



State of New Jersey

N J L R C

New Jersey Law Revision Commission

ANNUAL REPORT

2001

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I. MEMBERS AND STAFF OF THE COMMISSION IN 2001

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
Represented by **Bernard Bell**, Professor of Law

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

John J. A. Burke, Assistant Executive Director

Maureen E. Garde, Counsel (through March 2001)

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 inconsistent, obsolete or redundant statutes, and covers comprehensive revision of select areas of law. The Commission 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 56 reports with the Legislature of which 28 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.

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

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.

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 2001, the New Jersey Legislature enacted four bills based upon Final Reports and Recommendations of the Commission:

- Anatomical Gift Act (L. 2001, c.87);
- Intestate Succession (L. 2001, c.109)
- Revised UCC Article 9 (Secured Transactions) (L. 2001, c.177);
- Uniform Electronic Transactions Act (L. 2001, c.116).

In addition, the New Jersey Legislature considered several other bills based on Final recommendations of the Commission including A3274 relating to judgments and their enforcement and S1677, the Uniform Child Custody Jurisdiction and Enforcement Act.

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 opportunity to comment on tentative drafts of the report. The final report is filed with the Legislature.

² N.J.S.A. 52:11-61

³ L.1985, c.498.

After filing, the Commission and its staff work with the Legislature to draft the report in bill form and to facilitate its enactment.

In 2001, the New Jersey Law Revision Commission published one final report.

Common Interest Ownership Act (UCIOA)

The Commission completed its Final Report and Recommendations Relating to the Common Interest Ownership Act (UCIOA) (see Appendix A). UCIOA governs condominiums, cooperatives, planned real estate developments and related emerging forms of co-ownership. 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. The act applies to all "common interest property," regardless of form, to which an undivided interest in common elements is attached. However, 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. The Commission's draft preserves consumer protection provisions in residential developments, while allowing greater latitude where a community consists solely of non-residential units.

Condominiums and cooperative associations are the statutory creations and are the most common forms of common interest property. *The Berkley Condominium Association Inc. v. The Berkley Condominium Residences, Inc.*, 185 N.J. Super 313, 319 (Ch. Div. 1982). Each condominium unit is owned in fee simple and all unit owners automatically become

members of a governing association and own common areas. 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. 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.

UCIOA 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).

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 2001, the Commission published two tentative reports.

A. Title Recordation

The Commission approved a project to revise the statutes on recording of title documents motivated, in part, by the enactment of the Electronic Signatures in Global and National Commerce Act (E-sign), 15 U.S.C. §7001 et seq., and the New Jersey enactment of the Uniform Electronic Transactions Act (UETA), L.2001, c.116. This legislation requires the

acceptance of electronic alternatives to paper documents. While the use of electronic deeds and mortgages is not expected to take place soon, E-sign and UETA encourage development of systems that will accept them without disruption of the system for recording title documents.

The New Jersey statutes related to recording and indexing of title documents are contained in Title 46, chapters 15 to 26. Most statutes date from a period when recording meant large well-bound books of good paper. The statutes were amended, first, to allow recording offices to microfilm documents and second in 1997, to allow the use of any other method of recording, "in conformance with rules, standards and procedures promulgated by the Division of Archives and Records Management in the Department of State and approved by the State Records Committee pursuant to its authority under section 6 of P.L.1994, c.140 (C.47:1-12) and the 'Destruction of Public Records Law (1953),' P.L.1953, c.410 (C.47:3-15 et seq.)." N.J.S. 46:19-1. The system of approval of new methods seems to work well. It has the advantage of not providing for any particular method, and, as a result, will not become obsolete with changes of recording technology.

The proposed statutory revision contained in this Tentative Report (hereafter the revision) governs the methods of recording and indexing and reflects the same approach of existing law. In particular, references to separate sets of books or separate databases for different kinds of documents have been deleted. With modern technology, separate indexes serve the same function. In addition, the revision attempts to simplify the statutes, combining overlapping provisions and deleting unnecessary provisions. Some current statutes have grown by accretion. Chapter 16 begins with a section that characterizes and lists the documents that may be recorded. Other sections that allow the recording of particular kinds of documents follow Chapter 16. All of these sections have been combined into a single section that lists documents entitled to recording. In an exercise of caution, in many cases, the revision retains specifically listed kinds of documents that could have been treated as falling within other, more general, categories.

The general provisions on prerequisites for recording in the current statutes are the result of the Commission's work in 1989. It is generally considered successful in simplifying the process of deciding whether a document may be recorded. However, the scope of the

Commission's 1989 report was narrow. Exceptions and additions to recording requirements in other sections were left uncompiled. This revision assembles those sections and combines them where appropriate. While the 1989 report standardized the requirements for the most common documents recorded, there were a few issues in regard to unusual documents that were not reached. If the document is not a conveyance, and not prepared by the person who seeks to record it, how can the requirements be met? Practice has developed that requires an affidavit accompanying such a document. A provision has been added to reflect that practice. A provision has also been added to allow for format requirements for documents. Current statutes contain some limitations on the size of paper documents and on the quality of paper used. The problem of format becomes more acute if electronic equivalents to paper documents are to be accepted. A recording office must limit electronic documents to those it can decipher. Format requirements must be standardized throughout the State so that persons can know and comply with them. In addition, the requirements must always allow conventional paper documents to be filed. The revision is a first step toward balancing these interests.

B. Uniform Mediation Act

In 2001, the Commission published its Tentative Report on the Uniform Mediation Act (see Appendix C). At its 2001 annual meeting, the National Conference of Commissioners on Uniform State Laws approved the Uniform Mediation Act (UMA) and recommended its enactment by state legislatures. The UMA was the result of a joint project of the NCCUSL and the Mediation Section of the American Bar Association. The project was motivated by the belief that effective mediation requires all parties to be confident that anything that takes place during mediation is not disclosed later in any subsequent legal or administrative proceeding. The UMA would assure that confidence by enacting the broadest possible evidentiary privilege in every state. The UMA creates a privilege against disclosure of any "mediation communication" by (1) parties to the mediation, (2) the mediator, and (3) non-parties, such as experts, who attend the mediation. The privilege would apply in any judicial, administrative, or legislative proceeding and in any arbitration. The privilege

would apply unless waived by all parties to the mediation and by the mediator. Exceptions to the privilege are few and set out in detail.

New Jersey law provides substantial protection to the confidentiality of mediation. The Rules of Evidence make any offer of compromise of a disputed claim inadmissible on the validity or amount of the claim. N.J.R.E. 408. In addition, New Jersey Court Rules provide: “no disclosure made by a party during mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding.” R. 1:40. However, neither of these protections is a privilege and both are narrower than the protection³²¹ provided by the UMA. The UMA privilege, like most privileges, applies to more than court proceedings, and its application to administrative proceedings may be particularly important.

Moreover, the UMA privilege protects more persons than a traditional privilege. It provides protection not only to the parties to the mediation but also to the mediator. While a lawyer cannot invoke the lawyer-client privilege over the objection of the client, the mediator is separately protected by the privilege and cannot be forced to testify even if both parties request that he waive his privilege. The UMA would even let the mediator bar testimony by the parties about the mediation that the parties have agreed to give.

The Commission recommends the enactment of the UMA because it has determined that a uniform state law is necessary to protect mediation. Most commercial litigation has interstate effects. It is important that all parties understand that uniform rules concerning mediation apply regardless of where the mediation takes place. A testimonial privilege is necessary to protect mediation. The need for uniformity in this area makes any in-depth consideration of the details of the UMA privilege irrelevant.

VI. WORK IN PROGRESS

A. Uniform Computer Information Transactions Act

In 2001, the Commission continued its consideration of 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 2000 and 2001 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.

As of February 2002, only two states, Maryland and Virginia, have adopted UCITA.

B. Distressed Property

In 2001, the Commission approved a project to revise the law governing the regulation of abandoned or distressed real property. Current law consists of several statutes containing inadequate responses to the myriad problems posed by real property in a state of decline. The Commission's project is designed to set early triggers to require owners of residential and commercial property to comply with all real property regulations or face the prospect of having the real property put in receivership or sold at public auction. The Act prevents the decline of property before it poses serious risk to tenants and harms the community in which the property is located.

