chapter  
20 (Description of units);

21 (8) Subsections (h) and (i), section one hundred seventeen,  
22 article two (Amendment of declaration);

23 (9) Section one hundred twenty-one, article two of this

1 chapter (Merger or consolidation of common interest communities);  
2 (10) Section one hundred twenty-four, article two of this  
3 chapter (Termination following catastrophe);  
4 (11) Subdivisions (1) through (6) and (11) through (16),  
5 subsection (a), section one hundred two, article three of this  
6 chapter (Powers and duties of unit owners association);  
7 (12) Section one hundred three, article three of this chapter  
8 (Executive board members and officers);  
9 (13) Section one hundred eight, article three (Meetings);  
10 (14) Section one hundred eleven, article three of this chapter  
11 (Tort and contract liability);  
12 (15) Section one hundred sixteen, article three of this  
13 chapter (Lien for assessments);  
14 (16) Section one hundred eighteen, article three of this  
15 chapter (Association records);  
16 (17) Section one hundred twenty-four, article three of this  
17 chapter (Litigation involving declarant);  
18 (18) Section one hundred nine, article four of this chapter  
19 (Resale of units);  
20 (19) Section one hundred seventeen, article four of this  
21 chapter (Effect of violation on rights of action; attorney's fees);  
22 and  
23 (20) Section one hundred three of this article (Definitions)

1 to the extent necessary to construe any of those sections.

2 (b) The sections described in subsection (a) apply only to  
3 events and circumstances occurring after the effective date of this  
4 chapter and do not invalidate existing provisions of the  
5 declaration, bylaws, or plats or plans of those common interest  
6 communities.

7 ~~(b)~~ (c) The provisions of chapter one hundred fifty-three,  
8 Acts of the Legislature, 1963, chapter one hundred twenty-nine,  
9 Acts of the Legislature, 1980, or of chapter thirty-eight, Acts of  
10 the Legislature, 1984, do not apply to condominiums or other common  
11 interest communities created after the effective date of this  
12 chapter and do not invalidate any amendment to the declaration,  
13 rules, bylaws, plats and plans and code of regulations of any  
14 condominium or common interest community created before the  
15 effective date of this chapter if the amendment would be permitted  
16 by this chapter. The amendment must be adopted in conformity with  
17 the procedures and requirements specified by those instruments and  
18 by chapter one hundred fifty-three, Acts of the Legislature, 1963.  
19 If the amendment grants to any person any rights, powers or  
20 privileges permitted by this chapter, all correlative obligations,  
21 liabilities and restrictions in this chapter also apply to that  
22 person.

23 ~~(c) This chapter does not apply to condominiums or units~~

1 ~~located outside this state, but the public offering statement~~  
2 ~~provisions, (sections 4-102 through 4-109) apply to all contracts~~  
3 ~~for the disposition thereof signed in this state by any party~~  
4 ~~unless exempt under section 4-101(b).~~

5 (d) The provisions of this chapter shall apply to all  
6 condominiums or common interest communities to the extent such  
7 provisions conflict or are inconsistent with the provisions of  
8 chapter one hundred fifty-three, Acts of the Legislature, 1963:  
9 *Provided*, That the provisions of this chapter shall not modify,  
10 limit or nullify any rights, duties or obligations created or  
11 existing under any declaration, bylaws or plats or plans of  
12 condominiums created in this state before the effective date of  
13 this chapter.

14 **§36B-1-206. Amendments to governing instruments.**

15 (a) ~~In the case of amendments to~~ The declaration, bylaws or  
16 plats and plans of any common interest community created before the  
17 effective date of this chapter may be amended to achieve any result  
18 permitted by this chapter, regardless of what applicable law  
19 provided before this chapter was adopted.

20 (1) ~~If the result accomplished by the amendment was permitted~~  
21 ~~by law prior to this chapter, the amendment may be made either in~~  
22 ~~accordance with that law, in which case that law applies to that~~  
23 ~~amendment, or it may be made under this chapter, and~~

1 ~~(2) If the result accomplished by the amendment is permitted~~  
 2 ~~by this chapter, and was not permitted by law prior to this~~  
 3 ~~chapter, the amendment may be made under this chapter.~~

4 (3) Except as otherwise provided in subsections (i) and (j) of  
 5 section one hundred seventeen, article two of this chapter, an  
 6 amendment to the declaration, bylaws, or plats and plans authorized  
 7 by this section ~~to be made under this chapter~~ must be adopted in  
 8 conformity ~~with applicable law and with any the~~ procedures and  
 9 requirements for amending the instruments specified by those  
 10 instruments, or if there are none, in conformity with the amendment  
 11 procedures of this chapter. If an amendment grants to ~~any a~~ any a person  
 12 ~~any rights, powers or privileges~~ any right, power or privilege  
 13 permitted by this chapter, ~~all~~ any correlative obligations,  
 14 ~~liabilities and restrictions~~ liability, or restriction in this  
 15 chapter also ~~apply~~ applies to that person.

16 **§36B-1-207. Applicability to nonresidential and mixed-use common**  
 17 **interest communities.**

18 (a) Except as otherwise provided in subsection (d), this  
 19 section applies only to ~~This chapter does not apply to a~~ common  
 20 interest ~~planned~~ community in which all units are restricted  
 21 exclusively to nonresidential purposes. ~~use unless the declaration~~  
 22 ~~provides that the chapter does apply to that planned community.~~  
 23 ~~This chapter applies to a planned community containing both units~~



~~1 that are restricted exclusively to nonresidential use and other  
2 units that are not restricted, only if the declaration so provides  
3 or the real estate comprising the units that may be used for  
4 residential purposes would be a planned community in the absence of  
5 the units that may not be used for residential purposes.~~

6 (b) A nonresidential common interest community is not subject  
7 to this chapter except to the extent the declaration provides that:

8 (1) This entire chapter applies to the community;

9 (2) Articles 1 and 2 apply to the community; or

10 (3) In the case of a planned community or a cooperative, only  
11 sections one hundred five (Separate titles and taxation), one  
12 hundred six (Applicability of local ordinance, regulations and  
13 building codes), and one hundred seven (Eminent domain) of this  
14 article apply to the community.

15 (c) If this entire chapter applies to a nonresidential common  
16 interest community, the declaration may also require, subject to  
17 section one hundred twelve of this article (Unconscionable  
18 agreement or term of contract); that:

19 (1) Notwithstanding section one hundred five, article three of  
20 this chapter (Termination of Contracts and Leases of Declarant),  
21 and management, maintenance, operations, or employment contract,  
22 lease of recreational or parking areas or facilities, and any other  
23 contract or lease between the association and a declarant or an

1 affiliate of a declarant continues in force after the declarant  
2 turns over control of the association; and

3 (2) Notwithstanding section one hundred four of this article  
4 (Variation by Agreement), purchasers of units must execute proxies,  
5 powers of attorney, or similar devices in favor of the declarant  
6 regarding particular matters enumerated in those instruments.

7 (d) A common interest community that contains units restricted  
8 exclusively to nonresidential purposes and other units that may be  
9 used for residential purposes would comprise a common interest  
10 community that would be subject to this chapter in the absence of  
11 the nonresidential units or the declaration provides that this  
12 chapter applies as provided in subsection (b) or (c) of this  
13 section.

14 **§36B-1-208. Applicability to Out-of-State Common Interest**  
15 **Communities.**

16 This chapter does not apply to a common interest community  
17 located outside this state, but sections one hundred two and one  
18 hundred three, article four of this chapter and, to the extent  
19 applicable sections one hundred four through one hundred six,  
20 article four of this chapter apply to a contract for the  
21 disposition of a unit in that common interest community signed in  
22 this state by any party unless exempt under subsection (b), section  
23 one hundred one, article four of this chapter.

1 **§36B-1-209. Other Exempt Real Estates Arrangements.**

2 (a) An arrangement between the associations for two or more  
3 common interest communities to share the costs of real estate  
4 taxes, insurance premiums, services, maintenance or improvements of  
5 real estate, or other activities specified in their arrangement or  
6 declarations does not create a separate common interest community.

7 (b) An arrangement between an association and the owner of  
8 real estate that is not part of a common interest community to  
9 share the costs of real estate taxes, insurance premiums, services,  
10 maintenance or improvements of real estate, or other activities  
11 specified in their arrangement or declarations does not create a  
12 separate common interest community. However, assessments against  
13 the units in the common interest community required by the  
14 arrangement must be included in the periodic budget for the common  
15 interest community and the arrangement must be disclosed in all  
16 public offering statements and resale certificates required by this  
17 chapter.

18 **ARTICLE 2. CREATION, ALTERATION AND TERMINATION OF COMMON**  
19 **INTEREST COMMUNITIES.**

20 **§36B-2-103. Construction and validity of declaration and bylaws.**

21 (a) All provisions of the declaration and bylaws are  
22 severable.

23 (b) The rule against perpetuities does not apply to defeat any

1 provision of the declaration, bylaws or rules. ~~or regulations~~  
2 ~~adopted pursuant to section 3-102(a)(1)~~

3 (c) ~~In the event of~~ If a conflict exists between the  
4 ~~provisions of the~~ declaration and the bylaws, the declaration  
5 prevails except to the extent the declaration is inconsistent with  
6 this chapter.

7 (d) Title to a unit and common elements is not rendered  
8 unmarketable or otherwise affected by reason of an insubstantial  
9 failure of the declaration to comply with this chapter. Whether a  
10 substantial failure impairs marketability is not affected by this  
11 chapter.

12 (e) A declaration or the bylaws may not change or alter a  
13 restrictive covenant in a deed to any real estate that is or that  
14 becomes subject to the provisions of this chapter. The restrictive  
15 covenants that are in effect at the time real estate is purchased  
16 that is or that becomes subject to the provisions of this chapter  
17 may not be changed or altered as to the purchaser of that real  
18 estate or as to any assign, heir or beneficiary of the original  
19 purchaser unless that original purchaser, assign, heir or  
20 beneficiary agrees in writing to a change of a restrictive  
21 covenant. This subdivision does not apply to the change of  
22 restrictive covenants of homeowner fees if the fees do not exceed  
23 the sum of ~~\$100~~ \$300 a year. The provisions of this section have

1 no application to restrictive covenants which contain provisions  
2 authorizing amendment when those provisions for amendment are duly  
3 followed.

4 **§36B-2-105. Contents of declaration.**

5 (a) The declaration must contain:

6 (1) The names of the common interest community and the  
7 association and a statement that the common interest community is  
8 either a condominium, cooperative or planned community;

9 (2) The name of every county in which any part of the common  
10 interest community is situated;

11 (3) A legally sufficient description of the real estate  
12 included in the common interest community;

13 (4) A statement of the maximum number of units that the  
14 declarant reserves the right to create;

15 (5) In a condominium or planned community, a description of  
16 the boundaries of each unit created by the declaration, including  
17 the unit's identifying number or, in a cooperative, a description,  
18 which may be by plats or plans, of each unit created by the  
19 declaration, including the unit's identifying number, its size or  
20 number of rooms and its location within a building if it is within  
21 a building containing more than one unit;

22 (6) A description of any limited common elements, other than  
23 those specified in section 2-102(2) and (4), as provided in section

1 2-109(b)(10) and, in a planned community, any real estate that is  
2 or must become common elements;

3 (7) A description of any real estate, except real estate  
4 subject to development rights, that may be allocated subsequently  
5 as limited common elements, other than limited common elements  
6 specified in section 2-102(2) and (4), together with a statement  
7 that they may be so allocated;

8 (8) A description of any development rights ~~(section 1-~~  
9 ~~103(14))~~ and other special declarant rights ~~(section 1-103(29))~~  
10 reserved by the declarant, together with a legally sufficient  
11 description of the real estate to which each of those rights  
12 applies, and a time limit within which each of those rights must be  
13 exercised;

14 (9) If any development right may be exercised with respect to  
15 different parcels of real estate at different times, a statement to  
16 that effect together with

17 ~~(i)~~ (A) Either a statement fixing the boundaries of those  
18 portions and regulating the order in which those portions may be  
19 subjected to the exercise of each development right or a statement  
20 that no assurances are made in those regards; and

21 ~~(ii)~~ (B) A statement as to whether, if any development right  
22 is exercised in any portion of the real estate subject to that  
23 development right, that development right must be exercised in all

1 or in any other portion of the remainder of that real estate;

2 (10) Any other conditions or limitations under which the  
3 rights described in paragraph (8) may be exercised or will lapse;

4 (11) An allocation to each unit of the allocated interests in  
5 the manner described in section 2-107;

6 (12) Any restrictions ~~(i) on use, occupancy and~~ on alienation  
7 of the units, including any restrictions on leasing which exceed  
8 the restrictions on leasing units which executive boards may impose  
9 pursuant to section 3-102(c)(2) 3-120(d) and ~~(ii)~~ on the amount for  
10 which a unit may be sold or on the amount that may be received by  
11 a unit owner on sale, condemnation, or casualty loss to the unit or  
12 to the common interest community, or on termination of the common  
13 interest community;

14 (13) The recording data for recorded easements and licenses  
15 appurtenant to or included in the common interest community or to  
16 which any portion of the common interest community is or may become  
17 subject by virtue of a reservation in the declaration; ~~and~~

18 (14) Any authorization pursuant to which the association may  
19 establish and enforce construction and design criteria and  
20 aesthetic standards as provided in sections 3-106 and 3-120; and

21 ~~(14)~~ (15) All matters required by sections 2-106, 2-107, 2-  
22 108, 2-109, 2-115, 2-116 and 3-103(d).

23 (b) The declaration may contain any other matters the

1 declarant considers appropriate, including any restrictions on the  
2 uses of a unit or the number or other qualifications of persons who  
3 may occupy units.

4 **§36B-2-106. LEASEHOLD COMMON INTEREST COMMUNITIES.**

5 (a) Any lease the expiration or termination of which may  
6 terminate the common interest community or reduce its size, or a  
7 memorandum thereof, must be recorded. Every lessor of those leases  
8 in a condominium or planned community shall sign the declaration.  
9 The declaration must state:

10 (1) The recording data for the lease or a statement of where  
11 the complete lease may be inspected;

12 (2) The date on which the lease is scheduled to expire;

13 (3) A legally sufficient description of the real estate  
14 subject to the lease;

15 (4) Any right of the unit owners to redeem the reversion and  
16 the manner whereby those rights may be exercised, or a statement  
17 that they do not have those rights;

18 (5) Any right of the unit owners to remove any improvements  
19 within a reasonable time after the expiration or termination of the  
20 lease, or a statement that they do not have those rights; and

21 (6) Any rights of the unit owners to renew the lease and the  
22 conditions of any renewal, or a statement that they do not have  
23 those rights.



1 (b) After the declaration for a leasehold condominium or  
2 leasehold planned community is recorded, neither the lessor nor the  
3 lessor's successor in interest may terminate the leasehold interest  
4 of a unit owner who makes timely payment of a unit owner's share of  
5 the rent and otherwise complies with all covenants which, if  
6 violated, would entitle the lessor to terminate the lease. A unit  
7 owner's leasehold interest in a condominium or planned community is  
8 not affected by failure of any other person to pay rent or fulfill  
9 any other covenant.

10 (c) Acquisition of the leasehold interest of any unit owner by  
11 the owner of the reversion or remainder does not merge the  
12 leasehold and fee simple interests unless the leasehold interests  
13 of all unit owners subject to that reversion or remainder are  
14 acquired.

15 (d) If the expiration or termination of a lease decreases the  
16 number of units in a common interest community, the allocated  
17 interests must be reallocated in accordance with section 1-107(a)  
18 as if those units had been taken by eminent domain. Reallocations  
19 must be confirmed by an amendment to the declaration prepared,  
20 executed, and recorded by the association.

21 **§36B-2-109. Plats and plans.**

22 (a) Plats and plans are a part of the declaration and are  
23 required for all common interest communities except cooperatives.

1 Separate plats and plans are not required by this chapter if all  
2 the information required by this section is contained in either a  
3 plat or plan. Each plat and plan must be clear and legible and  
4 contain a certification that the plat or plan contains all  
5 information required by this section.

6 (b) Each plat must show:

7 (1) The name and a survey or general schematic map of the  
8 entire common interest community;

9 (2) The location and dimensions of all real estate not subject  
10 to development rights, or subject only to the development right to  
11 withdraw and the location and dimensions of all existing  
12 improvements within that real estate;

13 (3) A legally sufficient description of any real estate  
14 subject to development rights, labeled to identify the rights  
15 applicable to each parcel, but plats and plans need not designate  
16 or label which development rights are applicable to each parcel if  
17 that information is clearly delineated in the declaration.

18 (4) The extent of any encroachments by or upon any portion of  
19 the common interest community;

20 (5) To the extent feasible, a legally sufficient description  
21 of all easements serving or burdening any portion of the common  
22 interest community;

23 (6) Except as otherwise provided in subsection (h), the

1 approximate ~~The~~ location and dimensions of any vertical unit  
2 boundaries not shown or projected on plans recorded pursuant to  
3 subsection (d) and that unit's identifying number;

4 (7) Except as otherwise provided in subsection (h), the  
5 approximate ~~the~~ location with reference to an established datum of  
6 any horizontal unit boundaries not shown or projected on plans  
7 recorded pursuant to subsection (d) and that unit's identifying  
8 number;

9 (8) A legally sufficient description of any real estate in  
10 which the unit owners will own only an estate for years, labeled as  
11 "leasehold real estate";

12 (9) The distance between noncontiguous parcels of real estate  
13 comprising the common interest community;

14 (10) The approximate location and dimensions of limited common  
15 elements, including porches, decks, balconies, garages, and or  
16 patios, ~~other than parking spaces and the other limited common~~  
17 ~~elements described in sections 2-102(2) and (4)~~ allocated as  
18 limited common elements, and show or contain a narrative  
19 description of any other limited common elements; and

20 (11) ~~In the case of~~ For real estate not subject to development  
21 rights, all other matters customarily shown on land surveys.

