



State of New Jersey

N J L R C

New Jersey Law Revision Commission

ANNUAL REPORT

2000

Report to the Legislature of the State of New Jersey
as provided by C. 1:12A-9.

February 1, 2001

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I. MEMBERS AND STAFF OF THE COMMISSION IN 2000

The members of the Commission are:

Albert Burstein, Chairman, Attorney-at-Law

Hugo M. Pfaltz, Jr., Vice Chairman, Attorney-at-Law

Peter Buchsbaum, Attorney-at-Law

Vito A. Gagliardi, Jr., Attorney-at-Law

William L. Gormley, Chairman, Senate Judiciary Committee, Ex officio

Stuart Deutsch, Dean, Rutgers Law School - Newark, Ex officio

Patrick Hobbs, Dean, Seton Hall Law School, Ex officio
Represented by **William Garland**, Professor of Law

David C. Russo, Chairman, Assembly Judiciary Committee, Ex officio

Rayman Solomon, Dean, Rutgers Law School - Camden, Ex officio,
Represented by **Grace Bertone**, Attorney-at-Law

The staff of the Commission is:

John M. Cannel, Executive Director

Maureen E. Garde, Counsel

John J. A. Burke, Associate Counsel

Judith Ungar, Associate Counsel

Leland J. White, Associate Counsel

II. HISTORY AND PURPOSE OF THE COMMISSION

In 1985, the Legislature enacted a statute creating the Law Revision Commission.¹ The Commission conducts a continuous review of New Jersey's statutes to identify subjects that require statutory revision. This review covers the correction of statutes that conflict, are obsolete or redundant, or require comprehensive revision. The Commission also considers recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and public officers. The Commission's objective is to simplify, clarify and modernize New Jersey statutes.

The Commission opened its office in 1987. Since then, it has filed 55 reports with the Legislature of which 24 have been enacted into law. Several recommendations are now pending before the Legislature. The Commission's work has been published in law journals and has been used by law revision commissions in other states. In revising a law, the Commission extensively examines local law and practices and consults the law of other jurisdictions, experts in the area and proposals of learned bodies.

¹ The Law Revision Commission was created by L.1985, c.498, and charged with the duty to:

a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to

(1) Remedy the defects, (2) Reconcile conflicting provisions found in the law, and (3) Clarify confusing and excise redundant provisions found in the law;

b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;

c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and

d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

The meetings of the Commission are open to the public. The Commission actively solicits public comment on its Tentative Reports, which are widely distributed to interested persons and groups. In 1996, the Commission established its website where its reports are published on the Internet at <http://www.lawrev.state.nj.us>.

New Jersey has a tradition of law revision. The first Law Revision Commission was established in 1925. It produced the Revised Statutes of 1937. The Legislature intended the work of revision and codification to continue after enactment of the Revised Statutes. As a result, the Law Revision Commission continued in operation. After 1939, its functions passed to a number of successor agencies, most recently the Legislative Counsel.² In 1985, the Legislature transferred the functions of statutory revision and codification to the New Jersey Law Revision Commission.³

III. LEGISLATIVE SUMMARY

In 2000, the New Jersey Legislature introduced several bills based upon Final Reports and Recommendations of the Commission:

- Anatomical Gift Act (S1988 & A2801);
- Intestate Succession (A2105); Judgments and their Enforcement (S1496);
- Revised UCC Article 9 (Secured Transactions) (S1382 & A3125);
- Standard Form Contracts (A978);
- Uniform Electronic Transactions Act (A2497 & S1183);
- Usury (A876); and
- Voting Offenses (A864).

IV. FINAL REPORTS

A final report contains the decision of the Commission on a particular legal subject. The report contains an analysis of the subject, a proposed statute and appropriate commentary. It is approved and adopted after the public has had an

² N.J.S.A. 52:11-61

³ L.1985, c.498.

opportunity to comment on tentative drafts of the report. The final report is filed with the Legislature. After filing, the Commission and its staff work with the Legislature to draft the report in bill form and to facilitate its enactment.

In 2000, the New Jersey Law Revision Commission published one final report.

Uniform Electronic Transactions Act (UETA)

The Commission completed its Final Report and Recommendations Relating to the Uniform Electronic Transactions Act (UETA) (see Appendix A). UETA gives legal validity to electronic signatures and contracts used in commerce. It thus removes any ambiguity surrounding the issue of whether electronic documents have the force and effect of paper documents and ink signatures. UETA contains consumer protection provisions and enables New Jersey to opt out of the Federal Electronic Signatures in Global and National Commerce Act and thus retain important state authority in this area.

V. TENTATIVE REPORTS

A tentative report represents the first settled attempt of the Commission to revise an area of law. It is the product of lengthy deliberations, but it is not final. A tentative report is distributed to the general public for comment. The Commission considers these comments and amends its report.

In 2000, the Commission published three tentative reports.

A. New Jersey Common Interest Ownership Act

In 2000, the Commission published its Tentative Report on the New Jersey Common Interest Ownership Act (see Appendix B). The Act governs horizontal property rights, condominiums, cooperatives and planned real estate developments.

Common interest communities occupy a growing segment of the housing market. Since 1978, approximately 400,000 condominium and cooperative units have been built in New Jersey. Between 15 and 20 percent of New Jersey residents live in common interest properties. Communities accommodate diverse segments of the housing market from low to upper income housing. "[O]ne is led inexorably to the conclusion that the age of community association living, as opposed to renting or owning a one-family house, is upon us. The rental market in every urban center is rapidly disappearing as high-rise buildings are torn down, devoted to commercial uses, or converted into condominium or cooperative housing." Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 St. John's L. Rev. 3, 5-6 (1999).

Common interest communities cover residential, commercial and mixed use property. Communities differ in use and size ranging from a two or three unit brownstone to a multi-use planned town with facilities more extensive than some municipalities. Consequently, the Commission's draft preserves consumer protection provisions in residential developments, while allowing greater latitude where a community consists solely of non-residential units. The act applies to all "common interest property," regardless of form, to which an undivided interest in common elements is attached.

Condominiums and cooperative associations are the most common forms of common interest property. Each condominium unit is owned in fee simple. All unit owners automatically become members of a governing association and own common areas. Condominiums are statutory creations. *The Berkley Condominium Association Inc. v. The Berkley Condominium Residences, Inc.*, 185 N.J. Super 313, 319 (Ch. Div. 1982). New Jersey has two statutes on condominiums: 46:8A-1 et seq. and 46:8B-1 et seq. By contrast, cooperative associations hold title to the land and building through a corporation. Each resident owns stock in the corporation along with a "proprietary lease." While real estate cooperatives appear to have existed before legislation specifically authorized them, cooperatives now are controlled by statute, 46:8D-1 et seq.

The proposed act also accommodates emerging forms of co-ownership. However, detached single family residences subject to restrictive covenants or servitudes are not affected, and these communities continue to be governed by the law of servitudes or restrictive covenants.

The act governs the creation of common interest property and specifies criteria for enforcement of restrictions contained in governing documents. It requires alternative dispute resolution for conflicts between associations and unit owners, and conflicts between unit owners. The act protects purchasers, but does not displace the "Planned Real Estate Development Full Disclosure Act" (P.L. 1977, c. 419; C. 45:22a-21 et. seq.) that provides greater purchaser protections. In addition, federal securities law may provide alternative and additional remedies in some cases. *See* Note, *Sell a Condominium, Buy A Lawsuit: Unwarranted Liabilities in the Secondary Market*, 53 Ohio St. L. J. 413 (1982).

B. Transfers of Structured Settlement Payment Rights

In 2000, the Commission published its Tentative Report on Transfers of Structured Settlement Payment Rights (see Appendix C).

Personal injury lawsuits often are settled by "structured settlements" under which the injury victim receives deferred compensation payments over a fixed period of time, or for the remainder of the payee's life, instead of a single lump sum payment. The tortfeasor or its insurer establishes a fund, usually called an annuity, sufficiently adequate to make payments when due under the structured settlement agreement. The injury victim does not have any property interest in the fund, which remains the property of the tortfeasor or insurer, but has rights to future periodic or lump sum payments.

Structured settlement contracts often contain non-assignment clauses that prohibit the beneficiary from selling future payment rights to another person. Non-assignment clauses serve several purposes. First, insurance companies claim that if the beneficiary transfers the right to payment and then keeps the payment, the insurance company is exposed to double liability. Second, insurance

companies claim that assignments of payment rights impose tax-reporting requirements since the new payee must report the payment as income for federal tax purposes. Third, public officials maintain that "factors," professional buyers of structured settlement judgments, exploit injury victims by purchasing assets at unfairly discounted rates. The sale of structured settlement payment rights thus undermines the public policy of providing a private sector solution to the income problems of injured victims.

However, many injury victims disregard the non-assignment clause and assign future payment rights to another person. The reason for the assignment generally is to obtain up-front cash. The payout period of structured settlements often stretches over several years, sometimes beyond two decades. Injury victims with changed circumstances, financial or otherwise, sell the remaining value of the structured settlement payment rights to factors that are in the business of buying payment rights at discounted rates.

The issue has arisen whether or not the assignment of structured settlement payment rights is valid as a matter of law under the Uniform Commercial Code Article 9 and New Jersey statutes favoring free transfer of property, or whether the non-assignment clause in structured settlement contracts invalidate transfers of payment rights. The New Jersey courts have considered these issues in *Owen v. CNA Ins./Continental Casualty Co.*, 330 N.J. Super. 608 (App. Div.), certif. granted ___ N.J. ___ (2000). The Appellate Division held that Uniform Commercial Code Article 9-318(4) did not invalidate the non-assignment clause contained in the injury victim's structured settlement agreement.⁴ Therefore, unless the non-assignment clause was unenforceable under other New Jersey law, a question not then before the Court, the factor and the injury victim would be unable to consummate the sale of the remaining structured settlement payments. The dissenting opinion held that New Jersey law

⁴ New Jersey is expected to enact Revised Article 9 of the UCC; as of April 3, 2001, the bill is awaiting the Acting Governor's signature. That Article provides in commentary that structured settlement proceeds are assignable. The reporters for Revised Article 9 also state unambiguously that Revised Article 9 makes ineffective any anti-assignment clause in a structured settlement agreement. Consequently, the dicta in *Owen* that Revised Article 9 does not settle the question is

did not prevent the sale from going forward. That judge asked the Commission to determine the viability of a legislative solution.

In response, the Commission reviewed pending New Jersey legislation, the *Owen* decision, foreign state legislation and the "Model State Structured Settlement Protection Act" sponsored by the National Structured Settlements Trade Association and National Association of Settlement Purchasers. The Commission also held hearings to give interested parties the opportunity to submit written comments and to present their views on whether New Jersey should regulate the sale of structured settlement payment rights.

Consequently, the Commission drafted a proposed statute entitled the "Structured Settlement Protection Act" that requires prior court approval of an assignment of payment rights. The Commission proposal is based on the "Model State Structured Settlement Protection Act" sponsored by the National Structured Settlements Trade Association and National Association of Settlement Purchasers, but rejects the "best interest" of the beneficiary standard. Under the Commission proposal, the only finding the court is required to make is whether the beneficiary's decision is voluntary and knowingly made. The judge does not determine whether the assignment is in the best interests of the parties.

C. Games of Chance

In 2000, the Commission published its Tentative Report on Games of Chance (see Appendix D). This report recommends a thorough revision of the law regulating bingo, raffles and amusement games, collectively called "legalized games of chance."

The law on games now comprises Title 5, Chapter 8, of the New Jersey Statutes. This law is repetitive and, in some cases, self-contradictory. It is also overly detailed, including provisions better left to administrative regulations. The effect of these deficits is to make the law on legalized games of chance inaccessible to all but those experts who have puzzled through it frequently

enough to understand its complexities. However, it is important that the people who are regulated by it understand this law: volunteers for charitable organizations that use bingo and raffles and the business people who run amusement games. Officials who administer the current law have told the Commission that it often causes confusion as to what is required. The revised statutes proposed are an attempt to put the law into clear, concise language.

This report also recommends simplification of the substance of the law regulating legalized games of chance. At present, licensing is a two-step process, involving applications to, and approvals by, both the state regulatory commission and the municipality in which the game will take place. That process is duplicative and onerous for the person who must acquire a license. This report recommends that the Legalized Games of Chance Commission be responsible for all licensing.

The Commission also recommends substantive changes to bring the law into harmony with current community expectations. Present law limits amusement games to certain shore localities, established amusement parks, resorts or agricultural fairs and exhibitions. However, these games are also found throughout the state in arcades designed primarily for children, and at fairs and festivals. The proposed statute would accept that practice and make amusement games legal where not prohibited by municipal action. Present law can also be interpreted to forbid merchandise promotions where certain purchasers are given free merchandise or prizes. However, such promotions are common. For example, some soft drink companies give a free bottle where the label or cap of the bottle purchased so indicates. The proposed statute would allow this practice.

VI. WORK IN PROGRESS

A. Uniform Computer Information Transactions Act

In 2000, the Commission considered UCITA, a proposed state uniform law governing transactions in information. UCITA establishes special rules for information transactions as opposed to “goods” transactions regulated under the Uniform Commercial Code Article 2 (Sales). In its study, the Commission held numerous meetings throughout the year 2000 to obtain the comment of interested parties, the National Conference of Commissioners on Uniform State Laws and the reporters of UCITA. The Commission produced memoranda evaluating different sections of UCITA, such as its scope, choice of law and forum, the interaction of UCITA and federal law, and its application to libraries. The Commission identified several provisions that would produce unsound results if adopted in New Jersey.

The Commission suspended its work at the request of the reporters. However, the Commission produced an Interim Report containing its analysis of how UCITA would change New Jersey law if it were adopted and identifying provisions the Commission found objectionable.

Only two states, Maryland and Virginia, have adopted UCITA.

B. Title Recordation

In 2000, the Commission started a project to revise portions of Title 46 dealing with recording of documents. The project examines all relevant statutes to clarify and systematize them and to remove statutes that would bar electronic recording of documents.

C. Disability Terms

In 1997, legislation was enacted to change the usage of the terms "incompetent" and "mental incompetent" to the more appropriate terms "incapacity" and "incapacitated person." However, changes were made only in the definitions section of the Probate Code, not the text of substantive sections themselves. Therefore, the terms "incompetent" and "mental incompetent" remain in the statutes even though a technical change has been made in the definitions section. In 2000, the Commission continued a project to identify the statutes that use inappropriate words to refer to disabled persons and to replace them with contemporary terminology in the field.

D. Code of Criminal Procedure

In 1999, the Commission began a project to recompile the parts of Title 2A that deal with criminal procedure. Work on this project continues. This project would complete the reorganization of Title 2A and would compile all law on criminal procedure with the criminal law in Title 2C.



State of New Jersey

N J L R C

New Jersey Law Revision Commission

FINAL REPORT

relating to

**THE FEDERAL ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL
COMMERCE ACT AND THE UNIFORM ELECTRONIC TRANSACTIONS ACT**

AUGUST 2000

NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 648-3123
email: njlrc@eclipse.net
web site: <http://www.lawrev.state.nj.us>

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I. Introduction - Federal E-Sign and State Law

On June 30 of this year President Clinton signed into law the "Electronic Signatures in Global and National Commerce Act," popularly referred to as the federal "E-Sign" legislation.⁵ The federal E-Sign legislation broadly validates the use of electronic records and signatures in transactions in interstate and foreign commerce, and preempts virtually all State and federal statutes and regulations which require traditional paper documents and traditional signatures in transactions in interstate commerce.

As this legislation proceeded through the Congress over the last year, it was promoted as a temporary measure, designed to create a uniform national legal infrastructure for electronic commerce until such time as the States had a chance to consider and enact the Uniform Electronic Transactions Act (UETA). The UETA is a law reform proposal adopted by National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999; it contains principles similar to that in the federal legislation; in fact, the federal legislation appropriates many of its provisions. UETA gives electronic records and electronic signatures the same legal status as that afforded to ordinary writings and signatures under existing laws. UETA accomplishes this by redefining the terms "writing" and "signature" as they occur in State statutes and regulations to include "electronic records" and "electronic signatures." Federal E-Sign provides that if a State enacts the UETA, the enacting State's laws will no longer be preempted (with some exceptions) by the legal rules set out in the federal legislation.

In November 1998 this Commission recommended against the global re-definition approach to the revision of the New Jersey Statutes, on the ground that a universal change in the meaning of the terms "writing" and "signature" was both overbroad and unnecessary, and could raise more questions than it would answer so far as the validity of electronic transactions is concerned. The Commission expressed the view that relatively few, targeted changes to specific statutes were sufficient to validate the use of electronic records and signatures in those situations in which it was desirable to do so. The UETA, which was in its final drafting stages at the time of the Commission's recommendation, was precisely the kind of legislation which the Commission believed to be unnecessary and overbroad.

The enactment of the federal E-Sign legislation has caused this Commission to reconsider its previous position and recommend the enactment of the official version UETA with certain amendments that would be consistent with the federal legislation.⁶ Federal E-Sign effectively forces a State to choose between its provisions and those of UETA. If UETA is not enacted in this State prior to October 1, the federal E-Sign legislation will become the primary authority governing the validity and enforceability of ordinary commercial transactions which are undertaken electronically. The federal E-Sign legislation also intrudes on State sovereignty, in provisions that can be interpreted to limit the authority of States over the use of electronic technologies in governmental operations. The adoption of UETA will invoke the "anti-preemption" provisions of federal E-Sign 102(a), restore the authority of the State over the operation of its agencies and instrumentalities to the fullest extent possible under the federal

⁵ Electronic Signatures in Global and National Commerce Act (Federal E-Sign), Pub. L. No. 106-229, 114 Stat. 464 (2000), codified at 15 U.S.C. 7001-7031, referred to throughout this Report as "federal E-Sign."

⁶ Although federal E-Sign 102(a) specifies that a State must enact the official version of UETA as proposed by NCCUSL in July 1999, there are some amendments which may be added to it that are both consistent with the official version of UETA and are not inconsistent with E-Sign.

legislation, and thus avoid at least some of the constitutional questions which are raised by the provisions of the federal legislation which apply to the operations of State agencies.

This Commission believes that extremely rapid action on UETA is necessary to avoid inconsistencies in the applicability of State laws and regulations under the preemption provisions of the federal legislation. The general effective date of the federal legislation is October 1, 2000, and there is a specific, delayed effective date of March 1, 2001, for certain provisions concerning State records retention statutes and regulations.

In support of the Commission's recommendation, this Report details the provisions of the federal legislation and UETA. It concludes with an analysis of the effect of enacting UETA, including recommended amendments, as well as recommendations for the consideration of additional legislation to address problems which may arise with respect to electronic transactions under either the federal E-Sign legislation or UETA.

II. The Electronic Signatures in Global and National Commerce Act - Federal E-Sign⁷

A. Summary of federal E-Sign

The federal E-Sign legislation consists of four Titles, only the first two of which have effects on State law and State agencies. Title I contains provisions concerned with the use of electronic records and signatures in "transactions" in interstate or foreign commerce. Title II, "Transferable records," contains two sections which establish a legal framework for the development of electronic bills and notes which relate to "a loan secured by real property." The remaining two Titles are of concern only to federal regulatory authorities.⁸

⁷ The federal E-Sign legislation is the product of two contending bills, S.761 and H.R.1714. S.761 was a relatively simple bill which would have merely validated the use of electronic records and signatures in transactions between private parties in interstate commerce; it contained no provisions applicable specifically to State governmental authorities. H.R. 1714, sought to preempt a broader category of State and federal rules and statutes, including those which require the parties to transactions to retain records of transactions. Because of its much broader agenda, the House version of the legislation included much more complex provisions than the Senate version, such as provisions limiting the extent to which to State regulatory authorities could require parties to use and retain paper records. The lengthy Conference Committee process which resolved the dramatically different approaches of these two bills produced an exceeding complex piece of legislation, the effect of which remains the subject of debate among the Conference Committee participants. See, e.g., Statement of Senator Leahy, Cong. Rec. S5218-5221 (June 15, 2000)(disagreeing with statements by Rep. Bliley on the floor of the House, and pointing out that the lack of consensus regarding the meaning of many of the provisions among Conference Committee members resulted in the decision to dispense with adoption of the usual form of Conference Report).

⁸ Title III of federal E-Sign contains provisions directing the Secretary of Commerce to undertake various activities to promote international electronic commerce; Title IV contains one minor provision amending the federal Child

The first section in Title I broadly validates the use of electronic records and electronic signatures in "transactions" in interstate and foreign commerce, and specifically preempts any federal and State laws which would invalidate such transactions. (E-Sign 101.) The second section in Title I modifies the broad rules in the first section by setting forth the manner in which a State may escape the preemption provisions set out in the first section. (E-Sign 102.) The primary method of "escape" is the enactment of the official version of the Uniform Electronic Transactions Act (UETA), although a standard is also provided to evaluate the acceptability of other State legislation that would validate the use of electronic records and signatures. The third section of Title I contains specific exemptions from the operation of the validating rules in E-Sign 101. (E-Sign 103.) The fourth section sets forth rules which limit the manner in which federal and State agencies may interpret E-Sign 101 under their existing rule-making powers. (E-Sign 104.) The fifth section (E-Sign 105) directs the Secretary of Commerce and the Federal Trade Commission to complete certain studies of the operation of the legislation; the sixth section (E-Sign 105) contains definitional provisions and the seventh section (E-Sign 107) is the effective date provision.

Title II consists of just two provisions, E-Sign 201, which provides a legal infrastructure for electronic bills and notes relating to a "loan secured by real property" and E-Sign 202, the effective date provision for this Title.

B. Constitutional issues raised by the federal E-Sign legislation

Title I of the federal E-Sign legislation applies to "transactions in interstate or foreign commerce," E-Sign 101(a). Therefore, the scope of the legislation is dependent upon the scope of the Commerce Clause, U.S. Const. Art. I, Sec. VIII, cl. 3. Congress has the power to regulate commercial and business transactions between non-governmental parties that are in or affecting interstate or foreign commerce, and thus the provisions of the federal legislation which validate electronic transactions between non-governmental parties are on quite firm constitutional ground.

What is less clear is the extent to which Congress can, under the guise of regulating interstate commerce under the Commerce Clause, proscribe the workings of State government agencies by requiring them to "accept or use" electronic documents and signatures.⁹ Decisions by the United States Supreme Court in the last several decades have invoked the Tenth Amendment as a limitation on the ability of Congress to impose certain kinds of requirements on the States, their agencies and their officers. See, e.g., *Printz v. United States*, 521 U.S. 98 (1997) (holding

Online Protection Act.

⁹ One of the more objectionable features of federal E-Sign as it applies to State agencies is the suggestion that States need to be coerced into using, and permitting the use of, modern technologies. To the extent that it is a unfunded federal mandate, it fails to take into account on a purely practical level the effect that its directives might have on State government efforts to transition to the use of electronic technologies. In this State, the comprehensive initiative currently under way to utilize electronic technologies in governmental operations is exhaustively detailed in the Report recently issued by the State's Chief Information Officer entitled "Information Technology Strategic Plan," available for review at <http://www.state.nj.us/cio/stratplan>. The considerable efforts being made in this and other States toward "on-line government" can only be hampered by the distraction of determining the extent to which federal law might be read to limit the authority of States in those efforts. See E-Sign 104(c).

unconstitutional the provisions of the Brady handgun control law which required local law enforcement officers to conduct background checks and accept federal handgun permit applications). However, the difficult interpretive and constitutional questions raised by federal E-Sign as it might be applied to State officers and agencies are largely avoided by a State enactment of UETA.

C. Summary of the individual provisions of federal E-Sign

Set forth below is a general summary of the provisions of the federal legislation that are relevant to State law.

(1) E-Sign 101. General rule of validity

Subsection (a) of E-Sign 101 states a general rule of validity for electronic signatures and electronic records used in any "transaction" which is "in or affecting interstate or foreign commerce." Note that the requirement that the "transaction" be in interstate or foreign commerce is a jurisdictional prerequisite to the applicability of federal law under the Commerce Clause, U.S. Const. Art. I, Sec. VIII, cl. 3.

"Transaction" is a defined term. See E-Sign Section 106 ("an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons..."). Note that the E-Sign definition of "transaction" differs significantly from the the definition in UETA 2(16) ("an action ... relating to the conduct of business, commercial and governmental affairs").¹⁰

The rule of electronic validity stated in subsection (a) of E-Sign 101 applies, "notwithstanding any statute, regulation, or other rule of law." This last phrase is intended to be inclusive of all sources of law, including the common law, in both the federal and state systems. This general rule is both qualified and made more specific in the other subsections in this section; a subsequent section (E-Sign 103) also contains categorical exemptions from this general rule (e.g., for wills, family law transactions, among others).

Subsection (b) of E-Sign 101 is entitled "preservation of rights and obligations." Sub-subsection (b)(1) qualifies the general rule of subsection (a) of E-Sign 101 by providing that "this title" does not "limit, alter, or otherwise affect any requirement" imposed by a law "relating to the rights and obligations of persons" under such laws, "other than a requirement that contracts or other records be written, signed, or in nonelectronic form." In other words, if an existing law states that a contract must be made "in writing" in order to be binding, the federal legislation mandates that an electronic record is a "writing" for purposes of the existing State law; but the federal legislation does not override any other legal requirement for a binding contract, such as the requirement that the parties come to an agreement on the terms, or a requirement that a contract include certain specific terms, or any other such kinds of requirements for contracts in general or specific kinds of contracts in particular.

Sub-subsection (b)(2) of E-Sign 101 also clarifies the effect of the legislation, stating that it does not "require any person to agree to use or accept electronic records or electronic signatures,

¹⁰ The omission of the phrase "governmental affairs" excludes from the scope of federal E-Sign those transactions which are purely governmental in character, such as transactions within and between governmental agencies. Certain governmental transactions are also excluded from the scope of E-Sign 101 because they are not transactions in interstate or foreign commerce. See further discussion of this issue under heading *(6)E-Sign 106 Definitions*.

other than a governmental agency with respect to a record other than a contract to which it is a party."¹¹

Subsection (c) of E-Sign 101 contains very detailed qualifications of the general rule of subsection (a) which apply to consumers. The manner in which a consumer may consent to transact electronically is delineated, and parties who wish to bind a consumer to an agreement to transact electronically must have some basis for concluding that the consumer has the means to transact electronically (in other words, if a computer is required to undertake a particular transaction electronically, the other party must have reason to believe that the consumer has access to the necessary hardware and software).

Subsection (d) of E-Sign 101 specifically overrides any statute, regulation or other rule of law [hereinafter "law"] which requires an original record, a copy of a record or a check be retained. Under this subsection, an electronic record containing the same information satisfies such a provision.

Subsection (e) of E-Sign 101 qualifies the general rule of subsection (a) by providing that it applies only if the electronic record is "in a form capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record."

Subsection (f) of E-Sign 101 qualifies the rules in the entire Title by preserving any law which requires a particular "proximity" with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed."

Subsection (g) of E-Sign 101 deals specifically with notarization and acknowledgment. If a law requires a signature or record to be notarized, acknowledged, verified or made under oath, the requirement is satisfied if the officer authorized to perform the act affixes to the electronic document an electronic signature along with all other information required by law.

Subsection (h) of E-Sign 101 validates contracts and records involving the use of so-called electronic agents (a defined term) "so long as the action of any such electronic agent is legally attributable to the person to be bound."

Subsections (i) and (j) of E-Sign 101 concern the insurance industry, the first of them expressly including the business of insurance within the scope of the legislation, the second concerning liability of insurance agents and brokers for the use of electronic records and signatures.

(2) E-Sign 102. Exemptions from preemption

This section contains qualified exemptions from the broad preemption effect of the federal act. It is this section which specifies the circumstances under which a State can avoid the

¹¹ The negative implication of this convoluted passage appears to be that a State governmental agency can be required to "use or accept" electronic records and signatures except when it is contracting like a private party (in procurement activities, for example). Other provisions of federal E-Sign, in contrast to this provision, contains provisions which appear to reserve to State agencies the authority to refuse to "use or accept" electronic records and signatures. See, e.g., E-Sign 104(a)(...nothing in this Title limits or supersedes any requirement by a ... State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats."

application of the federal legislation by the enactment of UETA.