C. Election Law

In 2001, the Commission approved a project to reform New Jersey Election law. This project involves an in-depth examination of New Jersey law, federal election law, the law of other states, and institutional and academic reports on election law and procedures. The project reforms the administration of elections, establishes a statewide voter registration database, simplifies and makes more efficient the procedures regulating absentee and provisional ballots and creates a legal infrastructure flexible enough to accommodate

improvements to the voting system based upon future technological developments. The Commission has considered the comments of many election officials and interested members of the public. The Commission expects to release its Tentative Report and Recommendations in the Spring 2002.

D. Games of Chance

At the end of 2000, the Commission published a Tentative Report recommending a thorough revision of the law regulating bingo, raffles and amusement games, collectively called "legalized games of chance." Existing law on games 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 regulation. These deficits 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 bottled beverage where the label or cap of the bottle purchased so indicates. The proposed statute would allow this practice.

The Commission is now receiving public response to the Tentative Report. A Final Report on Games of Chance is expected early in 2002.

E. Revised UCC Article 9

The National Conference of Commissioners on Uniform State Laws promulgated for enactment in all states Revised Article 9 (Secured Transactions) in 1999. Thereafter, the Commission produced a Final Report and Recommendations recommending the enactment of Revised Article 9 with non-conforming amendments to create a central filing system for financing statements. In 2001, the Legislature enacted the bill without the Commission recommended amendments, in a form supported by the NJ Bar Association. However, the version of Revised Article 9 enacted by the Legislature did not contain the 2000 Official Text amendments and did not contain all conforming amendments to other articles of the Uniform Commercial Code.

The Commission, in conjunction with the Office of Legislative Services and Donald Rapson, an expert on Revised Article 9 and member of the NCCUSL drafting committee, prepared a clean-up bill to incorporate the 2000 amendments and to conform the New Jersey law to that of the Official Text of Revised Article 9. The Legislature enacted that clean-up bill in January 2002. However, due to time constraints, the clean-up bill did not contain all required conforming amendments to other articles of the Uniform Commercial Code. In 2002, the Commission will prepare a second bill to correct these omissions.

F. Cemeteries

In 1998, the Commission filed its Final Report and Recommendations with the Legislature. Industry representatives worked with the Commission on the development of the draft statute and supported the Final Report and Recommendations. However, the industry later decided to reconsider the Commission's Final Report and Recommendations and to draft its own statute. The Legislature indicated that it did not want to consider two competing bills on the subject, and requested the industry to work with the Commission to produce a single report and draft statute. That process is on going.

State of New Jersey



New Jersey Law Revision Commission

FINAL REPORT AND RECOMMENDATIONS

relating to

THE NEW JERSEY COMMON INTEREST OWNERSHIP ACT

January 2001

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 2000, more than 50 million lived in over 205,000 communities. 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. *Papalexioiu 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 within 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, and 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 words "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 or unit 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 legal and 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(l); 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 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 304^{1/2}; 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 a breach of 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 alleged 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, the board shall mail or deliver a summary of the budget to all unit owners, and make a copy available in a place convenient to the them. 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 period of 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 penalties imposed by associations for 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 at cost to unit owners, unit buyers and other interested persons.

d. If a petition signed by one-third 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 filed. 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 and occupants 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 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 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, any 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 owners 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 secured lenders. 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.

317. 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 the association's 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, votes 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 have not been recorded or that are 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 more than 60 days after the sale may be reassessed 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.

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 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 an 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) specify 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

N J L R C

New Jersey Law Revision Commission

TENTATIVE REPORT

relating to

RECORDING OF TITLE DOCUMENTS

November 2001

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.

The Commission particularly directs your attention to the section on the effect of recording on page XX. This section includes a new rule requiring that the proponent of a document be responsible for assuring that the document is properly indexed.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN FEBRUARY 28, 2002.

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>

Introduction

The Commission approved a project to revise the statutes on recording of title documents following the enactment of the Electronic Signatures in Global and National Commerce Act (E-sign), 15 U.S.C. §7001 *et seq.*, and the New Jersey enactment of the Uniform Electronic Transactions Act (UETA), L.2001, c.116. This legislation requires the acceptance of electronic alternatives to paper documents. While the use of electronic deeds and mortgages is not expected to take place soon, E-sign and UETA encourage development of systems that will accept them without disruption of the system for recording title documents.

The New Jersey statutes related to recording and indexing of title documents are contained in Title 46, chapters 15 to 26. Most statutes date from a period when recording meant large well-bound books of good paper. The statutes were amended, first, to allow recording offices to microfilm documents and second in 1997, to allow the use of any other method of recording, "in conformance with rules, standards and procedures promulgated by the Division of Archives and Records Management in the Department of State and approved by the State Records Committee pursuant to its authority under section 6 of P.L.1994, c.140 (C.47:1-12) and the 'Destruction of Public Records Law (1953),' P.L.1953, c.410 (C.47:3-15 *et seq.*).'" *N.J.S. 46:19-1*. The system of approval of new methods seems to work well. It has the advantage of not providing for any particular method, and, as a result, will not become obsolete with changes of recording technology.

The proposed statutory revision contained in this Tentative Report (hereafter the revision) governs the methods of recording and indexing and reflects the same approach of existing law. In particular, references to separate sets of books or separate databases for different kinds of documents have been deleted. With modern technology, separate indexes serve the same function. In addition, the revision attempts to simplify the statutes, combining overlapping provisions and deleting unnecessary provisions. Some current statutes have grown by accretion. Chapter 16 begins with a section that characterizes and lists the documents that may be recorded. Other sections that allow the recording of particular kinds of documents follow Chapter 16. All of these sections have been combined into a single section that lists documents entitled to recording. In an exercise of caution, in many cases, the revision retains specifically listed kinds of documents that could have been treated as falling within other, more general, categories.

The general provisions on prerequisites for recording in the current statutes are the result of the Commission's work in 1989. It is generally considered successful in simplifying the process of deciding whether a document may be recorded. However, the scope of the Commission's 1989 report was narrow. Exceptions and additions to recording requirements in other sections were left uncompiled. This revision assembles those sections and combines them where appropriate. While the 1989 report standardized the requirements for the most common documents recorded, there were a few issues in regard to unusual documents that were not reached. If the document is not a conveyance, and not prepared by the person who seeks to record it, how can the requirements be met? Practice has developed that requires an affidavit accompanying such a document. A provision has been added to reflect that practice.

A provision has also been added to allow for format requirements for documents. Current statutes contain some limitations on the size of paper documents and on the quality of paper used. The problem of format becomes more acute if electronic equivalents to paper documents are to be accepted. A recording office must limit electronic documents to those it can decipher. Format requirements must be standardized throughout the State so that persons can know and comply with them. In addition, the requirements must always allow conventional

paper documents to be filed. The revision is a first step toward balancing these interests.

R-1. Documents that may be recorded.

a. The county recording officer shall record any document affecting the title to real estate, located in the county, delivered for recording provided the document:

- (1) is in the form required by this act,
- (2) complies with requirements for recording, and
- (3) is accompanied by payment of any required fee.

b. Documents entitled to recording are:

- (1) deeds or other conveyances, releases, or declarations of trust of any interest;
- (2) powers of attorney for conveyance or release of any interest;
- (3) leases, or memoranda of lease, for life or a term not less than two years;
- (4) mortgages, defeasible deeds or other conveyances in the nature of a mortgage;
- (5) liens or encumbrances and releases of liens or encumbrances on any interest;
- (6) assignments, discharges or releases;
- (7) options, rights of first refusal and other restrictions on conveyance;
- (8) certified copies of judgments, decrees, orders and minutes of courts of record;
- (9) reports of condemnation commissioners filed with the Superior Court;
- (10) notices of Federal tax liens, liens arising from the federal "Comprehensive Environmental Response, Compensation and Liability Act of 1980," Pub.L.96-510 (42 U.S.C. s.9601 et seq.), and other federal liens, which any Act of Congress or regulation adopted pursuant to it provides for filing of notice in the recording office designated by a state, and certificates discharging such liens;
- (11) restrictions affecting the real estate or its use;
- (12) notices of settlement as provided by this chapter;
- (13) maps as provided by this chapter;
- (14) any other document of any kind that affects title to any interest in real estate in any way or contains any agreement in relation to real estate, or grants any right or interest in real estate or grants any lien in real estate; and
- (15) any other instrument relating to real estate that is directed to be recorded by any statute or court order.