22 (c) A plat may also show the intended location and dimensions  
23 of any contemplated improvement to be constructed anywhere within

1 the common interest community. Any contemplated improvement shown  
2 must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT."

3 (d) Except as otherwise provided in subsection (h), to the  
4 extent not shown or projected on the plats, plans of the units must  
5 show or project:

6 (1) The approximate location and dimensions of the vertical  
7 boundaries of each unit and that unit's identifying number;

8 (2) The approximate location of any horizontal unit  
9 boundaries, with reference to an established datum and that unit's  
10 identifying number; and

11 (3) ~~Any~~ The approximate location of any units in which the  
12 declarant has reserved the right to create additional units or  
13 common elements (section 2- 110(c)), identified appropriately.

14 (e) Unless the declaration provides otherwise, the horizontal  
15 boundaries of part of a unit located outside a building have the  
16 same elevation as the horizontal boundaries of the inside part and  
17 need not be depicted on the plats and plans.

18 (f) Upon exercising any development right, the declarant shall  
19 record either new plats and plans necessary to conform to the  
20 requirements of subsections (a), (b) and (d) or new certifications  
21 of plats and plans previously recorded if those plats and plans  
22 otherwise conform to the requirements of those subsections.

23 (g) ~~Any~~ A certification of a plat or plan required by this

1 section or section 2-101(b) must be made by an independent  
2 (registered) surveyor, architect or engineer.

3 (h) Plats and plans need not show the location and dimensions  
4 of the units' boundaries or their limited common elements if:

5 (1) The plat shows the location and dimensions of all  
6 buildings containing or comprising the units; and

7 (2) The declaration includes other information that shows or  
8 contains a narrative description of the general layout of the units  
9 in those buildings and the limited common elements allocated to  
10 those units.

11 **§36B-2-111. Alterations of units.**

12 Subject to the provisions of the declaration and other  
13 provisions of law, a unit owner:

14 (1) May make any improvements or alterations to his or her  
15 unit that do not impair the structural integrity or mechanical  
16 systems or lessen the support of any portion of the common interest  
17 community;

18 (2) May not change the appearance of the common elements or  
19 the exterior appearance of a unit or any other portion of the  
20 common interest community, without permission of the association;

21 (3) After acquiring an adjoining unit or an adjoining part of  
22 an adjoining unit, may remove or alter any intervening partition or  
23 create apertures therein, even if the partition in whole or in part

1 is a common element, if those acts do not impair the structural  
2 integrity or mechanical systems or lessen the support of any  
3 portion of the common interest community. Removal of partitions or  
4 creation of apertures under this paragraph is not an alteration of  
5 boundaries.

6 **§36B-2-112. Relocation of boundaries between adjoining units.**

7 (a) Subject to the provisions of the declaration and other  
8 provisions of law, the boundaries between adjoining units may be  
9 relocated by an amendment to the declaration upon application to  
10 the association by the owners of those units. If the owners of the  
11 adjoining units have specified a reallocation between their units  
12 of their allocated interests, the application must state the  
13 proposed reallocations. Unless the executive board determines,  
14 within thirty days, that the reallocations are unreasonable, the  
15 association shall prepare an amendment that identifies the units  
16 involved and states the reallocations. The amendment must be  
17 executed by those unit owners, contain words of conveyance between  
18 them, and, on recordation, be indexed in the name of the grantor  
19 and the grantee, and in the grantee's index in the name of the  
20 association.

21 (b) Subject to the provisions of the declaration and other  
22 provisions of law, boundaries between units and common elements may  
23 be relocated to incorporate common elements within a unit by an

1 amendment to the declaration upon application to the association by  
2 the owner of the unit who proposes to relocate a boundary. Unless  
3 the declaration provides otherwise, the amendment may be approved  
4 only if persons entitled to cast at least sixty-seven percent of  
5 the votes in the association, including sixty-seven percent of the  
6 votes allocated to units not owned by the declarant, agree to the  
7 action. The amendment may describe any fees or charges payable by  
8 the owner of the affected unit in connection with the boundary  
9 relocation and the fees and charges are assets of the association.  
10 The amendment must be executed by the unit owner of the unit whose  
11 boundary is being relocated and by the association, contain words  
12 of conveyance between them, and on recordation be indexed in the  
13 name of the unit owner and the association as grantor or grantee,  
14 as appropriate.

15       ~~(b)~~ (c) The association (i) In a condominium or planned  
16 community shall prepare and record plats or plans necessary to show  
17 the altered boundaries between adjoining units and their dimensions  
18 and identifying numbers, and (ii) in a cooperative shall prepare  
19 and record amendments to the declaration, including any plans,  
20 necessary to show or describe the altered boundaries between  
21 adjoining units and their dimensions and identifying numbers.

22 **§36B-2-113. Subdivision of units.**

23       (a) If the declaration expressly so permits, a unit may be

1 subdivided into two or more units. Subject to ~~the provisions of~~  
2 the declaration and ~~other provisions of~~ law other than this  
3 chapter, upon application of a unit owner to subdivide a unit, the  
4 association shall prepare, execute, and record an amendment to the  
5 declaration, including in a condominium or planned community, the  
6 plats and plans, subdividing that unit.

7 (b) The amendment to the declaration must be executed by the  
8 owner of the unit to be subdivided, assign an identifying number to  
9 each unit created, and reallocate the allocated interests formerly  
10 allocated to the subdivided unit to the new units in any reasonable  
11 manner prescribed by the owner of the subdivided unit or on any  
12 other basis the declaration requires.

13 **§36B-2-116. Easement rights.**

14 (a) Subject to ~~the provisions of~~ the declaration, a declarant  
15 has an easement through the common elements as may be reasonably  
16 necessary for the purpose of discharging the declarant's  
17 obligations or exercising special declarant rights, whether arising  
18 under this chapter or reserved in the declaration.

19 (b) ~~In a planned community,~~ Subject to ~~the provisions of~~  
20 sections 3-102(a)(6) and 3-112, the unit owners have an easement  
21 ~~(i) in the common elements for purposes of access to their units~~  
22 ~~and (ii) to use the common elements and all real estate that must~~  
23 ~~become common elements (section 2-105(a)(6)) for all other~~



1 ~~purposes.~~

2 (c) Subject to the declaration and rules, the unit owners have  
3 a right to use the common elements that are not limited common  
4 elements and all real estate that must become common elements  
5 (section 2-105(a)(6)) for the purposes for which they were intended.

6 **§36B-2-117. Amendment of declaration.**

7 (a) Except in cases of amendments that may be executed by a  
8 declarant under section 2-109(f) or 2-110, ~~or by the association~~  
9 under section 1-107, 2-106(d), 2-108(c), 2-112(a), or 2-113, ~~or by~~  
10 certain unit owners under section 2-108(b), 2-112(a), 2-113(b), or  
11 2-118(b), and except as limited by ~~subsection~~ subsections (d), (f),  
12 (g) and (h), the declaration, including any plats and plans, may be  
13 amended only by vote or agreement of unit owners of units to which  
14 at least sixty-seven percent of the votes in the association are  
15 allocated, ~~or any larger majority~~ unless the declaration specifies  
16 a different percentage for all amendments or for specific subjects  
17 of amendment. If the declaration requires the approval of another  
18 person as a condition of effectiveness, the amendment is not valid  
19 without that approval. The declaration may specify a smaller  
20 ~~number only if all of the units are restricted exclusively to~~  
21 ~~nonresidential use.~~

22 (b) No action to challenge the validity of an amendment  
23 adopted by the association pursuant to this section may be brought

1 more than one year after the amendment is recorded.

2 (c) Every amendment to the declaration must be recorded in  
3 every county in which any portion of the common interest community  
4 is located and is effective only upon recordation. An amendment,  
5 except an amendment pursuant to section 2- 112(a), must be indexed  
6 in the grantee's index in the name of the common interest community  
7 and the association and in the grantor's index in the name of the  
8 parties executing the amendment.

9 (d) Except to the extent expressly permitted or required by  
10 other provisions of this chapter, no amendment may create or  
11 increase special declarant rights, increase the number of units,  
12 change the boundaries of any unit, or change the allocated  
13 interests of a unit, or the uses to which any unit is restricted,  
14 in the absence of unanimous consent of the unit owners.

15 (e) Amendments to the declaration required by this chapter to  
16 be recorded by the association must be prepared, executed,  
17 recorded, and certified on behalf of the association by any officer  
18 of the association designated for that purpose or, in the absence  
19 of designation, by the president of the association.

20 (f) An amendment to the declaration may prohibit or materially  
21 restrict the permitted uses of or behavior in a unit or the number  
22 or other qualifications of persons who may occupy units only by  
23 vote or agreement of unit owners of units to which at least eighty

1 percent of the votes in the association are allocated, unless the  
2 declaration specifies that a larger percentage of unit owners must  
3 vote or agree to that amendment or that the amendment may be  
4 approved by unit owners of units having at least eighty percent of  
5 the votes of a specified group of units that would be affected by  
6 the amendment. An amendment approved under this subsection must  
7 provide reasonable protection for a use or occupancy permitted at  
8 the time the amendment was adopted.

9 (g) The time limits specified in the declaration pursuant to  
10 section 2-105(a)(8) (Contents of the declaration) within which  
11 reserved development rights must be exercised may be extended, and  
12 additional development rights may be created, if persons entitled  
13 to cast at least eighty percent of the votes in the association,  
14 including eighty percent of the votes allocated to units not owned  
15 by the declarant, agree to that action. The agreement is effective  
16 thirty days after an amendment to the declaration reflecting the  
17 terms of the agreement is recorded unless all the persons holding  
18 the affected special declarant rights, or security interests in  
19 those rights, record a written objection within the thirty-day  
20 period, in which case the amendment is void, or consent in writing  
21 at the time the amendment is recorded, in which case, the amendment  
22 is effective when recorded.

23 (h) A provision in the declaration creating special declarant

1 rights that have not expired may not be amended without the consent  
2 of the declarant.

3 (i) If any provision of this chapter, law, or of the  
4 declaration requires the consent of a holder of a security interest  
5 in a unit as a condition to the effectiveness of an amendment to  
6 the declaration, that consent is deemed granted if a refusal to  
7 consent in a record is not received by the association within sixty  
8 days after the association delivers notice of the proposed  
9 amendment to the holder at an address for notice provided by the  
10 holder or mails the notice to the holder by certified mail, return  
11 receipt requested, at that address. If the holder has not provided  
12 to the association an address for notice, the association shall  
13 provide notice to the address in the security interest of record.  
14 Notwithstanding this section, an amendment to the declaration that  
15 affects the priority of a holder's security interest or the ability  
16 of that holder to foreclose its security interest may not be  
17 adopted without that holder's consent in a record if the  
18 declaration requires that consent as a condition to the  
19 effectiveness of the amendment: *Provided*, That this subsection (i)  
20 shall not apply to an amendment which:

21 (A) Permits a unit previously restricted to residential  
22 occupancy to be used for nonresidential purposes;

23 (B) Increases the share of common expenses allocated to the

1 unit in a manner disproportionate to the formula stated in the  
2 declaration pursuant to section one hundred eighteen of this  
3 article;

4 (C) Terminates the common interest community pursuant to  
5 section one hundred eighteen of this article;

6 (D) Transfers from the association to the unit, the duty to  
7 maintain a common element or limited common element previously  
8 performed by the association; or

9 (E) The unit owner is contractually precluded from consenting  
10 to the amendment by the terms of a planned unit development rider  
11 in a recorded security instrument.

12 (j) If the declaration contains a provision requiring that  
13 amendments to the declaration may be adopted only by vote or  
14 agreement of unit owners of units to which more than eighty percent  
15 of the votes in the association are allocated, the amendment is  
16 approved:

17 (l) If:

18 (A) Unit owners of units to which at least eighty percent of  
19 the votes in the association are allocated vote for or agree to the  
20 proposed amendment;

21 (B) No unit owner votes against the proposed amendment; and

22 (C) Notice of the proposed amendment is delivered to the unit  
23 owners holding the votes in the association which have not voted or

1 agreed to the proposed amendment and no written objection to the  
2 proposed amendment is received by the association within sixty days  
3 after the association delivers notice; or

4 (2) Unit owners of units to which at least eighty percent of  
5 the votes in the association are allocated vote for or agree to the  
6 proposed amendment but at least one unit owner objects to the  
7 proposed amendment and, pursuant to an action brought by the  
8 association in a the circuit court of the county in which the  
9 common interest community is situate against all objecting unit  
10 owners, the court finds that the objecting unit owners do not have  
11 an interest, different in kind from the interests of the other unit  
12 owners, that the voting requirement of the declaration was intended  
13 to protect.

14 **§36B-2-118. Termination of common interest community.**

15 (a) Except ~~in the case of~~ for a taking of all the units by  
16 eminent domain, (Section 1-107) ~~or in the case of~~ foreclosure  
17 against an entire cooperative of a security interest that has  
18 priority over the declaration, or in the circumstances described in  
19 Section 2-124, a common interest community may be terminated only  
20 by agreement of unit owners of units to which at least eighty  
21 percent of the votes in the association are allocated, or any  
22 larger percentage the declaration specifies, and with any other  
23 approvals required by the declaration. The declaration may specify

1 a smaller percentage only if all of the units are restricted  
2 exclusively to nonresidential uses.

3 (b) An agreement to terminate must be evidenced by the  
4 execution of a termination agreement, or ratifications thereof, in  
5 the same manner as a deed, by the requisite number of unit owners.  
6 The termination agreement must specify a date after which the  
7 agreement ~~will be~~ is void unless it is recorded before that date.  
8 A termination agreement and all ratifications thereof must be  
9 recorded in every county in which a portion of the common interest  
10 community is situated and is effective only upon recordation.

11 (c) In the case of a condominium or planned community  
12 containing only units having horizontal boundaries described in the  
13 declaration, a termination agreement may provide that all of the  
14 common elements and units of the common interest community must be  
15 sold following termination. If, pursuant to the agreement, any  
16 real estate in the common interest community is to be sold  
17 following terminatino, the termination agreement must set forth the  
18 minimum terms of the sale.

19 (d) In the case of a condominium or planned community  
20 containing any units not having horizontal boundaries described in  
21 the declaration, a termination agreement may provide for sale of  
22 the common elements, but it may not require that the units be sold  
23 following termination, unless the declaration as originally

1 recorded provided otherwise or all the unit owners consent to the  
2 sale.

3       (e) The association, on behalf of the unit owners, may  
4 contract for the sale of real estate in a common interest  
5 community, but the contract is not binding on the unit owners until  
6 approved pursuant to subsections (a) and (b). If any real estate  
7 is to be sold following termination, title to that real estate,  
8 upon termination, vests in the association as trustee for the  
9 holders of all interests in the units. Thereafter, the association  
10 has all powers necessary and appropriate to effect the sale. Until  
11 the sale has been concluded and the proceeds thereof distributed,  
12 the association continues in existence with all powers it had  
13 before termination. Proceeds of the sale must be distributed to  
14 unit owners and lien holders as their interests may appear, in  
15 accordance with subsections (h), (i), and (j). Unless otherwise  
16 specified in the termination agreement, as long as the association  
17 holds title to the real estate, each unit owner and the unit  
18 owner's successors in interest have an exclusive right to occupancy  
19 of the portion of the real estate that formerly constituted the  
20 unit. During the period of that occupancy, each unit owner and the  
21 unit owner's successors in interest remain liable for all the  
22 assessments and other obligations imposed on unit owners by this  
23 chapter or the declaration.



1           (f) In a condominium or planned community, if the real estate  
2 constituting the common interest community is not to be sold  
3 following termination, title to the common elements and, in a  
4 common interest community containing only units having horizontal  
5 boundaries described in the declaration, title to all the real  
6 estate in the common interest community, vests in the unit owners  
7 upon termination as tenants in common in proportion to their  
8 respective interests as provided in subsection (j), and liens on  
9 the units shift accordingly. While the tenancy in common exists,  
10 each unit owner and the unit owner's successors in interest have an  
11 exclusive right to occupancy of the portion of the real estate that  
12 formerly constituted the unit.

13           (g) Following termination of the common interest community,  
14 the proceeds of ~~any~~ a sale of real estate, together with the assets  
15 of the association, are held by the association as trustee for unit  
16 owners and holders of liens on the units as their interests may  
17 appear.

18           (h) Following termination of a condominium or planned  
19 community, creditors of the association holding liens on the units,  
20 which were recorded before termination, may enforce those liens in  
21 the same manner as any lien holder. All other creditors of the  
22 association are to be treated as if they had perfected liens on the  
23 units immediately before termination.