Subsection (a) of E-Sign 102 states the general rule that a State law may "modify, limit, or supersede the provisions of E-Sign 101 with respect to State law only if" the law either constitutes an adoption of the official version of the Uniform Electronic Transactions Act or if the law otherwise specifies alternative procedures or requirements for the use and acceptance of electronic records and signatures. The latter of these two conditions is included to cover States which either have adopted a version of UETA or some other electronic signature law already, or wish to adopt a non-UETA law or a version of UETA which differs from the official version in the future.

Subsection (a) of E-Sign 102 is extremely important because it permits a State, by enacting the official version of UETA, to escape almost entirely the preemption effect of the federal legislation. There are two exceptions to the ability to escape the preemption effect, one of which concerns UETA 3(b)(4) and the other which concerns UETA 8(b)(2).

UETA 3(b)(4) was included in UETA to permit enacting States to list additional categorical or specific exemptions from UETA's operative provisions. For example, a State which wished to continue existing writing and signature requirements for transactions in land could add a reference in this subsection of UETA, either a categorical reference or a reference to specific statutory or regulatory provisions to which UETA would not apply. Under E-Sign 102(a) of the federal legislation, however, any such exception added by a State under UETA 3(b)(4) is preempted "to the extent such exception is inconsistent with this title or title II, or would not be permitted under" the limitations applicable to the alternative legislation mentioned above. The obvious purpose of this limitation on a State enactment of UETA is to prohibit states from evading the policy of UETA by adding wholesale exceptions which would swallow its rules.

The other provision of UETA which is specifically referenced in the federal legislation is UETA 8(b)(2). Subsection 102(c) of federal E-Sign, entitled "Prevention of circumvention," provides that the "anti-preemption" effect of the adoption of UETA does not "permit a State to circumvent" the effect of the federal legislation "through the imposition of nonelectronic delivery methods" under UETA 8(b)(2). UETA 8(b)(2) contains language preserving from the effect of UETA, State laws which specify a particular method of communication or transmission, such as a requirement that information be mailed, or sent by certified mail. Thus, federal E-Sign 102(c) prohibits a State from "circumventing" its provisions which validate the use of electronic records and signatures in transaction by enacting, under UETA 8(b)(2), requirements that a transaction be in some way effectuated by mailing a letter or sending a telegram.¹²

(3) E-Sign 103. Specific exemptions

This section contains the categorical exceptions to the operation of the general rule of E-Sign 101. Note that the first two exceptions listed below are already embodied in the official version of UETA 3(b).¹³ The categories of exempt laws and transactions in E-Sign 103 are:

¹² See the discussion below of whether the use of the term "circumvention" suggests that what is being prohibited by federal E-Sign 102(c) is the addition of new laws that fall under UETA 8(b)(2), not the continued enforcement of existing laws that fall under UETA 8(b)(2).

¹³ See the discussion below of whether a State which enacts UETA can include these exceptions in its enactment. Note that the exclusion of insurance in E-Sign is for health and life insurance and does not mention automobile insurance. Note also that deeds and other real estate documents are not excluded (at least to the extent that they pertain to a "business, consumer or commercial" transaction),

- the creation and execution of wills, codicils, or testamentary trusts.
- the UCC generally, but not UCC 1-107 and 1-206, and Articles 2 and 2A.
- laws governing adoption, divorce, or other matters of family law.
- court orders and notices, official court documents including briefs, pleadings, etc.
- utility shut-off notices.
- notices concerning default, acceleration, repossession or foreclosure under a credit or rental agreement secured by a primary residence of an individual
- cancellation or termination of health or life insurance benefits (excluding annuities).
- a product recall "that risks endangering health or safety."
- documents required to accompany "transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

(4) E-Sign 104. Applicability to federal and State governments

This section deals particularly with federal and to State regulatory authorities in those States which have not enacted UETA.¹⁴ This section of federal E-Sign has potentially important implications for the regulatory authority of State agencies in those jurisdictions, depending upon how the provision is interpreted.

Subsection (a) provides that nothing in the legislation "limits or supersedes any requirement" by a federal or State regulatory agency "that records be filed with such agency or organization in accordance with specified standards or formats." The extent of the authority left to the States pursuant to this section is a subject of controversy, with Senator Leahy taking the position that it leaves them with absolute authority over the acceptance of material for filing with State agencies¹⁵, while Rep. Bliley interprets the provision as leaving State agencies subject to the

both by implication in the general language of E-Sign 101, the main operative provision of the legislation, as well as expressly in the definition of "transaction" in E-Sign 106.

¹⁴ One commentator interprets federal E-Sign 104, with its limitations on the authority of State regulatory agencies, to have continuing applicability even in those states which enact UETA. See Patricia B. Fry, A Preliminary Analysis of Federal and State Electronic Commerce Laws, <http://www.jetaonline.com/docs/pfry700.html>, visited July 25, 2000. Professor Fry, who was the chair of NCCUSL's UETA drafting committee, assumes without analysis that the preemption-escape provisions of E-Sign 102 apply only to the operative provisions of E-Sign 101. This assumption does not take into account a textual analysis of E-Sign 104, which is concerned with placing limitation on the manner in which federal and State agencies "interpret section 101." See E-Sign 104(b)(1). In a State which has enacted UETA and thus, by virtue of E-Sign 102 is not governed by the operative principles of E-Sign 101, State agencies with rule-making or interpretive authority will be interpreting UETA, not E-Sign 101. This assumption also ignores the overall structure of Title I of the E-Sign legislation, which expresses its main operative principle in E-Sign 101, with the ensuing provisions either limiting or explaining the effect of the operative provisions. E-Sign 104 has no independent operative effect on State laws, it is merely ancillary to the preemption provision in E-Sign 101.

¹⁵ Read broadly, the term "standards and formats" in subsection (a) of E-Sign 104 can be interpreted to leave State agencies absolute authority to determine

constraints of E-Sign 104(c) in determining their filing requirements.¹⁶

Subsection (b) of Section 104 sets out the parameters within which State and federal agencies must remain in adopting regulations which interpret the operative provisions in Section 101. This section provides that such agencies may adopt regulations that interpret Section 101 of the federal legislation with respect to any law within a particular agency's jurisdiction. However, this rule-making authority is limited in sub-subsection (b)(2) which prohibits the adoption of a regulation interpreting Section 101 unless several specified requirements are met:

1. the regulation is "consistent with section 101".
2. the regulation "does not add to the requirements of Section 101."
3. the agency finds that there is "substantial justification" for the regulation.
4. the agency finds that the methods specified to carry out the purpose (of the regulation) are "substantially equivalent to the requirements imposed on records that are not electronic records."
5. the agency finds that the methods selected "will not impose unreasonable costs on the acceptance and use of electronic records."
6. the agency finds that the methods selected "do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures."

The list of prescriptions in sub-subsection (b)(2) is qualified in sub-subsection (b)(3) with a statement that a regulatory agency may interpret Section 101(d) (validating the retention of an electronic record of information) "to specify performance standards" which "assure accuracy, record integrity, and accessibility of records." In addition, those performance standards may impose a requirement which violates the proscription of sub-subsection (b)(2)(C)(iii) (item no. 6 in the list above) if there is a "compelling governmental interest relating to law enforcement or national security" and if "imposing such requirement is essential to attaining such interest." But, having so provided, the sub-subsection goes on to prohibit a regulatory agency from requiring

whether they will accept electronic records for filing. This is the interpretation given this subsection by Senator Leahy, one of the Senate sponsors of the legislation. Senator Leahy expressed the view concerning the authority of State regulatory agencies in interpreting E-Sign 101, that "section 104(a) of the conference report expressly preserves governmental filing requirements ... Until they are technologically equipped to [fully accept electronic filings, State agencies] have an unqualified right under section 104(a) to continue to require records to be filed in a tangible printed or paper form. Cong. Rec. S5221 (June 15, 2000). In other words, according to Senator Leahy, E-Sign 104(a) is not qualified by the remainder of E-Sign 104.

¹⁶ According to the Statement of Rep. Bliley, "Section 104(a) provides that *subject to section 104(a)(2)* a federal regulatory agency, a self-regulatory organization, or State regulatory agency may specify standards or formats for the filing of records with that agency organization, including requiring paper filings or records." Note that there is no sub-subsection **(a)(2)** in E-Sign 104, nor is E-Sign 104**(b)(2)** relevant to the point being made by Representative Bliley; this comment probably refers to sub-subsection **(c)(2)** of E-Sign 104, which limits the circumstances under which a federal or State regulatory agency may interpret E-Sign 101 to require traditional records or signatures to those implicating law enforcement or national security concerns.

the use "of a particular type of software or hardware in order to comply with" Section 101(d)(the provision regarding records retention).

Subsection (c) of Section 104 qualifies the effect of subsection (b) by prohibiting the imposition or re-imposition of "any requirement that a record be in tangible printed or paper form" except as provided in sub-subsection (b)(e)(B)(where a compelling governmental interest relating to law enforcement or national security is shown).

(5) E-Sign 106. Definitions

Section 106 contains a number of definitions, most of which have identical or virtually identical counterparts in UETA. The only definition of significance to States in particular is "Transaction," which is defined as follows in UETA 106:

The term "transaction" means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons....¹⁷

Compare the definition of the term "transaction" in UETA 2(16): 'Transaction' means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.' Because UETA was the source for the language of the definition in the federal legislation, the difference between the text of the two provisions can fairly be viewed as purposeful and of interpretive significance.¹⁸

The absence of the term "governmental affairs" from the definition in federal E-Sign, as well as the requirement that a transaction be in interstate or foreign commerce, leaves transactions within and between government agencies outside the scope of federal E-Sign, and it may also preclude the application of federal E-Sign to filings by private parties with governmental agencies.¹⁹

(6) E-Sign 107. Effective date

The general effective date of the legislation is October 1, 2000. There is a specific, extended effective date of March 1, 2001, with respect to "a requirement that a record be retained" which is imposed by a regulatory agency.

¹⁷ The E-Sign 106 definition goes on to provide that the term "transaction" includes "any of the following types of conduct:(A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (ii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.

¹⁸ Supporting this interpretation of the term transaction in E-Sign is the statement of Senator Leahy on the floor that "The conferees specifically rejected including 'governmental ' affairs in this definition. Thus, for example, the bill would not cover records generated purely for governmental purposes, such as regular monitoring reports on air or water quality that an agency may require pursuant to the Clean Air Act, Clean Water Act, Safe Drinking Act, or similar federal or State environmental laws." Cong. Rec. S5221 (June 15, 2000).

¹⁹ On this point, see also the discussion of E-Sign 104(a), which states that "nothing in this title limits or supersedes any requirement by ... a State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats."

(7) E-Sign 201 and 202 (Title II--Transferable records)

The purpose of the "transferable records" provisions in both federal E-Sign and the UETA is to provide the legal infrastructure needed to create an electronic analog to conventional, paper-based bills and notes. At present there are no such analogs, but the proponents of these provisions believe that the development of such analogs will follow from the creation of the legal infrastructure to support their use.

E-Sign 201 replicates the provisions of UETA 16, except that the scope of the E-Sign provisions is significantly narrower than the UETA provisions. E-Sign 201 applies only to "an electronic record that ... relates to a loan secured by real property." The scope of UETA 16 is not limited to this subject matter, therefore a "transferable record" under UETA could relate to any sort of transaction. Because E-Sign 201 is not subject to the "preemption opt-out" provided in E-Sign 102, a State adoption of UETA would establish a legal infrastructure for transferable records relating to all kinds of transactions, including those relating to a real property loan transaction which would continue to be covered under the federal legislation. Although in theory UETA 16 is preempted by E-Sign 201²⁰, because the rules which UETA 16 applies to real property loan transactions replicate those of the federal legislation, no actual conflict between the two exists. The more broadly applicable rules in UETA 16 can coexist with those of E-Sign 201.

III. The Uniform Electronic Transactions Act (UETA)

A. Summary of the individual provisions of UETA

Set forth below is a brief explanation of the operative provisions of UETA, along with some comments of this Commission, including a brief statement concerning the effect that the enactment of this particular provision of UETA would have on current New Jersey law.

(1) UETA 5, 7 and 8 - Legal recognition of electronic signatures, records and contracts and their equivalence with traditional writings and signatures

UETA 7 and 8 contain the central operative provisions of the Act. Both provisions contain broadly applicable rules that give the same legal effect to electronic records, electronic signatures and electronic contracts that their paper and ink equivalents are given under current law. Although stated in slightly different language from the equivalent provisions of federal E-Sign, their effect is the same: whenever a statute, regulation or other rule of law requires that a transaction be undertaken "in writing," an "electronic record" can be used for that purpose; similarly, whenever a "signature" is required, an "electronic signature" can be used. UETA 7 and 8 also provide that neither an electronic record nor an electronic signature nor an electronic contract can be denied legal effect solely because it is in electronic form.

UETA 5 provides an important rule of voluntariness that explains and qualifies the central operative provisions in the Act. Subsection (a) provides that the Act does not require a party to use electronic records or signatures, and subsection (b) provides that the Act is applicable only to transactions between parties who have "agreed to conduct transactions by electronic means."

Some of the work of equating the legal status of traditional and electronic records and signatures is accomplished in the definitions in UETA 2. A "record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is

²⁰ Note that the preemption-escape provisions of E-Sign 102 specifically refer to the operative rules set out in E-Sign 101, and both provisions are in E-Sign Title I. E-Sign 201 is in E-Sign Title II.

retrievable in perceivable form." The first part of this definition ("inscribed on a tangible medium") is the language in which traditional paper documents are usually described; the additional language in the UETA definition encompasses information that may be stored in binary form on the fixed disk of a computer system or on a removable floppy, but that can be retrieved and displayed in "human readable form," as text displayed on a screen or printed out on paper. The definition of the term "electronic record" is simply an expansive list of the various ways in which a record which is in electronic form may be found. An "electronic record" is defined as "a record created, generated, sent, communicated, received, or stored by electronic means."

An "electronic signature" is defined in UETA 2 as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." The definition parallels the definition of a traditional signature in the Uniform Commercial Code, but relates the traditional concept of "marking with intent" to electronic records and signatures. See UCC 1-201(30) ("signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing").

Effect of UETA 5, 7 and 8 on current New Jersey law.

The important operative rules of UETA are those stated above, which give legal recognition to the use of electronic records and signatures if the parties to a transaction agree to use them. The drafters of UETA also considered and provided rules for ancillary issues that arise from the legal recognition and use of electronic records and signatures. For the most part, UETA 5, 7 and 8 replicate the legal rules that apply to transactions generally, but restates them in language that is specifically applicable to electronic transactions. Thus, for the most part these provisions do not change current New Jersey law applicable to electronic transactions and accordingly, no general negative implication regarding the validity of electronic transactions undertaken prior to the enactment of UETA should be taken from the enactment of UETA in this State.²¹

UETA 5, 7 and 8 do effect change in New Jersey law in those transactions where there is an explicit or implicit requirement that a paper "writing" or a holographic "signature" be utilized to effectuate the transaction. For example, to the extent that the defined term "writing" as used in Article 2 of the Uniform Commercial Code can be construed as referring to tangible documents, it is superseded by these provisions of UETA.²² Similarly, to the extent that the use of the term

²¹ On this general point see this Commission's Final Report on Electronic Records and Signatures (November 1998)(in the absence of a specific legal requirement for a paper writing or holographic signature, electronic transactions are valid under current New Jersey law.)

²² Article 1 of the U.C.C. provides that "'written' or 'writing' includes printing, typewriting or any other intentional reduction to tangible form"). The requirement of "intentional reduction to tangible form" in the U.C.C. definition has been interpreted by some commentators as not including electronic messages or other electronic and digital records. See, e.g., Joseph I. Rosenbaum, *Electronic Commerce: Key Legal & Contractual Issues*, http://businesstech.com/law/btlaw6_96.html (accessed May 7, 1998); Public Law Research Institute Report, John Whipple, *The Formation and Enforcement of Electronic Contracts*, <http://www.uchastings.edu/plri/fall94/whipple.html> (accessed May 7, 1998). To the contrary is Charles R. Merrill, *The Digital Notary(tm) Record*

"signature" in current laws can be construed as requiring a mark on a tangible document, that construction is superseded by UETA, which affirmatively permits the use of an electronic signature on an electronic document. On this point, see also the discussion in this Commission's November 1998 Final Report on Electronic Records and Signatures (discussing the statutory requirements for filing title documents in the public land records).

(2) UETA 8 - Retention of information

An issue raised in electronic transactions, particularly those defined as "consumer" transactions, is whether both parties are able to retain a record of an electronic transaction. UETA 8 (a) provides that if a law requires a party to transaction to provide or send particular information to another party to the transaction, that requirement is met only if the recipient of the information can retain the information in some fashion. In other words, if a law requires that a particular kind of written contract must be provided to a purchaser (e.g., in the case of a door-to-door sales solicitation), it is not sufficient to provide that information to the purchaser merely by displaying the information on a monitor; the information must be provided in a form that the purchaser can retain. This might include, by way of example, the ability to save a copy of an electronic record on a computer hard drive or removable disk, or to print out the information on paper.

UETA 8(b)(2) preserves existing laws which require information to be "posted or displayed" in a certain manner, to be "sent, communicated, or transmitted" by a certain method or to contain information "that is formatted" in a particular way, although it does permit the parties to a transaction to vary these provisions to the extent permitted in the law. Among the laws preserved by this provision are those which require delivery by a particular form of mail, for example, by certified mail or by registered mail.

Effect of UETA 8 on current New Jersey law.

UETA 8(a) does not appear to change existing New Jersey law but simply clarifies it in particular circumstances. If an existing law requires that one of the parties to a transaction is entitled by law to be shown or given a copy of information (a copy of a contract, for example), that requirement is not met unless the information is provided to the recipient in a form that can be retained. UETA 8(b) does not change existing law, on the contrary UETA 8(b) preserves it with respect to requirements for the sending or receipt of information.

(3) UETA 9 - Attribution of signatures

As noted above, a valid "signature" on an electronic document may consist merely of the typing of the name of the individual who is signing on an electronic message, or the use of some other kind of device which is not inherently associated with the individual, such as a string of numbers (e.g. a "PIN" number) or a password. While forgery is also an issue in non-electronic transactions, it can be relatively much easier to accomplish where the "signature" consists of simply entering a number of digits or characters on an electronic message. UETA 9 states the rule that an electronic record or signature is "attributable" to a particular person "if it was the act of the person." Subsection (a) provides that this may be shown by proof of the "efficacy" of a security procedure; subsection (b) provides that attribution is determined from the context of the entire transaction.

Authentication System - A Practical Guide for Legal Counsel (1) On Mitigation of Risk From Electronic Records (June 22, 1995), http://www.surety.com/in_news/legalid.html (accessed May 7, 1998)(suggesting that questions regarding the status of electronic records as a "writing" within the meaning of the U.C.C. have been resolved affirmatively). To date, no New Jersey case appears to have addressed this issue.

Effect of UETA 9 on current New Jersey law.

The principles articulated in UETA 9(b) for the attribution of a signature are similar to those applied to traditional signatures under current New Jersey law. See, e.g., J.D. Louzeaux Lumber Co. v. Davis, 41 N.J. Super. 231 (App. Div. 1956)(evaluating a requirement that a lien filing be "signed" in the context of the entire transaction). UETA 9(a) simply states a specific application of this general rule in electronic transactions, in which the existence of a security procedure is one of the circumstances to be evaluated.

(4) UETA (10) Electronic errors

A frequent question raised with respect to electronic transactions which are automated in whole or in part is how the contract law principle of "mistake" should be applied. UETA 10 provides a limited set of rules to address errors that may occur in the transmission of information in an electronic transaction, and provides that if those rules do not apply to the particular electronic error in question, then the general law of contract, "including the law of mistake," applies to the transaction.

Effect of UETA 10 on current New Jersey law.

To the extent that it sets forth a new rule governing particular kinds of mistakes in electronic transactions, UETA 10(a) changes current New Jersey law by addition. UETA 10(b) does not purport to effect change, it simply refers to the current law of mistake as the governing rule of law if the special rules in subsection (b) do not apply. See, e.g., Cataldo Construction Co. v. Essex County, 110 N.J. Super. 414 (Ch. 1970)(relief from contractual obligation on ground of unilateral mistake depends on circumstances of each case).

(5) UETA 11 - Notarization and acknowledgment

UETA 11 provides that if a law requires a notarial act, the requirement is satisfied if the information required by the law is "attached to or logically associated with" the electronic record or signature being notarized. According to the Comment to this section, it effectively supersedes any requirement that the officer performing the notarial act affix either a stamp or a seal, although no such language appears in the section itself.

Effect of UETA 11 on current New Jersey law.

To the extent that current New Jersey law may be construed to require a notary to affix a holographic signature to a paper document, this section of UETA would supersede any such requirement. Neither stamping nor sealing has been required for a notarial act in this State for some time, thus this section has no effect on New Jersey law in that regard. The official Comment to UETA 13 also notes, and it is worth emphasizing, that no other requirement for a notarial act is affected by UETA 13, including the requirement that the individual who is signing, acknowledging, swearing or attesting do so in the physical presence of the officer performing the notarial act. Accordingly, the requirement under current New Jersey law that the officer performing the notarial act be in the physical presence of the signer is not affected by UETA 11.²³

²³ The requirement of personal presence is well-recognized in case law as a fundamental requisite of a notarial act. See, e.g., Commercial Union Ins. Co. of New York v. Burt Thomas-Aitken Construction Co., 54 N.J. 76 (1969); State v. Mershon, 39 N.J. Super. 599 (Passaic Cty. Ct. 1956).

(6) UETA 12 - Records retention

This section contains very broad language providing that if a law requires that a record be retained or that a record be presented or retained in its original form, the requirement is met by an electronic record of the information that "accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise," and that "remains accessible for later reference." Subsection (e) qualifies this rule in the case of checks, by requiring that the electronic record include the information on both the front and the back of the check.

Effect of UETA 12 current on New Jersey law.

UETA 12 is one of the provisions of the Act, in addition to the general rules in UETA 7 and 8, that would effect change in New Jersey law. This section affects legal requirements for the retention of records, not only as they may concern transactions between private parties, but also legal requirements imposed by regulatory authorities. Thus, any current requirements by State regulatory authorities that original records of transactions be retained by regulated parties are effectively superseded by this provision (unless the transaction is one that is excluded from the scope of the Act).

Note that what is taken away in the general rules of this section is restored to a significant extent in subsections (f) and (g). Subsection (f) provides that records retention requirements imposed for "evidentiary, audit, or like purposes" can "specifically prohibit[] the use of an electronic record" if the law containing the requirement is enacted after the UETA is enacted. This permits States to re-enact any laws which require the retention of paper or original records should they be deemed of sufficient importance. Subsection g. also qualifies the general rule of UETA 12 by providing that an agency may specify "additional requirements for the retention of a record subject to the agency's jurisdiction." Read together with subsection (f), which requires laws prohibiting the use of electronic records to be reenacted, this section can be read to permit a State agency to impose "additional requirements" on electronic records retention. Other than reading subsection (g) in context with subsection (f)(and thus subsection (g) does not permit a State agency to prohibit the use of electronic records), the phrase "additional requirement" is extremely broad.

(7) UETA 13 - Admissibility in evidence

UETA 13 states a broad rule that evidence may not be excluded from a proceeding "solely because it is in electronic form."

Effect of UETA 13 on current New Jersey law.

This section of UETA should be regarded as merely precatory in the context of New Jersey evidence law, which contains no provisions which categorically exclude electronic evidence. On the contrary, the New Jersey Rules of Evidence generally track the Federal Rules of Evidence and the Uniform Rules of Evidence which have been adopted in 38 states. N.J. Evid. R. 401 and 402 provide the broad, general principle that any relevant evidence is admissible in a proceeding, relevancy being defined as "having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J. Evid. R. 401. As a preliminary matter, these rules permit the introduction of all forms of evidence, including testimony, documents, photographs, video and audio tapes and "electronic" evidence of all kinds, provided that it is relevant and otherwise satisfies applicable rules governing admissibility for a particular purpose. UETA 13 should be included in any UETA enactment in this State only because it is required to be included in order to satisfy the preemption avoidance provisions of federal E-Sign 102.²⁴

²⁴ The evidence rules most likely to be at issue in the introduction of electronic

(8) UETA 14 - Automated transactions

Some commentators have raised questions concerning the validity of "automated" transactions, including those undertaken through the use of so-called electronic agents. Because an "electronic agent" is not capable of having the intent required for the formation of a contract under classical contract law, the argument goes, a contract which is effectuated by an "electronic agent" may be invalid because of the lack of "intent" on the part of the "electronic agent."

UETA addresses this issue of intent in automated transactions by expressly validating contracts formed by the use of automated technologies. Automated technologies are referred to in UETA as "electronic agents," defined very broadly in UETA 2 as "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual." Under this definition, an "electronic agent" may simply consist of the programming interface on a merchant's web site that automatically accepts and processes orders according to pre-programmed criteria, without a human individual reviewing and accepting each and every order that is submitted. This broad language also encompasses other forms of automated ordering technology that have been in use for some time, such as the use of a telephone "touch-tone" ordering system.

Effect of UETA 14 on New Jersey law.

There do not appear to be any unique questions raised under current New Jersey law concerning the validity of automated transactions. The explicit rule in UETA 14 is consistent with

records are N.J. Evid. R. 801(e) ("writing" broadly defined to include "data compilations" and all forms of information "set down or recorded by "magnetic impulse, mechanical or electronic recording, or by any other means, and preserved in perceptible form), 1002 and 1003 (requirement of an original, admissibility of duplicate) and 803(c)(6) (the business entry exception to the hearsay rule). Under these rules, electronic records are admissible pursuant to the business entry rule under the same test applicable to other business records. See Tomassini v. Saunders, 274 N.J. Super. 203 (Law Div. 1994) ("Computer printouts are admissible under the business entry rule as long as a proper foundation is laid."); see also State v. Swed, 255 N.J. Super. 228 (App. Div. 1992) (setting standard, under prior evidence rules, for admission of computer printout under business records exception, and eliminating requirement under earlier case law for witness testimony on the internal workings of the computer system as a predicate to admissibility).

While electronic records are generally admissible in evidence under current New Jersey law, it should be remembered that they must satisfy applicable requirements for admissibility as they may apply to the electronic evidence context. Thus, in some cases electronic evidence will not be admissible, just as is the case with other kinds of evidence. In Tomassini v. Saunders, the court excluded the proffered computer printout because the requirements of the business entry exception, as applicable to computer records, had not been met: "The information contained in the computer must be of the same worth as any other business record submitted as proofs of that which it asserts." 274 N.J. Super. at 208.

current New Jersey law, which analyzes the effectiveness of transactions according to general contract law principles such as offer and acceptance, intent and agency. See, e.g., *N. Rothenberg & Son, Inc. v. Nako*, 49 N.J. Super. 372 (App. Div. 1958)(principal bound by acts of agent with apparent authority which principal knowingly permits agent to assume).

(9) UETA 15 - Time and place of sending and receipt

Various statutes and other legal rules often impose time requirements on the sending or receipt of information or communications, such as a requirement that a confirmation of an order be "sent" within a particular period of time, or that a communication must be "received" by a particular date. UETA 15 provides a set of default rules for determining when an electronic communication has been either sent or received. The default rules may be varied by an agreement of the parties to a transaction.

(10) UETA 16 - Transferable records

Among the transactions expressly excluded from UETA are those which are included in Uniform Commercial Code Articles 3 and 4, that is, traditional bills and notes which are represented by paper documents. These transactions are excluded because the legal principles applicable to bills and notes are so thoroughly grounded in the possession, control and transfer of a tangible token, and no system has yet been put into place to provide an electronic equivalent. Even so, UETA 16 provides the basic legal framework to support the use of electronic bills and notes at such time as they come into use.

Effect of UETA 16 on current New Jersey law.

UETA 16 does change current New Jersey law in that it gives legal recognition to electronic bills and notes, which are not recognized under current New Jersey law (See, e.g., UCC Article 3 and 4). This change has no current effect, however, because no such system currently is in use.

(11) Electronic records and signatures - use and acceptance by State agencies under UETA

UETA 17, 18 and 19 provide rules for the use and acceptance of electronic records and signatures by State agencies. These provisions are bracketed in the official version of UETA because they are regarded as optional, that is, a particular State may or may not decide to include them in an enactment of the official version of UETA. It is emphasized in the Comment to these sections that they are intended to be very general and to empower rather than direct State agencies in the use and acceptance of electronic records and signatures, both within the agencies themselves (UETA 17) and in their dealings with other parties (UETA 18). Indeed, as noted in the official Comment to these sections, in many States these sections are unnecessary because existing law already delegates authority to State agencies for this purpose. UETA 19 encourages the use of interoperable systems in these efforts.