Source: 46:16-1

COMMENT

This section is derived from the parts of 46:16-1 that relate to real estate. The section makes no substantive change in the kinds of documents that may be recorded. The general rule that any document that affects title to real estate and meets certain requirements may be recorded is stated both in 46:16-1 and 46:16-2. Other provisions in Chapter 16 provide for the recording of particular kinds of document.

The parts of 46:16-1 that provide for recording of instruments concerning personal property have been deleted as unnecessary. Documents of title to the few kinds of personalty that are recorded, are not recorded with the county recording offices. Liens against personalty are governed, in general, by Revised Article 9 of the Uniform Commercial Code. *N.J.S. 12A:9-101 et seq.* Liens against personalty, other than personalty that is or will be fixtures, are recorded by filing a UCC form with the division of Commercial Recording. Liens against fixtures are recorded by filing the required document (usually a fixture filing) with the county recording officer, but that recording is separate from the recording governed by this Chapter. Fixtures are part of the real estate, may be encumbered by mortgages, liens, and the like filed in the real estate records, and be affected by any kind of encumbrance on the real estate generally. Recording these encumbrances is provided for by subsections (b)(4) and (b)(5).

Subsections (b) (8) and (9) are derived from 46:16-1.1. Subsection (b)(8) also includes the subject matter of 46:16-4.1 and 46:16-4.3, decrees and orders of the United States Bankruptcy Courts. Subsection (b)(11) is based on 46:16A-1. It incorporates the chapter allowing the recording of settlement statements into the general recording provisions. The general provisions, subsections (13) and (14) are derived from 46:16-2.

R-2. Prerequisites to recordation.

a. A document satisfies the prerequisites for recording if it appears that:

(1) the document is in English or accompanied by a translation into English;

(2) the document bears a signature or other notation that is equivalent to a signature as a matter of law;

(3) the document is acknowledged or proved in the manner provided by this title;

(4) the names are printed beneath the signatures of any parties to the document and the officer before whom it was acknowledged or proved;

(5) if the document is a deed conveying title to real estate, (a) fulfills the requirements of P.L.1968, c.49, s.2 (C.46:15-6), (b) includes the name and signature of its preparer on its first page and (c) it includes a reference to the lot and block number of the real estate conveyed as designated on the tax map of the municipality at the time of the conveyance or the account number of the real estate. If the real estate has been subdivided, the reference shall be preceded by the words "part of." If no lot and block or account number has been assigned to the real estate, the deed shall state that fact; and

(6) if the document is an assignment, release or satisfaction of a mortgage or an agreement respecting a mortgage, it states the book and page number or the document identifying number of the mortgage to which it relates.

b. A document, entitled to recording, whether made by an individual, corporation or other entity, is not required to be executed under seal, or to contain words referring to execution under seal.

Source: 46:15-1.1; 46:18-1.

COMMENT

This section is substantially similar to 46:15-1.1 which was based on the Commission's 1989 report. The section does not make any change in the content required to make a document eligible for recording. The opening language has been changed to reflect the section's new context. Subsection (a)(4) of the source has been reworded to allow for electronic documents. In the source, the subsection required that the names of signatories "appear typed, printed or stamped beneath the signatures" suggesting a requirement of a paper document. The new phrase, "printed beneath the signatures" is intended to indicate only that the name of the signatory appear in readable form. Subsection (a)(5) of the source, requiring the payment of fees, has been deleted here because it appears elsewhere.

Subsection (a)(6) is substantially identical to 46:18-1. This additional requirement for documents affecting mortgages is necessary to allow notations to be appended to the original mortgage. The reference to "book and page" in the source has been changed to "the book and page number or the document identifying number."

R-3. Exceptions to prerequisites to recording.

Notwithstanding the prerequisites to recording in section R-2:

a. A certified copy of the following may be recorded:

(1) judgments, decrees, orders or minutes of any court of record and petitions filed in a United States Bankruptcy Court;

(2) public documents affecting title to real estate;

(3) documents recorded in another public recording office.

b. The following may be recorded:

(1) trust instruments under which a fiduciary has acquired real estate if accompanied by an affidavit of the fiduciary that the document is the original trust instrument;

(2) ancient documents that cannot be acknowledged or proved because of the death or other disability of the grantors and subscribing witnesses, accompanied by an affidavit made by a person claiming to derive title from the document stating that the affiant truly believes that quiet, continuous, adverse and undisturbed possession of the real estate has been enjoyed by virtue of the document for forty years or more;

(3) other documents that by their nature cannot be acknowledged or proved, accompanied by an affidavit made by a person claiming to derive title to the real estate stating that the document is genuine and how the document relates to title to the real estate;

(4) notices of Federal tax liens, liens arising from the federal "Comprehensive Environmental Response, Compensation and Liability Act of 1980," Pub.L.96-510 (42 U.S.C. s.9601 et seq.), and other federal liens, which any Act of

Congress or regulation adopted pursuant to it provides for filing of notice in the recording office designated by a state, and certificates discharging such liens;

(5) maps as provided by this act; and

(6) notices of settlement executed by an attorney at law or legal representative of a party in accordance with the provisions of this act.

Source: 46:16-1.1; 46:16-4.1; 46:16-4.2; 46:16-4.3; 46:16-5.1; 46:16-7; 46:16-9; 46:16-9; 46:16-13; 46:16-14; 46:16-15; 46:16-17.

COMMENT

This section assembles the exceptions to the ordinary prerequisites for recording. It does not make any substantive change in those exceptions. Subsection (a) provides for the kinds of public documents that need not be original documents bearing a signature and acknowledgment. This subsection continues the substance of 46:16-1.1, 46:16-4.1, 46:16-4.2, 46:16-4.3, and 46:16-14. Although current law does not provide for recording of public documents, subsection (a)(2) reflects current practice. Subsection (a)(3) is a generalization of 46:16-9 and 46:16-10. Subsection (b)(1) contains the substance of 46:16-5.1. Subsection (b)(2) contains the substance of 46:16-7. Subsection (b)(3) has no direct source but enacts current practice. Subsection (b)(4) contains the substance of 46:16-13; 46:16-15 and 46:16-17. Subsection (c)(1) is identical in substance to 46:16A-2.

R-4. Form of documents.

a. To be accepted for recording, a document shall be either:

(1) legibly printed on paper no larger than 8½ inches by 14 inches; or

(2) in compliance with regulations on the form of documents promulgated by the Division of Archives and Records Management in the Department of State.

b. To be accepted for recording, a map, shall be either:

(1) clearly and legibly drawn in black ink on translucent tracing cloth, translucent mylars at least 4 mils thick or its equivalent, of good quality, with signatures in ink, or as an equivalent reproduction on photographic fixed line mylar 4 mils thick with signatures in black ink or its equivalent and accompanied by a cloth print or photographic fixed line mylar 4 mils thick duplicate; and one of six standard sizes: 8 1/2" x 13", 30" x 42", 24" x 36", 11" x 17", 18" x 24" or 15" x 21" as measured from cutting edges. If one sheet is not of sufficient size to contain the entire territory, the map may be divided into sections to be shown on separate sheets of equal sizes, with references on each sheet to the adjoining sheets; or

(2) in compliance with regulations on the form of documents promulgated by the Division of Archives and Records Management in the Department of State.

c. The regulations of the Division of Archives and Records Management specifying the form of documents and maps shall comply with rules, standards and procedures authorized by the State Records Committee pursuant to its authority under section 6 of P.L.1994, c.140 (C.47:1-12) and the "Destruction of Public Records Law (1953)," P.L.1953, c.410 (C.47:3-15 et seq.).