1           (i) In a cooperative, the declaration may provide that all  
2 creditors of the association have priority over any interests of  
3 unit owners and creditors of unit owners. In that event, following  
4 termination, creditors of the association holding liens on the  
5 cooperative which were recorded before terminatinon may enforce  
6 their liens in the same manner as any lien holder, and any other  
7 creditor of the association is to be treated as if ~~he~~ the creditor  
8 had perfected a lien against the cooperative immediatley before  
9 termination. Unless the declaration provides that all creditors of  
10 the association have that priority:

11           (1) The lien of each creditor of the association which was  
12 perfected against the association before termination becomes, upon  
13 termination, a lien against each unit owner's interest in the unit  
14 as of the date the lien was perfected;

15           (2) Any other creditor of the association is to be treated  
16 upon termination as if the creditor had perfected a lien against  
17 each unit owner's interest immediately before termination;

18           (3) The amount of the lien of an association's creditor  
19 described in paragraphs (1) and (2) against each of the unit owner's  
20 interest must be proportionate to the ratio which each unit's  
21 common expense liability bears to the common expense liability of  
22 all the units;

23           (4) The lien of each creditor of each unit owners which was

1 perfected before termination continues as a lien against that unit  
2 owner's unit as of the date the lien was perfected; ~~and~~

3 (5) The assets of the association must be distributed to all  
4 unit owners and all lien holders as their interests may appear in  
5 the order described above; and

6 (6) Creditors of the association are not entitled to payment  
7 from any unit owner in excess of the amount of the creditor's lien  
8 against that unit owner's interest.

9 (j) The respective interests of unit owners referred to in  
10 subsections (e), (f), (g), (h), and (i) are as follows:

11 (1) Except as otherwise provided in paragraph (2), the  
12 respective interests of unit owners are the fair market values of  
13 their units, allocated interests, and any limited common elements  
14 immediately before the termination, as determined by one or more  
15 independent appraisers selected by the association. The decision  
16 of the independent appraisers must be distributed to the unit  
17 owners and becomes final unless disapproved within thirty days  
18 after distribution by unit owners of units to which twenty-five  
19 percent of the votes in the association are allocated. The  
20 proportion of any unit owner's interest to that of all unit owners  
21 is determined by dividing the fair market value of that unit  
22 owner's unit and its allocated interests by the total fair market  
23 values of all the units and their allocated interests.

1 (2) If any unit or any limited common element is destroyed to  
2 the extent that an appraisal of the fair market value thereof  
3 before destruction cannot be made, the interests of all unit owners  
4 are:

5 ~~(i)~~ (A) in a condominium, their respective common element  
6 interests immediately before the termination;

7 ~~(ii)~~ (B) in a cooperative, their respective ownership  
8 interests immediately before the termination; and

9 ~~(iii)~~ (C) in a planned community, their respective common  
10 expense liabilities immediately before the termination.

11 (k) In a condominium or planned community, except as otherwise  
12 provided in subsection (l), foreclosure or enforcement of a lien or  
13 encumbrance against the entire common interest community does not  
14 terminate, of itself, the common interest community, and  
15 foreclosure or enforcement of a lien or encumbrance against a  
16 portion of the common interest community, other than withdrawable  
17 real estate, does not withdraw that portion from the common  
18 interest community. Foreclosure or enforcement of a lien or  
19 encumbrance against withdrawable real estate<sup>7</sup> or against common  
20 elements that have been subjected to a security interest by the  
21 association under Section 3-112, does not withdraw, of itself, that  
22 real estate from the common interest community, but the person  
23 taking title thereto may require from the association, upon

1 request, an amendment excluding the real estate from the common  
2 interest community.

3 (1) In a condominium or planned community, if a lien or  
4 encumbrance against a portion of the real estate comprising the  
5 common interest community has priority over the declaration and the  
6 lien or encumbrance has not been partially released, the parties  
7 foreclosing the lien or encumbrance, upon foreclosure, may record an  
8 instrument excluding the real estate subject to that lien or  
9 encumbrance from the common interest community.

10 **§36B-2-119. Rights of secured lenders.**

11 (a) The declaration may require that all or a specified number  
12 or percentage of the lenders who hold security interests  
13 encumbering the units or who have extended credit to the  
14 association approve specified actions of the unit owners or the  
15 association as a condition to the effectiveness of those actions,  
16 but no requirement for approval may operate to: (i) Deny or  
17 delegate control over the general administrative affairs of the  
18 association by the unit owners or the executive board, or (ii)  
19 prevent the association or the executive board from commencing,  
20 intervening in, or settling any litigation or proceeding, or (iii)  
21 prevent any insurance trustee or the association from receiving and  
22 distributing any insurance proceeds except pursuant to section  
23 3-113.

1       (b) A lender who has extended credit to an association secured  
2 by an assignment of income (section 3-102(14)) or an encumbrance on  
3 the common elements (section 3-112) may enforce its security  
4 agreement in accordance with its terms, subject to the requirements  
5 of this chapter and other law. Requirements that the association  
6 must deposit its periodic common charges before default with the  
7 lender to which the association's income has been assigned, or  
8 increase its common charges at the lender's direction by amounts  
9 reasonably necessary to amortize the loan in accordance with its  
10 terms, do not violate the prohibitions on lender approval contained  
11 in subsection (a).

12 **§36B-2-123. Master planned communities.**

13       (a) The declaration for a common interest community may state  
14 that it is a master planned community if the declarant has reserved  
15 the development right to create at least five-hundred units that  
16 may be used for residential purposes, and at the time of the  
17 reservation that declarant owns or controls more than five-hundred  
18 acres on which the units may be built.

19       (b) If the requirements of subsection (a) are satisfied, the  
20 declaration for the master planned community need not state a  
21 maximum number of units and need not contain any of the information  
22 required by section 2-105(a) (3) through (14) until the declaration  
23 is amended under subsection (c).

1           (c) When each unit in a master planned community is conveyed  
2 to a purchaser, the declaration must contain:

3           (1) A sufficient legal description of the unit and all  
4 portions of the master planned community in which any other units  
5 have been conveyed to a purchaser; and

6           (2) All the information required by section 2-105(a)(3)  
7 through (14) with respect to that real estate.

8           (d) The only real estate in a master planned community subject  
9 to this chapter are units that have been declared or which are  
10 being offered for sale and any other real estate described pursuant  
11 to subsection (c). Other real estate that is or may become part of  
12 the master planned community is only subject to other law and to  
13 any other restrictions and limitations that appear of record.

14           (e) If the public offering statement conspicuously identifies  
15 the fact that the community is a master planned community, the  
16 disclosure requirements contained in article four apply only with  
17 respect to units that have been declared or are being offered for  
18 sale in connection with the public offering statement and to the  
19 real estate described pursuant to subsection (c).

20           (f) Limitations in this chapter on the addition of unspecified  
21 real estate (section 2-122) do not apply to a master planned  
22 community.

23           (g) The period of declarant control of the association for a

1 master planned community terminates in accordance with any  
2 conditions specified in the declaration or otherwise at the time  
3 the declarant, in a recorded instrument and after giving notice in  
4 a record to all the unit owners, voluntarily surrenders all rights  
5 to control the activities of the association.

6 **§36B-2-124. Termination following catastrophe.**

7       If substantially all the units in a common interest community  
8 have been destroyed or are uninhabitable and the available methods  
9 for giving notice under section 3-121 of a meeting of unit owners  
10 to consider termination under section 2-118 will not likely result  
11 in receipt of the notice, the executive board or any other  
12 interested person may commence an action in the circuit court of  
13 the county in which the common interest community is situate  
14 seeking to terminate the common interest community. During the  
15 pendency of the action, the court may issue whatever orders it  
16 considers appropriate, including appointment of a receiver. After  
17 a hearing, the court may terminate the common interest community or  
18 reduce its size and may issue any other order the court considers  
19 to be in the best interest of the unit owners and persons holding  
20 an interest in the common interest community.

21 **ARTICLE 3. MANAGEMENT OF THE COMMON INTEREST COMMUNITY.**

22 **§36B-3-101. Organization of Unit Owners Association.**

23       A unit owners association must be organized no later than the



1 date the first unit in the common interest community is conveyed.  
 2 The membership of the association at all times consists exclusively  
 3 of all unit owners or, following termination of the common interest  
 4 community, of all former unit owners entitled to distributions of  
 5 proceeds under §section 2-118 or their heirs, successors, or  
 6 assigns. The association must have an executive board. The  
 7 association must be organized as a profit or nonprofit corporation,  
 8 trust, ~~or~~ limited liability company, partnership, ~~or as an~~  
 9 unincorporated association, or any other form of organization  
 10 authorized by the law of this state.

11 **§36B-3-102. POWERS AND DUTIES OF UNIT OWNERS ASSOCIATION.**

12 (a) Except as otherwise provided in subsection (b) and ~~subject~~  
 13 ~~to the~~ other provisions of ~~the declaration~~ this chapter, the  
 14 association ~~even if unincorporated,~~ even if not registered: may

15 (1) Shall adopt and may amend bylaws and may adopt and amend  
 16 rules; ~~and regulations~~

17 (2) Shall adopt and may amend budgets ~~for revenues,~~  
 18 ~~expenditures, and reserves~~ under Section 3-123, shall and collect  
 19 assessments for common expenses from unit owners, and may invest  
 20 funds of the association;

21 (3) May hire and discharge managing agents and other  
 22 employees, agents, and independent contractors;

23 (4) May institute, defend, or intervene in litigation or in

1 arbitration, mediation, or administrative proceedings in its own  
 2 name on behalf of itself or two or more unit owners on matters  
 3 affecting the common interest community, subject to section 3-124;

4 (5) May make contracts and incur liabilities;

5 (6) May regulate the use, maintenance, repair, replacement,  
 6 and modification of common elements;

7 (7) May cause additional improvements to be made as a part of  
 8 the common elements;

9 (8) May acquire, hold, encumber, and convey in its own name  
 10 any right, title, or interest to real estate or personal property,  
 11 but:

12 ~~(i)~~ (A) Common elements in a condominium or planned community  
 13 may be conveyed or subjected to a security interest only pursuant  
 14 to section 3-112 ~~section one hundred twelve of this article;~~ and

15 ~~(ii)~~ (B) Part of a cooperative may be conveyed, or all or part  
 16 of a cooperative may be subjected to a security interest, only  
 17 pursuant to section 3-112; ~~section one hundred twelve of this~~  
 18 ~~article~~

19 (9) May grant easements, leases, licenses, and concessions  
 20 through or over the common elements;

21 (10) May impose and receive any payments, fees, or charges  
 22 for:

23 (A) The use, rental, or operation of the common elements,

1 other than limited common elements described in section 2-102(2) and  
2 (4); ~~subsections (1) and (4), section one hundred two, article two~~  
3 ~~of this chapter, and~~

4 (B) ~~for~~ Services provided to unit owners;

5 (11) May impose charges for late payment of assessments and,  
6 after notice and an opportunity to be heard, may levy impose  
7 reasonable fines for violations of the declaration, bylaws, and  
8 rules ~~and regulations~~ of the association;

9 (12) May impose reasonable charges for the preparation and  
10 recordation of amendments to the declaration, resale certificates  
11 required by section one hundred nine, article four of this chapter,  
12 or statements of unpaid assessments;

13 (13) May provide for the indemnification of its officers and  
14 executive board and maintain directors' and officers' liability  
15 insurance;

16 (14) May assign its right to future income, including the  
17 right to receive common expense assessments, but only to the extent  
18 the declaration expressly so provides;

19 (15) May exercise any other powers conferred by the  
20 declaration or bylaws;

21 (16) May exercise all other powers that may be exercised in  
22 this state by legal entities of the same type as the association;

23 ~~(17) Institute litigation or administrative proceedings in its~~

1 ~~own name against a unit owner for the collection of dues or~~  
2 ~~assessments that are overdue or in arrears; and~~

3       ~~(18)~~ (17) May exercise any other powers necessary and proper  
4 for the governance and operation of the association;

5       (18) May require that disputes between the association and  
6 unit owners or between two or more unit owners regarding the common  
7 interest community be submitted to nonbinding alternative dispute  
8 resolution as a prerequisite to commencement of a judicial  
9 proceeding;

10       (19) May suspend any right or privilege of a unit owner that  
11 fails to pay an assessment, but may not:

12       (A) Deny a unit owner or other occupant access to the owner's  
13 unit; or

14       (B) Withhold services provided to a unit or a unit owner by  
15 the association if the effect of withholding the service would be  
16 to endanger the health, safety, or property of any person; and

17       (20) The association may, after notice, suspend a unit owner's  
18 right to vote and/or right to seek election as a director or  
19 officer of the association for failure of the unit owner to pay  
20 assessments. The suspended rights to vote or seek election shall  
21 be immediately restored to the unit owner upon payment of all past  
22 due or delinquent assessments even if paid during a meeting or  
23 election.

1 (b) The declaration may not ~~impose limitations on~~ limit the  
2 power of the association beyond the limitations authorized in  
3 subsection(a)(18) to:

4 (1) Deal with the declarant ~~which are~~ if the limit is more  
5 restrictive than the ~~limitations~~ limit imposed on the power of the  
6 association to deal with other persons; or

7 (2) Institute litigation or an arbitration, mediation or  
8 administrative proceeding against any person, subject to the  
9 following:

10 (A) The association shall comply with section 124 of this  
11 article, if applicable, before instituting any proceeding described  
12 in subsection (a) of said section in connection with construction  
13 defects; and

14 (B) The executive board promptly shall provide notice to the  
15 unit owners of any legal proceeding in which the association is a  
16 party other than proceedings involving enforcement of rules or to  
17 recover unpaid assessments or other sums due the association.

18 (c) If a tenant of a unit owner violates the declaration,  
19 bylaws, or rules of the association, in addition to exercising any  
20 of its powers against the unit owner, the association may:

21 (1) Exercise directly against the tenant the powers described  
22 in subsection (a)(11);

23 (2) After giving notice to the tenant and the unit owner and

1 an opportunity to be heard, levy reasonable fines against the  
2 tenant for the violation; and

3 (3) Enforce any other rights against the tenant for the  
4 violation which the unit owner as landlord could lawfully have  
5 exercised under the lease or which the association could lawfully  
6 have exercised directly against the unit owner, or both.

7 (d) The rights referred to in subsection (c)(3) may be  
8 exercised only if the tenant or unit owner fails to cure the  
9 violation within ten days after the association notifies the tenant  
10 and unit owner of that violation.

11 (e) Unless a lease otherwise provides, this section does not:

12 (1) Affect rights that the unit owner has to enforce the lease  
13 or that the association has under other law; or

14 (2) Permit the association to enforce a lease to which it is  
15 not a party in the absence of a violation of the declaration,  
16 bylaws, or rules.

17 (f) The executive board may determine whether to take  
18 enforcement action by exercising the association's power to impose  
19 sanctions or commencing an action for a violation of the  
20 declaration, bylaws, and rules, including whether to compromise any  
21 claim for unpaid assessments or other claim made by or against it.

22 The executive board does not have a duty to take enforcement action  
23 if it determines that, under the facts and circumstances presented:

1       (1) The association's legal position does not justify taking  
2 any or further enforcement action;

3       (2) The covenant, restriction, or rule being enforced is, or  
4 is likely to be construed as, inconsistent with law;

5       (3) Although a violation may exist or may have occurred, it is  
6 not so material as to be objectionable to a reasonable person or to  
7 justify expending the association's resources; or

8       (4) It is not in the association's best financial or other  
9 interests to pursue an enforcement action.

10       (g) The executive board's decision under subsection (f) not to  
11 pursue enforcement under one set of circumstances does not prevent  
12 the executive board from taking enforcement action under another  
13 set of circumstances, but the executive board may not be arbitrary  
14 or capricious in taking enforcement action.

15       (h) The executive board shall establish a reasonable method  
16 for unit owners to communicate among themselves and with the  
17 executive board on matters concerning the association.

18 **§36B-3-103. Executive board members and officers.**

19       (a) Except as otherwise provided in the declaration, the  
20 bylaws, subsection (b), or other provisions of this chapter, the  
21 executive board ~~may act in all instances~~ acts on behalf of the  
22 association. In the performance of their duties, the officers and  
23 members of the executive board ~~are required to exercise (i) if~~

1 appointed by the declarant ~~the care required of fiduciaries of the~~  
 2 ~~unit owners~~ shall exercise the degree of care and loyalty to the  
 3 association required of a trustee. ~~and (ii) if elected by the unit~~  
 4 ~~owners, ordinary and reasonable care.~~ Officers and members of the  
 5 executive board not appointed by the declarant shall exercise the  
 6 degree of care and loyalty to the association required of an  
 7 officer or director of a corporation and are subject to the  
 8 conflict of interest rules governing directors and officers, under  
 9 West Virginia Code Chapter 31E. The standards of care and loyalty  
 10 described in this section apply regardless of the form in which the  
 11 association is organized.