Effect of UETA 16 on current New Jersey law.

To the extent that UETA 17, 18 and 19 explicitly empower State agencies to utilize electronic records and signatures in their operations, they represent a change in New Jersey law. Currently there is no equivalent, general statutory authority in this State that empowers State agencies in this fashion. However, just as in the case of transactions between and among private parties, neither is there any general proscription in the New Jersey statutes against the use of electronic technologies in the operations of State agencies. For example, there is no express statutory authorization for the use of telephones or computers in the operation of State government, yet their use is ubiquitous. There are, however, myriad statutes which require, or can be read to require, that State agencies use non-electronic technologies in particular

circumstances which range from the mundane to the significant.²⁵ Enactment of UETA 17, 18 and 19 would consign to each individual agency the authority to determine whether to adopt electronic technologies where current law requires a conventional writing or signature.²⁶

B. Should UETA Be Enacted in This State

Analyzing the effect of federal E-Sign and UETA on New Jersey law, and the desirability of enacting UETA, is an exercise in evaluating alternatives. When federal E-Sign becomes effective on October 1, any current New Jersey law which requires the use of paper-and-ink is superseded in a transaction in interstate commerce. The enactment of UETA would largely displace federal E-Sign, but in general it would simply replace the federal legislation with a very similar state enactment. If this is all that would be accomplished, there would probably be little reason for a State to bother to enact UETA, other than the general principle that State law ought to be the primary authority for the enforceability of ordinary business and commercial transactions. Federal E-Sign and UETA are not identical, however. UETA contains provisions which have no parallel in federal E-Sign, including provisions which restore important authority to State regulatory agencies, as compared to the authority which they would have under federal E-Sign.²⁷

That UETA contains provisions which vary from federal E-Sign is anticipated in the federal legislation. Section 102(a) expressly states that "A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law...." It is anticipated by these words, therefore, that enactment of UETA will "modify, limit, or supersede" Section 101. The fact that UETA contains provisions which differ significantly from federal E-Sign is, of course, explicitly recognized in the E-Sign provisions which limit these differences in very specific ways as to certain specific UETA provisions.²⁸ Thus, unless a UETA provision which is different from federal E-Sign has been expressly limited in its effect, a difference in a UETA provision is a "permissible difference" under federal E-Sign.

The "permissible" differences in UETA which would "modify, limit or supersede" federal E-Sign appear in the language of the provisions which are common to both UETA and E-Sign,

²⁵ See, e.g., See, e.g., N.J.S. 40:69A-186 (specifying signing requirements for certain petitions: "Each signer of any such petition paper shall sign his name in ink or indelible pencil and shall indicate"); N.J.S. 39:4-14.31 (requiring a written, signed notification to DMV of removal from state, destruction, theft, discontinued usage of auto); N.J.S. 40:69A-186 (specifying signing requirements for certain petitions: "Each signer of any such petition paper shall sign his name in ink or indelible pencil").

²⁶ In its Final Report on Electronic Records and Signatures (November 1998) this Commission recommended the adoption of broadly worded legislation which would similarly empower State agencies to utilize electronic records and signatures through the adoption of administrative regulations.

²⁷ Assuming, of course, that the manner in which federal E-Sign limits the authority of State agencies is constitutionally valid. One of the virtues of enacting UETA is that doing so would avoid these issues to a large extent.

²⁸ As noted above in the discussion of E-Sign 102, the federal legislation contains two specific limitations on the ability of a State to "modify, limit, or supersede" its provisions by enacting UETA. One limitation concerns the addition of exceptions in UETA 3(b)(4) and the other concerns UETA 8(b)(2). See discussion above under "E-Sign 102. Exemptions from preemption."

and in the provisions which are contained in UETA but not in E-Sign.²⁹

(1) Records retention provisions

The first major "permissible difference" between UETA and federal E-Sign is in their records retention provisions. Both UETA and federal E-Sign contain similarly worded provisions which broadly validate the practice of retaining electronic copies of traditional records, and permit parties to retain electronic copies of original documents if they meet certain reliability criteria. E-Sign 101(d)(1), (2), (3) and (4) correspond almost exactly to Subsections (a) through (e) of UETA 12.³⁰ Absent from the federal legislation, however, are UETA 12 (f) and (g) which provide:

(f) A record retained as an electronic record in accordance with subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this [Act] specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this State from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Under UETA 12(f), State records retention laws which are superseded by the enactment of UETA can be re-enacted, and UETA 12(g) permits a State agency to impose "additional requirements" on the retention of records. Because neither this section of UETA nor these subsections in particular are expressly limited in the "anti-preemption" provision of the federal legislation (see E-Sign 102), they survive any preemptive effect such as that imposed on the UETA provisions that are mentioned expressly. Thus, although records retention provisions currently in place which preclude electronic records retention are superseded by the enactment of UETA 12 (a) through (e), any State law provisions of importance which limit or prohibit electronic records retention can be re-enacted under UETA 12(f). In addition, a State agency can specify "additional requirements for the retention of a record subject to the agency's jurisdiction" under UETA 12(g). The language "additional requirements" is extremely broad; the official Comment to this section states that "As always the government may require records in any medium, however, these subsections require a governmental agency to specifically identify the types of records and requirements that will be imposed." (Emphasis added.)

²⁹ There are also provisions in UETA which have no counterpart in federal E-Sign, but do not "modify, limit or supersede" E-Sign. For example, UETA 9, which concerns attribution of signatures, UETA 11, which provides for the notarization of electronic records, UETA 13, which contains provision concerning the admissibility of electronic records in evidence, have no counterpart in federal E-Sign and do not conflict with it.

³⁰ A relatively minor difference in the two is in UETA 12(c) which provides that a record retained in electronic form under the authority of this section must remain "accessible for later reference." E-Sign 101(d)(1) contains additional language that replaces the phrase "accessible for later reference" with the passage "accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise." The additional language of the federal E-Sign provision is probably fairly implied in the more succinct UETA provision.

Subsections (f) and (g) of UETA restore significant authority to State government agencies to regulate records retention practices of regulated parties. State agencies should be alerted to this provision and prodded to present for legislative re-enactment any provisions of this type which they regard as vital to their regulatory functions. State agencies should also formulate, and adopt as regulations, any "additional requirements" that they regard as important.

(3) Use and acceptance of electronic records and signatures by State agencies

A second major "permissible difference" between federal E-Sign and UETA is in the provisions of UETA 18 and 19. These provisions have no counterparts in the federal legislation, and they are another important source of authority for State agencies if UETA is enacted. The provisions of federal E-Sign raise numerous difficult questions concerning the authority of State agencies. For example, it is unclear whether federal E-Sign purports to limit the ability of State agencies to refuse to accept electronic documents for filing.³¹ The adoption of UETA 18 and 19 would avoid many if not most of the questions raised by the potential application of federal E-Sign to State government agencies.

UETA 18 is concerned with the use of electronic records in State agency transactions with other parties.³² UETA 18(a) provides that, subject to Section 12(f) (the records retention section discussed immediately above), State agencies "shall determine whether, and the extent to which" they "will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use and rely upon electronic records and electronic signatures." That this provision preserves absolutely the authority of State agencies to refuse to accept electronic records for filing if it chooses not to accept them, or to accept them under particular circumstances and not others, is expressly and unequivocally re-stated in UETA 18(c): "Except as otherwise provided in Section 12(f), this Act does not require a governmental agency of the State to use or permit the use of electronic records or electronic signatures."³³ UETA 18(b) delineates with particularity the matters which a government may specify, including the "manner and format" in which electronic records are stored, generated, received, etc., any requirements for electronic signatures, any processes for assuring records integrity and the similar matters.

The authority in UETA 18 is qualified in UETA 19 by a mildly-worded directive permitting State agencies (or, alternatively, as designated State officer) to take into account the

³¹ See the discussion above of federal E-Sign 104, and the difference of opinion on this point between two of its sponsors, Senator Leahy and Representative Bliley. To the extent that federal E-Sign can be read to impose requirements on the internal workings of State governments, it raises the constitutional issues noted elsewhere in this Report.

³² UETA 17, discussed above, pertains to records used within government agencies, and provides that each State agency (or, alternatively, a designated State officer) shall determine whether, and the extent to which "the agency will create and retain electronic records and convert written records to electronic records." Note that the absolute authority of State agencies to refuse to accept electronic records for filing is also implied in UETA 5(b), which provides that "This Act applies only to transactions between parties each of which has agreed to conduct transactions by electronic means."

³³ Compare the discussion above of E-Sign 104(a), the interpretation of which is the subject of disagreement between the Senate and House sponsors. While the Senate sponsor

promotion and encouragement of interoperability among electronic systems in adopting standards.

(3) Requirements for sending and receiving information

UETA 8(b)(2) is one of the UETA provisions which is expressly mentioned in the federal E-Sign legislation. UETA 8(b)(2) provides that the operative provisions of UETA do not affect laws which require a record to be "sent, communicated or transmitted" by a specified method, such as a requirement that information be sent by mail. The federal legislation states in a subsection entitled "Prevention of circumvention" that this section of UETA should not be used to "circumvent" the provisions of the federal legislation. E-Sign 102(c). Apparently this section of UETA was viewed as providing States an opportunity to enact laws that would defeat the use of electronic methods of transacting by requiring traditional methods of delivery.

Although the injunction in E-Sign 102(c) inhibits the enforceability of newly-enacted State laws which impose these kinds of requirements, it may not reach State laws already in existence. A State which already enacted laws or regulations which prescribe such requirements, well prior to the enactment of the federal Act, should not be regarded as "circumventing" the provisions of the federal legislation. Therefore, this provision of UETA should be regarded as preserving existing laws which fall within its ambit, while the federal legislation would preempt only those laws which a State might later add which would have the effect of inhibiting parties in transacting electronically.

B. Recommended amendments to UETA and recommended changes in other New Jersey Statutes

If UETA is enacted in New Jersey, there are a number of amendments that should be made to the official text to conform it to certain provisions in federal E-Sign. In addition, at least one change should be made in the New Jersey Statutes, to repeal the current definition of the term "writing" in Title 1. These recommended amendments and repeals are set forth below.

UNIFORM ELECTRONIC TRANSACTIONS ACT

SECTION 3. SCOPE.

(a) Except as otherwise provided in subsection (b), this Act applies to electronic records and electronic signatures relating to a transaction.

(b) This [Act] does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A;

~~(3) [the Uniform Computer Information Transactions Act]; and~~

~~(4) [other laws, if any, identified by State]~~

(3) a statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; or

(4) court orders or notices, or official court documents (including briefs, leadings, and other writings) required to be executed in connection with court proceedings;

(5) any notice of

(A) the cancellation or termination of utility services (including water, heat, and power);

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or

(D) recall of a product, or material failure of a product, that risks endangering health or safety; or

(3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

COMMENT

Although UETA drafters anticipated that States would exempt certain transactions and specific State laws from its operative provisions (see UETA 3(b)(4)), the extent to which this can be done consistently with federal E-Sign is limited. E-Sign 102(a) provides that States may not add any exemptions under UETA 3(b)(4) if they are "inconsistent" with the federal legislation. The federal legislation itself contains a list of additional exemptions not included in UETA. Because the exemptions listed in federal E-Sign, are not, by definition, "inconsistent" with federal E-Sign they can be added to a State enactment of UETA.³⁴ The additional federal exemptions should be added, not only for consistency with the scope of the federal law, but also because each of the exemptions from the rules of electronic transacting is supported by policy reasons articulated during the passage of the bill through the federal legislative process.

³⁴ That these exceptions in E-Sign 101(c) may be incorporated into a State's enactment of UETA, even though they are not part of the "official" version of UETA, is supported both by textual analysis of the provisions and by the legislative history of the federal E-Sign legislation. E-Sign 102(a)(1) invites the enactment of State laws which "modify, limit or supersede" its provisions, provided that the enactment "constitutes an enactment or adoption of" UETA as approved and recommended by NCCUSL. The "official" version of UETA is typical of many NCCUSL Uniform Law proposals in that it contains certain optional and bracketed provisions, including 3(b)(4), which are included in anticipation of individual State variations with respect to those provisions. The only constraint in E-Sign 102(a)(1) on UETA 3(b)(4) exceptions is that they not be "inconsistent" with the provisions of the E-Sign legislation and that they not run afoul of E-Sign 102(a)(2)(ii) by favoring any particular form of electronic technology. See, in that regard, the statement of Senator Leahy on the floor of the Senate at the time the Conference Committee Report was presented to the Senate. "By contrast, the conference report does not preempt the laws of those States that adopt UETA, so long as UETA is adopted in a uniform manner. Such exceptions to UETA as a State may adopt are preempted, but only to the extent that they violate the principle of technological neutrality or are otherwise inconsistent with the federal statute." See Cong Rec. S5221 (June 14, 2000):

SECTION 21. EFFECTIVE DATE.

This Act takes effect immediately.

COMMENT

In light of the October 1, 2000, effective date of federal E-Sign, UETA should be enacted with an immediate effective date.

[NEW SECTION] CONSUMER TRANSACTIONS

a. Notwithstanding any other provision of this Act, if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if

(1) the consumer has affirmatively consented to such use and has not withdrawn such consent;

(2) the consumer, prior to consenting, is provided with a clear and conspicuous statement

(A) informing the consumer of

(i) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and

(ii) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

(B) informing the consumer of whether the consent applies

(i) only to the particular transaction which gave rise to the obligation to provide the record, or

(ii) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(C) describing the procedures the consumer must use to withdraw consent as provided in (a)(2)(A) of this Section and to update information needed to contact the consumer electronically; and

(D) informing the consumer

(i) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and

(ii) whether any fee will be charged for such copy;

(3) the consumer

(A) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(B) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; and

(4) after the consent of a consumer in accordance with (a)(1) of this section, if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record

(A) provides the consumer with a statement of

(i) the revised hardware and software requirements for access to and retention of the electronic records, and

(ii) the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under (a)(2)(A) of this section; and

(B) again complies with (a)(3) of this section.

b. Nothing in this Act affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

c. If a law that was enacted prior to this Act expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).

d. The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with (a)(3)(B) of this section.

e. Withdrawal of consent by a consumer shall not affect the legal effectiveness, validity, or enforceability of electronic records provided or made available to that consumer in accordance with subsection (a) prior to implementation of the consumer's withdrawal of consent. A consumer's withdrawal of consent shall be effective within a reasonable period of time after receipt of the withdrawal by the provider of the record. Failure to comply with (a)(4) of this section may, at the election of the consumer, be treated as a withdrawal of consent for purposes of this subsection.

f. This subsection does not apply to any records that are provided or made available to a consumer who has consented prior to the effective date of this Act to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

g. An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this section except as otherwise provided under applicable law.

COMMENT

This amendment to UETA incorporates the consumer protection provisions which are included in E-Sign 101(c). Although it may be argued that the federal consumer provisions continue to be effective in a State which enacts UETA despite the anti-preemption provisions of E-Sign 101³⁵, they should be affirmatively embraced in this State's enactment of UETA regardless. Their inclusion in UETA provides, to the fullest extent possible, a single State legislative source for the law applicable to electronic transactions and resolves any questions regarding the continued applicability of E-Sign 101(c) which might give rise to litigation. In addition, these consumer protection provisions are meritorious in their own right as they remedy some of the concerns that arise in electronic consumer transactions. Most significantly, these provisions require a commercial party seeking a consumer's consent to future electronic transactions, to take steps to assure that the consumer is able to conduct electronic transactions.

Note that the same analysis of the acceptability of adding the federal E-Sign exceptions applies equally to the consumer provisions: they are not, by definition, inconsistent with federal E-Sign, therefore a State enactment of UETA may include them without losing the "preemption effect" of E-Sign 102(a). See the further discussion of this point above in the Comment to UETA 3. SCOPE.

[NEW SECTION]. LEGISLATIVE FINDINGS.

The Legislature finds and declares:

that the adoption of the "Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000), popularly known as "federal E-Sign,"

³⁵ Presumably, the argument that would be made on this point is that the official version of UETA does not contain any provisions which "modify, limit or supersede" the consumer provisions in E-Sign 101(c), thus these provisions of federal E-Sign survive a State enactment of UETA. Supporting the above textual analysis of E-Sign is the following Statement of Senators Hollings, Wyden and Sarbanes, all of whom were members of the Conference Committee:

Of course, the rules for consumer consent and accuracy and retainability of electronic records under this Act shall apply in all states that pass the Uniform Electronic Transactions Act or another law . . . in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points. A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supercede or displace the requirement of section 101. In a state which enacts UETA after passage of this Act, without expressly limiting the consent, integrity and retainability subsections of 101, those requirements of this Act would remain in effect. The general provisions of UETA, such as the requirement for agreement to receive electronic records in UETA are not inconsistent with and do not displace the more specific requirements of section 101, such as the requirement for a consumer's consent and disclosure in section 101(c).

146 Cong. Rec. S.5229-5230 (June 15, 2000).

encourages States to enact the Uniform Electronic Transactions Act proposed for adoption by the National Conference of Commissioners on Uniform State Laws; and

that the adoption of the Uniform Electronic Transactions Act will invoke the provisions of Section 102 of Pub. L. No. 106-229 which state that the federal law will no longer preempt the laws of an enacting State; and

that Section 102 of Pub. L. No. 106-229 also provides that a State, in enacting the Uniform Electronic Transactions Act, may "modify, limit or supersede" the provisions of the federal law; and

that it is desirable for this State to take the fullest possible advantage of the ability to "modify, limit or supersede" Pub. L. 106-229; and

that it is the intention of the Legislature that the adoption of the Uniform Electronic Transaction Act in this State modify, limit and supersede the provisions of Pub. L. No. 106-229 to the fullest possible extent permitted under the federal law.

COMMENT

Section 101(a) of the federal E-Sign legislation provides that a State may "modify, limit or supersede" by enacting the Uniform Electronic Transactions Act. This legislative findings section makes it clear that UETA is being enacted with that express purpose, to the fullest extent that it is permitted under the federal law.

Recommendations for Repeal

N.J.S. 1:1-2.4 Writing; written instruments; typewriting³⁶

COMMENT

N.J.S. 1:1-1.4 , which contains the general statutory definition of the term "writing," should be repealed, as it can be interpreted to be inconsistent with the general provisions of UETA. Note that the definition is not comprehensive, it states only that the term writing "includes" duplicates and typewritten documents.

IV. Consideration of additional legislation

The adoption of UETA has consequences that may require the adoption of corrective legislation, in addition to the possible reenactment of records retention requirements under UETA 12(f)(see discussion above).

A. Notarization

The Commission has some concerns over the effect of UETA 11, which permits electronic records to be notarized by affixing to (or "logically associating" with) the electronic record being signed, the same information that is required to be affixed to a traditional document. In other words, in place of a notary's holographic signature on a paper document, the notary's typed name, along with the typed name of the signer, is sufficient. Whatever anti-fraud purpose is

³⁶ N.J.S. 1:1-2.4 provides "Except as to signatures, 'writing' includes typewriting and the product of any other method of duplication or reproduction and 'written instruments' includes typewritten instruments and instruments so duplicated or reproduced."

served by the current requirement of a holographic signature on paper is largely negated if signatures on an electronic document can be represented simply by typing the name of the signatory and the notary.

The Commission believes that the Legislature should give further consideration to legislation that would require officers undertaking notarial acts to obtain and keep records of additional information concerning the identity of signers.³⁷ The requirement of personal presence before a notary is probably a greater protection against fraud than the requirement of a holographic signature on paper.

B. Land title recordation

If there were no federal constraints placed upon the substantive exemptions from UETA, this Commission would recommend that conveyances of an interest in land be exempted from its provisions. One of the major consequences of the adoption of UETA without exempting conveyances of an interest in land is the validation of deeds and mortgages and other conveyances of an interest in land which are executed electronically. However, there is currently no provision in New Jersey, either by law or in practice, for the recordation of a deed or mortgage in electronic form. Electronic filing of documents of title raises many policy and practical issues, not the least of which is the cost of the equipment that would be required to implement such a system.

The effects under New Jersey law of validating an electronic deed or mortgage that cannot not be recorded in the land records in electronic form is highly problematic. For example, even though an unrecorded conveyance of property is valid between the parties, see N.J.S. 46:22-1, the Recording Act provides that a "deed or instrument" until it is "duly recorded or lodged for record" in the county recording office is "void and of no effect against subsequent judgment creditors without notice...." *Id.* It seems unlikely that a title company would insure a transaction which utilized an electronic deed or that a lender would finance it if the deed could not be recorded. Moreover, recognition of such transactions would be contrary to the policy expressed in the Recording Act, that favors publicity of land titles and reliance on the public land records. The existence of valid documents of title which are not included in the chain of title which is searchable in the land records is contrary both to the private interests of the parties to transactions as well as to the public interest in the stability of the land title recordation system. See N.J. Bank v. Azco Realty, 148 N.J. Super. 159, 166-67 (App. Div. 1977) where the court stated that the Recording Act "was designed to compel the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title and to purchase and hold title to lands within this state with confidence.

³⁷ Senator Gormley introduced legislation to that effect in the last legislative session. See S311 (108th Legislature 1998) (copy attached). The Commission also believes that the requirement under current law that the signing, acknowledging or oath-taking party be in the personal presence of the notary or other officer who is undertaking the notarial act be made explicit rather than implicit in the New Jersey Statutes. There is a good deal of rhetoric which infects the discussion of electronic transacting, including frequent references to transactions taking place "in cyberspace." It should be made clear that UETA does not change the requirement that notarial acts take place in real space inhabited by the notary and the signing, acknowledging or oath-taking party, in immediate proximity to one another. The Official Comment to UETA 11 recognizes the requirement of personal presence in the examples that are given of how the notarization of an electronic document would be accomplished, but the point is not strongly made.

The drafters of UETA did not consider it a problem, that a State which enacts UETA would be validating electronically-executed deeds and mortgages without necessarily providing for their filing in the land records. See UETA 3 SCOPE, Comment 3. The Comment blithely assumes that a "paper deed" representing an electronically-executed transaction may be filed in the land records of any given State. Currently, however, there is no express provision in the law of the State of New Jersey for the filing of a paper copy of an electronically-executed deed or mortgage, and it is unclear whether such a document would be required to be accepted for filing. The law should be clarified to provide for such filings as it is highly undesirable to have open questions regarding the ability to record documents affecting title to real estate.

In the short run the proliferation of electronic deeds and mortgages which cannot be recorded is probably not a problem, as title companies are likely to be a practical constraint on the widespread use of electronic documents and signatures in conveyancing for the time being. Nevertheless, consideration should be given to the subject of title recordation and any changes that should be made in the statutes to accommodate the reality of such transactions, as they will surely become more prevalent in the future.

State of New Jersey



New Jersey Law Revision Commission

TENTATIVE REPORT

relating to

THE NEW JERSEY COMMON INTEREST OWNERSHIP ACT

June 2000

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN SEPTEMBER 1, 2000

Please send comments concerning this tentative report or direct any related inquiries, to:

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
email: reviser@eclipse.net
web site: <http://www.lawrev.state.nj.us>

The New Jersey Common Interest Property Act

Introduction

The New Jersey Common Interest Property Act developed from several initiatives taken in 1995 to update statutes governing horizontal property rights, condominiums, cooperatives and planned real estate developments. A modified version of the Uniform Common Interest Ownership Act (1994) (called "UCIOA") was prefiled in the State Assembly for consideration in the 1996 session. The Assembly created a Task Force to Study Homeowner Associations which met with homeowners and others from 1995 until it issued A Report of Findings and Recommendations in January 1998. Pursuant to its responsibility to review uniform laws the Law Revision Commission in 1995 undertook comprehensive revision of the statutes employing the uniform act as a framework. The Commission decided that it was preferable to prepare a comprehensive act specifically designed for New Jersey using the Uniform Act as a guide.

In 1998, approximately 42 million, or 15% of the U.S. population, lived in common interest properties. By the year 2000, more than 50 million will live in over 205,000 communities. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 Santa Clara L. Rev. 1135 (1998). Common interest communities occupy a growing segment of the housing market, accounting nationwide for approximately one third of new construction, and in some markets over one half. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 Santa Clara L. Rev. 1135 (1998). Since 1978, 372,963 condominium and cooperative units have been built in New Jersey. It has been estimated that between 15 and 20 percent of the residents of New Jersey now live in common interest properties. Communities accommodate diverse segments of the housing market from the marginal first time homeowner to the gated developments of the affluent. The future points to their being widespread:

Whether one focuses on the housing pattern in large cities or upon suburbia one is led inexorably to the conclusion that the age of community association living, as opposed to renting or owning a one-family house, is upon us. The rental market in every urban center is rapidly disappearing as high-rise buildings are torn down, devoted to commercial uses, or converted into condominium or cooperative housing. Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 St. John's L. Rev. 3, 5-6 (1999).

Though most development is residential, a development may be entirely commercial or consist of mixed uses. See Beck, *Beware the Inadvertent Condominium: The Commercial Common Interest Community Choices under the Uniform Common Interest Ownership Act and the Uniform Condominium Act*, 22 Real Prop. Prob. 7 Tr. J. 65 (1987). Reflecting this diversity, the Commission's draft preserves the consumer protective provisions in residential developments, while allowing greater latitude where a

community consists solely of non-residential units. Just as communities are diversified in use, their size may range from a 2 or 3 unit converted urban brownstone to a multi-use planned town with facilities more extensive than some municipalities.

The act creates a single framework for statutes governing all types of “common interest property” which refers to real property consisting of separately owned units, irrespective of form, to which an undivided interest in common elements is attached. Condominiums are the most common form of common interest property. Each unit is owned in fee simple while common areas are owned collectively by all unit owners who are automatically members of a governing association. Condominiums are statutory creations, there being none at common law. *The Berkley Condominium Association Inc. v. The Berkley Condominium Residences, Inc.*, 185 N.J. Super 313, 319 (Ch. Div. 1982). As a matter of history, it appears that the first statute creating condominiums in the United States was that enacted in Puerto Rico in 1958. All states presently have statutes modeled after either the Puerto Rican statute or after the 1962 Federal Housing Administration model condominium statute. UNIFORM REAL PROPERTY ACTS. OFFICIAL 1990 TEXT WITH COMMENTS. St. Paul, MN: West Publishing Co., 9. Two statutes exist in N.J., N.J.S. 46:8A-1 et seq. and N.J.S. 46:8B-1 et seq.

Cooperatives involve a corporation holding title to the land and building and each resident owning stock in the corporation along with a long term, renewable “proprietary lease.” See 2A Rohan & Riskin, *Cooperative Housing Law and Practice*, Secs. 9:01-01 (1998). While real estate cooperatives appear to have existed before legislation specifically authorizing them, cooperatives now are controlled by statute. N.J.S. 46:8D-1 et seq.

The act would accommodate other emerging forms of coownership. For example, there is “cohousing,” a small scale development originated by its owners consisting of privately owned units together with a “common house” providing shared facilities and employing collective, consensus based decision making. See U.S. Department of Housing and Urban Development, *Urban Development, Building Innovation for Homeownership* 4, 100 (1998); Fenster, *Community by Covenant, Process and Design: Cohousing and the Contemporary Common Interest Community*, 15 *J. Land Use & Envtl. Law* 3 (1999).

Detached single family residences subject to restrictive covenants or servitudes would not be affected because the Act requires that there be an undivided interest in common elements, and these communities involve no commonly owned property, only mutually restrictive covenants. Enforcement of restrictions in these communities will continue to be governed by the law of servitudes or restrictive covenants.

Common interest property law requires accommodating the legitimate interests of diverse, frequently conflicting groups, including developers, unit owners and the governing associations of the common interest properties. Common interest properties inherently involve regimes in which unit owners sacrifice some freedoms traditionally associated with real property ownership, vesting them in the association or its governing

board. Unit owners receive title to units and interests in “common areas” (ranging from a simple entranceway to extensive recreational facilities). Unit owners pay charges for the maintenance, repair and replacement of common areas.