Source: New

COMMENT

Currently, the only form restriction in the statutes is 46:19-4. It requires: "where photographic methods are used, all instruments presented for recording shall be typed, written or printed on paper not to exceed 8 1/2" x 14 " of sufficient quality to avoid bleed-through, and shall be legible and clear to produce a good, clear, legible photo recording." However, as a practical matter, that form restriction is generally applicable, since every recording office uses some kind of photographic method. Of course, even before recording offices used photographic methods, there were restrictions that did not need to be stated: that every document must be in writing, on paper and of a size that allowed its binding into the record books. The current form restriction is continued as a "safe harbor" provision in subsection (a)(1).

While the section preserves unchanged the ability to file a document on paper, it allows for later acceptance of electronic documents. If recording offices are to accept documents in electronic form, other restrictions will be necessary. Any electronic system adopted by a recording office must have limitations. To avoid confusion that would result from 21 separate sets of requirements for electronic filing, authority is given to the Division of Archives and Records Management to establish statewide form requirements. Notwithstanding any new systems of electronic filing that are allowed, the section provides that documents may still be filed on paper.

The section has been expanded to include the form requirements for maps. Currently, these form restrictions are in 46:23-9.11 along with content requirements. The current form restrictions are continued unchanged as a "safe harbor" provision in subsection (b)(1).

R-5. Duty to record; Recording officer's books, methods.

a. The county recording officer shall record any document or map affecting the title to real estate, located in the county, delivered for recording provided the document:

- (1) is in the form required by this act,
- (2) complies with requirements for recording specified in this act, and
- (3) is accompanied by payment of any required fee.

b. Every document or map shall be recorded and indexed within two days after its receipt.

c. When a document is recorded, a document identifying number shall be assigned. Recording shall be done by a method that produces a clear, accurate and permanent image of a document. The method used shall allow the document to be found by use of the indexes maintained, and shall allow notations to be appended to the document as required by law.

d. Recording shall be done by a method authorized by R.S.47:1-5 and in conformance with rules, standards and procedures promulgated by the Division of Archives and Records Management in the Department of State and approved by the State Records Committee pursuant to its authority under section 6 of P.L.1994, c.140 (C.47:1-12) and the "Destruction of Public Records Law (1953)," P.L.1953, c.410 (C.47:3-15 et seq.).

e. The Division of Archives and Records Management and the State Records Committee shall consult with the Office of Telecommunications and Information Systems in the Department of the Treasury in the development of technical standards for

record keeping. Notwithstanding this section, the State Records Committee may adopt rules and regulations to authorize pilot programs for various individual counties in order to evaluate alternative technologies for the preservation of records.

Source: 46:19-1; 46:19-3.

COMMENT

This section contains the portions of 46:19-1 that relate to methods of recording generally. The parts of the source section that refer specifically to “well-bound books” and to the systems of books of documents have been deleted as unnecessary. Subsection (b) reflects the settlement of litigation between the county recording officers and the New Jersey Land Title Association. Current statutes assume that every document will be recorded and indexed on the day received. All parties to the litigation agreed that that time requirement was impractical. Subsection (c) is derived from 46:19-3, but has been generalized to allow any kind of recording method that allows the search and use of the documents. As such, it provides for an identifying number rather than a book and page, and sets out general requirements for recording standards.

The section allows for new methods of recording but preserves the practical effect of the present system: every document is required to be recorded and indexed so that the whole text of the document and appended notations may be found by the use of standard indexes.

R-6. Receipts for instruments presented for record.

Upon request, the county recording officer shall return a copy of the instrument endorsed with the date it was received for recording, the fee paid, and the document identifying number assigned to the document.

Source: 46:19-5

COMMENT

This section replaces sections 46:19-4 and 46:19-5 which provide that the recording officer give receipts for documents lodged for record and, on request, return a copy of the document with filing information endorsed on it. The reference to a receipt for the fee is new but reflects current practice.

The section allows an identifying number other than the traditional book and page to be used.

R-7. Indexes; entries.

a. The county recording officer shall maintain indexes of recorded documents. The county recording officer may make other separate, classified, analytical or combination indexes in addition to required indexes. Separate indexes shall be made for:

(1) deeds and other conveyances of interests in real estate, including leases;

(2) mortgages;

(3) maps and documents relating to the elimination of public highways;

and

(4) notices of settlement;

b. A deed or other conveyance shall be indexed in the names of its grantors and grantees, and shall be indexed in the name of:

(1) the testator or intestate if a deed or other conveyance is made by executors or administrators;

(2) the person granting the power of attorney if a deed is made under power of attorney;

(3) the defendants in the execution for which the sale was made if a deed is made by a sheriff; or

(4) the person whose property has been conveyed if a deed is made by a person appointed to convey property by a court.

c. A mortgage shall be indexed under the names of the mortgagors of mortgagees.

d. A trust instrument shall be indexed under the names of the parties to the instrument and in the name of the cestui que trustent if it appears.

e. Any other document shall be indexed:

(1) in the names of the parties to them; and

(2) in any other names specified by the person who recorded the document.

f. A document shall be indexed under additional names requested by the person submitting the document for recording.

Source: 46:20-1; 46:20-3; 46:20-5; 46:19-2.

COMMENT

This section, for the most part, simplifies section 46:20-1. Subsection (d) is derived from 46:20-3. The requirement for a separate index of documents related to vacation of highways, subsection (a)(3), is derived from 46:19-2. The requirement for a separate index of notices of settlement is derived from 46:16A-1. The provision in subsection (a) allowing other indexes is derived from 46:20-5. Subsection (e)(2) has been added to provide for indexing of unusual documents in accord with common practice.

R-8. Appended notations on mortgages.

When an assignment, extension, postponement or modification of a mortgage is recorded, the county recording officer shall also append a notation to the record of the affected mortgage indicating the book and page number or document identifying number assigned to the assignment, extension, postponement or modification.

Source: 46:18-2.

COMMENT

This section preserves the substance of 46:18-2 without change, but it is not specific as to the manner of recording. It requires an appended notation rather than an entry in the margin of the original mortgage, and it refers to a document identifying number as well as a book and page number.

R-9. Sequence of recording.

The county recording officer shall record and index instruments in the order received. If two instruments are received at the same time, the county recording officer shall record and index them according to the priority of their dates.

Source: 46:20-2.

COMMENT

This section is substantially identical to 46:20-2 which provides for the sequence of index entries and to the second paragraph of 46:19-3 which provides for the sequence of recording.

R-10. Notices of Settlement.

a. A party, or the legal representative of a party, to a settlement which will convey a legal or equitable interest in real estate or a mortgage on real estate, may execute a "notice of settlement" and file it with the county recording officer of the county in which the real estate is located. The county recording officer may charge a fee not to exceed the fee charged for the filing and recording of notices of Federal tax liens.

b. The notice of settlement shall be signed by a party to the settlement or a party's authorized representative and shall state the names of the parties to the settlement and a description of the real estate. If the notice is executed by anyone other than an attorney at law of this State, the execution shall be acknowledged or proved in the manner of acknowledgement or proof of deeds.

c. The form of the notice of settlement shall be as follows:

Name)

Address)

(Seller or Mortgagor)

NOTICE OF SETTLEMENT

Name)

Address)

(Purchaser or Mortgagee))

NOTICE is hereby given of a(contract, agreement or mortgage commitment) between the parties.

THE lands to be affected are described as follows:

Premises in the of, (municipality) County of and State of New Jersey, commonly known as (street address) and more particularly described as follows:

(legal description)

Name of party or authorized representative

Address

(acknowledgement)

d. The notice of settlement shall be effective for 45 days from the date of filing.

e. Any person who claims an interest in the real estate described in the notice of settlement as the result of a conveyance during the time that a notice of settlement is effective shall be deemed to have acquired the interest with knowledge of the anticipated settlement and shall be subject to the provisions of the deed or mortgage between the parties filed within the time that the notice is effective.

f. Any lien filed on real estate described in the notice of settlement during the time that a notice of settlement is effective shall not attach to interests in the property that are conveyed during the time that a notice of settlement is effective but shall not be affected by a subsequent notice of settlement filed after the lien is filed.