12 (b) The executive board may not: ~~act on behalf of the~~  
 13 ~~association:~~

14 (1) ~~to~~ Amend the declaration except as provided in (section  
 15 2-117);

16 (2) ~~to~~ Terminate the common interest community (section  
 17 2-118);

18 (3) ~~or to~~ Elect members of the executive board but may fill  
 19 vacancies in its membership for the unexpired portion of any term  
 20 or, if earlier, until the next regularly scheduled election of  
 21 executive board members; or

22 (4) Determine the qualifications, powers, ~~and~~ duties, or terms  
 23 of office of executive board members (section 3-103(f). ), ~~but the~~



1 ~~executive board may fill vacancies in its membership for the~~  
2 ~~unexpired portion of any term.~~

3       (c) The executive board shall adopt budgets as provided in  
4 section 3-123. ~~Within thirty days after adoption of any proposed~~  
5 ~~budget for the common interest community, the executive board shall~~  
6 ~~provide a summary of the budget to all the unit owners, and shall~~  
7 ~~set a date for a meeting of the unit owners to consider~~  
8 ~~ratification of the budget not less than fourteen nor more than~~  
9 ~~thirty days after mailing of the summary. Unless at that meeting~~  
10 ~~a majority of all unit owners or any larger vote specified in the~~  
11 ~~declaration reject the budget, the budget is ratified, whether or~~  
12 ~~not a quorum is present. In the event the proposed budget is~~  
13 ~~rejected, the periodic budget last ratified by the unit owners must~~  
14 ~~be continued until such time as the unit owners ratify a subsequent~~  
15 ~~budget proposed by the executive board.~~

16       (d) Subject to subsection (e), the declaration may provide for  
17 a period of declarant control of the association, during which a  
18 declarant, or persons designated by ~~him~~ the declarant may appoint  
19 and remove the officers and members of the executive board. A  
20 declarant may voluntarily surrender the right to appoint and remove  
21 officers and members of the executive board before the period ends.  
22 In that event, the declarant may require during the remainder of  
23 the period that specified actions of the association or executive

1 board, as described in a recorded instrument executed by the  
2 declarant, be approved by the declarant before they become  
3 effective. Regardless of the period provided in the declaration,  
4 and except as provided in section 2-123(g) (Master Planned  
5 Communities), a period of declarant control terminates no later  
6 than the ~~earlier~~ earliest of:

7 (i) Sixty days after conveyance of ~~seventy-five percent~~  
8 three-fourths of the units that may be created to unit owners other  
9 than a declarant;

10 (ii) Two years after all declarants have ceased to offer units  
11 for sale in the ordinary course of business;

12 (iii) Two years after any right to add new units was last  
13 exercised; or

14 (iv) The day the declarant, after giving notice in a record to  
15 unit owners, records an instrument voluntarily surrendering all  
16 rights to control activities of the association. ~~A declarant may~~  
17 ~~voluntarily surrender the right to appoint and remove officers and~~  
18 ~~members of the executive board before termination of that period,~~  
19 ~~but in that event the declarant may require, for the duration of~~  
20 ~~the period of declarant control, that specified actions of the~~  
21 ~~association or executive board, as described in a recorded~~  
22 ~~instrument executed by the declarant, be approved by the declarant~~  
23 ~~before they become effective.~~

1 (e) Not later than sixty days after conveyance of ~~twenty-five~~  
2 ~~percent~~ one-fourth of the units that may be created to unit owners  
3 other than a declarant, at least one member and not less than  
4 twenty-five percent of the members of the executive board must be  
5 elected by unit owners other than the declarant. Not later than  
6 sixty days after conveyance of ~~fifty percent~~ one-half of the units  
7 that may be created to unit owners other than a declarant, not less  
8 than ~~thirty-three and one-third percent~~ one third of the members of  
9 the executive board must be elected by unit owners other than the  
10 declarant.

11 (f) Except as otherwise provided in section 2-120(e), not  
12 later than the termination of any period of declarant control, the  
13 unit owners shall elect an executive board of at least three  
14 members, at least a majority of whom must be unit owners. Unless  
15 the declaration provides for the election of officers by the unit  
16 owners, the ~~The~~ executive board shall elect the officers. The  
17 executive board members and officers shall take office upon  
18 election or appointment.

19 (g) ~~Notwithstanding any provision of the declaration or bylaws~~  
20 ~~to the contrary, the unit owners, by a two-thirds vote of all~~  
21 ~~persons present and entitled to vote at any meeting of the unit~~  
22 ~~owners at which a quorum is present, may remove any member of the~~  
23 ~~executive board with or without cause, other than a member~~

1 ~~appointed by the declarant.~~ A declaration may provide for the  
2 appointment of specified positions on the executive board by  
3 persons other than the declarant during or after the period of  
4 declarant control. It also may provide a method for filling  
5 vacancies in those positions, other than by election by unit  
6 owners. However, after the period of declarant control, appointed  
7 members:

8 (1) May not comprise more than one third of the board; and

9 (2) Have no greater authority than any other member of the  
10 board.

11 (h) Within thirty days after unit owners other than the  
12 declarant elect a majority of the members of the executive board,  
13 the declarant shall deliver to the association all property of the  
14 unit owners and of the association held by or controlled by the  
15 declarant, including without limitation the following items:

16 (1) The original or a certified copy of the recorded  
17 declaration as amended; the association articles of incorporation,  
18 if the association is incorporated; bylaws; minute books and other  
19 books and records of the association; and any rules which may have  
20 been promulgated;

21 (2) An accounting for association funds and financial  
22 statements, from the date the association received funds and ending  
23 on the date the period of declarant control ends. The financial

1 statements shall be audited by an independent certified public  
2 accountant and shall be accompanied by the accountant's letter,  
3 expressing either:

4 (A) The opinion that the financial statements present fairly  
5 the financial position of the association in conformity with  
6 generally accepted accounting principles, or

7 (B) A disclaimer of the accountant's ability to attest to the  
8 fairness of the presentation of the financial information in  
9 conformity with generally accepted accounting principles, and the  
10 reasons therefor. The expense of the audit shall not be paid for or  
11 charged to the association;

12 (3) Association funds or control thereof;

13 (4) All insurance policies then in force, in which the  
14 association or its directors and officers are named as insured  
15 persons;

16 (5) A roster of unit owners and mortgagees and their addresses  
17 and telephone numbers, if known, as shown on the declarant's  
18 records; and

19 (6) Contracts in which the association is a contracting party.

20 (i) During the period of declarant control, the declarant  
21 shall, at least every six months, provide the unit owners with a  
22 current financial statement of the association. The statement shall  
23 be on a cash basis and need not be audited by an independent

1 accountant. It shall include, without limitation:

2 (1) All income and expenses for the calendar year to date;

3 (2) All accounts payable and receivable, including the ages of  
 4 those accounts and showing all sums due to and from the declarant  
 5 and affiliates of the declarant;

6 (3) The amount of any funded replacement reserves; and

7 (4) The balance of any other funds of the association.

8 **§36B-3-105. Termination of contracts and leases of declarant.**

9 (a) If entered into before Within two years after the  
 10 executive board elected by the unit owners pursuant to section  
 11 3-103(f) takes office, the association may terminate without  
 12 penalty, upon not less than ninety days' notice to the other party,  
 13 any of the following if it was entered into before the executive  
 14 board was elected:

15 ~~(i) (1) Any management, maintenance, operations, or contract,~~  
 16 ~~employment contract, or lease of recreational or parking areas or~~  
 17 ~~facilities; or~~

18 ~~(ii) (2) Any other contract or lease between the association~~  
 19 ~~and a declarant or an affiliate of a declarant. or~~

20 ~~(iii) any contract or lease that is not bona fide or was~~  
 21 ~~unconscionable to the unit owners at the time entered into under~~  
 22 ~~the circumstances then prevailing, may be terminated~~

23 (b) The association may terminate without penalty ~~by the~~

1 ~~association~~ at any time after the executive board elected by the  
2 unit owners pursuant to section 3-103(f) takes office upon not less  
3 than ninety days' notice to the other party, any contract or lease  
4 that is not bona fide or was unconscionable to the unit owners at  
5 the time entered into.

6 (c) This section does not apply to:

7 ~~(i)~~ (1) Any lease the termination of which would terminate the  
8 common interest community or reduce its size, unless the real  
9 estate subject to that lease was included in the common interest  
10 community for the purpose of avoiding the right of the association  
11 to terminate a lease under this section; or

12 ~~(ii)~~ (2) A proprietary lease.

13 **§36B-3-106. Bylaws.**

14 (a) The bylaws of the association must: ~~provide~~

15 (1) Provide the number of members of the executive board and  
16 the titles of the officers of the association;

17 (2) Provide for election by the executive board, or if the  
18 declaration requires, by unit owners, of president, treasurer,  
19 secretary, and any other officers of the association the bylaws  
20 specify;

21 (3) Specify the qualifications, powers and duties, terms of  
22 office, and manner of electing and removing executive board members  
23 and officers and filling vacancies;

1       (4) Specify the ~~which, if any, of its~~ powers the executive  
2 board or officers may delegate to other persons or to a managing  
3 agent;

4       (5) Specify the ~~which of its~~ officers who may prepare,  
5 execute, certify, and record amendments to the declaration on  
6 behalf of the association; ~~and~~

7       (6) Specify a method for amending the bylaws;

8       (7) Contain any provision necessary to satisfy requirements in  
9 this chapter or the declaration concerning meetings, voting,  
10 quorums, and other activities of the association; and

11       (8) Provide for any matter required by law of this state other  
12 than this chapter to appear in the bylaws of organizations of the  
13 same type as the association.

14       (b) Subject to ~~the provisions of~~ the declaration and this  
15 chapter, the bylaws may provide for any other necessary or  
16 appropriate matters, ~~the association deems necessary and~~  
17 appropriate, including matters that could be adopted as rules.

18 **§36B-3-108. Meetings.**

19       ~~A meeting of the association must be held at least once each~~  
20 ~~year. Special meetings of the association may be called by the~~  
21 ~~president,~~

22       (a) The following requirements apply to unit owner meetings:

23       (1) An association shall hold a meeting of unit owners



1 annually at a time, date, and place stated in or fixed in  
2 accordance with the bylaws.

3 (2) An association shall hold a special meeting of unit owners  
4 to address any matter affecting the common interest community or  
5 the association if its president, a majority of the executive  
6 board, or by unit owners having at least twenty percent, or any  
7 lower percentage specified in the bylaws, of the votes in the  
8 association request that the secretary call the meeting. ~~Not less~~  
9 than 10 nor more than 60 days in advance of any meeting, the  
10 secretary or other officer specified in the bylaws shall cause  
11 notice to be hand-delivered or sent prepaid If the association does  
12 not notify unit owners of a special meeting within thirty days  
13 after the requisite number or percentage of unit owners request the  
14 secretary to do so, the requesting members may directly notify all  
15 the unit owners of the meeting. Only matters described in the  
16 meeting notice required by paragraph (3) may be considered at a  
17 special meeting.

18 (3) An association shall notify unit owners of the time, date,  
19 and place of each annual and special unit owners meeting not less  
20 than ten days or more than sixty days before the meeting date.  
21 Notice may be by any means described in Section 3-121 by United  
22 States mail to the mailing address of each unit or to any other  
23 mailing address designated in writing by the unit owner. The notice

1 of any meeting must state the time, date and place of the meeting  
2 and the items on the agenda, including:

3 (A) A statement of the general nature of any proposed  
4 amendment to the declaration or bylaws;

5 (B) Any budget changes; and

6 (C) Any proposal to remove an officer or member of the  
7 executive board.

8 (4) The minimum time to give notice required by paragraph (3)  
9 may be reduced or waived for a meeting called to deal with an  
10 emergency.

11 (5) Unit owners must be given a reasonable opportunity at any  
12 meeting to comment regarding any matter affecting the common  
13 interest community or the association.

14 (6) The declaration or bylaws may allow for meetings of unit  
15 owners to be conducted by telephonic, video, or other conferencing  
16 process, if the alternative process is consistent with subsection  
17 (b) (7).

18 (b) The following requirements apply to meetings of the  
19 executive board and committees of the association authorized to act  
20 for the association:

21 (1) Meetings must be open to the unit owners except during  
22 executive sessions. The executive board and those committees may  
23 hold an executive session only during a regular or special meeting

1 of the board or a committee. No final vote or action may be taken  
2 during an executive session. An executive session may be held only  
3 to:

4 (A) Consult with the association's attorney concerning legal  
5 matters;

6 (B) Discuss existing or potential litigation or mediation,  
7 arbitration, or administrative proceedings;

8 (C) Discuss labor or personnel matters;

9 (D) Discuss contracts, leases, and other commercial  
10 transactions to purchase or provide goods or services currently  
11 being negotiated, including the review of bids or proposals, if  
12 premature general knowledge of those matters would place the  
13 association at a disadvantage; or

14 (E) Prevent public knowledge of the matter to be discussed if  
15 the executive board or committee determines that public knowledge  
16 would violate the privacy of any person.

17 (2) For purposes of this section, a gathering of board members  
18 at which the board members do not conduct association business is  
19 not a meeting of the executive board. The executive board and its  
20 members may not use incidental or social gatherings of board  
21 members or any other method to evade the open meeting requirements  
22 of this section.

23 (3) During the period of declarant control, the executive

1 board shall meet at least four times a year. Up until the sale of  
2 the 12th unit, at least two of those meetings must be held at the  
3 common interest community or at a place convenient to the  
4 community. Upon the sale of the 12th unit, all meetings must be  
5 held at the common interest community or at a place convenient to  
6 the community. After termination of the period of declarant  
7 control, all executive board meetings must be at the common  
8 interest community or at a place convenient to the community unless  
9 the unit owners amend the bylaws to vary the location of those  
10 meetings.

11 (4) At each executive board meeting, the executive board shall  
12 provide a reasonable opportunity for unit owners to comment  
13 regarding any matter affecting the common interest community and  
14 the association.

15 (5) Unless the meeting is included in a schedule given to the  
16 unit owners or the meeting is called to deal with an emergency, the  
17 secretary or other officer specified in the bylaws shall give  
18 notice of each executive board meeting to each board member and to  
19 the unit owners. The notice must be given at least ten days before  
20 the meeting and must state the time, date, place, and agenda of the  
21 meeting.

22 (6) If any materials are distributed to the executive board  
23 before the meeting, the executive board at the same time shall make

1 copies of those materials reasonably available to unit owners,  
2 except that the board need not make available copies of unapproved  
3 minutes or materials that are to be considered in executive  
4 session.

5 (7) Unless the declaration or bylaws otherwise provide, the  
6 executive board may meet by telephonic, video, or other  
7 conferencing process if:

8 (A) The meeting notice states the conferencing process to be  
9 used and provides information explaining how unit owners may  
10 participate in the conference directly or by meeting at a central  
11 location or conference connection; and

12 (B) The process provides all unit owners the opportunity to  
13 hear or perceive the discussion and to comment as provided in  
14 paragraph (4).

15 (8) After termination of the period of declarant control, unit  
16 owners may amend the bylaws to vary the procedures for meetings  
17 described in paragraph (7).

18 (9) Instead of meeting, the executive board may act by  
19 unanimous consent as documented in a record authenticated by all  
20 its members. The secretary promptly shall give notice to all unit  
21 owners of any action taken by unanimous consent. After termination  
22 of the period of declarant control, the executive board may act by  
23 unanimous consent only to undertake ministerial actions or to

1 implement actions previously taken at a meeting of the executive  
2 board.

3 (10) Even if an action by the executive board is not in  
4 compliance with this section, it is valid unless set aside by a  
5 court. A challenge to the validity of an action of the executive  
6 board for failure to comply with this section may not be brought  
7 more than sixty days after the minutes of the executive board of  
8 the meeting at which the action was taken are approved or the  
9 record of that action is distributed to unit owners, whichever is  
10 later.

11 **§36B-3-109. QUORUM.**

12 (a) Unless the bylaws otherwise provide ~~otherwise~~, a quorum  
13 is present throughout any meeting of the ~~association~~ unit owners if  
14 persons entitled to cast twenty percent of the votes ~~that may be~~  
15 ~~cast for election of the executive board~~ in the association:

16 (1) Are present in person or by proxy at the beginning of the  
17 meeting;

18 (2) Have cast absentee ballots solicited in accordance with  
19 Section 3-110 (c) (4) which have been delivered to the secretary in  
20 a timely manner; or

21 (3) Are present by any combination of paragraphs (1) and (2).

22 (b) Unless the bylaws specify a larger ~~percentage number~~, a  
23 quorum of the executive board is ~~deemed~~ present for purposes of

1 determining the validity of any action throughout any taken at a  
2 meeting of the executive board only if individuals persons entitled  
3 to cast fifty percent a majority of the votes on that board are  
4 present at the time a vote regarding that action is taken. at the  
5 beginning of the meeting. If a quorum is present when a vote is  
6 taken, the affirmative vote of a majority of the board members  
7 present is the act of the executive board unless a greater vote is  
8 required by the declaration or bylaws.

9 **§36B-3-110. Voting; proxies; ballots.**

10 (a) Unless prohibited or limited by the declaration or bylaws,  
11 unit owners may vote at a meeting in person, by absentee ballot  
12 pursuant to subsection (b) (4), by a proxy pursuant to subsection  
13 (c) or, when a vote is conducted without a meeting, by electronic  
14 or paper ballot pursuant to subsection (d).

15 (b) At a meeting of unit owners the following requirements  
16 apply:

17 (1) Unit owners who are present in person may vote by voice  
18 vote, show of hands, standing, or any other method for determining  
19 the votes of unit owners, as designated by the person presiding at  
20 the meeting.

21 (2) If only one of several owners of a unit is present, that  
22 owner is entitled to cast all the votes allocated to that unit. If  
23 more than one of the owners are present, the votes allocated to the

1 unit may be cast only in accordance with the agreement of a  
2 majority in interest of the owners, unless the declaration  
3 expressly provides otherwise. There is majority agreement if any  
4 one of the owners casts the votes allocated to the unit without  
5 protest being made promptly to the person presiding over the  
6 meeting by any of the other owners of the unit.

7 (3) Unless a greater number or fraction of the votes in the  
8 association is required by this chapter or the declaration, a  
9 majority of the votes cast determines the outcome of any action of  
10 the association.

11 (4) Subject to subsection (a), a unit owner may vote by  
12 absentee ballot without being present at the meeting. The  
13 association promptly shall deliver an absentee ballot to an owner  
14 that requests it if the request is made at least three days before  
15 the scheduled meeting. Votes cast by absentee ballot must be  
16 included in the tally of a vote taken at that meeting.

17 (5) When a unit owner votes by absentee ballot, the  
18 association must be able to verify that the ballot is cast by the  
19 unit owner having the right to do so.

20 (c) Except as otherwise provided in the declaration or bylaws,  
21 the following requirements apply with respect to proxy voting:

22 (1) Votes allocated to a unit may be cast pursuant to a  
23 directed or undirected proxy duly executed by a unit owner.