Often the master deed and bylaws grant the association extensive powers sometimes compared to those of local governments. See Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 *J. Marshall L. Rev.* 303 (1998); Siegel, *The Constitution and Private Government: Toward Recognition of Constitutional Rights in Private Residential Communities Fifty Years after March v. Alabama*, 6 *Wm. & Mary Bill of Rts. J.* 461 (1998). Determining the extent of these powers to control both units’ physical characteristics and occupancy or conduct within units will continue to generate litigation, sometimes detrimental to both a sense of community and the economic and personal well being of participants. Association intrusions in lifestyle choices may produce heated conflict. For example, banning cats resulted in litigation reaching California’s Supreme Court and prompting a strong dissent amplified in a law review article. See Arabian, *Condos, Cats and CC&R’s: Invasions of the Castle Common*, 23 *Pepp. L. Rev.* (1995).

Two schools of thought have emerged concerning the proper extent of association regulations. Associations and their managers favor a “business judgment” analysis which would narrow review but unit owners and scholars may propose that association conduct and rules judged by a “reasonableness” standard affording more judicial review of rules. Compare Hyatt, *Common Interest Communities: Evolution and Reinvention*, *supra.* with Franzese, *Common Interest Communities: Standards of Review and Review of Standards* (Forthcoming 2000). See Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 *Stetson L. Rev.* 1133 (1983). In New Jersey the boundaries of rule making power are uncertain, being based on a reasonableness test with aspects of the business judgment rule woven in. *Papalexiou v. Tower W Condominium*, 167 *N.J. Super.* 516, 401 *A.2d* 280 (Chan. Div. 1979). The Law Revision Commission draft of UCIOA adopts a reasonableness standard and requires that the restrictions be no greater than those a lessor could impose on a residential tenant in keeping with a philosophy of the Restatement Third (Property) Servitudes, and *N.J.S. 46:8B-13(d)*. See also Franzese, *supra.* at 25.

This act provides how a common interest property is to be created and governed, how its governing documents are enforced and requires alternative dispute resolution for conflicts between associations and unit owners and among unit owners. The act also provides for certain protection of purchasers in Article 4, but more protection is provided by the “Planned Real Estate Development Full Disclosure Act” (P.L. 1977, c. 419; C. 45:22a-21 et. seq.) which is not displaced by this act. In addition, federal securities law may provide alternative and additional remedies in some cases. See Art, *Sell a Condominium, Buy A Lawsuit: Unwarranted Liabilities in the Secondary Market*, 53 *Ohio St. L. J.* 413 (1982).

Article 1. General Provisions.

101. Short title.

This Act shall be known and may be cited as the “New Jersey Common Interest Property Act.”

Source: New.

COMMENT

The title of the act is new. The act encompasses all real property owned as condominiums, cooperatives, planned community developments, time-shares and any other entity sharing the characteristic of ownership of a separate unit of real property along with co-ownership with other unit owners of common elements of real property. The Uniform Law Commissioners used the generic title, “common interest ownership,” a title not burdened by identification with any of the subtypes, but inclusive of all. The term “common interest association” is used to describe the entity that governs the common interest property.

102. Applicability.

a. This act shall govern the rights, duties and powers of all persons relating to common interest property in this State including common interest properties established pursuant to this act, properties established as real estate cooperatives, properties established pursuant to the “Horizontal Property Act,” (P.L. 1963, c. 168) or the “Condominium Act” (P.L. 1969, c. 257), or properties subject to the “Planned Real Estate Development Full Disclosure Act” (P.L. 1977, c. 419; C. 45:22a-21 et. seq.).

b. Any action relating to a common interest property that occurred prior to the effective date of this act shall be governed by the law at the time of the action.

c. This act shall not be construed to impair the obligations of any contract made prior to the effective date of the act.

d. Within two years after the effective date of this act, a common interest property created prior to the effective date of this act may make the property subject to specific provisions of law that were in effect before the effective date of this act by amending its declaration or master deed to specifically identify the provisions of prior law that will govern the property. The amendment shall be adopted if:

(1) 75 percent of the entire association board approves;

(2) the board delivers or sends to the mailing address of each unit owner notice of the amendment with a brief statement explaining the effect of the action; and

(3) unit owners holding more than 33 percent of all allocated voting rights do not file written objection to the proposed amendment within 30 days of the delivery or mailing.

e. Notwithstanding an amendment as provided in subsection (d), every common interest property shall be subject to the following sections of this act: §218 (Termination of common interest property), §219 (Merger of common interest properties), §302 (Powers), §303 (Board members, officers and managing employees), §304 (Conflicts of

interest), §307 (Penalties), §308 (Rules and regulations), §310 (Association meetings) §311 (Board meetings), §314 (Dispute resolution), §320 (Liens in favor of association; priority), §322 (Association records), §401 (Sales of units), §402 (Express warranties), §403 (Implied warranties), §404 (Exclusion or modification of implied warranties of quality), and §405 (Statute of limitations for warranties).

f. An amendment as provided for in subsection (d) shall be recorded, and not affect any interest recorded prior to the recording of the amendment.

g. This act shall not supersede the “Planned Real Estate Development Full Disclosure Act” (P.L. 1977, c. 419; C. 45:22a-21 et. seq.).

Source: New.

COMMENT

As a basic principle, this section applies the act to every common interest property in the State whether created before or after the effective date of the act. The rationale is to avoid the inevitable confusion for both lenders and consumers that would arise if different laws apply to different common interest communities.

Subsection (b) reaffirms the common law principle that with respect to actions taken prior to effective date of this act the law in effect at the time will govern. Subsection (c) excludes application of the act to the extent that application would violate the constitutional protection against impairment of contracts. In *Berkley Condo. Ass’n*, 185 N.J. Super 313, 320-322 (Ch. Div. 1982), the court held amendments to the Condominium Act creating rebuttable presumptions against certain contractual rights claimed by developers were constitutionally valid so long as the rights had not vested. The court also held that a potential for future profits was not a right that had vested.

Subsection (d) is an opt-out provision allowing a property to subject itself to specific law existing before the effective date of the act. The subsection requires an affirmative vote of 75% of the Board and acquiescence by 67% of unit owners to be covered by pre-existing law rather than this act. Those percentages are higher than that required for other actions of a common interest real property, but a change in applicable law is serious enough to warrant such a safeguard. Compare section 217 (b) requiring 67% generally for changes in by-laws, §217(c) requiring 80% for enactment of certain restrictions on the use of units and §218 requiring 80% for termination of common interest properties. Subsection (e) lists certain basic provisions of the act for which there is no right to opt-out. Subsection (f) safeguards interests established prior to recording the resolution.

103. Definitions.

As used in this act, unless specifically provided otherwise:

a. "Affiliate of a sponsor" means any person who controls, is controlled by, or is under common control with a sponsor.

A person "controls" another, if the person

(i) is a general partner, officer, director, or employer of the other,

(ii) directly or indirectly or acting in concert with other persons, or through subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the other,

(iii) controls in any manner the election of a majority of the directors of the other, or

(iv) has contributed more than 20 percent of the capital of the other.

Control does not exist if the powers described in this definition are held solely as security for an obligation and are not exercised.

b. "Allocated interests" means the following interests allocated to each unit: (i) in a condominium, the undivided interest in the common elements, the common expense liability, and votes in the property; and (ii) in a cooperative, the common expense liability and the ownership interest and votes in the property.

c. "Common elements" means all portions of the common interest property other than the units and any other interests in real estate for the benefit of unit owners which are subject to the master deed. "Common elements" include "limited common elements."

d. "Common expenses" means expenditures made by, or financial liabilities of, the association, together with any allocations to reserves.

e. "Common interest association" means an entity governing common interest property that is subject to this act.

f. "Common interest property" means property that consists of separately owned units, irrespective of form, to which an undivided interest in common elements is attached.

g. "Department" means the Department of Community Affairs.

h. "Limited common element" means a portion of the common elements allocated by the declaration or by operation of Section 204(c) for the exclusive use of one or more but fewer than all of the units.

i. "Sponsor" means a person who (i) as part of a common promotional plan, offers to dispose of an interest in a unit not previously disposed of or (ii) reserves or succeeds to any special sponsor right, or (iii) applies for registration of a common interest real property under the "Planned Real Estate Development Full Disclosure Act" (P.L. 1977, c. 419; C. 45:22a-21 et. seq.).

Source: New.

COMMENT

Most of the definitions have been selected from those appearing in U.C.I.O.A. 1-103. The definition of "common interest property" is derived from the definition in the Planned Real Estate Development Full Disclosure Act, N.J.S. 45:22A-21(h), which reads:

"Planned real estate development" or "development" means any real

property situated with the State, whether contiguous or not, which consists of or will consist of, separately owned areas, irrespective of form, be it lots, parcels, units, or interest, and which are offered or disposed of pursuant to a common promotional plan, and providing for common or shared elements or interests in real property.

This definition shall specifically include, but shall not be limited to, property subject to the “Condominium Act” (P.L. 1969, c. 257, C. 46:8B-1 et seq.), any form of homeowners’ association, any housing cooperative or to any community trust or other trust device.”

The words, “sponsor” and “master deed” have been chosen from various possibilities presented by current and model legislation. The word “sponsor” is defined; the phrase “master deed” was judged not to need definition. In New Jersey, the “Horizontal Property Act” refers to “owners” or co-owners” filing a master deed. The “Condominium Act” refers to the person who creates a condominium as “developer.” The “Cooperative Recording Act of New Jersey” avoids the issue by use of the passive voice so that the cooperative is created by recording a master declaration. Elsewhere, the Uniform Condominium Act (1977), the Uniform Planned Community Act (1980), the Uniform Common Interest Ownership Act (1982) (1994), and the Model Real Estate Cooperative Act (1981) all use the term “sponsor.” The Model Real Estate Time-Share Act (1980) uses the term “developer.”

The term “declaration” is used in the Uniform Common Interest Ownership Act (1982, 1994). It also appears in the Uniform Condominium Act (1977), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981). This instrument is called “master deed” in N.J. Condominium Act (N.J.S. 46:8B-1 et seq.). The N.J. “Cooperative Recording Act” (N.J.S. 46:8D-1 et seq.) refers to the parallel document as “master declaration.”

104. Variation by agreement excluded.

The provisions of this act may not be varied by agreement except as expressly provided in this act.

Source: New.

COMMENT

This section is derived from the U.C.I.O.A. §1-104.

105. Unit owner’s interest as real estate; security interests; taxation.

a. A unit owner’s share and leasehold interest in a cooperative shall be treated as an interest in real estate except that the real estate comprising the entire cooperative shall be assessed and taxed as an undivided parcel.

b. In a common interest property that is not a cooperative, each unit, together with its interest in the common elements, constitutes a separate parcel of real estate.

Source: 46:8A-26; 46:8B-19.

COMMENT

Subsection (a) of this section classifies the unit owner’s interest in a cooperative as an interest in real estate except for the purpose of tax assessment. This resolves an important theoretical and practical issue which pervades the cooperative field: whether a unit owner in a cooperative holds an interest in real or

in personal property. This classification changes New Jersey law, which characterized cooperative property as a hybrid of real and personal property. N.J.S. 46:8D-2. The Cooperative Recording Act (1987) (N.J.S. 46:8D-1 et seq.) acknowledges that (a) the public perceives cooperative units as having at least some of the characteristics of real estate; (b) purchasers of cooperatives seek protections “in cooperative leasing transactions similar to those protections available in transactions for the purchase of real estate, namely, a public title record, title searches to guarantee security of title, unpaid liens, unsatisfied judgments, unpaid taxes, freedom from municipal violations, title insurance and the equivalent of a mortgage where a cooperative unit is the asset to be pledged as security for the purchase loan.” N.J.S. 46:8D-2. For these reasons the Cooperative Recording Act provided for title registration. A sale or transfer of stock and a proprietary lease in a cooperative is recorded in the county recording office. N.J.S. 46:8D-12. The same law subjected cooperative sales to the fees prescribed for real property documents. N.J.S. 46:8D-13. Nonetheless, because of uncertainties in current law, to perfect their interests, lenders have had to record financing statements or security agreements on pledges of cooperative stocks and proprietary leases with both the Secretary of State under N.J.S. 12A:9-301 (U.C.C. secured transactions) and with the county recording officer under N.J.S. 46:8D-14. Subsection (a) makes the first recordation unnecessary.

Subsection (b) restates New Jersey law with reference to all common interest properties other than cooperatives.

106. Applicability of zoning, planning and building codes; entry on common interest property.

a. All laws, ordinances and regulations concerning zoning, planning, construction, maintenance and use of property shall be applied to common interest property without regard to the form of ownership. No law, ordinance or regulation may impose a requirement which it would not impose upon a physically similar structure under a different form of ownership.

b. Agents of the State and its subdivisions having jurisdiction over persons or property within the common interest property have the same authority to enter the common elements for the service of process or maintaining the safety, health, welfare, police and fire protection of residents as they would on similar property under other forms of ownership.

Source: N.J.S. 46:8B-29.

COMMENT

Though simplified, subsection (a) is substantially identical to its source. Subsection (b) insures access to communities required for public officials to carry out their responsibilities in reference to unit owners.

107. Effect of eminent domain on common elements.

a. If there is a taking of a unit by eminent domain, that unit's interests in common elements shall be automatically reallocated to the remaining units in proportion to the allocated interests of those units before the taking.

b. If there is a taking of a part of a unit by eminent domain, that unit's voting rights and interests in common elements shall not be reallocated.

c. If any part of the common elements is taken by eminent domain, each unit owner shall have a right to notice and the right to participate through the association in any proceedings. The award attributable to the common elements taken shall be paid to the association and distributed by it among the unit owners in proportion to each unit owner's undivided interest in the common elements, except to the extent that the association deems it appropriate to apply it to the repair or replacement of the affected common elements. Unless the master deed provides otherwise, any portion of the award attributable to the taking of a limited common element shall be divided among the owners of the units to which that limited common element was allocated at the time of condemnation.

d. The board of the common interest association shall amend the master deed to reallocate interests as required by this section.

Source: 46:8B-25.

COMMENT

This section supplements the general law on eminent domain (N.J.S. 20:3-1 *et seq.*) by addressing problems raised in the context of common interest property. If a unit is taken, the owner is entitled to the ordinary market value of the unit even though some of that value may be based on the use of common elements that are not taken. After the taking, as provided in subsection (a), percentage interests in the common interest property are re-allocated to reflect the fact that there is one fewer unit owner. Subsection (b) provides that if only a part of a unit is taken, the unit owner is entitled to the reduction in the ordinary market value of the unit caused the loss of the part. The subsection provides that even though the unit is now less valuable, percentage interests in the common interest property are not adjusted to reflect that fact. Subsection (c) establishes that the association receives the award for common elements that are taken. Awards for general common elements belong to the common interest association to be used for restoration of the common elements or divided as provided in the master deed and bylaws. Awards for limited common elements are paid to the unit owners who had use of those elements. While the subsection requires that unit owners receive notice of takings of common elements, it should not be read to indicate that others may not be entitled to notice under other law.

Article 2. Creation, alteration, and termination of common interest properties.

201. Creation of common interest property.

A common interest property may be created only by recording a master deed executed in the same manner as a deed; and if the property is a cooperative, by conveying the real estate to the common interest association. The master deed shall be recorded in every county in which the property is located.

Source: N.J.S. 46:8A-9; 46:8B-8; 46:8D-5; 46:8D-9.

COMMENT

The section continues provisions of current New Jersey law codified in the source sections. Unlike the uniform law, New Jersey law has never required completion or substantial completion of a project before the master deed is recorded.

202. Required contents of master deed.

The master deed shall contain:

a. The name of the common interest property, and if a cooperative, followed by the word “a cooperative”.

b. A legally sufficient description of the real property that constitutes the common interest property.

c. A survey of the land and plans or other graphic description of the improvements erected or to be erected thereon in sufficient detail to show and identify units and common elements and their respective locations and approximate dimensions. A licensed engineer or architect shall certify that plans or other graphic descriptions constitute a correct representation of the improvements to the land. The survey shall:

(1) Show recorded easements, encroachments on, and licenses appurtenant to or included in the common interest property; and

(2) Label any contemplated improvement shown either “SHALL BE BUILT” or “NEED NOT BE BUILT.”

d. An identification of each unit by distinctive letter, name or number.

e. The proportionate undivided interests in the common elements and limited common elements, if any, allocated to each unit. Interests shall be stated as percentages aggregating 100 percent.

f. The share of common expense and common surplus allocated to each unit, if different from the proportionate undivided interests in the common elements allocated to each unit, stated as percentages aggregating 100 percent.

g. A description of the common elements and any limited common elements.

h. A description of any property that may become common elements or limited common elements.

i. The person designated to receive service of process for the association.

Source: N.J.S. 46:8A-9; 46:8B-9; N.J.S. 46:8B-11; 46:8D-6.

COMMENT

This section revises content requirements of New Jersey law in the light of provisions included in U.C.I.O.A. § 2-105. It does not provide a complete list of provisions that should be included in a master deed. Sections 211 and 212 require that the interests of the various units must be specified, and §203 requires that the bylaws be recorded with the master deed. Other sections require that certain provisions, to be effective, must be in the master deed. See §206, Sponsor’s reserved rights, §210, Unit occupants, qualifications and restrictions, §214, Relocation of unit boundaries, §217, Amendment of master deed and bylaws. There are also sections that allow an ordinary statutory rule to be varied by a provision in the master deed. See, e.g. §204, Unit boundaries, §213, Alterations of units, §216. Easement rights, §218, Termination of common interest property.

203. Bylaws.

a. The bylaws of a common interest association shall be recorded with the master deed and shall provide for:

(1) the voting rights of unit owners if different from the proportionate undivided interests in the common elements allocated to each unit;

(2) the number of members of the board and the titles of the officers of the association;

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

(4) powers that the board or officers may delegate to other persons or to a managing agent;

(5) the method for amending the master deed and bylaws, but no amendment shall be effective until it is recorded;

(6) which officers may execute and record amendments to the master deed and bylaws on behalf of the association;

(7) the method for adoption and enforcement of administrative rules relating to the use and maintenance of units and common elements, including the imposition of fines and late fees which may be enforced as a lien pursuant to this act;

(8) the method of collecting expenses from unit owners; and

(9) the method of use or distribution of surplus.

b. The bylaws may provide for any other appropriate matters.

Source: N.J.S. 46:8b-13.

COMMENT

This section's premise is that the bylaws, which provide for the management of the common interest association, are an integral part of the master deed. As provided in N.J.S. 46:8B-13, the master deed, bylaws and amendments to them are effective only when recorded. Subsection (a)(7) embodies a 1996 amendment to the source law which authorized communities to adopt administrative rules and fines.

204. Unit boundaries.

Except as provided by the master deed:

a. If walls, floors, or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plaster, tiles, finished flooring, and any other materials constituting any part of the finished surfaces are a part of the unit. All other portions of the walls, floors, or ceilings are a part of the common elements.

b. If any flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture inside the designated boundaries of a unit serves any other unit or the common elements, it is a part of the common elements.

c. Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, windows or other fixtures designed to serve one or more individual units, but located outside unit boundaries, are limited common elements allocated exclusively to the individual unit or units.

d. Any part of the property other than those included in subsections (a), (b), and (c) not allocated by the master deed to a unit or designated as a limited common element is a part of the common elements.

Source: New.

COMMENT

Though simplified, this section generally follows the U.C.I.O.A. (1994) § 1-102. The uniform law defines unit boundaries and requires that the declaration and amendments to it allocate to each unit interests in the common and limited common elements. This differs conceptually from current New Jersey law (N.J.S. 46:8B-3(o); 46:8D-3(l)), which defines units so as to include the proportionate undivided interest in the common and limited common elements allocated to the unit. Subsection (d) provides a default rule that elements are common elements unless otherwise allocated or designated.

205. Description of units.

A description of a unit that states the name of the common interest property, the recording data for the master deed, and the identifying letter, name or number of the unit, is a legally sufficient description of that unit.

Source: New.

COMMENT

This section generally follows U.C.I.O.A. § 2-104.

206. Sponsor's reserved rights.

a. Provided that the master deed specifically provides, the sponsor may reserve the right to:

(1) maintain sales offices, management offices, and models in units or on common elements provided that the master deed specifies the number, size, location and relocation. Any sales office, management office or model not designated as a unit by the master deed is a common element.

(2) maintain signs on the common elements and on units that the sponsor owns advertising the common interest property subject to any limitations in the master deed.

(3) amend the master deed and bylaws with provisions narrowly designed to meet underwriting requirements of institutional lenders who regularly lend money secured by first mortgages on units in common interest properties, or to comply with the requirements of a governmental agency making or insuring a mortgage on any unit, a governmental agency having regulatory jurisdiction over the common interest property or by a title insurance company that may insure title to a unit.

(4) amend the master deed to add real property or improvements to the common interest property provided that the original master deed identifies the property or improvements that may be added and specifies:

(A) the maximum number of units that the sponsor reserves the right to create; and

(B) the minimum number of units, if any, that the sponsor shall create; and

(C) the date by which each addition must be made to the property.

(5) amend the master deed to withdraw real property from the common interest property provided that the original master deed identifies the property that may be withdrawn and the date by which the right to withdraw property must be exercised with respect to each parcel of real property.

b. An amendment to the master deed to add or withdraw real property or improvements to the common interest property shall not be recorded unless a certificate of Department approval pursuant to the Planned Real Estate Development Full Disclosure Act.

c. If the master deed does not state an earlier date, all rights reserved by the sponsor expire when the period of sponsor control ends.

d. Unless the master deed provides otherwise, any income or proceeds from real estate subject to reserved sponsor rights inures to the sponsor.

Source: New.

COMMENT

This section on a sponsor's reserved rights allows the sponsor to complete planned improvements to the site or to add property. New Jersey law has been virtually silent on the scope of rights that sponsors may reserve during the period in which they exercise control. The exception is sections describing certain leases or granting a right of first refusal as unconscionable (N.J.S. 46:8B-36 et seq.). It is a common, but nonetheless questionable, practice to include a power of attorney in master deeds to enable the developer to take actions requiring amendment to the master deed without seeking unit association approval. Following the approach of the uniform law, this section simply allows sponsors to reserve rights to take the actions described in this section during the period of control so long as they have given notice to prospective unit owners by specifically reserving the rights in the master deed.

Subsection (a)(4) requires that the sponsor specify both the maximum and any minimum number of units that the sponsor reserves the right to build or add. Specifying the maximum number determines one limit on the maximum time for sponsor control of the project. See Section 306 requiring that sponsor control ends either when 75% of the maximum number of units which the sponsor may create have been sold or at the end of a two-year period during which development is no longer taking place. Specifying the minimum number provides unit owners a basis for assessing the value of their investment in terms of prorated expenses.

Under subsection (a)(5), the sponsor may also reserve a right to withdraw any portion of the project. This right is especially significant if sales of units fall short of original projections. The desirability of specifying such reserved development rights has been recognized in New Jersey practice; master deeds commonly include this declaration to avoid (a) claims by unit owners or owners associations that no expansion has been authorized, and (b) the burden of having all unit owners join in the execution of any amendments to the master deed as required by N.J.S. 46:8B-11. See WENDELL A. SMITH & DENNIS A.

ESTIS, NEW JERSEY CONDOMINIUM & COMMUNITY ASSOCIATION LAW § 4.1(a) (1996). It needs to be noted that even though these rights may be reserved in the master deed, their actual exercise may be subject to zoning and subdivision approval, which may or may not be forthcoming. It is possible that advance approval for such contingencies may be granted from the time the common interest property is created.

Subsection (d) is derived from a part of U.C.I.O.A. 3-107.

207. Transfer of sponsor rights

a. A sponsor right reserved under this act may be transferred only by an instrument executed by the sponsor-transferor and the transferee recorded in each county in which the common interest property is located.

b. Upon transfer of any sponsor right, the liability of a transferor sponsor is as follows:

(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed by this act or the master deed.

(2) If a successor to any sponsor right is an affiliate of the sponsor, the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the common interest property.

(3) If a transferor retains any sponsor rights, the transferor is liable for any obligations or liabilities imposed by this act or by the master deed relating to the retained sponsor rights and arising after the transfer.

(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a sponsor right by a successor sponsor who is not an affiliate of the transferor.

c. In case of foreclosure or sale to satisfy a security interest, tax sale, judicial sale, or sale under bankruptcy or insolvency proceedings, of any units owned by a sponsor or real estate in a common interest real property subject to development rights, a person who acquires title to property being foreclosed or sold, on request, may succeed to all sponsor rights related to that property held by that sponsor, or only to rights reserved in the master deed to maintain models, sales offices, and signs. The instrument conveying title must provide for transfer of only the rights requested.

d. The liabilities and obligations of a person who succeeds to sponsor rights are as follows:

(1) A successor to any sponsor right who is an affiliate of a sponsor is subject to all obligations and liabilities imposed on the transferor by this act or by the master deed.

(2) A successor to any sponsor right who is not an affiliate of a sponsor, and, except as provided in paragraph (3) or (4), any other successor to a sponsor right, is subject to the obligations and liabilities imposed on the sponsor by this act or the master deed other than:

(A) liability for misrepresentations by any previous sponsor;

(B) warranty obligations on improvements made by any previous sponsor, or made before the common interest property was created;

(C) breach of any fiduciary obligation by any previous sponsor or his appointees to the board; or

(D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right to maintain models, sales offices, and signs is not subject to any liability or obligation as a sponsor, except the obligation to provide a public offering statement, and any liability arising as a result thereof.

(4) A successor to all sponsor rights pursuant to subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all sponsor rights, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the board in accordance with the master deed and Section 306 for the duration of any period of sponsor control, and any attempted exercise of those rights is void. So long as a successor may not exercise sponsor rights under this subsection, the successor is not subject to any liability or obligation as a sponsor other than liability for his own acts and omissions.

e. Nothing in this section subjects any successor to a sponsor right to any claims against or other obligations of a transferor sponsor, other than claims and obligations arising under this act or the master deed.

Source: New.

COMMENT

This section follows U.C.I.O.A. § 3-104.

208. Termination of contracts and leases with a sponsor

Any contract or lease between the association and a sponsor or an affiliate of a sponsor that the parties enter into before a board, the majority of which is elected by the unit owners, takes office may be terminated by the association at any time thereafter.

Source: New.

COMMENT

This section is derived from U.C.I.O.A. § 3-105. The provision of the Uniform Law that allowed the termination of unconscionable contracts or leases was deleted as unnecessary. Such agreements are unenforceable under other law. This section is limited to contracts between a board controlled by the sponsor and the sponsor or his affiliate. The section allows these contracts to be cancelled. A court can determine the effects of cancellation based on ordinary equitable principles. While the common interest association would not be liable for lost future profits, it should not be unjustly enriched and so would be liable for goods and services already provided.

209. Restrictions on transfers of ownership and use of units

A common interest property may not restrict the transfer of ownership or lease of a unit except that the master deed or bylaws may:

a. In a cooperative, restrict transfer of ownership of units to satisfy objective, generally applicable criteria to assure that owners are able to meet financial responsibility related to ownership;

b. Restrict leasing to meet requirements that a certain percentage of units be owner occupied if that is necessary to satisfy the requirements of institutions which regularly lend money secured by first mortgages on units in common interest properties or regularly purchase those mortgages;

c. Require certification of a handicap to comply with the purposes of a common interest property established by the master deed as primarily for handicapped persons;

d. Establish a minimum age limit to comply with the purposes of a common interest property established by the master deed as primarily for persons and family members meeting the age requirements of the Federal Fair Housing Act; and

e. Afford the sponsor or the association a right of first refusal to purchase a unit from a unit owner if that right is required by State or Federal law.

Source: New.

COMMENT

This section enforces the public policy of allowing minimal restraints on alienability of property.

210. Regulation of behavior in, or occupancy of, units.

a. The master deed or bylaws of a common interest property may regulate behavior in or occupancy of units which may adversely affect the use and enjoyment of other units or the common elements by other unit owners.

b. A common interest property may not:

(1) impose any regulation on the use of or behavior in residential units which is more restrictive than a landlord may legally impose on a tenant; or

(2) impose a regulation by amendment to the master deed, bylaws or rules, without reasonable accommodation for practices and uses by unit owners that were permitted at the time the unit owners acquired their units.

c. Any rule or regulation governing behavior in or occupancy of units shall be included in the master deed or bylaws.

Source: New.

COMMENT

This section allows an association to regulate use and behavior in units but restricts the subject of regulations and requires that new regulations that affect established uses accommodate those uses.