Source: 46:16A-1 through 46:16A-5.

COMMENT

This section is substantially identical to 46:16A-1 through 5. The form in subsection (c) has been simplified slightly. Subsection (d) has been reworded to reflect its intended effect more accurately.

F-1. Realty transfer fees.

In addition to the recording fees imposed by section 2 of P.L.1965, c.123 (C.22A:4-4.1), a fee is imposed upon grantors, at the rate of \$3.50 for each \$1000. of consideration or fractional part thereof recited in the deed; provided however, that on and after the tenth day following a certification by the Director of the Division of Budget and Accounting in the Department of the Treasury pursuant to subsection b. of section 2 of P.L.1992, c.148 (C.46:15-10.2), the fee imposed shall be \$1.00 for each \$1000. of consideration or fractional part thereof recited in the deed, which fee shall be collected by the county recording officer at the time the deed is offered for recording. For each \$1000. of consideration or fractional part thereof recited in the deed in excess of \$150,000. an additional fee is imposed of \$1.50; provided however, that on and after the tenth day following a certification by the Director of the Division of Budget and Accounting in the Department of the Treasury pursuant to subsection b. of section 2 of P.L.1992, c.148 (C.46:15-10.2), no such fee shall be imposed.

Every deed subject to the additional fee required by this act, which is in fact recorded, shall be conclusively deemed to have been entitled to recording, notwithstanding that the amount of the consideration shall have been incorrectly stated, or that the correct amount of such additional fee, if any, shall not have been paid, and no such defect shall in any way affect or impair the validity of the title conveyed or render the same unmarketable; but the person or persons required to pay said additional fee at the time of recording shall be and remain liable to the county recording officer for the payment of the proper amount thereof.

Source: 46:15-7.

COMMENT

This section is identical to its source except that the fees have been expressed per \$1000 of value.

F-2. County, State sharing of fee proceeds.

The proceeds of the fees collected by the county recording officer, as authorized by this act, shall be accounted for and remitted to the county treasurer. An amount equal to 28.6% of the proceeds from the first \$3.50 for each \$1000. of consideration or fractional part thereof recited in the deed so collected shall be retained by the county treasurer for the use of the county and the balance shall be paid to the State Treasurer for the use of the State; provided however, that on and after the tenth day following a certification by the Director of the Division of Budget and Accounting in the Department of the Treasury pursuant to subsection b. of section 2 of P.L.1992, c.148 (C.46:15-10.2), 100.0% of the proceeds from the first \$1.00 for each \$1000. of consideration or fractional part thereof recited in the deed so collected shall be retained by the county treasurer for the use of the county and no amount shall be paid to the State Treasurer for the use of the State. Payments shall be made to the State Treasurer on the tenth day of each month following the month of collection. Amounts, not in excess of \$25,000,000, paid during the State fiscal year to the State Treasurer from the payment of fees collected by the county recording officer other than the additional fee of \$1.50 for each \$1000. of consideration or fractional part thereof recited in the deed in excess of \$150,000. shall be credited to the "Shore Protection Fund" created pursuant to section 1 of P.L.1992, c.148 (C.13:19-16.1), in the manner established under that section. All amounts paid to the State Treasurer in payment of the additional fee of \$1.50 for each \$1000. of consideration or fractional part thereof recited in the deed in excess of \$150,000.00 shall be credited to the Neighborhood Preservation Nonlapsing Revolving Fund established pursuant to P.L.1985, c.222 (C.52:27D-301 et al.), in the manner established under section 20 thereof (C.52:27D-320).

Source: 46:15-8.

COMMENT

This section is identical to its source except that the fees have been expressed per \$1000 of value.

F-3. Falsifying consideration; penalty.

Any person who knowingly falsifies the consideration recited in a deed or in the proof or acknowledgment of the execution of a deed or in an affidavit annexed to a deed declaring the consideration therefor or a declaration in an affidavit that a transfer is exempt from recording fee is guilty of a crime of the fourth degree.

Source: 46:15-9.

COMMENT

This section is identical to its source.

F-4. Exemptions from realty transfer fee.

The fee imposed by this act shall not apply to a deed:

(a) For a consideration, as defined in section 1(c), of less than \$100.00;

(b) By or to the United States of America, this State, or any instrumentality, agency, or subdivision thereof;

(c) Solely in order to provide or release security for a debt or obligation;

(d) Which confirms or corrects a deed previously recorded;

(e) On a sale for delinquent taxes or assessments;

(f) On partition;

(g) By a receiver, trustee in bankruptcy or liquidation, or assignee for the benefit of creditors;

(h) Eligible to be recorded as an "ancient deed" pursuant to R.S.46:16-7;

(i) Acknowledged or proved on or before July 3, 1968;

(j) Between husband and wife, or parent and child;

(k) Conveying a cemetery lot or plot;

(l) In specific performance of a final judgment;

(m) Releasing a right of reversion;

(n) Previously recorded in another county and full realty transfer fee paid or accounted for, as evidenced by written instrument, attested by the grantee and acknowledged by the county recording officer of the county of such prior recording, specifying the county, book, page, date of prior recording, and amount of realty transfer fee previously paid;

(o) By an executor or administrator of a decedent to a devisee or heir to effect distribution of the decedent's estate in accordance with the provisions of the decedent's will or the intestate laws of this State;

(p) Recorded within 90 days following the entry of a divorce decree which dissolves the marriage between the grantor and grantee;

(q) Issued by a cooperative corporation, as part of a conversion of all of the assets of the cooperative corporation into a condominium, to a shareholder upon the surrender by the shareholder of all of the shareholder's stock in the cooperative corporation and the proprietary lease entitling the shareholder to exclusive occupancy of a portion of the property owned by the corporation.

Source: 46:15-10.

COMMENT

This section is identical to its source.

F-5. Partial fee exemptions.

a. The following transfers of title to real property shall be exempt from payment of \$2.50 per \$1000. of consideration or fractional part thereof of the fee imposed upon grantors by this act:

(1) The sale of any one- or two-family residential premises which are owned and occupied by a senior citizen, blind person, or disabled person who is the seller in such transaction; provided, however, that except in the instance of a husband and wife no exemption shall be allowed if the property being sold is jointly owned and one or more of the owners is not a senior citizen, blind person, or disabled person.

(2) The sale of low and moderate income housing.

b. Transfers of title to real property upon which there is new construction shall be exempt from payment of \$2.00 for each \$1000. or fractional part thereof not in excess of \$150,000.

c. The director shall promulgate rules, regulations and forms of certification or otherwise necessary to carry out the provisions of this section. No transfer shall be eligible for more than one exemption under this section. All fees collected on transfers subject to exemption under subsection a. of this section shall be remitted to the county treasurer for the use of the county. An amount equal to 66 2/3% of the proceeds from the fee imposed upon the consideration not in excess of \$150,000. for transfers of real property upon which there is new construction, and an amount equal to 20% of the proceeds of the \$5.00 fee imposed upon each \$1000. of consideration or fractional part thereof in excess of \$150,000. for transfers of real property upon which there is new construction, shall be remitted to the county treasurer for the use of the county.

d. The balance of the fees collected on transfers subject to exemption under subsection b. of this section shall be remitted to the State Treasurer and shall be credited to the Neighborhood Preservation Nonlapsing Revolving Fund established pursuant to P.L.1985, c.222 (C.52:27D-301 et al.), to be spent in the manner established under section 20 thereof (C.52:27D-320).

e. Subsections a. through d. of this section shall be without effect on and after the tenth day following a certification by the Director of the Division of Budget and Accounting in the Department of the Treasury pursuant to subsection b. of section 2 of P.L.1992, c.148 (C.46:15-10.2).

Source: 46:15-10.1.

COMMENT

This section is identical to its source except that the fees have been expressed per \$1000 of value.