1           (2) If a unit is owned by more than one person, each owner of  
2 the unit may vote or register protest to the casting of votes by  
3 the other owners of the unit through a duly executed proxy.

4           (3) A unit owner may revoke a proxy given pursuant to this  
5 section only by actual notice of revocation to the person presiding  
6 over a meeting of the association.

7           (4) A proxy is void if it is not dated or purports to be  
8 revocable without notice.

9           (5) A proxy is valid only for the meeting at which it is cast  
10 and any recessed session of that meeting.

11           (6) A person may not cast undirected proxies representing more  
12 than fifteen percent of the votes in the association, unless the  
13 undirected proxies are for units under common ownership.

14           (d) Unless prohibited or limited by the declaration or bylaws,  
15 an association may conduct a vote without a meeting. In that  
16 event, the following requirements apply:

17           (1) The association shall notify the unit owners that the vote  
18 will be taken by ballot.

19           (2) The association shall deliver a paper or electronic ballot  
20 to every unit owner entitled to vote on the matter.

21           (3) The ballot must set forth each proposed action and provide  
22 an opportunity to vote for or against the action.

23           (4) When the association delivers the ballots, it shall also:

1 (A) Indicate the number of responses needed to meet the quorum  
2 requirements;

3 (B) State the percent of votes necessary to approve each  
4 matter other than election of directors;

5 (C) Specify the time and date by which a ballot must be  
6 delivered to the association to be counted, which time and date may  
7 not be fewer than three days after the date the association  
8 delivers the ballot; and

9 (D) Describe the time, date, and manner by which unit owners  
10 wishing to deliver information to all unit owners regarding the  
11 subject of the vote may do so.

12 (5) Except as otherwise provided in the declaration or bylaws,  
13 a ballot is not revoked after delivery to the association by death  
14 or disability or attempted revocation by the person that case that  
15 vote.

16 (6) Approval by ballot pursuant to this subsection is valid  
17 only if the number of votes cast by ballot equals or exceeds the  
18 quorum required to be present at a meeting authorizing the action.

19 (e) If the declaration requires that votes on specified  
20 matters affecting the common interest community be cast by lessees  
21 rather than unit owners of leased units:

22 (1) This section applies to lessees as if they were unit  
23 owners.

1           (2) Unit owners that have leased their units to other persons  
2 may not cast votes on those specified matters; and

3           (3) Lessees are entitled to notice of meetings, access to  
4 records, and other rights respecting these matters as if they were  
5 unit owners.

6           (f) Unit owners must also be given notice of all meetings at  
7 which lessees are entitled to vote.

8           (g) Votes allocated to a unit owned by the association must be  
9 cast in any vote of the unit owners in the same proportion as the  
10 votes cast on the matter by unit owners other than the association.

11 **§36B-3-111. Tort and contract liability; tolling of limitation**  
12 **period.**

13           (a) A unit owner is not liable, solely by reason of being a  
14 unit owner, for an injury or damage out of the condition or use of  
15 the common elements. Neither the association nor any unit owner  
16 except the declarant is liable for that declarant's torts in  
17 connection with any part of the common interest community which  
18 that declarant has the responsibility to maintain.

19           **(b)** An action alleging a wrong done by the association,  
20 including an action arising out of the condition or use of the  
21 common elements, may be maintained only against the association and  
22 not against any unit owner. If the wrong occurred during any  
23 period of declarant control and the association gives the declarant

1 reasonable notice of and an opportunity to defend against the  
2 action, the declarant who then controlled the association is liable  
3 to the association or to any unit owner for all tort losses not  
4 covered by insurance suffered by the association or that unit  
5 owner, and all costs that the association would not have incurred  
6 but for a breach of contract or other wrongful act or omission.  
7 Whenever the declarant is liable to the association under this  
8 section, the declarant is also liable for all expenses of  
9 litigation, including reasonable attorney's fees, incurred by the  
10 association.

11 (c) Except as provided in Section 4-116(d) with respect to  
12 warranty claims, any statute of limitation affecting the  
13 association's right of action against a declarant under this  
14 chapter is tolled until the period of declarant control terminates.  
15 A unit owner is not precluded from maintaining an action  
16 contemplated by this section because he is a unit owner or a member  
17 or officer of the association. Liens resulting from judgments  
18 against the association are governed by section 3-117.

19 **§36B-3-112. Conveyance or encumbrance of common elements.**

20 (a) In a condominium or planned community, portions of the  
21 common elements may be conveyed or subjected to a security interest  
22 by the association if persons entitled to cast at least eighty  
23 percent of the votes in the association, including eighty percent

1 of the votes allocated to units not owned by a declarant, or any  
2 larger percentage the declaration specifies, agree to that action;  
3 but all owners of units to which any limited common element is  
4 allocated must agree in order to convey that limited common element  
5 or subject it to a security interest. The declaration may specify  
6 a smaller percentage only if all of the units are restricted  
7 exclusively to nonresidential uses. Proceeds of the sale are an  
8 asset of the association, but the proceeds of the sale of limited  
9 common elements must be distributed equitably among the owners of  
10 units to which the limited common elements were allocated.

11 (b) Part of a cooperative may be conveyed and all or part of  
12 a cooperative may be subjected to a security interest by the  
13 association if persons entitled to cast at least eighty percent of  
14 the votes in the association, including eighty percent of the votes  
15 allocated to units not owned by a declarant, or any larger  
16 percentage the declaration specified, agree to that action; but, if  
17 fewer than all of the units or limited common elements are to be  
18 conveyed or subjected to a security interest, then all unit owners  
19 of those units, or the units to which those limited common elements  
20 are allocated, must agree in order to convey those units or limited  
21 common elements or subject them to a security interest. The  
22 declaration may specify a smaller percentage only if all of the  
23 units are restricted exclusively to nonresidential uses. Proceeds

1 of the sale are an asset of the association. Any purported  
2 conveyance or other voluntary transfer of an entire cooperative,  
3 unless made pursuant to section 2-118, is void.

4 (c) An agreement to convey common elements in a condominium or  
5 planned community, or to subject them to a security interest, or in  
6 a cooperative, an agreement to convey any part of a cooperative or  
7 subject it to a security interest, must be evidenced by the  
8 execution of an agreement, or ratifications thereof, in the same  
9 manner as a deed, by the requisite number of unit owners. The  
10 agreement must specify a date after which the agreement will be  
11 void unless recorded before that date. The agreement and all  
12 ratifications thereof must be recorded in every county in which a  
13 portion of the common interest community is situate, and is  
14 effective only upon recordation.

15 (d) The association, on behalf of the unit owners, may  
16 contract to convey an interest in a common interest community  
17 pursuant to subsection (a), but the contract is not enforceable  
18 against the association until approved pursuant to subsections (a),  
19 (b), and (c). Thereafter, the association has all powers necessary  
20 and appropriate to effect the conveyance or encumbrance, including  
21 the power to execute deeds or other instruments.

22 (e) Unless made pursuant to this section, any purported  
23 conveyance, encumbrance, judicial sale, or other voluntary transfer

1 of common elements or of any other part of a cooperative is void.

2 (f) A conveyance or encumbrance of common elements or of a  
3 cooperative pursuant to this section does not deprive any unit of  
4 its rights of access and support.

5 (g) Unless the declaration otherwise provides, ~~a conveyance or~~  
6 ~~encumbrance of common elements pursuant to this section does not~~  
7 ~~affect the priority or validity of preexisting encumbrances~~ if the  
8 holders of first security interests on eighty percent of the units  
9 that are subject to security interests on the day the unit owners'  
10 agreement under subsection (c) is recorded, consent in writing:

11 (1) A conveyance of common elements pursuant to this section  
12 terminates both the undivided interests in those common elements  
13 allocated to the units and the security interests in those  
14 undivided interests held by all persons holding security interests  
15 in the units; and

16 (2)An encumbrance of common elements pursuant to this section  
17 has priority over all preexisting encumbrances on the undivided  
18 interests in those common elements held by all persons holding  
19 security interests in the units.

20 (h) The consents by holders of first security interests on  
21 units described in subsection (g), or a certificate of the  
22 secretary affirming that those consents have been received by the  
23 association, may be recorded at any time before the date on which

1 the agreement under subsection (c) becomes void. Consents or  
2 certificates so recorded are valid from the date they are recorded  
3 for purposes of calculating the percentage of consenting first  
4 security interest holders, regardless of later sales or  
5 encumbrances on those units. Even if the required percentage of  
6 first security interest holders so consent, a conveyance or  
7 encumbrance of common elements does not affect interests having  
8 priority over the declaration, or created by the association after  
9 the declaration was recorded.

10 ~~(h)~~ (i) In a cooperative, the association may acquire, hold,  
11 encumber, or convey a proprietary lease without complying with this  
12 section.

13 **§36B-3-113. INSURANCE.**

14 (a) Commencing not later than the time of the first conveyance  
15 of a unit to a person other than a declarant, the association shall  
16 maintain, to the extent reasonably available and subject to  
17 reasonable deductibles:

18 (1) property insurance on the common elements and, in a  
19 planned community, also on property that must become common  
20 elements, insuring against ~~all~~ risks of direct physical loss  
21 commonly insured against ~~or, in the case of a conversion building,~~  
22 ~~against fire and extended coverage perils. The total amount of~~  
23 which insurance, after application of any deductibles, must be not



1 less than eighty percent of the actual cash value of the insured  
2 property at the time the insurance is purchased and at each renewal  
3 date, exclusive of land, excavations, foundations, and other items  
4 normally excluded from property policies; ~~and~~

5 (2) Commercial general liability insurance, including medical  
6 payments insurance, in an amount determined by the executive board  
7 but not less than any amount specified in the declaration, covering  
8 all occurrences commonly insured against ~~for death,~~ bodily injury,  
9 and property damage arising out of or in connection with the use,  
10 ownership, or maintenance of the common elements and, in  
11 cooperatives, also of all units; and

12 (3) Fidelity insurance.

13 (b) In the case of a building ~~that is part of a cooperative or~~  
14 that contains units ~~having~~ divided by horizontal boundaries  
15 described in the declaration, or vertical boundaries that comprise  
16 common walls between units, the insurance maintained under  
17 subsection (a) (1), to the extent reasonably available, must include  
18 the units, but need not include improvements and betterments  
19 installed by unit owners.

20 (c) If the insurance described in subsections (a) and (b) is  
21 not reasonably available, the association promptly shall cause  
22 notice of that fact to be ~~hand-delivered or sent prepaid by United~~  
23 ~~States mail~~ given to all unit owners. The declaration may require

1 the association to carry any other insurance, and the association  
2 ~~in any event~~ may carry any other insurance it considers appropriate  
3 to protect the association or the unit owners.

4 (d) Insurance policies carried pursuant to subsections (a) and  
5 (b) must provide that:

6 (1) Each unit owner is an insured person under the policy with  
7 respect to liability arising out of ~~his~~ the owner's interest in the  
8 common elements or membership in the association;

9 (2) The insurer waives its right to subrogation under the  
10 policy against any unit owner or member of ~~his~~ the owner's  
11 household;

12 (3) No act or omission by ~~any~~ a unit owner, unless acting  
13 within the scope of ~~his~~ the owner's ~~scope of his~~ authority on  
14 behalf of the association, ~~will~~ voids the policy or ~~be~~ is a  
15 condition to recovery under the policy; and

16 (4) If, at the time of a loss under the policy, there is other  
17 insurance in the name of a unit owner covering the same risk  
18 covered by the policy, the association's policy provides primary  
19 insurance.

20 (e) Any loss covered by the property policy under subsections  
21 (a)(1) and (b) must be adjusted with the association, but the  
22 insurance proceeds for that loss are payable to any insurance  
23 trustee designated for that purpose, or otherwise to the

1 association, and not to any holder of a security interest. The  
2 insurance trustee or the association shall hold any insurance  
3 proceeds in trust for the association, unit owners, and lien  
4 holders as their interests may appear. Subject to ~~the provisions~~  
5 ~~of~~ subsection (h), the proceeds must be disbursed first for the  
6 repair or ~~restoration~~ replacement of the damaged property, and the  
7 association, unit owners, and lien holders are not entitled to  
8 receive payment of any portion of the proceeds unless there is a  
9 surplus of proceeds after the property has been completely repaired  
10 or ~~restored~~ replaced, or the common interest community is  
11 terminated.

12 (f) An insurance policy issued to the association does not  
13 prevent a unit owner from obtaining insurance for ~~his~~ the owner's  
14 own benefit.

15 (g) An insurer that has issued an insurance policy under this  
16 section shall issue certificates or memoranda of insurance to the  
17 association and, upon ~~written~~ request made in a record, to any unit  
18 owner or holder of a security interest. The insurer issuing the  
19 policy may not cancel or refuse to renew it until 30 ~~thirty~~ days  
20 after notice of the proposed cancellation or non-renewal has been  
21 mailed to the association, each unit owner, and each holder of a  
22 security interest to whom a certificate or memorandum of insurance  
23 has been issued at their respective last known addresses.

1 (h) Any portion of the common interest community for which  
 2 insurance is required under this section which is damaged or  
 3 destroyed must be repaired or replaced promptly by the association  
 4 unless:

5 ~~(i)~~ (1) The common interest community is terminated, in which  
 6 case ~~S~~section 2-118 applies;

7 ~~(ii)~~ (2) Repair or replacement would be illegal; ~~under any~~  
 8 ~~state or local statute or ordinance governing health or safety,~~ or

9 ~~(iii)~~ (3) Eighty percent of the unit owners, including every  
 10 owner of a unit or assigned limited common element that will not be  
 11 rebuilt, vote not to rebuild.

12 (i) The cost of repair or replacement in excess of insurance  
 13 proceeds, deductibles, and reserves is a common expense. If the  
 14 entire common interest community is not repaired or replaced:

15 ~~(i)~~(1) The insurance proceeds attributable to the damaged  
 16 common elements must be used to restore the damaged area to a  
 17 condition compatible with the remainder of the common interest  
 18 community; and

19 ~~(ii)~~(2) Except to the extent that other persons will be  
 20 distributees (section 2-105(a)(12)(ii)):

21 (A) The insurance proceeds attributable to units and limited  
 22 common elements that are not ~~rebuilt~~ repaired or replaced must be  
 23 distributed to the owners of those units and the owners of the

1 units to which those limited common elements were allocated, or to  
2 lien holders, as their interests may appear; and

3 (B) The remainder of the proceeds must be distributed to all  
4 the unit owners or lien holders, as their interests may appear, as  
5 follows:

6 ~~(1)~~(i) In a condominium, in proportion to the common element  
7 interests of all the units; and

8 ~~(2)~~(ii) In a cooperative or planned community, in proportion  
9 to the common expense liabilities of all the units.

10 (j) If the unit owners vote not to rebuild any unit, that  
11 unit's allocated interests are automatically reallocated upon the  
12 vote as if the unit had been condemned under section 1-107(a), and  
13 the association promptly shall prepare, execute, and record an  
14 amendment to the declaration reflecting the reallocations.

15 ~~(i)~~ (k) ~~The provisions of~~ This section may be varied or waived  
16 in the case of a common interest community all of whose units are  
17 restricted to nonresidential use.

18 **§36B-3-114. Surplus Funds.**

19 Unless otherwise provided in the declaration, any surplus  
20 funds of the association remaining after payment of or provision  
21 for common expenses and any prepayment of reserves must be paid  
22 annually to the unit owners in proportion to their common expense  
23 liabilities or credited to them to reduce their future common

1 expense assessments

2 **§36B-3-115. Assessments.**

3 (a) Until the association makes a common expense assessment,  
4 the declarant shall pay all common expenses. After an assessment  
5 has been made by the association, assessments must be made at least  
6 annually, based on a budget adopted at least annually by the  
7 association.

8 (b) Except for assessments under subsections (c), (d), and  
9 (e), or as otherwise provided in this chapter, all common expenses  
10 must be assessed against all the units in accordance with the  
11 allocations set forth in the declaration pursuant to ~~section~~  
12 2-107(a) and (b). The association may charge interest on any ~~Any~~  
13 ~~past due common expense~~ assessment or portion ~~installment~~ thereof  
14 ~~bears interest~~ at the rate established by the association, not  
15 exceeding eighteen percent per year.

16 (c) To the extent required by the declaration:

17 (1) ~~Any~~ A common expense associated with the maintenance,  
18 repair, or replacement of a limited common element must be assessed  
19 against the units to which that limited common element is assigned,  
20 equally, or in any other proportion the declaration provides;

21 (2) ~~Any~~ A common expense ~~or portion thereof~~ benefiting fewer  
22 than all of the units or their owners ~~must~~ may be assessed  
23 exclusively against the units or unit owners benefitted; and

1 (3) The costs of insurance must be assessed in proportion to  
2 risk, and the costs of utilities must be assessed in proportion to  
3 usage.

4 (d) Assessments to pay a judgment against the association  
5 (section 3-117(a)) may be made only against the units in the common  
6 interest community at the time the judgment was entered, in  
7 proportion to their common expense liabilities.

8 (e) If damage to a unit or other part of the common interest  
9 community, or if any other common expense is caused by the willful  
10 misconduct or gross negligence of any unit owner or a guest or  
11 invitee of a unit owner, the association may assess that expense  
12 exclusively against his unit. that owner's unit, even if the  
13 association maintains insurance with respect to that damage or  
14 common expense.

15 (f) If common expense liabilities are reallocated, common  
16 expense assessments and any installment thereof not yet due must be  
17 recalculated in accordance with the reallocated common expense  
18 liabilities.