211. Allocation of interests.

a. The master deed shall allocate to each unit:

(1) in a condominium, a fraction of undivided interests in common elements, a fraction of common expenses of the association and a number of votes in the association; and

(2) in a cooperative, a share in the cooperative, a fraction of the common expenses of the association and a number of votes in the association;

b. The master deed shall state the formula used to establish allocations of interests. Those allocations may not discriminate on the basis of ownership of units.

c. If units may be added to or withdrawn from the property, the master deed shall state the formula to be used to reallocate interests among units after the addition or withdrawal.

d. The master deed may provide that different allocations of votes shall be made to the units on specified matters.

e. Voluntary or involuntary transfer or encumbrance of an undivided interest in the common elements made separate from the unit to which that interest is allocated is void.

Source: N.J.S. 46:8A-9(d); 46:8B-B-9(1); 46:8D-6(k).

COMMENT

Existing New Jersey law requires only that the master deed state the proportionate undivided interests in the common elements and the limited common elements as well as the voting rights allotted in the association. Existing law has been supplemented in this section with provisions from U.C.I.O.A. § 2-107. Subsection (b) requires that the master deed state the formula used for the allocation. It does not specify a basis for the formula used, which might, for example, include value, size or simple ownership of a unit, along with variations in how, for example, value or size might be calculated. The sponsor is also free to allocate interests in the common elements by one formula and voting rights by another. The sponsor may not, however, discriminate on the basis of ownership of units, such as in favor of units owned by the sponsor or an affiliate of the sponsor. Because the sponsor must also state the basis for reallocation if units are added or subtracted from the project, the master deed provides purchasers of units in projects subject to development rights advance knowledge of how their units may be affected.

212. Limited common elements.

a. Except for the limited common elements described in Section 204(c), the master deed shall specify to which units each limited common element is allocated.

b. An allocation of limited common elements may not be altered except by an amendment to the master deed with the consent of the unit owners whose units are affected.

c. A common element not previously allocated as a limited common element may be so allocated only by an amendment to the master deed.

Source: New.

COMMENT

N.J.S. 46:8B-9(f) required a description of limited common elements, if any existed. This section, following U.C.I.O.A. § 2-108, provides for allocation or reallocation of these elements.

213. Alterations of units.

Subject to the provisions of the master deed, bylaws, rules, and other provisions of law:

a. a unit owner may make improvements or alterations to the owner's unit that do not impair the structural integrity or mechanical systems of any portion of the common interest property or unreasonably interfere with the use of other units or common elements;

b. if the unit owner owns two or more units that have been combined by amendment to the master deed, the owner may remove or alter a partition between the units, even if it is a common element in whole or in part, if those acts do not impair the structural integrity or mechanical systems of other units or common elements.

Source: N.J.S. 46:8B-18.

COMMENT

This section restates the law in the source in the language of the uniform law, U.C.I.O.A § 2-111. Removal of partitions between units owned by the same individual is neither provided for nor forbidden in existing New Jersey law.

214. Relocation of unit boundaries.

a. Boundaries between units may not be altered except by an amendment to the master deed with the consent of the unit owners whose units are affected.

b. Boundaries of a unit may be altered to incorporate common elements within the unit by an amendment to the master deed with the consent of the unit owner. Unless the master deed provides otherwise, the relocation must be approved by 67% of the total votes in the association, and 67% of the votes allocated to units not owned by the sponsor. Relocation affecting limited common elements must be approved by all unit owners who have an interest in them.

Source: New.

COMMENT

There is no provision in existing New Jersey law for relocation of boundaries. This section generally follows U.C.I.O.A. § 2-112.

215. Unit dimensions and location.

To the extent that the dimensions or the location of any unit as built differ from the dimensions or location described in the master deed or on drawings or representations to the buyer, the unit owner acquires title to the unit as built. This provision does not

relieve any person of liability for the misrepresentation or for failure to adhere to any survey or any representation as to dimensions or location of the unit.

Source: New.

COMMENT

This section deals with the problem that the actual physical boundaries may not conform to the boundaries depicted on plats and plans. The Uniform Law recommended that this problem be solved with an easement for the encroachment. This section follows the industry practice, often stated in master deeds, that locations and dimensions are approximate, and the buyer takes the unit as it actually exists. The section does not deal with the question of when a difference between representations and the actual unit is sufficient to justify repudiation of a contract to buy the unit. That question is controlled by ordinary common law principles applicable to land transactions generally.

216. Easement rights.

Subject to the master deed, a sponsor has an easement through the common elements reasonably necessary to discharge the sponsor's obligations or to exercise any of the sponsor's reserved rights.

Source: New.

COMMENT

Existing New Jersey law is silent as to whether the sponsor has an easement to allow him to discharge his obligations, but master deeds frequently include a provision on this subject. The section provides a general easement for sponsors, but requires justification based on the sponsor's obligations. This section does not deal with the rights of the association to reasonable access to units to carry out its duties. That subject is included in Section 305.

217. Amendment of master deed and bylaws.

a. Except as limited by subsection (b), the master deed and bylaws may be amended by (1) the sponsor pursuant to any right reserved, or (2) the association pursuant to powers created by the master deed or this law;

b. An amendment to the master deed or bylaws by unit owners shall require the assent of the owners of units to which at least 67 percent of the votes in the association are allocated, or any larger percentage that another provision of this act or that the master deed specifies. Amendments may be approved by a smaller percentage if the master deed so specifies and if all the units are restricted exclusively to nonresidential use.

c. An amendment that increases the sponsor's reserved rights or extends the time limits for the exercise of reserved rights must be approved by vote or agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, including 80 percent of the votes allocated to units not owned by the sponsor, or any larger percentage specified in the master deed.

d. An amendment to the master deed by which property or units are added to or withdrawn from the common interest property shall provide a description of the modified common interest property. The description shall identify each unit and allocate all

interests, including interests in common elements, limited common elements and voting rights.

e. No amendment to the master deed shall take effect before it is recorded in every county in which the common interest property is located.

f. No action to challenge the procedure by which an amendment has been adopted, and no action to challenge and amendment under subsections (c) or (d) may be brought more than one year after the amendment is recorded.

g. Except as permitted by other provisions of this act or by the master deed, no amendment may increase the number of units or change the allocated interests of the units in the absence of unanimous consent of the unit owners.

h. An amendment may not change the boundaries of a unit without the consent of the owner of the unit.

Source: N.J.S. 46:8b-11; 46:8D-10.

COMMENT

Existing New Jersey law requires only that procedures for amending the master deed be set forth in the master deed. The uniform law, U.C.I.O.A. § 2-117, recognizes that various parties may need to amend the master deed, and sets forth specific provisions for amendment by the sponsor or the common interest association, each of these acting pursuant to the master deed. Otherwise, amendments are subject to an affirmative vote of 67% of the unit owners unless the master deed specifies any larger vote. If the common interest property is exclusively non-residential, the master deed may allow amendment with a smaller vote. Subsection (c) addresses the possibility that sponsor rights may expire at a time when neither the association nor unit owners wish to see development halted by allowing amendment to extend or increase special sponsor rights, which requires approval by 80% of unit owners.

218. Termination of common interest property.

a. A common interest property may be terminated only by:

(1) a taking of all the units by eminent domain;

(2) foreclosure and sale to enforce a lien or security interest against the entire property that has priority over the master deed; or

(3) agreement of the owners of units to which at least 80 percent of the votes in the common interest association are allocated, including 80 percent of the of the votes allocated to units not owned by the sponsor or any larger percentage the master deed specifies. A termination agreement shall be executed in the same manner as a deed by the requisite number of unit owners and recorded in every county in which the common interest property is situated.

b. Any conveyance of the entire property of a cooperative that would serve to terminate the cooperative and that is not made as provided in this section is void.

Source: N.J.S. 46:8B-26; 46:8D-16.

COMMENT

Subsection (a)(3) repeats existing provisions in the N.J.S. 46:8B-26, which applies to condominiums; this subsection will also apply to all types of common interest properties, including

cooperatives where termination formerly required an agreement approved by all unit owners (N.J.S. 46:8D-21). Language adopted from the uniform law (U.C.I.O.A. § 2-118) provides for termination by eminent domain or foreclosure.

219. Merger of common interest properties.

a. Two or more common interest properties of the same form of ownership may be merged into a single property. In the event of a merger, the resultant property is the legal successor, for all purposes, of all the pre-existing properties.

b. An agreement of properties to merge must be approved by owners of units to which are allocated the percentage of votes in each property required to terminate that property. The agreement shall not be effective until it is recorded in every county in which a portion of the common interest property is located.

c. A merger agreement must provide for the allocation of interests in the new property among the units by stating either the allocations or the formulas upon which they are based.

Source: New.

COMMENT

Merger as understood by this section has not been provided for in prior New Jersey law. The 1963 New Jersey Horizontal Property Act spoke of “merger” (N.J.S. 46:8A-12 to 13) but described it as a waiver of regime by unit owners within one condominium, effecting a merger of all the units into one property, effectively terminating the condominium. Section 219, which follows the uniform law (U.C.I.O.A. § 2-121) envisions a merger or consolidation of two or more common interest properties, creating a successor property.

Article 3. Governance of a common interest association.

301. Association; membership; functions

a. Establishing a common interest property by filing a master deed shall automatically establish a common interest association for that property. Unless otherwise organized, the common interest association shall be a nonprofit association.

b. The membership of the association consists of all unit owners.

c. The association shall maintain the common interest property and shall exercise its powers and discharge its functions in a manner that furthers the health, safety and general welfare of its residents.

Source: N.J.S. 46:8B-12; N.J.S. 46:8B-12; 46:8B-14(j).

COMMENT

This act simplifies the law by eliminating the need for separate establishment of an association consisting of unit owners. Recording the master deed, without further action, establishes the association. The common interest association is a self-governing entity. The source statute provided that unit owners’ associations might be established as any type of entity recognized under state law. In practice, the overwhelming majority of associations have been organized as nonprofit corporations. However, section

302 reduces the need to incorporate the association by making the association itself an entity enjoying the powers of a nonprofit corporation.

Subsection (b) makes all unit owners members of the association. Subsection (c) establishes the purpose of the association, and, in accordance with current New Jersey law, N.J.S. 46:8B-14(j), establishes the legal standard governing the exercise of association powers, (*Thanasoulis v. Winston Towers 200 Ass'n.*, 110 N.J. 650 at 657 (1988); *Siller v. Hartz Mountain Assoc.*, 93 N.J. 370 at 382 (1983

302. Powers.

a. Except as limited by this act, other law or the master deed, the common interest association may exercise all of the powers of a not-for-profit corporation. In addition, except as limited by this act, other law or the master deed, the common interest association may:

(1) collect reasonable assessments from unit owners;

(2) impose reasonable payments to repair common elements damaged by the unit owner, and for services provided to unit owners, including preparing or recording documents or statements of unpaid assessments;

(3) impose reasonable payments for the use of common elements;

(4) in compliance with section 304, impose reasonable fines and charges for failure to comply with provisions of the master deed or bylaws or late payment of assessments;

(5) exercise any other powers conferred by the master deed or bylaws; and

(6) exercise other powers necessary and proper to effect the purposes for which the association was established;

b. The master deed or bylaws may restrict the association's power to deal with the sponsor to a greater extent than its power to deal with others.

c. If a tenant of a unit owner violates the master deed or bylaws, in addition to exercising any of its powers against the unit owner, the association may exercise its powers, including its power to impose fines, directly against the tenant, provided that it gives the tenant and the unit owner notice and an opportunity to be heard. The association may exercise any power which the unit owner could have lawfully exercised against the tenant if the tenant and the unit owner fail to cure the violation within 10 days after the association gives notice.

d. Before the board makes a purchase or contract with a cost of more than one per cent of the operating budget for the fiscal year, it shall obtain proposals from at least three competent providers. If the purchase or contract has a total cost of more than five percent of the operating budget for the fiscal year, the proposals shall be in writing and shall be retained in association records for three years.

Source: N.J.S. 46:8B-15.

COMMENT

The source statute, N.J.S. 46:8B-15, lists a variety of powers of associations, some powers of the kind generally available to non-profit corporations and some specifically applicable to common interest associations. This section substitutes language referring to the powers of non-profit corporations for the general powers. In general, the particular powers in the source statute are retained except where a power duplicates powers granted and regulated by other sections. The power to enact rules and regulations has been deleted from this section because it is the subject of Section 304½; the power to enter units is the subject has been deleted from this section because it is the subject of Section 305. The power to impose fines, added to the source statute in 1996 has been retained even though it is subject to restrictions found in Section 304.

303. Board members, officers and managing employees.

a. Except as limited by law, the master deed, or bylaws, the board may act on behalf of the common interest association. In performing their duties, officers and members of the board appointed by the sponsor shall exercise the degree of care and loyalty required of a trustee. Officers and members of the board not appointed by the sponsor shall exercise the degree of care and loyalty required of an officer or director of a nonprofit corporation.

b. Notwithstanding any provision of the master deed or bylaws to the contrary, the unit owners, by a two-thirds vote at any meeting of the unit owners may remove any officer or board member with or without cause, other than a board member appointed by the sponsor provided that (1) a quorum is present at the meeting, and (2) notice of the proposed removal is made in the manner required by Section 310(b).

c. Notwithstanding any provision of the master deed or bylaws to the contrary, within 90 days of the resignation or removal of an officer or board member elected by the unit owners, a person shall be elected to fill the unexpired term. Within 90 days of the resignation or removal of a board member appointed by the sponsor, the sponsor may appoint a successor board member.

d. Upon conviction within any jurisdiction of an offense involving fiduciary responsibility, fraud, or any crime of the second degree or higher, a board member or officer shall be removed from office.

Source: New.

COMMENT

This section follows part of section 3-103 of the Uniform Common Interest Ownership Act.

304. Conflicts of interest.

a. No officer, board member or managing employee or member of the immediate family of an officer, board member or managing employee shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of duties to the association;

b. The association shall not, during the period in office of the officer or board member and for one year subsequent to that period:

(1) award a contract to an officer or board member or to a member of the immediate family of an officer or board member, or to a business organization in which the officer or board member holds more than a 5 percent interest; or

(2) employ for compensation, an officer or board member or member of the immediate family of an officer or board member.

c. No officer or board member shall use or attempt to use that office to secure unwarranted privileges or advantages for the officer or others;

d. No officer or board member shall act in official capacity in any matter where the officer or board member, an immediate family member, or a business organization in which the officer or board member has more than a 5 percent interest, has a direct or indirect financial or personal involvement that might reasonably impair the objectivity or independence of judgment of the officer or board member;

e. No officer or board member shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice the independence of judgment of the officer or board member in the discharge of duties to the association;

f. No officer or board member or employee or member of the immediate family of an officer or board member, or business organization in which an officer or board member holds more than a 5 percent interest, shall solicit or accept any benefit offered for the purpose of influencing the officer or board member, directly or indirectly, in the discharge of duties to the association;

g. No officer or board member shall use, or allow to be used, the officer or board member's position, or any information received through it that is not generally available to all unit owners, to secure financial gain for the officer, board member, any member of the immediate family of the officer or board member, or any business organization with which the officer or board member is associated;

h. In awarding contracts to management companies and other service providers, the association shall:

(1) disqualify any contractor in which a sponsor holds an interest until three years after termination of sponsor control;

(2) require that any contractor disclose the names of any association officer board member or managing employee, or member of the immediate family of an officer or board member, employed by the contractor or subcontractor.

i. At the request of a unit owner, the Department shall investigate allegations of violation of this section. If the Department finds a violation by a board member or officer, it shall order the removal of the board member or officer, and may declare void any action of the board member or officer related to the violation. If the Department finds a violation by a managing employee, it shall report the violation to the association.

Source: New.

COMMENT

Following a recommendation of The Assembly Task Force to Study Homeowner Associations: A Report of Findings and Recommendations (Jan. 8, 1998), this section supplements and modifies provisions in section 3-103 of the Uniform Common Interest Ownership Act. The section imposes on board members and officers conflict of interest regulations paralleling those regulating local government officials.

305. Budget.

Within 30 days after adoption of any proposed budget for the association, the board shall mail or deliver a summary of the budget to all the unit owners, and make a copy available in a place convenient to the unit owners. Unit owners or their agents may copy the budget at their expense. The board shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 30 nor more than 45 days after mailing or delivery of the summary. At that meeting, if a majority of votes of unit owners present, or any larger vote specified in the master deed approves the budget, the budget is ratified, whether or not a quorum is present. If the proposed budget is rejected, the last budget shall be continued until the unit owners ratify a budget.

Source: New.

COMMENT

This section follows part of section 3-103 of the Uniform Common Interest Ownership Act.

306. Period of sponsor control.

a. The sponsor may appoint members to the board of the common interest association from the time of its establishment subject to this section.

b. Not later than 60 days after 25 percent of completed units have been occupied, at least one member and not less than 25 percent of the members of the board shall be elected by unit owners other than the sponsor. Not later than 60 days after 33 1/3 percent of the units that may be created have been occupied, not less than 33 1/3 percent of the members of the board must be elected by unit owners other than the sponsor.

c. Not later than 60 days after 75 percent of the units specified in the master deed or allowed to be added by exercise of the sponsor's reserved rights have been occupied or when the Department has found that the common interest property has reached full development, the sponsor control shall terminate. A property has reached full development when 75 percent of the units completed have been occupied and the sponsor does not have the capacity to complete the remaining units in a reasonable time.

d. The sponsor may agree to terminate control at any time.

e. When the period of sponsor control terminates the unit owners shall elect all members of the board. A majority of the members shall be unit owners. The board shall elect the officers. The board members and officers shall take office upon election.

Source: New.

COMMENT

Subsection (a) is new, but it has been assumed by UCIOA and other condominium acts. The other subsections generally follow section 3-103 of the Uniform Common Interest Ownership Act. Following a recommendation of The Assembly Task Force to Study Homeowner Associations: A Report of Findings and Recommendations (Jan. 8, 1998), this section supplements and modifies provisions of the Uniform Common Interest Ownership Act. This section uses the number of units occupied, rather than the units conveyed as the measure for making this determination. The effect is to end sponsor control even if units are rented rather than sold.

307. Penalties

a. A reasonable fine for violation of the master deed or bylaws shall not exceed the penalty commonly imposed for a violation of comparable seriousness of the ordinances of the municipality in which the common interest property is located.

b. If authorized by the master deed or bylaws, in addition to penalties the association may collect interest and reasonable attorney fees if the association specifically advised the unit owner of this power in its notice of violation. A provision that permits the association to collect attorney fees shall allow a person who prevails against the association in an action brought by the association to collect attorney fees on the same basis.

c. An association may not impose fines for moving automobile violations on roads with respect to which Title 39 of the Revised Statutes is in effect.

d. A fine shall not be imposed unless the unit owner is given written notice of the basis for the proposed action and of the right to seek the appointment of a mediator in accordance with Section 309, and, if mediation is unsuccessful, the right to arbitration or to file a complaint in the Superior Court.

Source: 46:8B-15(e).

COMMENT

Subsection (a) makes it public policy to use municipal ordinance violations as a standard for judging the reasonableness of common community violations. Subsections (b), (c) and (d) restate the source section.

308. Rules and regulations.

a. Unless otherwise limited by this act, other law, the master deed or bylaws, the board may act on behalf of the association to establish reasonable rules and regulations to:

(1) Govern the internal structure and procedures for operating the association;

(2) Establish conditions for using common and limited common elements, including provisions pertaining to hours, numbers of persons, types of permitted uses, and procedures to obtain specific permits as required, and impose reasonable fees, if appropriate;

b. A rule or regulation established pursuant to subsections (a)(2) shall become effective after:

(1) approval by the board at a meeting held with prior notice to unit owners of the subject matter to be considered, and

(2) mailing or delivery of a copy of the rule or regulation to all unit owners.

c. The board shall maintain a compilation of all current rules and regulations in suitable printed form and make copies available to unit owners, unit buyers and other interested persons.

d. If a petition signed by 1/3 of the unit owners requesting that a rule or regulation be discontinued is filed with the board, the board shall conduct a written secret ballot vote of unit owners on the issue no later than 90 days after the petition is filled. The question shall be submitted substantially as follows:

Shall the following rule or regulation of this common interest property be continued? (insert text of rule or regulation)

If you wish the rule or regulation continued, mark the “yes” box. If you do not wish the rule or regulation continued, mark the “no” box.

The rule or regulation shall end unless it is approved by a majority of the ballots submitted.

Source: 46:8B-13(d).

COMMENT

The current statutory provision merely provides for general rule making power. UCIOA refers to rules but does not define their subject matter. This section restricts rule making power to matters concerning the operation of the association and use of common elements. It resolves ambiguity in current case law by requiring that rules and regulations be reasonable rather than an exercise of business judgment. Restrictions on occupancy and use of individual units must be made by the master deed or bylaws. See section 210.

309. Upkeep of common interest association property.

a. Except as provided by the master deed or subsection (b), the maintenance, repair, and replacement of the common elements is a common responsibility. Unit owners shall allow agents of the common interest association access reasonably necessary to fulfill association responsibilities and to make emergency repairs to prevent damage to common elements or other units. If damage is inflicted on the common elements, limited common elements, or any unit through which access is taken, the person responsible for the damage is liable for the reasonable cost of its prompt repair.

b. In addition to the liability that a sponsor has as a unit owner, the sponsor alone is liable for all expenses in connection with real estate subject to reserved sponsor rights. Neither any other unit owner nor the association is subject to a claim for payment of those expenses.

Source: New.

COMMENT

This section follows U.C.I.O.A. 3-107, but the provision giving the income from property subject to sponsor rights to the sponsor has been moved to Section 206, Sponsor's reserved rights.

310. Association meetings.

a. A meeting of the common interest association shall be held at least once each year. Special meetings may be called by the president, a majority of the board, or by unit owners having 20 percent, or any lower percentage specified in the master deed or bylaws, of the votes in the association.

b. Not less than 10 nor more than 60 days in advance of any meeting, the other officer specified in the bylaws shall provide written notice to each unit owner. The notice of a meeting shall be posted in a manner that all unit owners are likely to see it, or it shall be mailed or delivered to each unit owner. The notice shall state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the master deed or bylaws, any budget changes, and any proposal to remove an officer or member of the board. If an amendment to the master deed or bylaws will be considered, the notice shall indicate where the text of the amendment may be obtained, but that a proposed amendment may be amended at the meeting.

c. Emergency meetings of unit owners may be called by three quarters of members of the board present notwithstanding the failure to provide adequate notice if:

(1) the meeting is required to deal with matters of such urgency and importance that a delay for the purpose of providing adequate notice would be likely to result in substantial harm to the interest of the common interest association; and

(2) the meeting is limited to discussion of and acting with respect to such matters of urgency and importance; and

(3) notice of the meeting is provided as soon as possible by posting written notice in a manner that assures that unit owners will be made aware of the meeting date, place, time and agenda; and

(4) at the beginning of the meeting, the person presiding announces (A) the nature of the urgency and importance referred to in subsection (a)(1); (B) that the meeting will be limited to the specified matters of urgency and importance; (C) the time, place and manner in which notice of the meeting was provided; and (D) the reason either that the need for a meeting could not have been foreseen or if the need for such meeting could have been foreseen, why in fact adequate notice was not provided.

d. The person who presides at the meeting may exclude persons from the meeting who are not unit owners.

Source: New.

COMMENT

This section generally follows U.C.I.O.A. 3-108. Additional provisions, including those regulating notice, are derived from provisions applicable to not-for-profit corporations. See N.J.S. 15A:5-1 et seq.

311. Board meetings.

a. All meetings of the board, except as provided by subsection (c), shall be open at all times to unit owners. No chance meeting, social meeting, or electronic communication may be used to circumvent this section.

b. The board of the association may meet in a session closed to unit owners to discuss:

(1) a matter, the disclosure of which constitutes an unwarranted invasion of individual privacy, unless the individual requests in writing that it be disclosed publicly;

(2) a proposed collective bargaining agreement, or matters proposed for inclusion in a collective bargaining agreement, including the negotiation of its terms and conditions with employees or representatives of employees of the association or of persons and entities who have a contractual relationship with the association;

(3) a matter involving the purchase or lease of real property with association funds, or investment of association funds, where disclosure could adversely affect the association's interest;

(4) tactics and techniques used in protecting the safety and property of the association and unit owners, if their disclosure could impair protection;

(5) investigations of violations of law, the master deed, bylaws or rules;

(6) pending or anticipated litigation or contract negotiation where the association is, or may become a party;

(7) matters falling within attorney-client privilege;

(8) matters involving the employment, appointment, termination, evaluation of performance, promotion or discipline of an officer or employee or prospective officer or employee, unless all employees whose rights could be adversely affected request in writing that such matter be discussed in a public meeting.

c. The board shall not meet in executive session to discuss any matter described in subsection (b) unless the board first determines that the identity of specific parties may not be deleted without adversely affecting the discussion or that deletion of identities will not affect the need for confidentiality.

d. Before meeting in executive session pursuant to subsection (b), the board, in an open meeting, shall vote on meeting in executive session and if the vote is favorable, the presiding officer shall state with specificity, the matters to be discussed, and as precisely as possible, the time when and the circumstances under which the discussion conducted in executive session of the body can be disclosed to the unit owners.

e. No vote committing the association to a specific course of action may be taken in executive session.

f. The board shall keep minutes of all meetings. The minutes shall include:

(1) the date, time and place of the meeting;

(2) the members of the board or officers recorded as either present or absent;

(3) the substance of all matters proposed, discussed or decided and the vote of each member of the board;

(4) any other information that any member of the board or officers requests be included or reflected in the minutes.

g. The minutes of meetings, other than those of an executive session, shall be promptly available to the unit owners.

h. Board meetings may be recorded by any person in attendance by any means except when a meeting is conducted in executive session pursuant to subsection (b), provided that the recording does not interfere with the meeting. The board shall not be required to furnish recording facilities or equipment.

i. At the request of a unit owner, within one year after the action sought to be voided has been made public, the Superior Court or the Department may declare void an action taken in a meeting in which the board or officers failed to comply with this section. The board or officers may take corrective action only by deciding the matter de novo at a meeting in compliance with this section.

Source: N.J.S. 46:8B-13(a).

COMMENT

Existing New Jersey law requires that, apart from stated exceptions, meetings of the board be open to all unit owners. N.J.S. 46:8B-13(a). Following the recommendation of The Assembly Task Force to Study Homeowner Associations: A Report of Findings and Recommendations (Jan. 8, 1998), existing provisions have been made to conform to the extent reasonable to N.J.S. 10:4-6 et seq., the "Open Public Meetings Act." The Superior Court or the department enforces this section in a manner parallel to the provisions in the "Open Meetings Act."

312. Quorums.

a. Unless the master deed or bylaws provide otherwise, a quorum is present at any association meeting if persons entitled to cast 20 percent of the votes that may be cast for election of the board are present in person or by proxy.

b. Unless the master deed or bylaws specify a larger percentage, a quorum of the board is present if persons entitled to cast 50 percent of the votes are present.

Source: New.

COMMENT

This section follows U.C.I.O.A. § 3-109.

313. Voting by unit owners; proxies; secret ballots; written ballots.

a. If only one of several owners of a unit is present, that owner is entitled to cast all the votes allocated to that unit. If more than one owner is present, in person or in proxy, the votes allocated to that unit may be cast only in accordance with the agreement

of a majority in interest of the owners, unless the master deed provides otherwise. There is majority agreement if any one owner casts the votes allocated to that unit and no other protests promptly.

b. Unless limited by the master deed or bylaws, voting by proxy shall be permitted. If a unit is owned by more than one person, each owner may separately execute a proxy. A unit owner may revoke a proxy only by actual notice of revocation to the person presiding over a meeting. A proxy is void if it is not dated. A proxy terminates one year after its date, unless it specifies a shorter term.

c. No votes allocated to a unit owned by the sponsor or the association may be cast.

d. If any unit owner requests, a vote shall be by secret ballot.

e. Unless limited by the master deed or bylaws, the board may submit any question or election other than the election of the board elected at the termination of sponsor control to a vote of the unit owners by written ballot, provided that:

(1) the board establishes a reasonable method for distribution and submission of ballots;

(2) the board requires that any ballots submitted bear the signature of a unit owner, that this signature is verified according to procedures established by the board, and that the procedures employed safeguard the confidentiality of the ballots;

(3) the board delivers a ballot to the owners of each unit with a statement of the questions or candidates upon which the vote is to be taken and the date and manner by which the vote must be received;

(4) no action is taken and no officer is elected as a result of a ballot by mail until at least 7 days after the date the ballots were required to be received; and

(5) no action is approved and no person is elected unless a majority of the votes are cast in favor of the action or the officer.

f. At the request of a unit owner, the Department shall enforce this section. The Department may settle disputes, issue warnings, and after notice and opportunity to be heard, impose reasonable penalties, including and removal from office, on boards and officers for violations of this section. The person presiding at the meeting immediately following the issuance of a warning or the imposition of a sanction by the Department shall report the warning or sanction, specifying the violation for which the action was taken, without disclosing the name of the unit owner who requested the intervention of the Department, and direct that this report in all its particulars be included in the minutes.