F-6. Required provisions of annual appropriations act.

a. The annual appropriations act for each State fiscal year shall, without other conditions, limitations or restrictions on the following:

(1) credit amounts paid to the State Treasurer, if any, in payment of fees collected pursuant to section 3 of P.L.1968, c.49 (C.46:15-7), to the "Shore Protection Fund" created pursuant to section 1 of P.L.1992, c.148 (C.13:19-16.1), and the Neighborhood Preservation Nonlapsing Revolving Fund established pursuant to section 20 of P.L.1985, c.222 (C.52:27D-320), pursuant to the requirements of section 4 of P.L.1968, c.49 (C.46:15-8);

(2) appropriate the balance of the "Shore Protection Fund" created pursuant to section 1 of P.L.1992, c.148 (C.13:19-16.1), for the purposes of that fund; and

(3) appropriate the balance of the Neighborhood Preservation Nonlapsing Revolving Fund established pursuant to section 20 of P.L.1985, c.222 (C.52:27D-320), for the purposes of that fund.

b. If the requirements of subsection a. of this section are not met on the effective date of an annual appropriations act for the State fiscal year, or if an amendment or supplement to an annual appropriations act for the State fiscal year should violate any of the requirements of subsection a. of this section, the Director of the Division of Budget and Accounting in the Department of the Treasury shall, not later than five days after the enactment of the annual appropriations act, or an amendment or supplement thereto, that violates any of the requirements of subsection a. of this section, certify to the Director of the Division of Taxation that the requirements of subsection a. of this section have not been met.

Source: 46:15-10.2.

COMMENT

This section is identical to its source.

F-7. Rules and regulations.

a. The Director of the Division of Taxation of the Department of the Treasury may prescribe such rules and regulations as the director may deem necessary to carry out the purposes of this act.

b. Any person aggrieved by any action of the Director of the Division of Taxation or county recording officer under P.L.1968, c.49 (C.46:15-5 et seq.), may appeal therefrom to the tax court in accordance with the provisions of the State Tax Uniform Procedure Law, R.S.54:48-1 et seq.

c. The Director of the Division of Taxation shall, no later than five days after certification by the Director of the Division of Budget and Accounting in the Department of the Treasury pursuant to subsection b. of section 2 of P.L.1992, c.148 (C.46:15-10.2), that the requirements of subsection a. of section 2 of P.L.1992, c.148 (C.46:15-10.2), have not been met or have been violated by an amendment or supplement to the annual appropriations act, notify the county recording officers and county treasurers of the several counties of such certification.

Source: 46:15-11.

COMMENT

This section is identical to its source.

OE-1. Effect of recording.

a. Any recorded document affecting the title to real estate is, from the time of recording, notice to all subsequent purchasers, mortgagees and judgment creditors of the execution of the document recorded and its contents.

b. A claim under a recorded document affecting the title to real estate shall not be subject to the effect of a document that was later recorded or was not recorded unless the claimant was on notice of the later recorded or unrecorded document.

c. A deed or other conveyance of an interest in real estate shall be of no effect against subsequent judgment creditors without notice, and against subsequent bona fide purchasers and mortgagees for valuable consideration without notice and whose conveyance or mortgage is recorded, unless that conveyance is evidenced by a document that is first recorded.

d. For the purpose of this section, a document is recorded if the document:

(1) is delivered to the county recording office in which the real estate is located,

(2) is in the form required by this act,

(3) complies with the requirements for recording specified in this act, and

(4) is accompanied by payment of any required fee.

e. Notwithstanding subsection (d), a document is not recorded if 10 days after delivery of the document to the county recording office, it has not been indexed as required by this act and the county recording office has not been notified of that fact.

Source: 46:21-1; 46:22-1.

COMMENT

Subsection (a) is closely based on its source. Two small changes have been made. The source section does not give the effects of recording to documents that have not been acknowledged or proved. Another section, 46:21-2, limits those effects to any document that has been on record for six years notwithstanding defects in acknowledgment. This distinction serves no modern purpose. If a document has been actually recorded, a prospective purchaser should have notice of it.

The second change is not truly substantive. It has been held that a deed is not lodged for record unless it is accompanied by the required recording fee. *Dickerson v. Bowers*, 42 N.J. Eq. 295 (Ch. 1886). Similar logic would indicate that any document sent to the recording officer that could not be recorded because it did not meet the basic requirements should not be considered as lodged for record. If a different rule were adopted, a person could send a document that with defects that made it unrecordable, never correct those defects and have all of the protections of recording.

Subsection (b) contains the rule that is implied by subsection (a) and its source, 46:21-1. The first recorded document takes precedence over later filed documents unless the claimant under the first recorded document has notice of the documents that are filed later. *See e.g., Lieberman v. Arzee Mid-State Supply*, 306 N.J. Super 335, 341 (App. Div. 1997). To the extent that this rule is stated explicitly in the statutes, it is part of 46:22-1. It has been separated from subsection (c), the provision directly derived from 46:22-1, for clarity. Otherwise, Subsection (c) is closely based on 46:22-1. The only substantive changes are those noted in the comment to the previous section.

Subsection (c) is new. Under one reported case, *Michalski v. U.S.*, 49 N.J. Super. 104 (Ch. Div. 1958), a conveyance, that because it was unwritten and so could not be recorded, is effective against a creditor without notice. *See also, In re L.D. Patella Construction Co.*, 114 B.R. 53, 58-59 (Bankr. D.N.J. 1990). Subsection (d) reverses that rule. If a party chooses not to make a conveyance in a form that allows it to be recorded so that a subsequent bona fide purchaser, mortgagee or creditor could not learn of the conveyance from the land records, the purchaser, mortgagee or creditor is not bound by the conveyance. This principle is in accord with the statute of frauds, 25:1-11, which makes unwritten conveyances enforceable as conveyances only in some cases where possession is transferred. Transfer of possession is notice to prospective purchasers or mortgagees.

Subsections (d) and (e) are new. They define when a document is treated as "recorded." Current statutes use the terms, "recorded" and "lodged for record" without defining them. Under subsection (d), a document is recorded if it is submitted to the recording officer and meets all the requirements for recording. However, if after 10 days, the document has not been indexed as required by section R-7, and the proponent of the document has not informed the recording officer of the problem, the document is no longer treated as recorded. This rule continues the practice of making a document effective against others immediately after it is delivered to the recording office. However, it places a burden on a person who submits a document to see that it is indexed properly. As a practical matter, it is only through indexes that a searcher can find a document, and only the person who submitted the document is in a position to assure that is indexed correctly. The result of this rule is that a searcher who conducts an index search on a property, and further checks all documents submitted for recording within the last 10 days, is assured that he has found every document concerning the property.

M-1. Definitions.

As used in this act:

a. "Condominium plan" means a survey of the condominium property in sufficient detail to identify the location and dimensions of units and common elements, which shall be filed in accordance with the requirements of section 3 of P.L.1960, c.141 (C.46:23-9.11). A condominium plan shall bear a certification by a land surveyor, professional engineer or architect authorized to practice in this State that the plan is a correct representation of the improvements described.

b. "Entire tract" means all of the property that is being subdivided including lands remaining after subdivision.

c. "General property parcel map" means a right of way parcel map showing a group of parcel and easement acquisitions for part of a highway or street project.

d. "Land Surveyor" means a person who is legally authorized to practice land surveying in this State as provided by P.L.1938, c.342 (C.45:8-27 et seq.).

e. "Map" includes a map, plat, condominium plan, right of way parcel maps of the State, county or municipality, chart, or survey of lands presented for approval to a proper authority or presented for filing as provided by this act, but does not include a map, plat or sketch required to be filed or recorded under the provisions of P.L.1957, c.130 (C.48:3-17.2) or a subdivision plat for a subdivision that was granted final approval by a municipal approving authority on or prior to July 1, 1999.

f. "Municipal Engineer" means the official licensed professional engineer appointed by the proper authority of the municipality in which the territory shown on a map is located.

g. "Professional Engineer" means a person who is legally authorized to practice professional engineering in this State as provided by P.L.1938, c.342 (C.45:8-27 et seq.).

h. "Proper authority" means the chief legislative body of a municipality or other agencies to which the authority for approval of maps has been designated by ordinance.

i. "Right of way parcel map" means any general property parcel map which shows highways or street acquisitions and any associated easements for highway or street rights of way.