19 **§36B-3-116. Lien for sums due association; enforcement.**

20 (a) The association has a statutory lien on a unit for any  
21 assessment ~~levied against~~ attributable to that unit or fines  
22 imposed against its unit owner ~~from the time the assessment or fine~~  
23 ~~becomes due.~~ Unless the declaration otherwise provides, reasonable

1 attorney's fees and costs, other fees, charges, late charges,  
 2 fines, and interest charged pursuant to section 3-102(a) (10), (11),  
 3 and (12), and any other sums due to the association under the  
 4 declaration, this chapter, or as a result of an administrative,  
 5 arbitration, mediation, or judicial decision are enforceable in the  
 6 same manner as unpaid assessments under this section. If an  
 7 assessment is payable in installments, the lien is for the full  
 8 amount of the assessment ~~is a lien~~ from the time the first  
 9 installment thereof becomes due.

10 (b) A lien under this section is prior to all other liens and  
 11 encumbrances on a unit except:

12 ~~(i)~~(1) Liens and encumbrances recorded before the recordation  
 13 of the declaration and, in a cooperative, liens and encumbrances  
 14 ~~which~~ that the association creates, assumes, or takes subject to;

15 ~~(ii)~~(2) Except as otherwise provided in subsection (c), a  
 16 first security interest on the unit recorded before the date on  
 17 which the assessment sought to be enforced became delinquent<sup>7</sup>, or,  
 18 in a cooperative, the first security interest encumbering only the  
 19 unit owner's interest and perfected before the date on which the  
 20 assessment sought to be enforced became delinquent<sup>7</sup>; and

21 ~~(iii)~~(3) Liens for real estate taxes and other governmental  
 22 assessments or charges against the unit or cooperative.

23 (c) The A lien under this section is also prior to all



1 security interests described in subsection (b) (2) clause (ii) above  
 2 to the extent of both the common expense assessments based on the  
 3 periodic budget adopted by the association pursuant to section  
 4 3-115(a) which would have become due in the absence of acceleration  
 5 during the six months immediately preceding institution of an  
 6 action to enforce the lien and reasonable attorney's fees and costs  
 7 incurred by the association in foreclosing the association's lien.  
 8 ~~This subsection~~ Subsection (b) and this subsection does do not  
 9 affect the priority of mechanics' or materialmen's liens, or the  
 10 priority of liens for other assessments made by the association.  
 11 ~~(The lien under this section is not subject to the provisions of~~  
 12 ~~(insert appropriate reference to state homestead, dower and~~  
 13 ~~curtesy, or other exemptions).)~~ A lien under this section shall be  
 14 void, as to creditors, and subsequent purchasers for valuable  
 15 consideration without notice, until and except from the time that  
 16 it is duly admitted to record in all counties wherein the unit  
 17 situate. This followings our recording statute.

18 ~~(c)~~ (d) Unless the declaration otherwise provides, if two or  
 19 more associations have liens for assessments created at any time on  
 20 the same property, those liens have equal priority.

21 ~~(d)~~ (e) A lien for unpaid assessments is extinguished unless  
 22 proceedings to enforce the lien are instituted within three years  
 23 after the full amount of the assessments becomes due.

1       ~~(e)~~(f) This section does not prohibit actions against unit  
2 owners to recover sums for which subsection (a) creates a lien or  
3 prohibit an association from taking a deed in lieu of foreclosure.

4       ~~(f)~~(g) A judgment or decree in any action brought under this  
5 section must include costs and reasonable attorney's fees for the  
6 prevailing party and shall relate back for purposes of priority to  
7 the date the association lien was recorded in the county clerk's  
8 office, and shall bear interest at the rate set by the association  
9 for the original lien, not to exceed eighteen percent pursuant to  
10 Section 36B-3-115(b).

11       ~~(g)~~(h) The association upon ~~written~~ request made in a record  
12 shall furnish to a unit owner, a statement setting forth the amount  
13 of unpaid assessments against the unit. If the unit owner's  
14 interest is real estate, the statement must be in recordable form.  
15 The statement must be furnished within ten business days after  
16 receipt of the request and is binding on the association, the  
17 executive board, and every unit owner. The trustee or trustees  
18 under a record deed of trust encumbering a unit, or judicially  
19 appointed commissioner charged with the sale of a unit, has the  
20 same rights under this paragraph as the owner of the encumbered  
21 unit.

22       ~~(h)~~ For the purpose of perfecting and preserving its lien, the  
23 association shall given notice to the unit owner in the manner set

~~1 forth in section one, article two, chapter fifty six of this code,  
2 or by registered or certified mail, return receipt requested, and  
3 in a form reasonably calculated to inform the owner of his  
4 liability for payment of the assessment. The lien shall be  
5 discharged as to subsequent purchasers for value without notice  
6 unless the association shall cause to be recorded a notice of the  
7 lien in the office of the clerk of the county commission of any  
8 county wherein any part of the condominium is located. The notice  
9 shall contain:~~

- ~~10 (1) A legally sufficient description of the unit;~~
- ~~11 (2) The name or names of the owners of the unit;~~
- ~~12 (3) The amount of unpaid assessments due together with the  
13 date when each fell due; and~~
- ~~14 (4) the date of the recordation.~~

~~15 The clerk of the county commission in whose office the notice  
16 is recorded shall index the notice in the appropriate deedbooks and  
17 lien books in the name of the unit owners and of the association.  
18 The cost of recordation shall be assessed against any unit owner  
19 found to be delinquent in a subsequent proceeding to enforce the  
20 lien.~~

~~21 Upon payment of the assessment, the association shall execute  
22 a written release of the lien in a manner set forth in section one,  
23 article twelve, chapter thirty-eight of this code. This release~~

1 ~~shall be recorded, at the expense of the association, in the clerk~~  
2 ~~of the county commission wherein the notice of the lien was filed.~~

3 (i) ~~At any time before the association has disposed of a unit~~  
4 ~~in a cooperative or entered into a contract for its disposition~~  
5 ~~under the power of sale, the unit owners or the holder of any~~  
6 ~~subordinate security interest may cure the unit owner's default and~~  
7 ~~prevent the sale or other disposition by tendering the performance~~  
8 ~~due under the security agreement, including any amounts due because~~  
9 ~~of exercise of a right to accelerate, plus the reasonable expenses~~  
10 ~~of proceeding to foreclosure incurred to the time of tender,~~  
11 ~~including reasonable attorney fee's of the creditor. In a~~  
12 ~~cooperative, upon nonpayment of an assessment on a unit, the unit~~  
13 ~~owner may be evicted in the same manner as provided by law in the~~  
14 ~~case of an unlawful holdover by a commercial tenant, and the lien~~  
15 ~~may be foreclosed as provided by this section.~~

16 (j) For the purpose of facilitating requests to the  
17 association by trustees and judicially appointed commissioners, the  
18 association shall at all times record its notice address in either  
19 the office of the West Virginia Secretary of State, or in the  
20 office of the clerk of the county commission of each county in  
21 which the common interest community is located.

22 (k) The association's lien may be foreclosed as provided in  
23 this subsection and subsection (p) of this section:

1       (1) In a condominium or planned community, the association's  
2 lien must be foreclosed in like manner as a mortgage on real  
3 estate;

4       (2) In a cooperative whose unit owners' interests in the units  
5 are real estate, the association's lien must be foreclosed in like  
6 manner as a mortgage on real estate or by power of sale under  
7 subsection (1); and

8       (3) In a cooperative whose unit owners' interests in the units  
9 are personal property, the association's lien must be foreclosed in  
10 like manner as a security interest; and

11       (4) In a foreclosure under [insert reference to state power of  
12 sale statute], the association shall give the notice required by  
13 statute or, if there is no such requirement, reasonable notice of  
14 its action to all lien holders of the unit whose interest would be  
15 affected:

16       (1) If the unit owner's interest in a unit in a cooperative is  
17 real estate, the following requirements apply:

18       (1) The association, upon nonpayment of assessments and  
19 compliance with this subsection, may sell that unit at a public  
20 sale or by private negotiation, and at any time, date, and place.  
21 The association shall give to the unit owner and any lessee of the  
22 unit owner reasonable notice in a record of the time, date, and  
23 place of any public sale or, if a private sale is intended, of the

1 intention of entering into a contract to sell and of the time and  
2 date after which a private disposition may be made. The same  
3 notice must also be sent to any other person that has a recorded  
4 interest in the unit which would be cut off by the sale, but only  
5 if the recorded interest was on record seven weeks before the date  
6 specified in the notice as the date of any public sale or seven  
7 weeks before the date specified in the notice as the date after  
8 which a private sale may be made. The notices required by this  
9 subsection may be sent to any address reasonable in the  
10 circumstances. A sale may not be held until five weeks after the  
11 sending of the notice. The association may buy at any public sale  
12 and, if the sale is conducted by a fiduciary or other person not  
13 related to the association, at a private sale.

14 (2) Unless otherwise agreed, the unit owner is liable for any  
15 deficiency in a foreclosure sale.

16 (3) The proceeds of a foreclosure sale must be applied in the  
17 following order:

18 (A) The reasonable expenses of sale;

19 (B) The reasonable expenses of securing possession before  
20 sale; the reasonable expenses of holding, maintaining, and  
21 preparing the unit for sale, including payment of taxes and other  
22 governmental charges and premiums on insurance; and, to the extent  
23 provided for by agreement between the association and the unit

1 owner, reasonable attorney's fees, costs, and other legal expenses  
2 incurred by the association;

3 (C) Satisfaction of the association's lien;

4 (D) Satisfaction in the order of priority of any subordinate  
5 claim of record; and

6 (E) Remittance of any excess to the unit owner.

7 (4) A good faith purchaser for value acquires the unit free of  
8 the association's debt that gave rise to the lien under which the  
9 foreclosure sale occurred and any subordinate interest, even though  
10 the association or other person conducting the sale failed to  
11 comply with this section. The person conducting the sale shall  
12 execute a conveyance to the purchaser sufficient to convey the unit  
13 and stating that it is executed by the person after a foreclosure  
14 of the association's lien by power of sale and that the person was  
15 empowered to make the sale. Signature and title or authority of  
16 the person signing the conveyance as grantor and a recital of the  
17 facts of nonpayment of the assessment and of the giving of the  
18 notices required by this subsection are sufficient proof of the  
19 facts recited and of the authority to sign. Further proof of  
20 authority is not required even though the association is named as  
21 grantee in the conveyance.

22 (5) At any time before the association has disposed of a unit  
23 in a cooperative or entered into a contract for its disposition

1 under the power of sale, the unit owners or the holder of any  
2 subordinate security interest may cure the unit owner's default and  
3 prevent sale or other disposition by tendering the performance due  
4 under the security agreement, including any amounts due because of  
5 exercise of a right to accelerate, plus the reasonable expenses of  
6 proceeding to foreclosure incurred to the time of tender, including  
7 reasonable attorney's fees and costs of the creditor.

8 (m) In an action by an association to collect assessments or  
9 to foreclose a lien on a unit under this section, the court may  
10 appoint a receiver to collect all sums alleged to be due and owing  
11 to a unit owner before commencement or during pendency of the  
12 action. The receivership is governed by [insert state law  
13 generally applicable to receiverships]. The court may order the  
14 receiver to pay any sums held by the receiver to the association  
15 during pendency of the action to the extent of the association's  
16 common expense assessments based on a periodic budget adopted by  
17 the association pursuant to Section 3-115.

18 (n) An association may not commence an action to foreclose a  
19 lien on a unit under this section unless:

20 (1) The unit owner, at the time the action is commenced, owes  
21 a sum equal to at least [three] months of common expense  
22 assessments based on the periodic budget last adopted by the  
23 association pursuant to Section 3-115(a) and the unit owner has



1 failed to accept or comply with a payment plan offered by the  
2 association; and

3 (2) The executive board votes to commence a foreclosure action  
4 specifically against that unit.

5 (o) Unless the parties otherwise agree, the association shall  
6 apply any sums paid by unit owners that are delinquent in paying  
7 assessments in the following order:

8 (1) Unpaid assessments;

9 (2) Late charges;

10 (3) Reasonable attorney's fees and costs and other reasonable  
11 collection charges; and

12 (4) All other unpaid fees, charges, fines, penalties,  
13 interest, and late charges.

14 (p) If the only sums due with respect to a unit are fines and  
15 related sums imposed against the unit, a foreclosure action may not  
16 be commenced against the unit unless the association has a judgment  
17 against the unit owner for the fines and related sums and has  
18 perfected a judgment lien against the unit under [insert reference  
19 to state statute on perfection of judgments].

20 (q) Every aspect of a foreclosure, sale, or other disposition  
21 under this section, including the method, advertising, time, date,  
22 place, and terms, must be commercially reasonable.

23 **§36B-3-117. OTHER LIENS.**

1 (a) In a condominium or planned community:

2 (1) Except as otherwise provided in paragraph (2), a judgment  
3 for money against the association ~~(if recorded)~~, is not a lien on  
4 the common elements, but is a lien in favor of the judgment lien  
5 holder against all of the other real estate of the association and  
6 all of the units in the common interest community at the time the  
7 judgment was entered. No other property of a unit owner is subject  
8 to the claims of creditors of the association.

9 (2) If the association has granted a security interest in the  
10 common elements to a creditor of the association pursuant to  
11 ~~S~~section 3-112, the holder of that security interest shall exercise  
12 its right against the common elements before its judgment lien on  
13 any unit may be enforced.

14 (3) Whether perfected before or after the creation of the  
15 common interest community, if a lien, other than a deed of trust or  
16 mortgage, including a judgment lien or lien attributable to work  
17 performed or materials supplied before creation of the common  
18 interest community, becomes effective against two or more units,  
19 the unit owner of an affected unit may pay to the lien holder the  
20 amount of the lien attributable to ~~his~~ the unit, and the lien  
21 holder, upon receipt of payment, promptly shall deliver a release  
22 of the lien covering that unit. The amount of the payment must be  
23 proportionate to the ratio ~~which~~ that the unit owner's common

1 expense liability bears to the common expense liabilities of all  
2 unit owners ~~whose~~ the units of which are subject to the lien. After  
3 payment, the association may not assess or have a lien against that  
4 unit owner's unit for any portion of the common expenses incurred  
5 in connection with that lien.

6 (4) A judgment against the association must be indexed in the  
7 name of the common interest community and the association and, when  
8 so indexed, is notice of the lien against the units.

9 (b) In a cooperative:

10 (1) If the association receives notice of an impending  
11 foreclosure on all or any portion of the association's real estate,  
12 the association shall promptly transmit a copy of that notice to  
13 each unit owner of a unit located within the real estate to be  
14 foreclosed. Failure of the association to transmit the notice does  
15 not affect the validity of the foreclosure.

16 (2) Whether ~~or not~~ a unit owner's unit is subject to the  
17 claims of the association's creditors, no other property of a unit  
18 owner is subject to those claims.

19 **§36B-3-118. Association records.**

20 (a) An association must retain the following:

21 (1) Detailed records of receipts and expenditures affecting  
22 the operation and administration of the association and other  
23 appropriate accounting records;

1           (2) Minutes of all meetings of its unit owners and executive  
2 board other than executive sessions, a record of all actions taken  
3 by the unit owners or executive board without a meeting, and a  
4 record of all actions taken by a committee in place of the  
5 executive board on behalf of the association;

6           (3) The names of unit owners in a form that permits  
7 preparation of a list of the names of all owners and the addresses  
8 at which the association communicates with them, in alphabetical  
9 order showing the number of votes each owner is entitled to cast;

10          (4) Its original or restated organizational documents, if  
11 required by law other than this chapter, bylaws and all amendments  
12 to them, and all rules currently in effect;

13          (5) All financial statements and tax returns of the  
14 association for the past three years;

15          (6) A list of the names and addresses of its current executive  
16 board members and officers;

17          (7) Its most recent annual report delivered to the Secretary  
18 of State, if any;

19          (8) Financial and other records sufficiently detailed to  
20 enable the association to comply with section 4-109;

21          (9) Copies of current contracts to which it is a party;

22          (10) Records of executive board or committee actions to  
23 approve or deny any requests for design or architectural approval

1 from unit owners; and

2 (11) Ballots, proxies, and other records related to voting by  
3 unit owners for one year after the election, action, or vote to  
4 which they relate.

5 (b) Subject to subsections (c) and (d), all records retained  
6 by an association must be available for examination and copying by  
7 a unit owner or the owner's authorized agent;

8 (1) During reasonable business hours or at a mutually  
9 convenient time and location; and

10 (2) Upon five days notice in a record reasonably identifying  
11 the specific records of the association requested.

12 (c) Records retained by an association may be withheld from  
13 inspection and copying to the extent that they concern:

14 (1) Personnel, salary, and medical records relating to  
15 specific individuals;

16 (2) Contracts, leases, and other commercial transactions to  
17 purchase or provide goods or services, currently being negotiated;

18 (3) Existing or potential litigation or mediation,  
19 arbitration, or administrative proceedings;

20 (4) Existing or potential matters involving federal, state, or  
21 local administrative or other formal proceedings before a  
22 governmental tribunal for enforcement of the declaration, bylaws,  
23 or rules;

1 (5) Communications with the association's attorney which are  
2 otherwise protected by the attorney-client privilege or the  
3 attorney work-product doctrine;

4 (6) Information the disclosure of which would violate law  
5 other than this chapter;

6 (7) Records of an executive session of the executive board; or

7 (8) Individual unit files other than those of the requesting  
8 owner.

9 (d) An association may charge a reasonable fee for providing  
10 copies of any records under this section and for supervising the  
11 unit owner's inspection.