Source: New.

COMMENT

This section modifies U.C.I.O.A. Section 3-110 to conform to the recommendation of The Assembly Task Force to Study Homeowner Associations: A Report of Findings and Recommendations (Jan. 8, 1998), that sponsors who rent out units rather than sell them forfeit the voting rights allocated to the unit, while retaining any right sponsors might have to appoint board members. Subsection (c) redresses the dual representation that may result, which often allows sponsors and investors to dominate a board, sometimes disposing of community assets to subsidize rental units. The task force also recommended that

unit owners be afforded the opportunity to vote by secret ballot. Subsection (d) incorporates a part of that recommendation. Subsection (e) makes provisions in accordance with the provisions in N.J.S. 15A:5-6 (the "Non-Profit Corporation Act") for written ballots. Following the recommendation of the Assembly Task Force, subsection (f) requires the Department to enforce this section. Following the task force recommendation, a report of warnings and sanctions must be divulged at a public meeting and recorded in the minutes.

314. Dispute resolution

The association shall provide fair and efficient procedures for the resolution of disputes between individual unit owners and the association, and between unit owners, as an alternative to litigation. These procedures shall provide for the mediation of disputes concerning rights and obligations established by this act, the master deed, bylaws and rules, as follows:

a. A dispute concerning rights and obligations established by this act, the master deed, bylaws or rules, is one that arises specifically from the creation, alteration, termination, or management of the common interest property rather than from other personal or contractual relationships.

b. A unit owner, with written notice to all other parties to the dispute, may file with the board a request for mediation. The unit owner's request for mediation and notice to parties shall include a concise statement of the claims, and where appropriate the defenses, in dispute between the parties, and the relief sought, if any.

c. If any party other than the association or its board, or persons acting on their behalf, is named in the request for mediation, within 30 days after receiving the notice of the request for mediation the party may file a consent to mediation. Immediately upon receipt of the consent of all parties named in the request, the board shall request that each party to the dispute to designate a mediator. The association or its board, or persons acting on behalf of the association or its board shall not participate in the designation of the mediator. A mediator shall be selected from the Department list of persons qualified to mediate disputes related to common interest properties. The board shall make subsequent requests to the parties to secure the designation of a mediator.

d. An agreement for mediation, which shall stipulate the allocation of costs, shall be signed by all parties. The mediator shall proceed under the terms of the agreement.

e. Unless the bylaws provide otherwise or the parties stipulate otherwise, costs for mediating a dispute between individual unit owners shall be borne equally by the parties to the dispute.

f. If a dispute concerns the grounds for the imposition of a fine, the procedure by which it was imposed, or the amount of a fine, the costs for mediating the dispute shall be borne by the association.

g. If a dispute concerns whether the association or board has imposed a burden on unit owners not authorized by law, the master deed or bylaws, the costs for mediating the dispute shall be borne by the association if the parties conclude that the allegation was correct, and otherwise one half of the cost shall be allocated to the other parties.

h. If the mediation fails to reach a settlement, each party may seek the appointment of an arbitrator or file a complaint in the Superior Court. At the request of a unit owner, the Department may enforce this section.

Source: N.J.S. 46:8B-14(k).

COMMENT

This section amplifies the requirement in NJS 46:8B-14 (k) which required that associations provide alternative dispute resolution procedures. The Assembly Task Force to Study Homeowner Associations: A Report of Findings and Recommendations (Jan. 8, 1998) found the statutory provision inadequate on a number of grounds. Among other things, with no clear guidelines, boards had hired arbitrators, charging the expense to homeowners, or used covenants committees, which may not have been disinterested parties, etc. Moreover the statute provided no guidance as to what issues must be submitted to arbitration. While allowing all other means of dispute resolution, the section mandates the availability of mediation for certain disputes between the community and unit owners, and between unit owners. Subsection (a) defines the disputes for which mediation must be available. Subsections (b) and (c) set forth the procedure for requesting mediation and selecting a mediator. Subsections (d), (e), (f) and (g) require a written agreement for mediation and provides for allocation of mediation costs. Subsection (h) affirms the right of the parties to resort to arbitration or litigation. Finally, the Department may enforce the section at the request of a unit owner.

315. Tort and contract liability; tolling of limitation period.

a. A unit owner is not liable, solely by reason of being a unit owner, for an injury or damage arising out of the condition or use of common elements. Neither the common interest association nor any unit owner except the sponsor is liable for the sponsor's torts.

b. An action alleging a wrong done by the association, including an action arising out of the condition or use of the common elements, may be maintained only against the association and not against any unit owner.

c. If the wrong occurred during sponsor control and the association gives the sponsor reasonable notice and an opportunity to defend the action, the sponsor who controlled the association is liable to the association or to any unit owner for (i) all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) all costs that the association or the owner would not have incurred. Whenever the sponsor is liable to the association under this section, the sponsor is also liable for reasonable expenses of litigation, including attorney's fees.

d. Except as provided in Article 4 with respect to warranty claims, any statute of limitation affecting the association's right of action against a sponsor under this act is tolled until sponsor control terminates.

e. An action contemplated by this section shall not be precluded because the claimant is a unit owner or a member or officer of the association.

f. Where the master deed or bylaws of a association specifically provide, pursuant to conditions and qualifications set forth in N.J.S. 2A: 62A-12 to 14, the association shall not be liable in any civil action brought by or on behalf of a unit owner to respond in damages as a result of bodily injury to the unit owner occurring on the premises of the association, unless the injury is the result of willful, wanton or grossly negligent act of commission or omission by the association.

Source: New; N.J.S. 46:8B-16(c).

COMMENT

This section follows U.C.I.O.A. section 3-111. Subsection (f) adds the provision in existing New Jersey law allowing common interest associations to claim immunity from injury to unit owners due to the merely negligent acts of the association.

316. Conveyance or encumbrance of common elements.

a. Any purported voluntary conveyance, encumbrance, or transfer of common elements of any common interest property or of any part of a cooperative is void unless it is made pursuant to this section.

b. In a common interest property other than a cooperative, the association may convey or create a security interest in:

(1) common elements on agreement of units allocated at least 80 percent of the votes not allocated to units owned by a sponsor, or any larger percentage the master deed specifies; and

(2) limited common elements on agreement of all units to which the limited common element are allocated.

c. Proceeds of the sale of common elements are a common asset, but the proceeds of the sale of limited common elements must be distributed among the owners of units to which the limited common elements were allocated.

d. In a cooperative, the association may:

(1) convey all or part of common elements other than limited common elements on agreement of units allocated at least 80 percent of the votes in the association not allocated to units owned by a sponsor, or any larger percentage the master deed specifies; and

(2) create a security interest in all or part of the cooperative on agreement of units allocated at least 80 percent of the votes in the association not allocated to units owned by a sponsor, or any larger percentage the master deed specifies; and

(3) convey, or create a security interest in fewer than all of the units or in limited common elements if all units affected agree.

e. For purposes of this section, agreement of a unit means agreement of all owners and all secured lenders of that unit.

f. No requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association, or (ii) prevent the association or the board from commencing, intervening in, or settling any litigation or proceeding, or (iii) prevent any insurance trustee or the association from receiving and distributing any insurance proceeds except pursuant to Section 312.

g. The board, on behalf of the association, may contract to convey an interest in common interest property pursuant to subsection (a). The common interest association

has all powers necessary to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

h. A conveyance or encumbrance of common elements of any common interest property or of a part of a cooperative may not be made pursuant to this section if it deprives any unit of its rights of access or support without the agreement of the unit affected.

i. In a cooperative, the association may acquire, hold, encumber, or convey a proprietary lease without complying with this section.

Source: New.

COMMENT

This section generally follows U.C.I.O.A. § 3-112, but some changes have been made in the rights of mortgage holders. Under the uniform law, separate ratification by 80% of first mortgage holders was required. This section requires ratification by all of the units, including the mortgage holders of those units.

This change protects junior mortgage holders who may rely on the marginal value attributable to the property sold or encumbered.

315. Insurance.

a. Commencing not later than the first conveyance of a unit to a person other than a sponsor, the common interest association shall maintain, to the extent reasonably available:

(1) property insurance on the common elements, insuring against all risks of direct physical loss commonly insured. The total amount of insurance after application of any deductibles must be not less than 80 percent of the value of the insured property at risk at the time the insurance is purchased and at each renewal date; and

(2) liability insurance, including medical payments insurance, in an amount determined by the board but not less than any amount specified in the master deed or bylaws, covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements and, in cooperatives, also of all units.

b. If the insurance described in subsection (a) is not reasonably available, the board shall promptly notify unit owners of that fact.

c. The master deed or bylaws may require any other insurance, and the common interest association may carry additional insurance it considers appropriate.

d. Insurance policies carried pursuant to subsection (a) must provide that:

(1) each unit owner is an insured person under the policy with respect to liability arising out of association interest in the common elements or membership in the association;

(2) the insurer waives its right to subrogation under the policy against any unit owner or member of the unit owner's household;

(3) no act or omission by any unit owner, unless acting within the scope of authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and

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

e. Any loss covered by the property policy under subsection (a)(1) must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any holder of a security interest. The insurance trustee or the association shall hold any insurance proceeds in trust for the association, unit owners, and lien holders as their interests may appear. Subject to the provisions of subsection (g), the proceeds must be disbursed first for the repair or restoration of the damaged property, and the association, unit owners, and lien holders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the common interest property is terminated.

f. An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for the owner's own benefit.

g. An insurer that has issued an insurance policy required by this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner or holder of a security interest. The insurer issuing the policy may not cancel or refuse to renew it until 30 days after notice of the proposed cancellation or non-renewal has been mailed to the association, each unit owner and each holder of a security interest to whom a certificate or memorandum of insurance has been issued at their last known addresses.

h. Any portion of the property for which insurance is required which is damaged or destroyed must be repaired or replaced promptly by the association unless (i) the common interest property is terminated, in which case Section 218 applies, or (ii) repair or replacement would be illegal, or (iii) 80 percent of the unit owners, including every owner of a unit or assigned limited common element that will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds is a common expense. If the entire common interest property is not repaired or replaced, the insurance proceeds attributable to the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the common interest property.

i. The insurance proceeds attributable to units and limited common elements that are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lien holders, as their interests may appear, and the remainder of the proceeds must be distributed to all the unit owners or lien holders, as their interests may appear, as follows: (1) in a condominium, in proportion to the common element interests of all the units and (2) in a cooperative, in proportion to the common expense liabilities of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the

vote as if the unit had been condemned under Section 107(a), and the association promptly shall amend the master deed to reflect the reallocations.

j. This section may be varied or waived in a property all of whose units are restricted to non-residential use.

Source: New.

COMMENT

This section generally follows U.C.I.O.A. § 3-113.

318. Surplus funds.

Unless otherwise provided in the master deed, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves shall be credited to the unit owners in proportion to their common expense liabilities.

Source: New.

COMMENT

This section follows U.C.I.O.A. § 3-114.

319. Assessments for common expenses; utilities.

a. During sponsor control, until the common interest association makes a common expense assessment, the sponsor shall pay all common expenses. Assessments must be made at least annually, based on a budget adopted at least annually.

b. Except for assessments under subsections (c), (d), (e) and (f), common expenses must be assessed against the units in accordance with the allocations set forth in the master deed pursuant to Section 211(a) and (b). Any common expense payment that is 30 days past due bears interest at a reasonable rate established by the association not exceeding 18 percent per year.

c. If the master deed so provides, common expenses associated with the maintenance, repair, or replacement of a specific limited common element shall be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the master deed provides; and

d. Unless the master deed provides otherwise, the costs of utilities shall be assessed in proportion to usage.

e. Assessments to pay a judgment against the association (Section 316(a)) may be made only against the units in the common interest property at the time the judgment was entered, in proportion to their common expense liabilities.

f. If any common expense is caused by the misconduct of a unit owner, the association may assess that expense against that owner's unit.

g. If common expense liabilities are reallocated, common expense assessments and any installment of assessments not yet due must be recalculated in accordance with the reallocation.

Source: New.

COMMENT

This section follows U.C.I.O.A. § 3-115 but subsection (c) has been changed to make clear that expenses related to limited common elements are not the responsibility of particular units unless the declaration so specifies.

320. Liens in favor of association; priority

a. The association shall have a lien on each unit for unpaid assessments, and other money owed to the association, with interest. If authorized by the master deed or bylaws, The association shall also have a lien late fees, fines and reasonable attorney's fees. However an association may not record a lien in which the unpaid assessment consists solely of late fees. The lien shall include only sums due when the lien is recorded.

b. A lien shall be effective on recording in the county in which the unit is located.

c. A lien shall include:

- (1) the description of the unit,
- (2) the name of the record owner,
- (3) the amount due and the date due, and
- (4) the signature and verification of an officer or agent of the association.

d. Upon full payment of all sums secured by the lien, the payer shall be entitled to a recordable satisfaction of lien.

e. Except as provided in subsection (f), an association lien shall be subordinate to any lien for past due property taxes, and to any mortgage or other lien recorded or docketed prior to the time of recording of the lien claim.

f. A lien recorded pursuant to this section shall have a priority over prior recorded mortgages and other liens, except municipal tax liens, with the as following limitations:

(1) Liens given priority shall be for customary assessments. A "customary assessment" shall mean an assessment, (i) due no less frequently than quarterly, (ii) due the association for regular and usual operating and common area expenses pursuant to the association's annual budget and (iii) not including late charges, penalties, interest or any fees or costs for the collection or enforcement of the assessment or any lien arising from the assessment.

(2) The total amount of liens given priority shall not exceed the aggregate customary assessment against the unit for the six-month period prior to the recording of the lien.

(3) A lien shall not have priority over a particular mortgage unless it was recorded before (i) the receipt by the association of a summons and complaint in an action

to foreclose the mortgage; and before (b) the filing of a lis pendens in connection with foreclosure of the mortgage.

(4) The priority granted to a lien shall expire on the first day of the 60th month after its recording.

(5) No lien shall be granted priority over a particular mortgage if a prior recorded lien of the association obtained priority over the same mortgage for a period of 60 months from the date of recording of the lien granted priority.

(6) An association recording a lien granted priority pursuant to this section shall give written notice holders of any mortgages or liens recorded or docketed before the filing of the association lien. If an association makes a good faith effort but is unable to ascertain the identity of a holder of a prior recorded mortgage, it will be deemed in substantial compliance with this paragraph.

g. When a unit is voluntarily transferred all parties to the transfer shall be jointly and severally liable for unpaid assessments on that unit until the transfer.

h. The association shall provide a certificate showing the amount of unpaid assessments against a unit within 10 days after receipt of a request by the unit owner, a prospective buyer, mortgage or lien holder or a prospective mortgagee. The liability of any person other than the unit owner who relies on the certificate shall be limited to the amounts stated in it.

i. Claims for unpaid assessments may be enforced (1) against the unit, or (2) by suit against the unit owner, or both.

j. If a unit is sold in a foreclosure, tax sale, or other forced sale:

(1) the sale shall be free of any claim for common expenses or other assessments by the association that has not been recorded or that is subordinate to the lien or claim enforced by the sale;

(2) proceeds of sale remaining after satisfaction of prior liens and charges but before distribution to the previous unit owner, shall be applied to payment of unpaid common expenses or other assessments if written notice of them has been given to the officer conducting the sale before distribution;

(3) any unpaid common expenses or assessments that remain uncollected from the former unit owner for a period of more than 60 days after the sale may be reassessed by the association as common expenses to be collected from all unit owners including the purchaser who acquired title at the sale;

(4) an association may acquire the unit at the sale unless prohibited by the master deed or bylaws;

(5) the master deed and bylaws shall bind any buyer to the same extent as they would bind a voluntary buyer.

Source: 46:8B-21; 46:8B-22

COMMENT

This section is substantially identical to the sources. However, the section has been broadened to apply the same rules to cooperatives as other common interest properties. Special provisions for cooperatives allowing private sale in lieu of foreclosure but requiring a separate action for eviction of the unit owner (see U.C.I.O.A. § 3-116) were rejected as introducing an unnecessary distinction and complication. The approach taken by the section is consistent with that of Section 105 which treats an interest in a cooperative as real estate for almost every purpose.

321. Other liens.

a. In a common interest property other than a cooperative:

(1) Except as provided in paragraph (2), a judgment for money against the association, if docketed, is not a lien on the common elements, but is a lien against all of the units at the time the judgment was entered. No other property of a unit owner is subject to the claims of association creditors.

(2) If the association has granted a security interest in the common elements pursuant to Section 311, the secured party shall exercise its right against the common elements before enforcing a judgment lien on any unit.

(3) The owner of a unit encumbered by a lien pursuant to this section may pay the amount of the lien attributable to his unit, and the lien holder shall promptly deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the lien or of any common expenses incurred thereafter in connection with that lien.

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

b. An association that receives notice of any impending foreclosure on any portion of the association's real estate shall promptly transmit a copy of that notice to each unit owner affected by the foreclosure. Failure of the association to transmit the notice does not affect the validity of the foreclosure.

c. Whether or not a unit owner's unit is subject to the claims of the association's creditors, no other property of a unit owner is subject to those claims.

Source: New.

COMMENT

This section follows U.C.I.O.A. § 3-117.

322. Association records.

a. The association shall keep financial records, in accordance with generally accepted accounting principles. Records shall include a record of all receipts and expenditures of the association. During the period of sponsor control, and in associations that have gross receipts of more than \$100,000, the board shall submit the books, records,

and memoranda of the association to an annual audit by an independent certified public accountant who shall report in writing to the board. If gross receipts are between \$25,000 and \$100,000, the board shall submit the books, records, and memoranda to such an audit every third year. An audit shall cover the operating budget and reserve accounts and the auditor shall make a determination as to whether the association maintains sufficient reserves to cover reasonably foreseeable common expenses and long-term capital expenditures. The certified public accountant shall prepare a written report in summary form which shall be mailed to all unit owners.

b. The association shall maintain records of all warnings and sanctions imposed by the Department on the association, board or officers. The record shall specify the violation and the nature of the action taken, but shall not show the name of the unit owner who requested the Department's intervention.

c. At the request of a unit owner or authorized agent, the association shall make available in a place convenient to the unit owner within 10 days copies of association records, including but not limited to:

- (1) the master deed, bylaws, articles of incorporation, and rules,
- (2) a list of the names and addresses of unit owners;
- (3) the budget or the proposed budget;
- (4) the most recent audit;
- (5) minutes except those of executive sessions, including all attachments, of the board or the association; newsletters, contract specifications, contract bids after the time for submitting bids is closed, or contracts that have been awarded;
- (6) records of all warnings and sanctions imposed by the Department;
- (7) all association income tax returns for the most recent three-year period;
- (8) real estate tax records, insurance policies and certificates, investment statements and employee job descriptions and gross salaries for the most recent year;
- (9) disclosures required to be made by board members, officers of the community, management companies or service providers pursuant to rules governing conflicts of interest in section 303.2 of this act;
- (10) administrative staff manuals and instructions to staff insofar as they pertain to services provided to unit owners.

d. The board may establish fees that do not exceed the actual cost of searching for and copying records. An association may make records available by electronic or other means practical for use by the person requesting access.

e. The association may refuse to make the following records available:

- (1) any document, the disclosure of which constitutes an unwarranted invasion of individual privacy, unless the individual requests in writing that it be disclosed publicly;

(2) any document pertaining to a proposed collective bargaining agreement, or matters proposed for inclusion in a collective bargaining agreement, including the negotiation of its terms and conditions with employees or representatives of employees of the association or of persons and entities who have a contractual relationship with the association;

(3) any document pertaining to the purchase or lease of real property with association funds, or investment of association funds, where disclosure could adversely affect the association's interest;

(4) any document pertaining tactics and techniques used in protecting the safety and property of the association, if their disclosure could impair protection;

(5) any document pertaining to investigations of violations of law, the master deed, bylaws or rules;

(6) any document pertaining to pending or anticipated litigation or contract negotiation where the association is, or may become a party;

(7) any document relating to matters falling within the attorney-client privilege;

(8) any document pertaining to the employment, appointment, termination, evaluation of performance, promotion or discipline of an officer or employee or prospective officer or employee, unless all employees whose rights could be adversely affected request in writing that the matter be disclosed.

f. If any record contains material which is not exempt from disclosure under subsection (e) of this section, the board shall separate the exempt and the non-exempt material and make the non-exempt material available.

g. A unit owner may notify the Department of the association's failure to comply with a request to inspect association records. Upon investigation, the Department may order the association to comply with the request.

Source: U.C.I.O.A. § 3-118; N.J.S. 46:8B-14(g); 46:8B-16(d).

COMMENT

Subsection (a) repeats the uniform law requiring the common interest association to keep financial records. Subsections (b) and (c) specifies other records required to be maintained and made available to unit owners. Subsection (d) establishes standards for defraying expenses of making records available. Subsections (e) and (f) exempt certain documents or portions of documents from disclosure. Subsection (g), which repeats a provision of current New Jersey law, gives unit owners' recourse to the department for enforcement of these rights. The records specified follow recommendations of The Assembly Task Force to Study Homeowner Associations: A Report of Findings and Recommendations (Jan. 8, 1998).

Article 4. Sales and Warranties.

401. New Home Warranty and Builders' Registration Act

This article is intended to supplement, not replace the “New Home Warranty and Builders' Registration Act” (N.J.S. 46:3B-1 et seq.) or other law. The rights and remedies of that act shall continue to apply to new homes in common interest properties.

Source: New.

COMMENT

This section makes it clear that the warranties, express and implied, enforced by this act supplement the protections and remedies afforded purchasers under the “New Home Warranty and Builders' Registration Act” (N.J.S. 46:3B-1 et seq.).

402. Express warranties

a. (1) Any affirmation of fact or promise that relates to the unit, its use or rights, to common elements, to improvements to the common interest property that would benefit the unit, or to the right to use or have the benefit of facilities not located in the common interest property, creates an express warranty by the sponsor that the unit, common elements and related rights and uses will conform to the affirmation or promise;

(2) A model, description or plans of the physical characteristics of the common interest property, creates an express warranty by the sponsor that the common interest property will conform to the model description or plans;

(3) A description of the extent of the property comprising the common interest property creates an express warranty that the common interest property will conform to the description, subject to customary tolerances; and

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

b. A statement purporting to be merely an opinion or commendation of the unit or the common interest property or its value does not create a warranty.

c. Any conveyance of a unit transfers all express warranties made by previous sellers.

Source: New.

COMMENT

This section follows U.C.I.O.A. § 4-113.

403. Implied warranties

a. A sponsor and any dealer warrants that a unit and common elements will be in at least as good condition at the time of the conveyance as they were at the time of contracting, reasonable wear and tear excepted.

b. A sponsor and any dealer warrants that a unit and the common elements are suitable for the ordinary uses of real estate of its type and that improvements will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards.

c. A sponsor and any dealer warrants that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession, and that a residential unit may be used for residential use.

d. Warranties imposed by this section may be excluded or modified only as specified in Section 404.

e. Any conveyance of a unit transfers to the purchaser all of the sponsor's implied warranties.

Source: New.

COMMENT

This section is derived from U.C.I.O.A. § 4-114.

404. Exclusion or modification of implied warranties of quality

a. With respect to a purchaser of a unit for residential use, no general disclaimer of implied warranties is effective, but a sponsor and any dealer may disclaim liability in an instrument signed by the purchaser for a specified defect or failure to comply with a specified provision of law.

b. With respect to a purchaser of a unit that the master deed does not permit to be used as a residence, implied warranties:

(1) may be excluded or modified by agreement; and

(2) are excluded by expression of disclaimer, such as "as is," "with all faults," or other language that in common understanding calls the purchaser's attention to the exclusion of warranties.

Source: New.

COMMENT

This section is substantially derived from U.C.I.O.A. § 4-115.

405. Statute of limitations for warranties

a. Unless a period of limitation is tolled under Section 310 (Tort Liability) or affected by subsection (d), a judicial proceeding for breach of any obligation arising under Section 402 or 403 must be commenced within ten years after the cause of action accrues.

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

(1) as to a unit, when the purchaser to whom the warranty is first made is conveyed the unit or when the unit is completed, whichever is later; and

(2) as to each common element, at the time the common element is completed or, when it becomes part of the common interest property, whichever is later.

c. If a warranty explicitly extends to future performance or the useful life of any improvement or component of the common interest property, the cause of action accrues at the time the breach is or should have been discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

d. During the period of sponsor control, the association membership may authorize an independent committee of the board to evaluate and enforce by any lawful means warranty claims involving the common elements, and to compromise those claims. Only members of the board elected by unit owners other than the sponsor and other persons appointed by those independent members may serve on the committee, and the committee's decision must be free of any control by the sponsor or any member of the board or officer appointed by the sponsor. All costs reasonably incurred by the committee, including attorney's fees, are common expenses, and must be added to the budget annually adopted by the association. If the committee is so created, the period of limitation for claims for these warranties begins to run from thirty days after the committee is created, regardless of when the period of sponsor control terminates.

Source: New.

COMMENT

This section is derived from U.C.I.O.A. § 4-116. But the statute or limitations adopted here conforms to the provision in current New Jersey law found in N.J.S. 2A:14-1.1.

STATE OF NEW JERSEY

NJLR C

NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

relating to

TRANSFERS OF STRUCTURED SETTLEMENT PAYMENT RIGHTS

DECEMBER 2000

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN JANUARY 31, 2000

Please send comments concerning this tentative report or direct any related inquiries, to:

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax)973-648-3123
email: njlrc@eclipse.net
web site: <http://www.lawrev.state.nj.us>

APPENDIX C

Introduction

Personal injury lawsuits often are settled by “structured settlements” under which the injury victim receives deferred compensation payments over a fixed period of time instead of a single lump sum payment. The tortfeasor or its insurer establishes a fund usually called an annuity sufficiently adequate to make payments when due under the structured settlement agreement. The injury victim does not have any property interest in the fund, which remains the property of the tortfeasor or insurer, but has rights to future periodic or lump sum payments. Structured settlements provide leverage during settlement talks, guard against dissipation of lump sum payments and give tax relief to all parties.

However, there is a cloud in the silver lining of “structured settlement” agreements. Sometimes the deferred compensation period stretches beyond two decades. What may have seemed like a good deal to the injury victim at settlement time may turn out to be a burdensome wait for inflation diluted dollars. Injury victims with changed circumstances – financial or otherwise - turn to the market to sell their remaining payments. The market has produced an industry of willing – in the view of some predatory – buyers called factors that purchase payment rights at discounted rates.

Nevertheless, “factoring” has proved nettlesome to injury victims and factors alike. Many “structured settlement” agreements contain non-assignment clauses. These clauses throw into doubt the validity of the assignment under state law. To get around this obstacle, and to avoid the objections of the person required to pay under the agreement, injury victims and factors sometimes have collaborated to hide the fact of the assignment. In such a case, the payee orders the insurance company, or other party required to pay, to deliver the checks to a new address often a post office box under the factor’s control. The guerilla tactics employed to bypass the non-assignment clauses have proved troublesome for all involved parties.

Insurance companies are exposed to double liability if the injury victim reneges on his deal with the factor. Injury victims sometimes keep the factor’s cash payment and the structured settlement periodic payments. Insurance companies also claim that assignments impose tax-reporting requirements on them since the new payee must report the payment as income for federal tax purposes. In addition, factors run the litigation risk of having to collect from a defaulting seller often by way of garnishment proceedings. Finally, some public officials maintain that factors are exploiting injury victims by purchasing assets at unfairly discounted rates. The sale of structured settlement payment rights undermines the public policy of providing a private sector solution to the income problems of injured victims.