Source: 46:23-9.10

COMMENT

All of the definitions in 46:23-9.10 have been retained. Language has been simplified slightly and the definitions have been put into alphabetical order. The first exclusion in the definition of maps, subsection (e), has been retained even though it is unnecessary in that it duplicates a provision in 48:3-17.3(d). The second exclusion in the definition of map continues the substance of 46:23-9.18.

M-2. Requirements for approval or filing of a map.

a. A map shall not be approved by a proper authority unless it meets the requirements of this section specified for the kind of map involved. The following kinds of maps shall meet the following requirements:

(1) Major subdivision plats shall meet all of the requirements of this section.

(2) Right of way parcel maps shall meet the requirements of subsections b (1), (2), (4), (5), (6), (7), (11) of this section.

(3) Minor subdivision maps shall meet all of the requirements of this section subsection j. except for the outside tract line monuments requirement of subsection b (8).

(4) Condominium plans shall meet the requirements of subsections b (1), (4), (5), (6), (7) and (11).

b. No map requiring approval by law or that is to be approved for filing with a county, shall be approved by the proper authority unless it conforms to the following requirements:

(1) A map shall show the scale, which shall be inches to feet and be large enough to contain legibly written data on the dimensions, bearings and all other details of the boundaries, and it shall also show the graphic scale.

(2) A map shall show the dimensions, square footage of each lot to the nearest square foot or nearest one hundredth of an acre. Bearings and curve data shall include the radius, delta angle, length of arc, chord distance and chord bearing sufficient to enable the definite location of all lines and boundaries shown, including public

easements and areas dedicated for public use. Non-tangent curves and non-radial lines shall be labeled. Right of way parcel maps shall show bearings, distances and curve data for the right of way or the center line or base line and ties to right of way lines if from a base line.

(3) Where lots are shown thereon, those in each block shall be numbered consecutively. Block and lot designations shall conform with the municipal tax map? if municipal regulations so require. In counties which adopt the local or block system of indices pursuant to sections 46:24-1 to 46:24-22 of the Statutes, the map shall show the block boundaries and designations established by the board of commissioners of land records for the territory shown on the map.

(4) The reference meridian used for bearings on the map shall be shown graphically. The coordinate base, either assumed or based on the New Jersey Plane Coordinate System, shall be shown on the plat.

(5) All municipal boundary lines crossing or adjacent to the territory shall be shown and designated.

(6) All natural and artificial watercourses, streams, shorelines and water boundaries and encroachment lines shall be shown. On right of way parcel maps all easements that affect the right of way, including slope easements and drainage, shall be shown and dimensioned.

(7) All permanent easements, including sight right easements and utility easements, shall be shown and dimensioned.

(8) The map shall clearly show all monumentation required by this chapter, including monuments found, monuments set, and monuments to be set. An indication shall be made where monumentation found has been reset. For purposes of this subsection "found corners" shall be considered monuments. A minimum of three corners distributed around the tract shall indicate the coordinate values. The outbound corner markers shall be set pursuant to regulations promulgated by the State Board of Professional Engineers and Land Surveyors.

(9) The map shall show as a chart on the plat any other technical design controls required by local ordinances, including minimum street widths, minimum lot areas and minimum yard dimensions.

(10) The map shall show the name of the subdivision, the name of the last property owners, the municipality and county.

(11) The map shall show the date of the survey and shall be in accordance with the minimum survey detail requirements of the State Board of Professional Engineers and Land Surveyors.

(12) A certificate of a land surveyor or surveyors, shall be endorsed on the map as follows:

(A) I certify that to the best of my knowledge and belief this map and land survey dated meet the minimum survey detail requirements of the State Board of Professional Engineers and Land Surveyors and the

map has been made under my supervision, and complies with the "map filing law" and that the outbound corner markers as shown have been found, or set.

(Include the following, if applicable)

I further certify that the monuments as designated and shown have been set.

.....
Licensed Professional Land Surveyor and No.

(Affix Seal)

(13) If the land surveyor who prepares the map is different from the land surveyor who prepared the outbound survey, the following two certificates shall be added in lieu of the certificate above.

(A) I certify to the best of my knowledge information and belief that this land survey dated _____ has been made under my supervision and meets the minimum survey detail requirements of the State Board of Professional Engineers and Land Surveyors and that the outbound corner markers as shown have been found, or set

.....
Licensed Professional Land Surveyor and No.

(Affix seal)

(B) I certify that this map has been made under my supervision and complies with the "map filing law."

(Including the following if applicable)

I further certify that the monuments as designated and shown have been set.

.....
Licensed Professional Land Surveyor and No.

(Affix seal)

(C) If monuments are to be set at a later date, the following requirements and endorsement shall be shown on the map.

The monuments shown on this map shall be set within the time limit provided in the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.) or local ordinance.

I certify that a bond has been given to the municipality, guaranteeing the future setting of the monuments as designated and shown on this map.

.....

Municipal Clerk

(D) If the map is a right of way parcel map the project surveyor need only to certify that the monuments have been set or will be set.

(14) A certificate of the municipal engineer shall be endorsed on the map as follows:

I have carefully examined this map and to the best of my knowledge and belief find it conforms with the provisions of "the map filing law," resolution of approval and applicable municipal ordinances and requirements.

.....

Municipal Engineer(Affix Seal)

(15) An affidavit setting forth the names and addresses of all the record title owners of the lands subdivided by the map and written consent to the approval of the map of all those owners shall be submitted to the proper authority with the map.

(16) If the map shows highways, streets, lanes or alleys, a certificate shall be endorsed on it by the municipal clerk that the municipal body has approved the highways, streets, lanes or alleys, except where such map is prepared and presented for filing by the State of New Jersey or any of its agencies. The map shall show all of the street names as approved by the municipality.

Source: 46:23-9.11.

COMMENT

The substance of 46:23-9.11 has not been changed; language has been simplified slightly. Subsection (r) of 46:23-9.11 has been separated as a new section on monumentation.

Format requirements, limitations on the size of maps and the materials from which they may be made, from 46:23-9.11 (a) and (b), have been moved to a separate section.

M-3. Monumentation.

a. A map shall not be approved by a proper authority unless it meets the monumentation requirements of this section specified for the kind of map involved. The following kinds of maps shall meet the following requirements:

(1) Subdivision plats shall meet all of the requirements of this section.

(2) Right of way parcel maps shall meet the requirements of subsections b (12).

b. Monuments are required on one side of the right of way only and shall be of metal detectable durable material at least 30 inches long. The top and bottom shall be a minimum of 4 inches square; if concrete, however, it may be made of other durable metal detectable material specifically designed to be permanent, as approved by the State Board of Professional Engineers and Land Surveyors. All monuments shall include the identification of the professional land surveyor or firm. They shall be firmly set in the

ground so as to be visible at the following control points; provided that in lieu of installation of the monuments, the municipality may accept bond with sufficient surety in form and amount to be determined by the governing body, conditioned upon the proper installation of the monuments on the completion of the grading of the streets and roads shown on the map.

(1) At each intersection of the outside boundary of the whole tract, with the right-of-way line of any side of an existing street.

(2) At the intersection of the outside boundary of the whole tract with the right-of-way line on one side of a street being established by the map under consideration.

(3) At one corner formed by the intersection of the right-of-way lines of any two streets at a T-type intersection.

(4) At any two corners formed by the right-of-way lines of any two streets in an "X" or "Y" type intersection.