12 (e) A right to copy records under this section includes the  
13 right to receive copies by photocopying or other means, including  
14 copies through an electronic transmission if available upon request  
15 by the unit owner.

16 (f) An association is not obligated to compile or synthesize  
17 information.

18 (g) Information provided pursuant to this section may not be  
19 used for commercial purposes.

20 **§36B-3-120. Rules.**

21 (a) Before adopting, amending, or repealing any rule, the  
22 executive board shall give all unit owners notice of:

23 (1) Its intention to adopt, amend, or repeal a rule and

1 provide the text of the rule or the proposed change; and

2       (2) A date on which the executive board will act on the  
3 proposed rule or amendment after considering comments from unit  
4 owners.

5       (b) Following adoption, amendment, or repeal of a rule, the  
6 association shall notify the unit owners of its action and provide  
7 a copy of any new or revised rule.

8       (c) An association may adopt rules to establish and enforce  
9 construction and design criteria and aesthetic standards if the  
10 declaration so provides. If the declaration so provides, the  
11 association shall adopt procedures for enforcement of those  
12 standards and for approval of construction applications, including  
13 a reasonable time within which the association must act after an  
14 application is submitted and the consequences of its failure to  
15 act.

16       (d) A rule regarding displaying of the flag of the United  
17 States must be consistent with federal law. In addition, the  
18 association may not prohibit display on a unit or on a limited  
19 common element adjoining a unit of the flag of this state, or signs  
20 regarding candidates for public or association office or ballot  
21 questions, but the association may adopt rules governing the time,  
22 place, size, number, and manner of those displays.

23       (e) Unit owners may peacefully assemble on the common elements

1 to consider matters related to the common interest community, but  
2 the association may adopt rules governing the time, place, and  
3 manner of those assemblies.

4 (f) An association may adopt rules that affect the use of or  
5 behavior in units that may be used for residential purposes, only  
6 to:

7 (1) Implement a provision of the declaration;

8 (2) Regulate any behavior in or occupancy of a unit which  
9 violates the declaration or adversely affects the use and enjoyment  
10 of other units or the common elements by other unit owners; or

11 (3) Restrict the leasing of residential units to the extent  
12 those rules are reasonably designed to meet underwriting  
13 requirements of institutional lenders that regularly make loans  
14 secured by first mortgages on units in common interest communities  
15 or regularly purchase those mortgages.

16 (g) An association's internal business operating procedures  
17 need not be adopted as rules.

18 (h) Every rule must be reasonable.

19 **§36B-3-121. Notice to unit owners.**

20 (a) An association shall deliver any notice required to be  
21 given by the association under this chapter to any mailing or  
22 electronic mail address a unit owner designates. Otherwise, the  
23 association may deliver notices by:



1 (1) Hand delivery to each unit owner;

2 (2) Hand delivery, United States mail postage paid, or  
3 commercially reasonable delivery service to the mailing address of  
4 each unit;

5 (3) Electronic means, if the unit owner has given the  
6 association an electronic address; or

7 (4) Any other method reasonably calculated to provide notice  
8 to the unit owner.

9 (b) The ineffectiveness of a good faith effort to deliver  
10 notice by an authorized means does not invalidate action taken at  
11 or without a meeting.

12 **§36B-3-122. Removal of officers and directors.**

13 (a) Notwithstanding any provision of the declaration or bylaws  
14 to the contrary, unit owners present in person, by proxy, or by  
15 absentee ballot at any meeting of the unit owners at which a quorum  
16 is present, may remove any member of the executive board and any  
17 officer elected by the unit owners, with or without cause, if the  
18 number of votes cast in favor of removal exceeds the number of  
19 votes cast in opposition to removal, but:

20 (1) A member appointed by the declarant may not be removed by  
21 a unit owner vote during the period of declarant control;

22 (2) A member appointed under subdivision 3-103(g) may be  
23 removed only by the person that appointed that member; and

1           (3) The unit owners may not consider whether to remove a  
2 member of the executive board or an officer elected by the unit  
3 owners at a meeting of the unit owners unless that subject was  
4 listed in the notice of the meeting.

5           (b) At any meeting at which a vote to remove a member of the  
6 executive board or an officer is to be taken, the member or officer  
7 being considered for removal must have a reasonable opportunity to  
8 speak before the vote.

9 **§36B-3-123. Adoption of budgets; special assessments.**

10           (a) The executive board, at least annually, shall adopt a  
11 proposed budget for the common interest community for consideration  
12 by the unit owners. Not later than thirty days after adoption of  
13 a proposed budget, the executive board shall provide to all the  
14 unit owners a summary of the budget, including any reserves, and a  
15 statement of the basis on which any reserves are calculated and  
16 funded. Simultaneously, the board shall set a date not less than  
17 ten days or more than sixty days after providing the summary for a  
18 meeting of the unit owners to consider ratification of the budget.  
19 Unless at that meeting a majority of all unit owners or any larger  
20 number specified in the declaration reject the budget, the budget  
21 is ratified, whether or not a quorum is present. If a proposed  
22 budget is rejected, the budget last ratified by the unit owners  
23 continues until unit owners ratify a subsequent budget.

1 (b) The executive board, at any time, may propose a special  
2 assessment. Except as otherwise provided in subsections (c) and  
3 (d), the assessment is effective only if the executive board  
4 follows the procedures for ratification of a budget described in  
5 subsection (a) and the unit owners do not reject the proposed  
6 assessment.

7 (c) If the executive board determines by a two-thirds vote  
8 that a special assessment is necessary to respond to an emergency:

9 (1) The special assessment becomes effective immediately in  
10 accordance with the terms of the vote;

11 (2) Notice of the emergency assessment must be provided  
12 promptly to all unit owners; and

13 (3) The executive board may spend the funds paid on account of  
14 the emergency assessment only for the purposes described in the  
15 vote.

16 (d) The board may not levy a special assessment for the  
17 purpose of circumventing the annual budget requirements of  
18 subsection (a).

19 **§36B-3-124. Litigation involving declarant.**

20 (a) The following requirements apply to an association's  
21 authority under subdivision 3-102(a)(4) to institute and maintain  
22 a proceeding alleging a construction defect with respect to the  
23 common interest community, whether by litigation, mediation,

1 arbitration, or administratively, against a declarant or an  
2 employee, independent contractor, or other person directly or  
3 indirectly providing labor or materials to a declarant:

4       (1) Subject to subsection (e), before the association  
5 institutes a proceeding described in this section, it shall provide  
6 notice in a record of its claims to the declarant and those persons  
7 that the association seeks to hold liable for the claimed defects.  
8 The text of the notice may be in any form reasonably calculated to  
9 give notice of the general nature of the association's claims,  
10 including a list of the claimed defects. The notice may be  
11 delivered by any method of service and may be addressed to any  
12 person if the method of service used:

13       (A) Provides actual notice to the person named in the claim;  
14 or

15       (B) Would be sufficient to give notice to the person in  
16 connection with commencement of an action by the association  
17 against the person.

18       (2) Subject to subsection (e), the association may not  
19 institute a proceeding against a person until forty-five days after  
20 the association sends notice of its claim to that person.

21       (3) During the period described in subdivision (2), the  
22 declarant and any other person to which the association gave notice  
23 may present to the association a plan to repair or otherwise remedy

1 the construction defects described in the notice. If the  
2 association does not receive a timely remediation plan from a  
3 person to which it gave notice, or if the association does not  
4 accept the terms of any plan submitted, the association may  
5 institute a proceeding against the person.

6 (4) If the association receives one or more timely remediation  
7 plans, the executive board shall consider promptly those plans and  
8 notify the persons to which it directed notice whether the plan is  
9 acceptable as presented, acceptable with stated conditions, or not  
10 accepted.

11 (5) If the association accepts a remediation plan from a  
12 person the association seeks to hold liable for the claimed defect,  
13 or if a person agrees to stated conditions to an otherwise  
14 acceptable plan, the parties shall agree on a period for  
15 implementation of the plan. The association may not institute a  
16 proceeding against the person during the time the plan is being  
17 diligently implemented.

18 (6) Except as otherwise provided in subdivision 4-116(d) for  
19 warranty claims, any statute of limitation affecting the  
20 association's right of action against a declarant or other person  
21 is tolled during the period described in subdivision (2) and during  
22 any extension of that time because a person to which notice was  
23 directed has commenced and is diligently pursuing the remediation

1 plan.

2 (b) After the time described in subsection (a)(2) expires,  
3 whether or not the association agrees to any remediation plan, a  
4 proceeding may be instituted by:

5 (1) The association against a person to which notice was  
6 directed which fails to submit a timely remediation plan, the plan  
7 of which is not acceptable, or which fails to pursue diligent  
8 implementation of that plan; or

9 (2) A unit owner with respect to the owner's unit and any  
10 limited common elements assigned to that unit, regardless of any  
11 action of the association.

12 (c) This section does not preclude the association from making  
13 repairs necessary to mitigate damages or to correct any defect that  
14 poses a significant and immediate health or safety risk.

15 (d) Subject to the other provisions of this subsection, the  
16 determination of whether and when the association may institute a  
17 proceeding described in this subsection may be made by the  
18 executive board. The declaration may not require a vote by any  
19 number or percent of unit owners as a condition to institution of  
20 a proceeding.

21 (e) This subsection does not prevent an association from  
22 seeking equitable relief at any time without complying with  
23 subsection (a)(1) or (2).

1 **ARTICLE 4. PROTECTION OF PURCHASERS.**

2 **§36B-4-101. Applicability; waiver.**

3 (a) This article applies to all units subject to this chapter,  
4 except as provided in subsection (b) or as modified or waived by  
5 agreement of purchasers of units in a common interest community in  
6 which all units are restricted to non-residential use.

7 (b) Neither a public offering statement nor a resale  
8 certificate need be prepared or delivered in the case of:

9 (1) A gratuitous disposition of a unit;

10 (2) A disposition pursuant to court order;

11 (3) A disposition by a government or governmental agency;

12 (4) A disposition by foreclosure or deed in lieu of  
13 foreclosure;

14 (5) A disposition to a dealer; or

15 ~~(6) A disposition that may be canceled at any time and for any  
16 reason by the purchaser without penalty;~~

17 ~~(7) A disposition of a unit in a planned community in which  
18 the declaration limits the maximum annual assessment of any unit to  
19 not more than five hundred dollars, as adjusted pursuant to section  
20 1-114 (Adjustment of dollar amounts) if:~~

21 ~~(i) The declarant has a reasonable and good faith belief that  
22 the maximum stated assessment will be sufficient to pay the  
23 expenses of the planned community;~~

1       ~~(ii) The declaration cannot be amended to increase the~~  
2 ~~assessment during the period of declarant or declarant's family~~  
3 ~~control without the consent of a majority of unit owners other than~~  
4 ~~the declarant; and~~

5       ~~(iii) The planned community is not subject to any development~~  
6 ~~rights.~~

7       (6) A disposition of a unit restricted to nonresidential  
8 purposes.

9 **§36B-4-102. LIABILITY FOR PUBLIC OFFERING STATEMENT REQUIREMENTS.**

10       (a) Except as otherwise provided in subsection (b), a  
11 declarant, before offering any interest in a unit to the public,  
12 shall prepare a public offering statement conforming to the  
13 requirements of sections 4-103, 4-104, 4-105, and 4-106.

14       (b) A declarant may transfer responsibility for preparation of  
15 all or a part of the public offering statement to a successor  
16 declarant (section 3-104) or to a dealer ~~who~~ that intends to offer  
17 units in the common interest community. In the event of any such  
18 transfer, the transferor shall provide the transferee with any  
19 information necessary to enable the transferee to fulfill the  
20 requirements of subsection (a).

21       (c) Any declarant or dealer ~~who~~ that offers a unit to a  
22 purchaser shall deliver a public offering statement in the manner  
23 prescribed in ~~subsection~~ section 4-108(a). The ~~person~~ declarant or



1 ~~dealer who that~~ prepared all or a part of the public offering  
2 statement is liable under ~~S~~sections 4-108 and 4-117 for any false  
3 or misleading statement set forth therein or for any omission of a  
4 material fact therefrom. ~~with respect to that portion of the public~~  
5 ~~offering statement which he prepared. If a declarant did not~~  
6 ~~prepare any part of a public offering statement that he delivers,~~  
7 ~~he is not liable for any false or misleading statement set forth~~  
8 ~~therein or for any omission of a material fact therefrom unless he~~  
9 ~~had actual knowledge of the statement or omission or, in the~~  
10 ~~exercise of reasonable care, should have known of the statement or~~  
11 ~~omission.~~

12 (d) If a unit is part of a common interest community and is  
13 part of any other real estate regime in connection with the sale of  
14 which the delivery of a public offering statement is required under  
15 the laws of this state, a single public offering statement  
16 conforming to the requirements of sections 4-103, 4-104, 4-105, and  
17 4-106 as those requirements relate to each regime in which the unit  
18 is located, and to any other requirements imposed under the laws of  
19 this state, may be prepared and delivered in lieu of providing two  
20 or more public offering statements.

21 **§36B-4-103. Public offering statement; general provisions.**

22 (a) Except as provided in subsection (b), a public offering  
23 statement must contain or fully and accurately disclose:

1 (1) The name and principal address of the declarant and of the  
2 common interest community and a statement that the common interest  
3 community is ~~either~~ a condominium, cooperative or planned  
4 community;

5 (2) A general description of the common interest community,  
6 including to the extent possible, the types, number, and  
7 declarant's schedule of commencement and completion of construction  
8 of buildings and amenities that the declarant anticipates including  
9 in the common interest community;

10 (3) The number of units in the common interest community;

11 (4) Copies and a brief narrative description of the  
12 significant features of the declaration, other than any plats and  
13 plans and any other recorded covenants, conditions, restrictions  
14 and reservations affecting the common interest community; the  
15 bylaws and any rules ~~or regulations~~ of the association; copies of  
16 any contracts and leases to be signed by purchasers at closing and  
17 a brief narrative description of any contracts or leases that will  
18 or may be subject to cancellation by the association under section  
19 3-105;

20 (5) The financial information required by subsection (b). ~~Any~~  
21 ~~current balance sheet and a projected budget for the association,~~  
22 ~~either within or as an exhibit to the public offering statement,~~  
23 ~~for one year after the date of the first conveyance to a purchaser~~

1 ~~and thereafter the current budget of the association, a statement~~  
2 ~~of who prepared the budget and a statement of the budget's~~  
3 ~~assumptions concerning occupancy and inflation factors. The budget~~  
4 ~~must include, without limitation:~~

5 ~~(i) A statement of the amount or a statement that there is no~~  
6 ~~amount, included in the budget as a reserve for repairs and~~  
7 ~~replacement;~~

8 ~~(ii) A statement of any other reserves;~~

9 ~~(iii) The projected common expense assessment by category of~~  
10 ~~expenditures for the association; and~~

11 ~~(iv) The projected monthly common expense assessment for each~~  
12 ~~type of unit;~~

13 (6) Any services not reflected in the budget that the  
14 declarant provides, or expenses that he or she pays and which he or  
15 she expects may become at any subsequent time a common expense of  
16 the association and the projected common expense assessment  
17 attributable to each of those services or expenses for the  
18 association and for each type of unit;

19 (7) Any initial or special fee due from the purchaser or  
20 seller at the time of sale closing, together with a description of  
21 the purpose and method of calculating the fee;

22 (8) A description of any liens, defects, or encumbrances on or  
23 affecting the title to the common interest community;

1 (9) A description of any financing offered or arranged by the  
2 declarant;

3 (10) The terms and significant limitations of any warranties  
4 provided by the declarant, including statutory warranties and  
5 limitations on the enforcement thereof or on damages;

6 (11) A statement that:

7 ~~(i)~~ (A) Within fifteen days after receipt of a public offering  
8 statement a purchaser, before conveyance, may cancel any contract  
9 for purchase of a unit from a declarant;

10 ~~(ii)~~ (B) If a declarant fails to provide a public offering  
11 statement to a purchaser before conveying a unit, that purchaser  
12 may recover from the declarant ten percent of the sales price of  
13 the unit plus ten percent of the share, proportionate to his or her  
14 common expense liability, of any indebtedness of the association  
15 secured by security interests encumbering the common interest  
16 community: ~~Provided, That purchaser is required to show that he or~~  
17 ~~she has been actually damaged as a result of the failure to provide~~  
18 ~~such offering statement and that his or her action to recover such~~  
19 ~~damage and the penalty provided in this paragraph is instituted~~  
20 ~~within three years from the date on which purchaser's right of~~  
21 ~~action shall have accrued; and~~

22 ~~(iii)~~ (C) If a purchaser receives the public offering  
23 statement more than fifteen days before signing a contract, he or

1 ~~she cannot~~ may not cancel the contract;

2 (12) A statement of any unsatisfied judgments or pending ~~suits~~  
3 action against the association and the status of any pending ~~suits~~  
4 action material to the common interest community of which a  
5 declarant has actual knowledge;

6 (13) A statement that any deposit made in connection with the  
7 purchase of a unit will be held in an escrow account until closing  
8 and will be returned to the purchaser if the purchaser cancels the  
9 contract pursuant to section 4-108, together with the name and  
10 address of the escrow agent;

11 (14) Any restraints on alienation of any portion of the common  
12 interest community and any restrictions:

13 ~~(i)~~ (A) On use, occupancy, and alienation of the units; and

14 ~~(ii)~~ (B) On the amount for which a unit may be sold or on the  
15 amount that may be received by a unit owner on sale, condemnation  
16 or casualty loss to the unit or to the common interest community or  
17 on termination of the common interest community;

18 (15) A description of the insurance coverage provided for the  
19 benefit of unit owners;

20 (16) Any current or expected fees or charges to be paid by  
21 unit owners for the use of the common elements and other facilities  
22 related to the common interest community;

23 (17) The extent to which financial arrangements have been

1 provided for completion of all improvements that the declarant is  
2 obligated to build pursuant to section 4-119 (Declarant's  
3 obligation to complete and restore);

4 (18) A brief narrative description of any zoning and other  
5 land use requirements affecting the common interest community;

6 (19) ~~All~~ Any other unusual and material circumstances,  
7 features and characteristics of the common interest community and  
8 the units; ~~and~~

9 (20) In a cooperative, whether ~~(i) Whether~~ the unit owners  
10 will be entitled, for federal, state and local income tax purposes,  
11 to a pass through of deductions for payments made by the  
12 association for real estate taxes and interest paid the holder of  
13 a security interest encumbering the cooperative, and ~~(ii)~~ a  
14 statement as to the effect on every unit owner if the association  
15 fails to pay real estate taxes or payments due the holder of a  
16 security interest encumbering the cooperative; and

17 (21) A description of any arrangement described in section  
18 1-209 binding the association.