On February 10, 2000, Senators Gerald Cardinale and Robert W. Singer, joined by co-sponsors Senators Inverso and Bucco, introduced S944 relating to structured settlement agreements; that same day, the bill was referred to the Senate

Commerce Committee. On February 28, 2000, Assemblywoman Clare M. Farragher introduced A2146 parallel legislation relating to structured settlement agreements. On June 15, 2000, the Senate Commerce Committee adopted a substitute for S944. Subsequently, on June 23, 2000, at the request of the Honorable Howard H. Kestin, J.A.D., the New Jersey Law Revision Commission approved a project to examine the need to regulate transfers of structured settlement agreements.

On September 14, 2000, the Commission held a meeting to solicit testimony from the interested parties in the field: the National Structured Settlements Trade Association, the National Association of Settlement Purchasers and counsel representing the recipients of structured settlement payments. At that meeting, the NSSTA, representing annuity issuers, and the NASP, representing factors buying settlement payments, reported that, on September 11, 2000, they had approved the “Model State Structured Settlement Protection Act.” The Commission decided that it was preferable to write a statute from whole cloth. The extant proposals and law contained unnecessary definitions, unsuitable standards of review and imprudent jurisdictional language. On December 4, 2000, the Senate adopted a substitute for Senate Committee Substitute for S944. That Senate substitute is a wholesale adoption of the “Model State Structured Settlement Protection Act.”

S944 and A2146 would require the Superior Court of New Jersey or responsible government authority to approve any transfer of structured settlement payment rights. S944 would require the court to find that the transfer agreement is in the best interest of the payee and his dependants. S944 does not define the term “best interest.” S944 also extends its coverage to worker’s compensation claims apparently reversing the rule contained in N.J.S.A. 34:15-29 (“claims or payments due under this chapter [Labor & Worker’s Compensation] shall not be assignable and shall be exempt from all claims of creditors and from levy, execution or attachment”). A2146 would require a court to find that the transfer was necessary “to avoid imminent financial hardship” and that the transfer would not create an “undue financial hardship” on the payee’s dependents. A2146 would also require service of the transfer application upon the Attorney General and give the Attorney General standing to contest a transfer. Each bill contains additional consumer protections and penalizes the factor for violating the law.

The New Jersey courts also have considered the issue of assignment of structured settlement payment rights. In Owen v. CNA Ins./Continental Casualty Co., 330 N.J. Super. 608 (App. Div. 2000), the Appellate Division held that Uniform Commercial Code Article 9-314 did not invalidate the non-assignment clause contained in the injury victim’s structured settlement agreement.³⁸ Therefore, unless the non-assignment clause

³⁸ New Jersey is expected to enact Revised Article 9 of the UCC. That Article provides in commentary that the structured settlement proceeds are assignable. The reporters for Revised Article 9 also state unambiguously that Revised Article 9 makes ineffective any anti-assignment clause in a structured settlement agreement. Consequently, the dicta in Owen that Revised Article 9

were unenforceable under other New Jersey law, a question not then before the Court, the factor and the injury victim would be unable to consummate the sale of the remaining structured settlement payments. The dissenting opinion, though deploring predatory factoring practices, held that New Jersey law did not prevent the sale from going forward. The case is on appeal to the New Jersey Supreme Court.

Sixteen states have enacted statutes governing the assignment of structured settlement payments. Each requires prior approval of a court or responsible administrative authority, service of the application upon interested parties (often including the state Attorney General) and a finding that the transfer does not harm the injured victim's dependents. In addition, the two main industry groups involved in structured settlements – the National Structured Settlements Trade Association and the National Association of Settlement Purchasers – have reached agreement on model state legislation designed to provide legal certainty to the assignment and to clarify the rights and liabilities of the parties.

Commission Proposal

The Commission has reviewed the pending New Jersey legislation, the Owen decision, foreign state legislation and the proposed model acts.³⁹ The Commission also has held hearings to allow interested parties the opportunity to submit written comments and to present their views on whether New Jersey should regulate the sale of structured settlement payment rights.

New Jersey law generally does not require prior court approval for the sale of private assets in the marketplace. Buyers and sellers of real property set the terms of their contract of sale. Investors in the stock and bond markets make unsupervised investment decisions. Gamblers in Atlantic City casinos place bets limited only by the credit terms of the casino. These transactions have the capacity to affect the financial condition of the actor. The decision to transfer an asset may be informed and wise or impulsive and foolish. However, the law does not substitute the judgment of the state for the judgment of the actor even though that judgment has social costs. Competent adults may freely dispose of property without prior government sanction.

The proposed legislation deviates from this basic principle of law and requires prior court approval to transfer payment rights. The proposed legislation presumes that payees are incapable of making independent investment decisions and that, if payments rights sales were permitted, the payee and his dependents would become wards of the state. The legislation would provide consumer protection against the aggressive sales techniques of the factor industry. However, compelling evidence does not support these premises. The Owen case, in fact, demonstrates otherwise. In that case, the victim was not

does not settle the question is error.

³⁹ Howard H. Kestin, J.A.D., the dissenting judge in Owen, asked the Commission to consider whether the Legislature should regulate the assignment of proceeds under structured settlement agreements.

severely injured, continued to work after entering into the settlement agreement and made the decision to sell the remaining payment rights based on changed circumstances approximately 15 years after the date of the structured settlement agreement. There is no reason to presume that Ms. Owen cannot make a financial decision and that the court should decide her best interest.

Equally troublesome are the standards of review contained in the proposed legislation. The language of “best interest” in S944 does not establish clear guidelines for the court to follow. Rather, it opens the door to creative interpretation. Likewise, the language of “undue financial hardship” in A2146 respecting the payee’s dependents is equally open-ended. The effect of both bills is to deny competent adults the dignity of decision-making and to treat payees like minors or incompetents requiring the representation of a fiduciary.

Nevertheless, the law has a role to play in payment right sales transactions. As already stated, these transactions produce legal uncertainty. Annuity issuers claim that anti-assignment clauses contained in the structured settlement agreement prohibit the sale of payment rights. Factors and payees claim that the anti-assignment clauses are ineffective under state law. In addition, private IRS rulings suggest that, if a transfer of payment rights is court-sanctioned, then neither the annuity issuer nor the payee incurs any adverse tax consequence under federal law. Consequently, an appropriately balanced legislative response is warranted.

The Commission has drafted a proposed statute entitled the “Structured Settlement Protection Act.” The Commission proposal is based on the “Model State Structured Settlement Protection Act” sponsored by the National Structured Settlements Trade Association and National Association of Settlement Purchasers. But the Commission proposal does not contain provisions regarding jurisdiction and venue that should be left to the New Jersey Courts and the Court Rules. Because the Model Act is not adopted anywhere, and the sixteen state statutes covering structured settlement agreements are not uniform, the Commission modified the Model Act to achieve its statutory mandate to simplify, clarify and modernize New Jersey statutory law.

The draft statute requires the factor to obtain a court order approving the sale of structured settlement payment rights. The court’s inquiry is limited to finding that the payee is making a “voluntary and knowing” decision. That voluntary and knowing decision is presumed to be in the payee’s interest. The court is not permitted to second-guess the decision based on perceived negative consequences. The court also is not permitted to review the decision’s effect upon the payee’s dependents. This standard incorporates the payee’s right to freely dispose of his private property. The proposed statute provides for service upon interested parties, gives the payee a three-day grace period to rescind the sale and permits the procedure to be conducted in summary manner.

Draft Structured Settlement Protection Act

Section 1. Definition

a. “Discounted present value” means the present value of future payments determined by discounting those payments to the present using the most recently published Applicable Federal Rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

b. “Payee” is a person who receives compensation in deferred payments resulting from a structured settlement agreement.

c. “Payor” means the person obligated to pay the payee under the structured settlement agreement.

d. “Structured settlement” is the settlement of a personal injury claim under which the payee receives recurring or scheduled future lump sum payments but does not have any interest in the fund or source from which the payments are derived.

e. “Transfer” means a disposition or encumbrance of payment rights under a structured settlement agreement in return for money or other thing of value.

f. “Transferee” means a person obtaining the right to receive all or part of the payee’s remaining payments as the result of transferring a structured settlement agreement.

Section 2. The Right to Transfer

a. A payee may transfer rights to payments under a structured settlement agreement only as provided by this Act.

b. ~~An anti-assignment clause~~ Any restraints on transfer contained in a structured settlement agreement or any writing arising out of the settlement is ineffective to transfers made under this Act.

c. This Act does not apply to ~~deferred compensation~~ any sum payable under worker’s compensation.

Section 3. Disclosure Requirements

a. Not less than six days prior to the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a disclosure statement containing the following information in plain language:

(1) the payee should seek independent professional advice regarding the transfer;

(2) the amounts and due dates of the structured settlement payments to be transferred;

(3) the total amount of such payments;

(4) the discounted present value of the payments to be transferred and the Federal Rate used to make the calculation;

(5) the gross amount payable to the payee in exchange for the transfer before deduction of any expenses;

(6) an itemized list of all expenses to be deducted from the gross amount or, if not known, an honest estimate of those expenses,

(7) the net amount payable to the payee after all expenses are deducted from the gross amount;

(8) the consequences to the payee of breaking the transfer agreement; and

(9) a statement that the payee has an absolute right to cancel the transfer agreement not later than the third business day after it was signed.

b. Payment rights that are life-contingent under a structured settlement agreement may be transferred only if, prior to the date the transfer agreement is signed, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the payor that periodically confirm the payee's survival and that give prompt written notice of the payee's death.

Section 4. Court Order

a. A transferee shall apply to the court for a final order approving the transfer agreement. The application shall include a record of the disclosure requirements and a copy of the transfer agreement. The transferee shall serve the application upon the payee, payor and, if applicable, any named irrevocable beneficiary named in the structured settlement agreement to receive payments on the payee's death.

b. A transfer agreement is effective only when a court of this State enters a final order approving the transfer agreement based on findings that:

(1) the payee is not a minor or incompetent and has made an informed and voluntary decision to enter into the transfer agreement,

(2) the payee has received independent professional advice or has declined the opportunity to receive independent professional advice, and

(3) the periodic payments to be transferred are not divided between the payee and transferee.

c. An informed and voluntary decision under subsection (b) ~~is presumed to be in~~ creates a rebuttable presumption that the transfer is in the payee's best interest.

Section 5. Effect of Approval or Disapproval

a. A final court order approving the transfer agreement discharges the payor from all liability for paying as directed by the approved transfer agreement.

b. The transferee is liable to the payor for taxes incurred by the payor resulting from the transfer agreement.

c. If the court disapproves of the transfer agreement or, if the transferee fails to comply with this Act, the payee shall have no liability to the transferee, and the transferee shall return to the payee monies paid to the transferee in anticipation of the transfer.

d. The payor must acknowledge in writing that it will honor the approved assignment within three days of the date the court enters its order.

Section 6. Transferee's Liability

a. The payor is not liable for the transferee's failure to comply with this Act.

b. The transferee is liable for damages the payor sustains as a result of the transferee's failure to comply with this Act.

Section 7. Choice of Law

This Act applies to ~~transfers of payment rights~~ transfer agreements ~~under structured settlement agreements~~ entered into by New Jersey residents.

Section 8. Summary Procedure

Actions under this statute shall proceed in a summary manner.

Section 9. Effective Date and Non-Retroactive Application

This Act applies ~~where the~~ to transfer agreements ~~is~~ entered into after the effective date of this Act.

STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

relating to

LEGALIZED GAMES OF CHANCE

DECEMBER 2000

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN MARCH 5, 2001

Please send comments concerning this tentative report or direct any related inquiries, to:

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
email: njlrc@eclipse.net
web site: <http://www.lawrev.state.nj.us>

APPENDIX D

LEGALIZED GAMES OF CHANCE

Introduction

This report recommends a thorough revision of the law regulating bingo, raffles and amusement games, collectively called "legalized games of chance." The law on these games now comprises Title 5, Chapter 8, of the New Jersey Statutes. This law is repetitive and, in some cases, self-contradictory. It is also overly detailed, including provisions better left to administrative regulations. The effect of these deficits is to make the law on legalized games of chance inaccessible to all but those experts who have puzzled through it frequently enough to understand its complexities. However, it is important that this law be understood by the people who are regulated by it: volunteers for charitable organizations that use bingo and raffles and the business people who run amusement games. Officials who administer the current law have told the Commission that it often causes confusion as to what is required. The revised statutes proposed are an attempt to put the law into clear, concise language.

This report also recommends simplification of the substance of the law regulating legalized games of chance. At present, licensing is a two-step process, involving applications to, and approvals by, both the state regulatory commission and the municipality in which the game will take place. That process involves unnecessary complication for the person who must acquire a license. This report recommends instead, that the Legalized Games of Chance Commission be responsible for all licensing.

The Commission also recommends substantive changes to bring the law into harmony with current community expectations. Present law limits amusement games to certain shore localities, established amusement parks, resorts or agricultural fairs and exhibitions. However, these games are also found throughout the state in arcades designed primarily for children, and at fairs and festivals. The proposed statute would accept that practice and make amusement games legal where not prohibited by municipal action. Present law can also be interpreted to forbid merchandise promotions where certain purchasers are given free merchandise or prizes. However, such promotions are common. For example, some soft drink companies give a free bottle where the label or cap of the bottle purchased so indicates. The proposed statute would allow this practice.

Chapter 1. Legalized Games of Chance Control Commission

1-1. Definitions

As used in this act:

“Amusement game” is a game of chance:

- (1) played for entertainment,

- (2) in which the player participates actively,
- (3) the outcome of which is not controlled by the operator; and
- (4) operated so that the sale of right to play, the event determining win or loss, and the award of prize, all occur as a continuous sequence at the time and place that players are present.

“Bingo” means a game of chance as defined in the N.J. Const. Art. IV, Sect. VII, par. 2(A).

“Commission” means the Legalized Games of Chance Control Commission;

“Game of chance” is a game in which:

- (1) players pay to participate;
- (2) winners are determined by chance, skill or combination of the two;
- (3) prizes are awarded to winners; and
- (4) the cost of the prizes is derived from the amount paid by players.

“Raffle” means a game of chance conducted by the drawing for prizes or by the allotment of prizes by chance. "Draw raffle" is one in which the winners are determined by a drawing. "No-draw raffle" is any other kind of raffle, and includes an amusement game.

“Organization” means any group licensed to operate games of chance under the Bingo Licensing Law or under the Raffles Licensing Law.

Source: 5:8-25, 5:8-49.2, 5:8-51, 5:8-101, N.J. Const. Art IV, Sect. VII, par. 2(A).

Comment

This section streamlines language of the source provisions and adds definitions for "amusement game", "bingo" and "raffle." Originally, the director of the Division of Alcoholic Beverage Control served as the Amusement Games Control Commissioner. N.J.S. 5:8-78. By Reorganization Plan No. 004-1992 at 24 N.J.R. 4462, which reorganized the Department of Law and Public Safety, the Amusement Games Control Commission was abolished and its statutory functions were transferred to the Legalized Games of Chance Control Commission.

The Constitutional definition of bingo is a game of chance "played with cards bearing numbers or other designations, five or more in one line, the holder covering numbers as objects, similarly numbered, are drawn from a receptacle and the game being won by the person who first covers a previously designated arrangement of numbers on such a card...."

1-2. Legalized Games of Chance Control Commission, members

a. The Legalized Games of Chance Control Commission shall be in the Department of Law and Public Safety.

b. The Commission shall consist of five citizens of the State who do not hold public office, appointed by the Governor with the advice and consent of the Senate. Not more than three of the appointees shall belong to the same political party.

c. Members of the Commission shall be appointed for terms of five years. Members may serve on the Commission beyond their appointed terms until their successors are appointed and qualify.

d. The Governor shall fill any vacancies which arise for unexpired terms.

e. The members of the Commission shall serve without compensation and shall be reimbursed for their expenses.

f. The Commission shall choose a chairperson and a secretary. The secretary need not be a member of the Commission.

Source: 5:8-1; 5:8-2, 5:8-3, 5:8-4, 5:8-5.

Comment

Subsections (a) and (b) are substantially identical to 5:8-1. Subsections (c), (d), (e) and (f) streamline and combine 5:8-2, 5:8-3, 5:8-4 and 5:8-5.

1-3. Expenses and personnel

a. The Commission may incur expenses and may engage an executive officer and other necessary staff.

b. Investigators employed by the Commission need not be subject to Title 11A, Civil Service.

Source: 5:8-21, 5:8-94.

Comment

This section clarifies the language of its source provisions and deletes unnecessary repetition.

1-4. Legalized Games of Chance Control Commission Fund

a. The Legalized Games of Chance Control Commission Fund is a nonlapsing fund in the Department of the Treasury. Except as otherwise provided by law, all fees, penalties or fines collected by the Legalized Games of Chance Control Commission pursuant to the Bingo Licensing Law, Raffles Licensing Law and Amusement Games Licensing Law shall be deposited in the fund.

b. All interest on money in the fund shall be credited to the fund. The State Treasurer shall administer the fund.

c. At the end of each fiscal year the necessary amount for the Commission shall be appropriated from the fund to the Department of Law and Public Safety.

Source: 5:8-21.1

Comment

This section streamlines the language of the 1994 source provision and adds the Amusement Games Licensing Law.

1-5. Study of licensing laws; Commission reports and recommendations

a. The Commission shall study the operation and administration of the licensing laws to discover defects, abuses and evasions, and to recommend improvements, and shall study similar laws of other states.

b. The Commission shall report annually its recommendations to the Governor, the President of the Senate and the Speaker of the General Assembly. The Commission may make interim reports immediately if it discovers matters requiring immediate change in the laws.

Source: 5:8-12, 5:8-13, 5:8-23, 5:8-85, 5:8-86, 5:8-96.

Comment

This section combines and streamlines related provisions.

1-6. Administrative regulations; forms; fees

a. The Commission shall adopt regulations governing (1) registration and licensing under the Bingo Licensing Law and the Raffles Licensing Law, and certification and licensing under the Amusement Games Licensing Law, and (2) the operation of games under the licenses.

b. The Commission shall file a copy of each regulation it adopts in the office of the Secretary of State before it becomes effective and shall make copies available to municipalities operating under this act.

c. The Commission shall prescribe forms necessary for uniform administration of the laws.

d. The Commission shall establish fees for registrations, licenses and other services at a level that will raise funds necessary to defray expenses of the Commission and of staff administering the Bingo Licensing Law, the Raffles Licensing Law and the Amusement Games Licensing Law.

Source: 5:8-6, 5:8-7, 5:8-79, 5:8-79.1, 5:8-80.

Comment

This section combines the source provisions.

Chapter 2. Games of Chance; General Provisions

2-1. Legalized games of chance; immunity from prosecution for gambling

A person who is licensed or otherwise authorized by this act to operate a game of chance or to allow its operation on premises the person owns, shall not be liable to prosecution or conviction for violation of N.J.S. 2C:37-1 or 2C:37-3. This immunity shall not extend to any game of chance under a license obtained by fraud.

Source: 5:8-40, 5:8-67.

Comment

This section greatly condenses the source provisions and updates the statutory citations. There is no parallel provision applicable to amusement games, but it is implicit that licensed amusement games cannot be prosecuted as gambling.

2-2. Supervision

The Commission shall supervise administration of the Bingo Licensing Law, the Raffles Licensing Law and the Amusement Games Licensing Law.

Source: 5:8-6, 5:8-79.

Comment

This provision derives from one of the duties of the Commission listed in the source provisions.

2-3. Inspection; suspension; revocation; summary proceeding

a. Agents of the municipality and of the Commission shall have the right of entry into, and inspection of, premises where bingo games, raffles or amusement games are being operated or held. Agents of the municipality and of the Commission, with a judicially issued warrant, shall have the right of entry into, and inspection of, premises where equipment for the games' operation is kept for use.

b. If, during inspection, agents observe a violation of this act or Commission regulations, the agents may suspend operation of games on the premises until the violation is corrected.

c. The Commission, after notice and hearing, may suspend or revoke a license for violation of this act or Commission regulations.

d. The Commission also, after giving a licensee opportunity to be heard, may:

(1) issue a letter of reprimand regarding any conduct which the Commission judges not to warrant formal action;

(2) assess and enforce civil penalties;

(3) order any person who violated a law or regulation to refrain from future violations or to make necessary corrections to the operation of games of chance;

(4) order any person who violated a law or regulation to restore to any person money or property wrongly taken;

(5) order a person, as a condition for a continued, reinstated or renewed license, to secure medical or other professional treatment necessary to discharge licensee functions properly; and

(6) revoke a license for violation of provisions of the license, regulations and this chapter.

e. The Commission, in addition to any other proceeding, may bring an action in Superior Court for an injunction to prohibit violations of this law or of Commission regulations. The court shall not suspend or revoke a license or a registration certificate issued by the Commission.

Source: 5:8-9, 5:8-30, 5:8-30.1, 5:8-57, 5:8-57.1, 5:8-82.

Comment

This section streamlines language of the source sections, deleting the enumeration of the court's options ("may assess a civil penalty..., may order restoration..., may enter such orders as may be necessary..."). Subsection (a) adds a "judicially issued warrant" as a prerequisite for entry into, and inspection of, premises where equipment is kept for use.

2-4. Investigations and hearings; subpoenas

a. The Commission shall investigate the administration of this act and complaints concerning violations.

b. A majority of Commission members may hold investigations and hearings in or out of the State, and by subpoena may compel attendance of witnesses and production of documents relating to games of chance under the licensing laws.

c. If a person disobeys a subpoena commanding attendance in an investigation or hearing, or refuses to answer a question or to exhibit documentary evidence when ordered, the Commission may apply to the Superior Court for an order directing the person to comply with the subpoena or order.

d. If the court determines that the person illegally refused to comply with a subpoena or an order of the Commission, it may order the person to comply and may punish failure to obey the court order as a contempt of the court.

Source: 5:8-8, 5:8-14, 5:8-16, 5:8-17, 5:8-85, 5:8-87, 5:8-89, 5:8-90.

Comment

This section streamlines and combines source sections.

2-5. Witness privilege

a. No person shall be excused from testifying or producing any document in any investigation or hearing on the ground that the required testimony or documentary evidence may tend to incriminate or subject the person to penalty.

b. No person shall be prosecuted, punished or subjected to penalty or forfeiture for testimony or documentary evidence produced under oath, except for perjury.

c. A witness shall be privileged from arrest in civil action, during necessary attendance before the Commission, at any place required by subpoena, and while traveling to and from those places.

Source: 5:8-15, 5:8-18, 5:8-91.

Comment

Subsection (a) and (b) are substantially identical to 5:8-15; Subsection (c) is substantially identical to 5:8-18 and 5:8-91. The section requires witnesses to testify before the Commission notwithstanding the constitutional privilege against self-incrimination. That requirement is constitutionally permissible because of the automatic use immunity provided by subsection (b). See, e.g., Hirsch v. N.J. State Bd. of Med. Exam., 252 N.J. Super. 596, 606-608 (App. Div. 1991).

2-6. Registration of qualified organizations

a. An organization that desires to apply for a license to operate or hold a bingo game or raffle shall first apply for registration with the Commission.

b. The following kinds of organizations are qualified to register:

(1) Associations of bona fide veterans of the United States Armed Forces;

(2) Charitable, religious or fraternal organizations, civic and service clubs, and senior citizen associations or clubs;

(3) Educational associations including nonprofit corporations organized for the sole purpose of making loans to students from a single New Jersey school district to defray the costs of post-secondary education;

(4) Volunteer fire companies and first aid or rescue squads.

c. If the Commission determines that the organization is qualified, registered as a charitable or an exempt organization, and is in compliance with all regulations, the Commission shall register the organization and assign it an identification number.

Source: 5:8-6, 5:8-51.3.

Comment

This section details the registration process, which precedes the licensing procedure for bingo and raffles. In the present law, the requirement of registration is buried in the section relating generally to duties of the Commission. The inclusion in Subsection (b)(3) of certain education loan corporations is derived from 5:8-51.3 which became effective in 1997.

2-7. Bingo and raffle equipment; approved lessor of equipment

a. Equipment used in operating or holding a bingo game or a raffle shall be:

(1) owned, or used free of charge, by the licensee; or

(2) leased by the licensee for an amount which conforms to Commission regulations and is specified in a statement annexed to the application for the license to

operate a bingo game or a raffle, and is leased from a person approved as a lessor of equipment.

b. A person shall be approved as a lessor of equipment if the Commission finds the lessor to be of good moral character and free from criminal conviction. The Commission may have access to criminal records for this purpose. If the lessor is a corporation, all of its officers and each stockholder holding 10% or more of outstanding stock, must be approved as to good moral character and freedom from conviction.

c. The Commission may consider violation of this act evidence of lack of good moral character.

Source: 5:8-6, 5:8-34, 5:8-49.6, 5:8-52, 5:8-61.

Comment

This new section describes the securing of Commission approval of a rentor of equipment for use in bingo games or in raffles. Subsection (c) provides one objective criterion for determining "good moral character."

2-8. Statement of receipts, expenses; records

a. An organization which operates or holds a bingo game, a raffle or an amusement game and its members who are in charge shall file quarterly with the Commission a verified statement showing:

- (1) the gross receipts derived from each game of chance operated including receipts connected with participation in the game;
- (2) each item of expense incurred or paid;
- (3) each item of expenditure made or to be made;
- (4) the name and address of each person to whom each item has been or is to be paid, with a detailed description of the merchandise purchased or services rendered;
- (5) the net profit derived from each game of chance and the uses to which the net profit has been or is to be applied; and
- (6) a list of prizes offered or given with their respective values.

b. Each licensee shall maintain records necessary to substantiate the report.

Source: 5:8-37; 5:8-64 5:8-98.

Comment

This section renders the block source provisions more easily readable.

2-9. Examination of records and person; disclosure

a. The municipality and the Commission may examine:

- (1) the records of any licensed organization relating to transactions connected with operating or holding bingo games or raffles; and

(2) any manager, officer, director, agent, member or employee regarding a licensed bingo game or raffle.

b. Information received shall be disclosed only as necessary to enforce the act.

Source: 5:8-38; 5:8-65.

Comment

This section renders the text of the source sections more readable.

2-10. Civil penalties

a. A person who violates the Bingo Licensing Law or the Raffles Licensing Law or a regulation administered by the Commission shall be liable to a civil penalty not exceeding \$7,500.00 for the first offense and not exceeding \$15,000.00 for each subsequent offense. A person who violates the Amusement Games Licensing Law or a regulation administered by the Commission shall be liable to a penalty not exceeding \$250.00 for the first offense and not exceeding \$500.00 for each subsequent offense. Each violation shall constitute a separate offense, but a subsequent offense shall be deemed to exist only if an administrative or court order has been entered in a prior proceeding.

b. Civil penalties may be enforced by the Attorney General pursuant to the Penalty Enforcement Law.

c. Organizations that are registered with the Commission and hold a valid identification number shall not be subject to the provisions of this section.

Source: 5:8-30.2, 5:8-57.2, 5:8-82.

Comment

This section deletes details of process; see N.J.S. 2A:58-10 through 12 regarding summary proceeding for collection of statutory penalties.

2-11. Prosecution for violations

a. The Commission may institute prosecutions for violations of the Bingo Licensing Law, the Raffles Licensing Law, and the Amusement Games Licensing Law.

b. A person who makes false statements in any application or report to the Commission or who violates any provision of this chapter or of any license term may be prosecuted as a disorderly person.

c. A person convicted of being a disorderly person, in addition to other imposed penalties, shall forfeit any license issued under this act and shall be ineligible to apply for a license under this act for one year after forfeiture.

Source: 5:8-10, 5:8-83, 5:8-41, 5:8-68.

Comment

Subsection (a) derives from source provisions 5:8-10 and 5:8-83. Subsections (b) and (c) delete the listing of particular kinds violations, but since all are included within the general language that is retained, they are substantially identical to 5:8-41 and 5:8-68.

2-12. Advertising

The Commission shall adopt regulations for advertising bingo and raffles. The regulations shall prohibit:

- a. any advertisement from containing any false or misleading statement regarding the game;
- b. any advertisement from causing undue or unfair competition between organizations registered with the Commission that are operating competing games; and
- c. the excessive use of the proceeds derived from any game for advertising subsequent games.

Source: 5:8-63.1.

Comment

The provision is substantially similar to 5:8-63.1 which became effective in 1996. It has been extended to cover both bingo and raffles.

Chapter 3. Bingo Licensing Law

3-1. Short title

This chapter shall be known as the “Bingo Licensing Law.”

Source: 5:8-24.

Comment

This section is substantially identical to its source.

3-2. Municipal adoption of Bingo Licensing Law; resubmission; form of question

- a. The Bingo Licensing Law shall remain inoperative in a municipality until approved by the voters of the municipality.
- b. Within 10 days after a municipality adopts the Bingo Licensing Law , it shall file a copy of the ordinance adopting the law with the Commission.
- c. If a petition signed by at least 15% of the total votes cast at the preceding general election in the municipality, requesting that the question of adopting the Bingo Licensing Law be submitted to the voters, is filed with the municipal clerk, the question shall be submitted to the voters of the municipality at the next general election occurring at least 45 days after the filing date.

d. At any election where the question of adoption of this act shall be submitted, the question upon the official ballots shall read: “Shall the ‘Bingo Licensing Law’” be adopted within this municipality?”

e. In any municipality where a majority of votes is cast against adopting the Bingo Licensing Law, if a required petition is filed, the question may not be submitted again until the third general election after the election at which the law was rejected is held.

Source: 5:8-22, 5:8-42, 5:8-44, 5:8-45.

Comment

Subsection (a) is substantially identical to 5:8-42. Details on the conduct of the 1954 referendum found in 5:8-43 have been deleted as executed. Subsection (b) derives from 5:8-22. Subsections (c) and (e) derive from 5:8-44. Subsection (d) derives from 5:8-45. Current 5:8-46 which states that a majority of votes cast is necessary for adoption, has been deleted as unnecessary.

3-3. Rescinding the Bingo Licensing Law

a. In any municipality in which the Bingo Licensing Law has become operative, if a petition signed by at least 15% of the total number of votes cast at the preceding general election in the municipality, requesting that the question of rescinding the Bingo Licensing Law be submitted to the voters, is filed with the municipal clerk, the question shall be submitted to the voters of the municipality at the next general election occurring at least 45 days after the filing date.

b. At any election where the question of rescinding the Bingo Licensing Law is submitted to the voters, the question upon the official ballots shall read: “Shall the ‘Bingo Licensing Law’ within the municipality be rescinded?”

c. If the majority of votes cast are in favor of the rescission of the Bingo Licensing Law, it shall be rescinded and it shall cease to be operative within the municipality.

d. No petition for submission of the question of adoption of the Bingo Licensing Law or its rescission shall be submitted to the municipality’s voters earlier than the general election in the third calendar year after the vote on rescission.

Source: 5:8-47, 5:8-48, 5:8-49.

Comment

Subsection (a) is a streamlined version of 5:8-47. Subsection (b) is substantially identical to 5:8-48. Subsections (c) and (d) contain the substance of 5:8-49.

3-4. Application for license to operate or hold a bingo game; fees; issuance; duration; display; amendment

a. If an applicant, whether to be paid or unpaid, for a license to operate or hold a bingo game files a written application with the Commission, is registered with the Commission, and pays any required fee, the Commission shall issue a license upon

determining that the applicant is qualified, has paid the license fees set by regulations and is not in violation of regulations.

b. A license shall be effective for no more than one year and shall be displayed conspicuously on site during the entire time the game of chance operates.

c. A license may be amended, upon application to the Commission if the proposed subject lawfully could have been included in the original license, and upon payment of any proper additional license fee.

Source: 5:8-26, 5:8-27, 5:8-29.

Comment

This section greatly condenses the source provisions by removing the details of what information the application requires. It provides that the Commission alone, rather than both the Commission and municipalities, shall issue licenses for bingo games. Subsection (b) incorporates the requirement to display the license.

3-5. Licensing of registered organizations; proceeds of games

a. The Commission may license a registered organization to operate or hold bingo games in any municipality that has adopted the Bingo Licensing Law.

b. The entire net proceeds of the bingo games shall go to educational, charitable, patriotic, religious or public-spirited uses and in the case of senior citizen groups, to their support.

Source: 5:8-25.

Comment

This section transfers licensing authority from municipalities to the Commission. Unlike the source provision, it does not describe how to play bingo, leaving the details to common knowledge and regulations. See also the definition of “bingo” in Section 1-1.

3-6. Limitations on operation or holding of games

Bingo games licensed under this act shall not operate or be held:

a. on Sunday unless permitted by municipal ordinance;

b. with persons below the age of 18 years as participants, unless only non-money prizes are awarded;

c. more often than six days per week; nor

d. any place where alcoholic beverages are sold or served to players during the games.

Source: 5:8-31, 5:8-32, 5:8-33.

Comment

This section combines three source provisions, and deletes unnecessary detail (i.e., definition of “Sunday”). Subsection (c) changes six days per month to six days per week. Note Assembly Bill 2176, introduced March 6, 2000, which proposes this change. The Bill also would change the content of

Subsection (d) to read: "Alcoholic beverages shall not be served to any bingo player during the conduct of the game."

3-7. Prizes

a. All winners shall be determined and all prizes shall be awarded in any game played on any occasion within the same calendar day that the winner is determined.

b. Any prizes above \$25,000 may be awarded only when the entire amount is insured by a company approved by the Commission.

c. The Commission may regulate the amounts of prizes that may be awarded.

Source: 5:8-27, 5:8-35

Comment

Subsection (a) is substantially identical to a portion of 5:8-35. Subsections (b) and (c) are new. They delete specific dollar limitations on prizes and allow the Commission to limit prizes by regulation. The insurance requirement is taken from a parallel provision on raffles, 5:8-62.

3-8. Persons operating or holding bingo; compensation; equipment; expenses; rents; regulations

a. No person shall operate or hold licensed bingo except:

(1) an active member of the licensed group,

(2) a member of a group which is an auxiliary to the licensed group,

(3) a person compensated by the licensed group, who is approved by the Commission for that purpose, or

(4) a person who is compensated for bookkeeping or accounting services as provided in Commission regulations.

b. A person lawfully may operate bingo for two or more affiliated licensees of which the person is an active member. The Commission by regulation shall determine affiliation.

c. Bingo equipment shall be owned absolutely or used without payment of compensation by the licensee or leased for a rental which is specified in the statement annexed to the application for the licensee and conforms to the schedule of authorized rentals prescribed by Commission regulation and the lessor shall have been approved by the Commission as to good moral character and freedom from conviction of crime.

d. Expenses shall be paid only when incurred in reasonable amounts for items and services necessary for operating or holding bingo.

e. Rent for premises used in connection with operating or holding bingo games shall not be paid in excess of the amount specified in the statement annexed to the application for a license to operate bingo and approved by the Commission.

f. A licensee may pay reasonable compensation to a person approved by the Commission for services rendered in connection with operating bingo. The regulations shall include provisions which: establish the qualifications, the duties which may be performed and the compensation which may be paid; require that a person receive approval of the Commission prior to rendering compensable services; provide that an active member of the organization shall oversee the rendering of services; and prohibit the payment of compensation to any person who is an active member of the organization or of an auxiliary or affiliated organization. The Commission, in order to determine that a person is of good moral character and free from conviction, may have access to criminal records for that purpose.

Source: 5:8-34, 5:8-34.1.

Comment

This section streamlines the language of 5:8-34 as amended in 1999. Subsection (b) is substantially like 5:8-34.1.

3-9. Bingo premises; license for rentor of premises to operator of bingo

a. Premises used for licensed bingo shall be:

- (1) owned by the licensee operating the bingo game,
- (2) owned by another person licensed to operate bingo, or
- (3) rented by the licensee from an approved rentor licensed by the Commission.

b. A person seeking a license as an approved rentor shall file an application in a form specified by the Commission.

c. A license as an approved rentor shall not be granted:

(1) when any person whose signature or name appears in the application is not the real party in interest or when the person signing or named in the application is an undisclosed agent or trustee for the real party in interest; and

(2) unless the Commission determines that the applicant, and if the applicant is not the owner, the owner of the premises, and if the applicant or owner is a corporation, all of its officers and each of its stockholders owning 10% or more of its

(2) unless the Commission determines that the applicant, and if the applicant is not the owner, the owner of the premises, and if the applicant or owner is a corporation, all of its officers and each of its stockholders owning 10% or more of its issued and outstanding stock, are of good moral character and have not been convicted of a crime.

d. The Commission may consider a violation of this act as evidence of lack of good moral character.

e. When the Commission is satisfied that the required person qualifies, the Commission shall issue a license to the applicant as an approved rentor for the premises specified in the application, upon payment of the license fee. The license shall be valid

until revoked, suspended or modified by the Commission. The licensed rentor shall pay the fee for each occasion bingo games are operated in the licensed premises.

f. The Commission may issue a temporary permit to a license applicant pending final action on the application. A temporary permit shall be valid for a maximum of 180 days.

Source: 5:8-49.3, 5:8-49.4, 5:8-49.5, 5:8-49.6, 5:8-49.7.

Comment

This new section combines portions of a number of source provisions. Subsection (a) is new.

Chapter 4. Raffles Licensing Law

4-1. Short title

This chapter shall be known as the “Raffles Licensing Law.”

Source: 5:8-50.

Comment

This section is substantially identical to its source.

4-2. Municipal adoption of Raffles Licensing Law; resubmission; form of question

a. The Raffles Licensing law shall remain inoperative in a municipality until approved by the voters of the municipality.

b. Within 10 days after a municipality adopts the Raffles Licensing Law, it shall file a copy of the ordinance adopting the law with the Commission.

c. If a petition signed by at least 15% of the total number of votes cast at the preceding general election in the municipality, requesting that the question of adopting the Raffles Licensing Law be submitted to the voters, is filed with the municipal clerk, the question shall be submitted to the voters of the municipality at the next general election occurring at least 45 days after the filing date.

d. At any election where the question of adoption of this act shall be submitted, the question upon the official ballots shall read: “Shall the Raffles Licensing Law be adopted within this municipality?”

e. In any municipality where a majority of votes is cast against adopting the Raffles Licensing Law, if a required petition is filed, the question may not be submitted again until the third general election after the election at which the Law was rejected is held.

Source: 5:8-22, 5:8-69, 5:8-71, 5:8-72.

Comment

Subsection (a) is substantially identical to 5:8-69. Details on the conduct of the 1954 referendum found in 5:8-70 have been deleted as executed. Subsection (b) derives from 5:8-22. Subsection (d) derives from 5:8-72. Subsections (c) and (e) derive from 5:8-71. Current 5:8-73 which states that a majority of votes cast is necessary for adoption, has been deleted as unnecessary.

4-3. Rescinding the Raffles Licensing Law

a. In any municipality in which the Raffles Licensing Law has become operative, if a petition signed by at least 15% of the total number of votes cast at the preceding general election in the municipality, requesting that the question of rescinding the Raffles Licensing Law be submitted to the voters, is filed with the municipal clerk, the question shall be submitted to the voters of the municipality at the next general election occurring at least 45 days after the filing date.

b. At any election where the question of rescinding the Raffles Licensing Law is submitted to the voters, the question upon the official ballots shall read: “Shall the Raffles Licensing Law within the municipality be rescinded?”

c. If the majority of votes are cast in favor of the rescission of the Raffles Licensing Law, its adoption shall be rescinded and it shall cease to be operative within the community.

d. No petition for submission of the question of adoption of the Raffles Licensing Law or its rescission shall be submitted to the municipality’s voters earlier than the general election in the third calendar year after the vote on rescission.

Source: 5:8-74, 5:8-75, 5:8-76

Comment

Subsection (a) is a streamlined version of 5:8-74. Subsection (b) is substantially identical to 5:8-75. Subsections (c) and (d) contain the substance of 5:8-76.

4-4. Application for license to operate or hold a raffle; fees; issuance; duration; display; amendment

a. If an applicant, whether to be paid or unpaid, for a license to operate or hold a raffle files a written application with the Commission, is registered with the Commission, and pays any required fee, the Commission shall issue a license upon determining that the applicant is qualified, has paid the license fees set by regulations and is not in violation of regulations.

b. A license shall be effective for no more than one year and shall be displayed conspicuously on site during the entire time the raffle operates.

c. A license may be amended, upon application to the Commission if the proposed subject lawfully could have been included in the original license, and upon payment of any proper additional license fee.

Source: 5:8-52, 5:8-53, 5:8-54, 5:8-55, 5:8-56.

Comment

This section greatly condenses the source provisions by removing the details of what information the application requires. It provides that the Commission alone, rather than both the Commission and municipalities, shall issue licenses for raffles. Subsection (b) incorporates the requirement to display the license.

4-5. Licensing of registered organizations

a. The Commission may license a registered organization to operate raffles in a municipality that has adopted the Raffles Licensing Law.

b. The entire net proceeds of the raffles shall go to educational, charitable, patriotic, religious or public-spirited uses and, in the case of senior citizen groups, to their support

c. The Commission may adopt regulations authorizing licensees to hold events known as:

(1) “armchair races” at which wagers are placed on the outcome of previously-filmed horse races and wagers do not know the results in advance, when the prize awarded consists of merchandise or raffle tickets only, and not cash; and

(2) “casino nights” at which players use chips or scrip purchased from the licensee to wager in games of chance known as blackjack, under/over, beat-the-dealer, chuck-a-luck, craps, roulette, bingo or similar games approved by the Commission, when the chips or scrip are redeemable for merchandise or raffle tickets only, and not for cash.

d. The regulations shall establish the frequency with which armchair races and casino nights may be held, the rules of the games, the specific types and values of prizes which may be offered, the qualifications of the individuals conducting the games and other requirements which the Commission may deem pertinent.

e. No license shall be required for a registered organization operating a raffle for a door prize of donated merchandise valued under \$400.00 when no extra charge is made, no other game of chance is operated, the proceeds are devoted to the uses approved in this section and receipts are reported as required.

f. No license shall issue under this act for operating any game of chance which may be licensed under the Bingo Licensing Law.

Source: 5:8-51, 5:8-54.

Comment

This section transfers licensing authority from municipalities to the Commission. Subsection (b) allows the use of proceeds for support of the licensed charitable organization. Under current law, that use may be restricted to senior citizen organizations. Subsections (c) and (d) were added by the Legislature in 1999. Subsection (e) is substantially similar to current law, except that \$50.00 has been increased to \$400.00. Subsection (f) derives from 5:8-54. It has no counterpart in the Bingo Licensing Law.

4-6. Limitations on operation of raffles

Raffles licensed under this act shall not be operated:

a. on Sunday unless permitted by municipal ordinance; nor

b. more often than six days per week.

Source: 5:8-58, 5:8-60.

Comment

The section combines two source provisions and deletes unnecessary detail (i.e., definition of “Sunday,” repetition of phrase “games of chance operated under license issued under this act”). Subsection (b) changes the current limit of six days per month to six per week. This change is proposed in Assembly Bill 2176.

4-7. Persons under 18 not allowed to participate

a. No person under the age of 18 years shall be permitted to participate in any manner in any game of chance not conducted by a drawing, except that a person under the age of 18 years shall be permitted to play a game of chance not conducted by a drawing when the prize consists of merchandise only and does not include money.

b. No person under the age of 18 years shall be permitted to participate in any manner in any licensed game of chance conducted by a drawing, except to play an on-premises draw raffle, including a Penny auction, when any prize consists of merchandise only.

c. “Penny auction” means an event at which multiple items of merchandise, or gift certificates, but not cash, are raffled by drawing the winning ticket from a container designated for each item into which players seeking to win that item have placed tickets, with all tickets having been sold for the same price or different prices and each ticket placed in a container having an equal chance of winning.

Source: 5:8-59, 5:8-60.2.

Comment

The Legislature amended the source provision to allow persons under 18 to play draw raffles for merchandise prizes. Subsection (c) derives from 5:8-60.2 which became effective in 1998.

4-8. Cash prizes; retail value of prizes

a. No prize shall be given in cash except as authorized by Commission regulation.

b. The aggregate retail value of all prizes given by raffles operated by one licensee under this act, except as provided in subsection (c), in any year shall not exceed \$500,000, but the limit shall not apply to any raffle with respect to which all tickets, shares or rights to participate are sold only to persons present, the winners determined, and the prizes awarded, on the same occasion or if the prizes are wholly donated.

c. The maximum prize in a golf hole-in-one contest shall not exceed \$1,000,000. Any prizes above \$25,000 may be awarded only when the entire amount is insured by a company approved by the Commission. The prize shall be paid as an annuity with a payout over a maximum period of 20 years. Ancillary prizes awarded shall have an aggregate retail value no greater than that provided by subsection (b) and shall also be subject to the provisions of subsection (d).

d. No prize having a retail value greater than that prescribed by Commission regulation shall be awarded in any raffle conducted by a drawing, or for each spin of the wheel or other allotment by chance.

Source: 5:8-62.

Comment

This section is substantially similar to its source. Subsection (c) concerning a golf hole-in-one contest was added in 1996.

4-9. Regulations; prizes; discount tickets; non-draw raffles

The Commission shall adopt regulations allowing registered organizations to:

- a. offer as a raffle prize any lawful personal or professional service that the Commission determines to be an appropriate raffle prize, and the value of which is within the limits set by the Commission;
- b. offer as a raffle prize a gift certificate redeemable for live, edible seafood the value of which is within the limits set by the Commission;
- c. offer a discount to any person purchasing two or more tickets for a draw raffle; and
- d. use a big six wheel, a big eight wheel or other wheel to determine the winner of a non-draw raffle.

Source: 5:8-60.3.

Comment

This new section became effective in 1998.

4-10. Persons operating or holding a raffle; compensation; equipment; expenses; rents

- a. No person shall operate or hold a licensed raffle except:
 - (1) an active member of the licensed group,
 - (2) a member of a group which is an auxiliary to the licensed group,
 - (3) a person compensated by the licensed group, who is approved by the Commission, or
 - (4) a person who is compensated for bookkeeping or accounting services as provided in Commission regulations.
- b. Raffles shall be operated or held only with equipment owned absolutely or used without payment of compensation by the licensee or shall be leased for a rental, which amount is specified in the statement annexed to the application for the license and conforms to the schedule of authorized rentals prescribed by Commission regulation and the lessor has been approved by the Commission as to good moral character and freedom from conviction of crime.
- c. Expenses shall be paid only when incurred in reasonable amounts for items and services necessary for operating or holding the raffle.

d. Rent for premises used in connection with operating or holding raffles shall not be paid in excess of the amount specified in the statement annexed to the application for a license to operate a raffle.

e. A licensee may pay reasonable compensation to a person approved by the Commission for services rendered in connection with operating a raffle. The regulations shall include provisions which: establish the qualifications, the duties which may be performed and the compensation which may be paid; require that a person receive approval of the Commission prior to rendering compensable services; provide that an active member of an organization shall oversee the rendering of services; and prohibit the payment of compensation to any person who is an active member of the organization or of an auxiliary or affiliated organization. The Commission, in order to determine that a person is of good moral character and free from conviction, may have access to criminal records for that purpose.

Source: 5:8-61.

Comment

This section streamlines the language of 5:8-61 and incorporates 1999 amendments which allow a non-member of a licensed group to be paid to operate or assist in operating games, if the person is approved by the Commission. Subsection (b) concerns equipment used in operating games and is more expansive than the corresponding section (4-7) pertaining to bingo. The 1999 amendment added a new subsection, here designated (e), which states the scope of relevant regulations.

4-11. Statement for approved rentor of premises used for raffle

No rental shall be paid for the use of any premises for operating a raffle unless the amount of the rental to be charged conforms to the Commission-authorized amount and is written in the statement annexed to the application for a license to operate a raffle, and the rentor is approved by the Commission as being of good moral character and free from conviction of crime. If the rentor is a corporation, all of its officers and each of its stockholders who hold 10% or more of its outstanding stock, must be of good moral character and free from criminal conviction.

Source: 5:8-27, 5:8-34.

Comment

Unlike the more stringent license requirement for a rentor of premises to an operator of bingo, the rentor of premises used for a raffle need only be satisfactory to the Commission based on the statement annexed to the application for a license to operate a raffle.

4-12. Pamphlet

The Commission shall produce and make available to any qualified organization, upon request, a pamphlet which describes in plain language the rights, duties and responsibilities of organizations conducting raffles and the manner in which raffles are to be conducted.

Source: 5:8-60.4.

Comment

This new section became effective in 1998.

4-13. Violation of rules of conduct; oral or written warning

Prior to initiating administrative action or bringing charges against an organization qualified to conduct raffles for a violation which relates to operation of the game or awarding of prizes, the Commission shall first issue an oral or written warning and offer the organization the opportunity to cease the conduct which constitutes the violation.

Source: 5:8-60.5.

Comment

This new section became effective in 1998.

4-14. On-premises 50-50 cash draw raffle

a. A registered organization may conduct an on-premises 50-50 cash draw raffle without a license but must declare the receipts in its required quarterly reports. An on-premises 50-50 cash draw raffle is a raffle conducted by a drawing for cash, in which all tickets are sold only to persons present at the place of drawing with the winner determined there and the prize awarded equals fifty percent of the amount received for all tickets sold.

b. An organization registered by the Commission to conduct raffles may conduct an on-premises 50-50 cash draw raffle on unlimited occasions as long as each does not exceed \$400.00, in any municipality in which the Raffles Licensing Law is operative.

Source: New

Comment

This new section reflects the substance of the first two subsections of Assembly Bill 725. This section would allow certain nonprofit organizations to conduct an unlimited number of on-premises 50-50 cash draw raffles without the payment of a per-occasion fee.

Chapter 5. Amusement Games Licensing Law

5-1. Short title

This chapter shall be known as the "Amusement Games Licensing Law."

Source: 5:8-100.

Comment

This section is substantially identical to its source.

5-2. Municipal disapproval of Amusement Games Licensing Law; resubmission; form of question

a. The Amusement Games Licensing Law shall be operative in a municipality unless disapproved by the voters of the municipality.

b. Within 10 days after a municipality disapproves the Amusement Games Licensing Law, it shall file a copy of the ordinance disapproving the law with the Commission.

c. If a petition signed by at least 15% of the total votes cast at the preceding general election in the municipality, requesting that the question of disapproving the Amusement Games Licensing Law be submitted to the voters, is filed with the municipal clerk, the question shall be submitted to the voters of the municipality at the next general election occurring at least 45 days after the filing date.

d. At any election where the question of disapproving this act shall be submitted, the question upon the official ballots shall read: “Shall the ‘Amusement Games Licensing Law’ be disapproved in this municipality?”

e. In any municipality where a majority of votes is cast against disapproving the Amusement Games Licensing Law, if a required petition is filed, the question may not be submitted again until the third general election after the election at which the law was rejected is held.

Source: New.

Comment

This section reverses the current practice of requiring municipal adoption of the Amusement Games Licensing Law prior to the law's becoming operative in a municipality. The section provides instead, for the law to operate in all municipalities except those which "disapprove" it in a municipal election.

5-3. Rescinding disapproval of the Amusement Games Licensing Law

a. In any municipality in which the Amusement Games Licensing Law has been disapproved, if a petition signed by at least 15% of the total number of votes cast at the preceding general election in the municipality, requesting that the question of rescinding disapproval the Amusement Games Licensing Law be submitted to the voters, is filed with the municipal clerk, the question shall be submitted to the voters of the municipality at the next general election occurring at least 45 days after the filing date.

b. At any election where the question of rescinding disapproval of the Amusement Games Licensing Law is submitted to the voters, the question upon the official ballots shall read: “Shall the ‘Amusement Games Licensing Law’ within the municipality be approved?”

c. If the majority of votes cast are in favor of the approving of the Amusement Games Licensing Law, disapproval of the law shall be rescinded and the law shall be operative within the municipality.

d. No petition for submission of the question of disapproval of the Amusement Games Licensing Law shall be submitted to the municipality's voters earlier than the general election in the third calendar year after the vote on rescinding disapproval.

Source: New.

Comment

This section provides for rescinding disapproval of the Amusement Games Licensing Law and is patterned on the analogous sections for rescinding the Bingo Licensing Law and the Raffles Licensing Law.

5-4. Certification of games

a. An amusement game must be certified as permissible by the Commission before a license to operate the game may issue. A certification shall be effective for all licenses issued for the specific kind of game named in the certification.

b. Commission regulations shall list the amusement games that have been certified, describe each game and may limit the number or kind of prizes that may be awarded for the game.

c. Any person may apply to the Commission for certification of a game not already certified. Applications shall be made on the form and with the fee prescribed by regulations.

d. An amusement game shall not be certified if it:

(1) is deceptive or unfair to participants, or

(2) unfairly competes with games of chance operated under the Bingo Licensing Law or the Raffles Licensing Law, and

e. The commission shall not certify as an amusement game:

(1) pool selling, the keeping of a gambling resort, or betting on horse racing,

(2) betting on the outcome of any athletic game or contest in which the player does not actively participate;

(3) bingo or raffles other than draw raffles, where prizes have a value not exceeding \$15.00.

Source: 5:8-79, 5:8-113, 5:8-112.

Comment

Certification of permissible games is unique to amusement games; there is no counterpart in the Bingo or Raffle laws. This section combines, in streamlined form, the three source sections.

5-5. Application for license to operate an amusement game; fees; hearing; issuance; duration; display; amendment

a. If an applicant for a license to operate an amusement game files a written application with the Commission and pays any required fee, the Commission shall send a copy of the application to the municipality in which the game will be operated.

(1) If the municipality concurs in the application or does not object to the application within 10 days, the Commission shall issue a license upon determining that the applicant is qualified and has paid the license fees set by regulations.

(2) If the municipality objects to the application, the Commission after notice to the applicant and the municipality, shall hold a hearing and issue a license upon determining that the applicant is qualified and has paid the license fees.

d. A license shall be effective for no more than one year and shall be displayed conspicuously on site during the entire time the game of chance operates.

e. A license may be amended, upon application to the Commission if the proposed subject lawfully could have been included in the original license, and upon payment of any proper additional license fee and notice to the municipality.

Source: 5:8-101, 5:8-102, 5:8-103, 5:8-104, 5:8-105.

Comment

This section provides that the Commission alone, rather than both the Commission and the municipalities, shall issue licenses for amusement games.

5-6. Qualifications for license to operate an amusement game

a. An application for a license to operate an amusement game shall not be approved unless the applicant, and the officers, directors and stockholders of any corporation holding 10% or more of the capital stock of a corporate applicant, or the partners or members of a partnership or association applicant, are of good moral character and have not been convicted of a crime, or, if convicted of a crime, the disqualification has been removed by the Commission.

b. No license shall issue for premises licensed under an alcoholic beverage license.

Source: 5:8-103.

Comment

Subsection (a) greatly condenses the source provision and raises 5% to 10%. Subsection (b) is new and without a statutory source. It reflects current practice. See NJAC 13:3-1.7.

5-7. Contents of license

A license shall specify:

a. the name and address of the licensee,

- b. the place at which the games are to be operated,
- c. the particular games that will be operated,
- d. the days and hours of permitted operation, and
- e. the term of the license.

Source: 5:8-103, 5:8-105.

Comment

This section condenses the source provisions.

5-8. Restriction on time of operation of amusement game

No game shall operate at a time prohibited by municipal ordinance.

Source: New.

Comment

No statute explicitly forbids operation of amusement games at times prohibited by municipal ordinance. Current practice, as reflected in NJAC 13:3-1.6., does.

5-9. Charges; prizes

- a. All amusement game prizes shall be merchandise.
- b. All prizes shall be awarded at the conclusion of the game.
- c. The Commission, by regulation:
 - (1) may set the amount which a licensee may charge for playing a game, and
 - (2) shall set the value of a merchandise prize that may be given in a game.

Source: 5:8-107.

Comment

This section is substantially similar to the source provision.

5-10. Reports by licensee

The Commission may require licensees to submit periodical reports and may specify their form, contents and filing times.

Source: 5:8-98.

Comment

This section condenses the source provision.

5-11. Merchandise giveaways

No license shall be required for a manufacturer or seller of a product to give free merchandise or other prizes to randomly selected purchasers of the product if the only cost to the purchaser to be eligible for the prize is the ordinary cost of the product.

Source: New.

Comment

This section allows the unlicensed giveaway of prizes which otherwise could be construed as illegal gambling. Examples include promotions where winners are indicated by bottlecap inserts, and drawings where a winning customer's purchase price is refunded.