19 (b) The public offering statement must contain any current  
20 balance sheet and a projected budget for the association, either  
21 within or as an exhibit to the public offering statement, for one  
22 year after the date of the first conveyance to a purchaser, and  
23 thereafter the current budget of the association, a statement of

1 who prepared the budget, and a statement of the budget's  
2 assumptions concerning occupancy and inflation factors. The budget  
3 must include:

4 (A) A statement of the amount, or a statement that there is no  
5 amount, included in the budget as a reserve for repairs and  
6 replacement;

7 (B) A statement of any other reserves;

8 (C) The proposed common expense assessment by category of  
9 expenditures for the association; and

10 (D) The projected monthly common expense assessment for each  
11 type of unit.

12 ~~(b)~~ (c) If a common interest community composed of not more  
13 than twelve units is not subject to any development ~~rights~~ right  
14 and no power is reserved to a declarant to make the common interest  
15 community part of a larger common interest community, group of  
16 common interest communities, or other real estate, a public  
17 offering statement may ~~but need not~~ include the information  
18 otherwise required by ~~paragraphs~~ subdivisions (9), (10), (15),  
19 (16), (17), (18) and (19) of subsection (a) of this section and the  
20 narrative descriptions of documents required by subsection (a)(4).

21 ~~(c)~~ (d) A declarant promptly shall amend the public offering  
22 statement to report any material change in the information required  
23 by this section.

1 **§36B-4-108. Purchaser's right to cancel.**

2 (a) A person required to deliver a public offering statement  
3 pursuant to section 4-102(c) shall provide a purchaser with a copy  
4 of the public offering statement and all amendments thereto before  
5 conveyance of the unit, and not later than the date of any contract  
6 of sale. Unless a purchaser is given the public offering statement  
7 more than fifteen days before execution of a contract for the  
8 purchase of a unit, the purchaser, before conveyance, may cancel  
9 the contract within fifteen days after first receiving the public  
10 offering statement.

11 (b) If a purchaser elects to cancel a contract pursuant to  
12 subsection (a), he may do so by hand delivering notice thereof to  
13 the offeror or by mailing notice thereof by prepaid United States  
14 mail to the offeror or to his agent for service of process.  
15 Cancellation is without penalty, and all payments made by the  
16 purchaser before cancellation must be refunded promptly.

17 (c) If a person required to deliver a public offering  
18 statement pursuant to section 4-102(c) fails to provide a purchaser  
19 to whom a unit is conveyed with that public offering statement and  
20 all amendments thereto as required by subsection (a), the  
21 purchaser, in addition to any rights to damages or other relief, is  
22 entitled to receive from that person an amount equal to ten percent  
23 of the sale price of the unit, plus ten percent of the share,



1 proportionate to his common expense liability, of any indebtedness  
2 of the association secured by security interests encumbering the  
3 common interest community. ~~Provided, That purchaser show that he or~~  
4 ~~she has been actually damaged as a result of the failure to provide~~  
5 ~~such offering statement and that his or her action to recover such~~  
6 ~~damage and the penalty provided in this subsection is instituted~~  
7 ~~within three years from the date on which purchaser's right of~~  
8 ~~action shall have accrued.~~

9 **§36B-4-109. Resales of units.**

10 (a) Except in the case of a sale in which delivery of a public  
11 offering statement is required, or unless exempt under section  
12 4-101(b), a unit owner shall furnish to a purchaser before  
13 ~~execution of any contract for sale of a unit, or otherwise by~~  
14 ~~conveyance, a copy of the declaration (other than any plats and~~  
15 ~~plans), the earlier of conveyance or transfer of the right to~~  
16 ~~possession of a unit, a copy of the declaration, other than any~~  
17 ~~plats and plans,~~ the bylaws, the rules or regulations of the  
18 association, and a certificate containing:

19 (1) A statement disclosing the effect on the proposed  
20 disposition of any right of first refusal or other restraint on the  
21 free alienability of the unit held by the association;

22 (2) A statement setting forth the amount of the ~~monthly~~  
23 periodic common expense assessment and any unpaid common expense or

1 special assessment currently due and payable from the selling unit  
2 owner;

3 (3) A statement of any other fees payable by the owner of the  
4 unit being sold; ~~unit owners;~~

5 (4) A statement of any capital expenditures ~~anticipated~~  
6 approved by the association for the current and ~~two next~~ succeeding  
7 fiscal years;

8 (5) A statement of the amount of any reserves for capital  
9 expenditures and of any portions of those reserves designated by  
10 the association for any specified projects;

11 (6) The most recent regularly prepared balance sheet and  
12 income and expense statement, if any, of the association;

13 (7) The current operating budget of the association;

14 (8) A statement of any unsatisfied judgments against the  
15 association and the status of any pending suits in which the  
16 association is a defendant;

17 (9) A statement describing any insurance coverage provided for  
18 the benefit of unit owners;

19 (10) A statement as to whether the executive board has given  
20 or received notice in a record that any existing uses, occupancies,  
21 ~~knowledge that any~~ alterations or improvements in or to the unit or  
22 to the limited common elements assigned thereto violate any  
23 provision of the declaration;

1 (11) A statement as to whether the executive board has  
2 ~~knowledge of any violations of the health~~ received notice in a  
3 record from a governmental agency of any violation of  
4 environmental, health, or building codes with respect to the unit,  
5 the limited common elements assigned thereto, or any other portion  
6 of the common interest community which has not been cured;

7 (12) A statement of the remaining term of any leasehold estate  
8 affecting the common interest community and the provisions  
9 governing any extension or renewal thereof;

10 (13) A statement of any restrictions in the declaration  
11 affecting the amount that may be received by a unit owner upon  
12 sale, condemnation, casualty loss to the unit or the common  
13 interest community, or termination of the common interest  
14 community; ~~and~~

15 (14) In a cooperative, an accountant's statement, if any was  
16 prepared, as to the deductibility for federal income tax purposes  
17 by the unit owner of real estate taxes and interest paid by the  
18 association;

19 (15) A statement describing any pending sale or encumbrance of  
20 common elements; and

21 (16) A statement disclosing the effect on the unit to be  
22 conveyed of any restrictions on the owner's right to use or occupy  
23 the unit or to lease the unit to another person.

1           (b) The association, within ten days after a request by a unit  
2 owner, shall furnish a certificate containing the information  
3 necessary to enable the unit owner to comply with this section. A  
4 unit owner providing a certificate pursuant to subsection (a) is  
5 not liable to the purchaser for any erroneous information provided  
6 by the association and included in the certificate.

7           (c) A purchaser is not liable for any unpaid assessment or fee  
8 greater than the amount set forth in the certificate prepared by  
9 the association. A unit owner is not liable to a purchaser for the  
10 failure or delay of the association to provide the certificate in  
11 a timely manner, but the purchase contract is voidable by the  
12 purchaser until the certificate has been provided and for five days  
13 thereafter or until conveyance, whichever first occurs.

14 **§36B-4-112. Conversion buildings.**

15           (a) A declarant of a common interest community containing  
16 conversion buildings, and any dealer who intends to offer units in  
17 such a common interest community, shall give each of the  
18 residential tenants and any residential subtenant in possession of  
19 a portion of a conversion building notice of the conversion and  
20 provide those persons with the public offering statement no later  
21 than one hundred twenty days before the tenants and any subtenant  
22 in possession are required to vacate. The notice must set forth  
23 generally the rights of tenants and subtenants under this section

1 and must be hand delivered to the unit or mailed by prepaid United  
2 States mail to the tenant and subtenant at the address of the unit  
3 or any other mailing address provided by a tenant. No tenant or  
4 subtenant may be required to vacate upon less than one hundred  
5 twenty days' notice, except by reason of nonpayment of rent, waste,  
6 or conduct that disturbs other tenants' peaceful enjoyment of the  
7 premises, and the terms of the tenancy may not be altered during  
8 that period. Failure to give notice as required by this section is  
9 a defense to an action for possession.

10 (b) For sixty days after delivery or mailing of the notice  
11 described in subsection (a), the person required to give the notice  
12 shall offer to convey each unit or proposed unit occupied for  
13 residential use to the tenant who leases that unit. If a tenant  
14 fails to purchase the unit during that sixty day period, the  
15 offeror may not offer to dispose of an interest in that unit during  
16 the following one hundred eighty days at a price or on terms more  
17 favorable to the offeree than the price or terms offered to the  
18 tenant. This subsection does not apply to any unit in a conversion  
19 building if that unit will be restricted exclusively to  
20 nonresidential use or the boundaries of the converted unit do not  
21 substantially conform to the dimensions of the residential unit  
22 before conversion.

23 (c) If a seller, in violation of subsection (b), conveys a

1 unit to a purchaser for value who has no knowledge of the  
2 violation, the recordation of the deed conveying the unit or, in a  
3 cooperative, the conveyance of the unit, extinguishes any right a  
4 tenant may have under subsection (b) to purchase that unit if the  
5 deed states that the seller has complied with subsection (b), but  
6 the conveyances does not affect the right of a tenant to recover  
7 damages from the seller for a violation of subsection (b).

8 (d) If a notice of conversion specifies a date by which a unit  
9 or proposed unit must be vacated and otherwise complies with the  
10 provisions of applicable law, the notice also constitutes a notice  
11 to vacate specified by that statute.

12 ~~(d)~~ (e) Nothing in this section permits termination of a lease  
13 by a declarant in violation of its terms.

14 **§36B-4-113. Express warranties of quality.**

15 (a) Express warranties made by ~~any seller~~ a declarant to a  
16 purchaser of a unit, if relied upon by the purchaser, are created  
17 as follows:

18 (1) Any affirmation of fact or promise which relates to the  
19 unit, its use, or rights appurtenant thereto, area improvements to  
20 the common interest community that would directly benefit the unit,  
21 or the right to use or have the benefit of facilities not located  
22 in the common interest community, creates an express warranty that  
23 the unit and related rights and uses will conform to the

1 affirmation or promise;

2       (2) Any model or description of the physical characteristics  
3 of the common interest community, including plans and  
4 specifications of or for improvements, creates an express warranty  
5 that the common interest community will conform to the model or  
6 description unless the model or description clearly discloses that  
7 it is only proposed or is subject to change;

8       (3) Any description of the quantity or extent of the real  
9 estate comprising the common interest community, including plats or  
10 surveys, creates an express warranty that the common interest  
11 community will conform to the description, subject to customary  
12 tolerances; and

13       (4) A provision that a purchaser may put a unit only to a  
14 specified use is an express warranty that the specified use is  
15 lawful.

16       (b) Neither formal words, such as "warranty" or "guarantee,"  
17 nor a specific intention to make a warranty, are necessary to  
18 create an express warranty of quality, but a statement purporting  
19 to be merely an opinion or commendation of the real estate or its  
20 value does not create a warranty.

21       (c) Any conveyance of a unit transfers to the purchaser all  
22 express warranties of quality made by ~~previous sellers.~~ the  
23 declarant.

1 **§36B-4-114. IMPLIED WARRANTIES OF QUALITY.**

2 (a) A declarant and any dealer warrants that a unit will be in  
3 at least as good condition at the earlier of the time of the  
4 conveyance or delivery of possession as it was at the time of  
5 contracting, reasonable wear and tear excepted.

6 (b) A declarant and any dealer impliedly warrants that a unit  
7 and the common elements in the common interest community are  
8 suitable for the ordinary uses of real estate of its type and that  
9 any improvements made or contracted for by ~~him~~, the declarant or  
10 dealer, or made by any person before the creation of the common  
11 interest community, will be:

12 (1) Free from defective materials; and

13 (2) Constructed in accordance with applicable law, according  
14 to sound engineering and construction standards, and in a  
15 workmanlike manner.

16 (c) ~~In addition~~, A declarant and any dealer warrants to a  
17 purchaser of a unit that may be used for residential use that an  
18 existing use, continuation of which is contemplated by the parties,  
19 does not violate applicable law at the earlier of the time of  
20 conveyance or delivery of possession.

21 (d) Warranties imposed by this section may be excluded or  
22 modified as specified in Section 4-115.

23 (e) For purposes of this section, improvements made or



1 contracted for by an affiliate of a declarant (section 1-103(1))  
2 are made or contracted for by the declarant.

3 (f) Any conveyance of a unit transfers to the purchaser all of  
4 the declarant's implied warranties of quality.

5 **§36B-4-116. Statute of limitations for warranties.**

6 (a) Unless a period of limitation is tolled under Section  
7 3-111 or affected by subsection (d), a judicial proceeding for  
8 breach of any obligation arising under section 4-113 or 4-114 must  
9 be commenced within six years after the cause of action accrues,  
10 but the parties may agree to reduce the period of limitation to not  
11 less than two years. With respect to a unit that may be occupied  
12 for residential use, an agreement to reduce the period of  
13 limitation must be evidenced by a separate instrument executed by  
14 the purchaser.

15 (b) Subject to subsection (c), a cause of action for breach of  
16 warranty of quality, regardless of the purchaser's lack of  
17 knowledge of the breach, accrues:

18 (1) As to a unit, at the time the purchaser to whom the  
19 warranty is first made enters into possession if a possessory  
20 interest was conveyed or at the time of acceptance of the  
21 instrument of conveyance if a nonpossessory interest was conveyed;  
22 and

23 (2) As to each common element, at the time the common element

1 is completed or, if later, as to:

2        ~~(i)~~ (A) A common element that ~~may be~~ is added to the common  
3 interest community ~~or portion thereof,~~ by exercise of development  
4 rights, at the time the first unit ~~therein~~ which was added to the  
5 condominium by the same exercise of development rights is conveyed  
6 to a bona fide purchaser; or

7        ~~(ii)~~ (B) a common element within any other portion of the  
8 common interest community, at the time the first unit is conveyed  
9 to a bona fide purchaser.

10        (c) If a warranty of quality explicitly extends to future  
11 performance or duration of any improvement or component of the  
12 common interest community, the cause of action accrues at the time  
13 the breach is discovered or at the end of the period for which the  
14 warranty explicitly extends, whichever is earlier.

15        (d) During the period of declarant control, the association  
16 may authorize an independent committee of the executive board to  
17 evaluate and enforce any warranty claims involving the common  
18 elements, and to compromise those claims. Only members of the  
19 executive board elected by unit owners other than the declarant and  
20 other persons appointed by those independent members may serve on  
21 the committee, and the committee's decision must be free of any  
22 control by the declarant or any member of the executive board or  
23 officer appointed by the declarant. All costs reasonably incurred

1 by the committee, including attorney's fees, are common expenses,  
2 and must be added to the budget annually adopted by the association  
3 under section 3-115. If the committee is so created, the period of  
4 limitation for a warranty claim considered by the committee begins  
5 to run from the date of the first meeting of the committee.

6 **§36B-4-117. Effect of violations on rights of action; attorney's**  
7 **fees.**

8 ~~(a) If a declarant or any other person subject to this chapter~~  
9 ~~fails to comply with any of its provisions or any provision of the~~  
10 ~~declaration or bylaws, any person or class of persons adversely~~  
11 ~~affected by the failure to comply has a claim for appropriate~~  
12 ~~relief. A declarant, association, unit owner, or any other person~~  
13 ~~subject to this chapter may bring an action to enforce a right~~  
14 ~~granted or obligation imposed by this chapter, the declaration, or~~  
15 ~~the bylaws. Punitive damages may be awarded for a willful failure~~  
16 ~~to comply with this chapter. The court ~~in an appropriate case,~~ may~~  
17 ~~award reasonable attorney's fees and costs.~~

18 (b) Parties to a dispute arising under this chapter, the  
19 declaration, or the bylaws may agree to resolve the dispute by any  
20 form of binding or nonbinding alternative dispute resolution, but:

21 (1) A declarant may agree with the association to do so only  
22 after the period of declarant control has expired unless the  
23 agreement is made with an independent committee of the executive

1 board elected pursuant to subdivision 4-116(d); and

2       (2) An agreement to submit to any form of binding alternative  
3 dispute resolution must be in a record authenticated by the  
4 parties.

NOTE: The purpose of this bill is to update the Uniform Common Interest Ownership Act.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

§36B-1-115, §36B-1-116, §36B-1-208, §36B-1-209, §36B-2-123, §36B-2-124, §36B-3-120, §36B-3-121, §36B-3-122, §36B-3-123 and §36B-3-124 are new; therefore, strike-throughs and underscoring have been omitted.

§36B-3-110, §36B-3-111 and §36B-3-118 have been completely rewritten; therefore strike-throughs and underscoring have been omitted.