(5) If the right-of-way lines of two streets are connected by a curve at an intersection, monuments shall be as stipulated in (3) and (4) of this subsection at one of the following control points:

(A) The point of intersection of the prolongation of said lines,

(B) The point of curvature of the connecting curve,

(C) The point of tangency of the connecting curve,

(D) At the beginning and ending of all tangents on one side of any street, or

(E) At the point of compound curvature or point of reversed curvature where either curve has a radius equal to or greater than 100 feet. Complete curve data as indicated in subsection d. of this section shall be shown on the map, or

(F) At intermediate points in the sidelines of a street between two adjacent street intersections in cases where the street deflects from a straight line or the line of sight between the adjacent intersections is obscured by a summit or other obstructions which are impractical to remove. This requirement may necessitate the setting of additional monuments at points not mentioned above. Bearings and distances between the monuments or coordinate values shall be indicated.

(6) In cases where it is impossible to set a monument at any of the above designated points, a nearby reference monument shall be set and its relation to the designated point shall be clearly designated on the map; or the plate on the reference monument shall be stamped with the word "offset" and its relation to the monument shown on the filed map.

(7) In areas where permanency of monuments may be better insured by off-setting the monuments from the property line, the municipal engineer may authorize such procedure; provided, that proper instrument sights may be obtained and complete off-set data is recorded on the map.

(8) By the filing of a map in accordance with the provisions of "the map filing law," reasonable survey access to the monuments is granted, which shall not restrict in any way the use of the property by the landowner.

(9) On right of way parcel maps, the monuments shall be set at the points of curvature, points of tangency, points of reverse curvature and points of compound curvature or the control base line or center line, if used, and be intervisible with a second monument.

(10) On minor subdivisions a monument shall be set at each intersection of an outside boundary of the newly created lot(s) with the right of way line of any side of an existing street.

Source: 46:23-9.11(r).

COMMENT

The substance of 46:23-9.11 has not been changed; language has been simplified slightly. Subsection (r) of 46:23-9.11 has been separated as a new section on monumentation.

M-4. Approval of maps.

a. The proper authority shall approve or disapprove a map within 45 days from its receipt.

b. The approval of a map under this law by the proper authority shall not be construed as acceptance of any street or highway indicated on the map; nor shall approval obligate the State of New Jersey or any county or municipality, to maintain or exercise jurisdiction over those streets or highways.

Source: 46:23-9.12; 46:23-9.13

COMMENT

Subsection (a) continues the substance of 46:23-9.12 unchanged. Subsection (b) continues the substance of 46:23-9.13 unchanged. Language has been simplified slightly.

M-5. Additional prerequisites to filing.

The county recording officer shall not accept for filing any map unless it has endorsed on it a certificate by the municipal clerk or secretary of the planning board stating:

a. that the proper authority has approved the map or stating its exemption from approval

b. that the map complies with the provisions of this law; and

c. the date by which the map is required to be filed by the applicable law.

Source: 46:23-9.14

COMMENT

This section continues the substance of 46:23-9.14 unchanged. The final sentence of the source has been deleted as unnecessary; section TR-5 makes reference to all of the requirements for recording.

M-6. Filing and indexing of maps, fee.

a. The county recording officer shall file a map if an original and a copy of the map are presented for filing, the map complies with all the requirements for filing and is accompanied with the fees for filing and indexing that are provided by law. No fee shall be charged when the map is presented by the State of New Jersey, or any of its agencies.

b. The original map and a duplicate shall be endorsed by the recording office with a receipt indicating the date of filing.

c. The original map shall be retained by the recording office in an appropriate manner for preservation and use for reproduction purposes.

c. Copies of filed maps shall be made available to the public at a reasonable cost.

Source: 46:23-9.15

COMMENT

This section continues the substance of 46:23-9.15 with little change. References to the way that a map should be stored and the format of a map and its copies have been deleted to allow any technological method that serves the purposes of map filing: preservation and use. The section has also been rearranged and substantially reworded.-

M-7. Duplicates of maps in cities having atlases or block maps filed with recording officer and transmitted to proper city officer

Whenever a map is filed in the office of the county recording officer of land in a city that has an atlas, or block map, on which is plotted the lots or subdivision of lots of lands, the person filing the map shall file a duplicate of the map, and the recording officer shall indorse on the duplicate the time of recording and filing of the original and deliver the duplicate to the officer of the city having charge of the atlas or block map.

This section shall have no application to maps filed by commissioners appointed to assess benefits derived from the construction of sewers, drains or other municipal improvements.

Source: 46:23-10

COMMENT

This section continues the substance of 46:23-9.15 with no change. The section has been reworded slightly.

M-9. Approval and filing of duplicates of maps identical with maps already filed.

Whenever a map has been filed in the office of the county recording officer, and copies of it have been made that differ from the original only in title or style, and there have been made conveyances or liens, under which the lands intended to be conveyed or liened have been described by reference to the unfiled copy, the governing body of the municipality in which the land is located, by resolution, may approve the copy for filing in the manner prescribed by law. This approval and filing shall not constitute a

dedication of the streets or lot locations as therein delineated; and shall be merely for the identification of the lands conveyed or liened.

Source: 46:23-11

COMMENT

This section continues the substance of 46:23-11 with no change. The section has been condensed and clarified.

State of New Jersey

N J L R C

New Jersey Law Revision Commission

TENTATIVE REPORT

relating to

UNIFORM MEDIATION ACT

December 2001

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.

The Commission particularly directs your attention to the breadth of the evidentiary privilege created. In writing this Report, the Commission's reservations on that subject were outweighed by the need for interstate uniformity. However, the Commission will reconsider the issue in light of the comments received.

COMMENTS MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN MARCH 31, 2002.

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>

UNIFORM MEDIATION ACT

Introduction

At its 2001 annual meeting, the National Conference of Commissioners on Uniform State Laws approved the Uniform Mediation Act (UMA) and recommended its enactment by state legislatures.

The UMA was the result of a joint project of the NCCUSL and the Mediation Section of the American Bar Association. The project was motivated by the belief that effective mediation requires all parties to be confident that anything that took place during mediation would not be disclosed in any legal or administrative proceeding. The UMA would assure that confidence by enacting the broadest possible evidentiary privilege in every state. The UMA creates a privilege against disclosure of any “mediation communication” by (1) parties to the mediation, (2) the mediator, and (3) non-parties, such as experts, who attend the mediation. The privilege would apply in any judicial, administrative, or legislative proceeding and in any arbitration. The privilege would apply unless waived by all parties to the mediation and by the mediator. Exceptions to the privilege are few and set out in detail.

New Jersey now provides substantial protection to the confidentiality of mediation. The Rules of Evidence make any offer of compromise of a disputed claim inadmissible on the validity or amount of the claim. N.J.R.E. 408. In addition, New Jersey Court Rules provide: no disclosure made by a party during mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding.” R. 1:40. However, neither of these protections is a privilege and so is not as broad in scope as that provided by the UMA. The UMA privilege, like most privileges applies to more than court proceedings, and its application to administrative proceedings may be particularly important.

Moreover, the UMA privilege is more extensive in the persons protected than a traditional privilege. It provides protection not only to the parties to the mediation but also to the mediator. While a lawyer cannot invoke the lawyer–client privilege over the objection of the client, the mediator is separately protected by the privilege and cannot be forced to testify even if both parties wish him to. The UMA would even let the mediator bar testimony by the parties about the mediation that the parties have agreed to give.

The Commission recommends the enactment of the UMA because it has determined that a uniform state law is necessary to protect mediation. Most commercial litigation has interstate effects. It is important that all parties can understand that the rules concerning mediation will apply regardless where proceedings on the dispute mediated take place. The Commission agrees that a testimonial privilege is necessary to protect mediation. The need for uniformity in this area makes any in-depth consideration of the details of the UMA privilege irrelevant.

UNIFORM MEDIATION ACT

SECTION 1. Title.

This Act may be cited as the Uniform Mediation Act.

COMMENT

This section is identical to the uniform provision.

SECTION 2. Definitions.

In this [Act]:

(1) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(3) "Mediator" means an individual who conducts a mediation.

(4) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(5) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(7) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "Sign" means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

COMMENT

This section is identical to the uniform provision.

SECTION 3. Scope.

a. Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

b. The [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties are students or

(B) a correctional institution for youths if all the parties are residents that institution.

c. If the parties agree in advance in a signed record or a record of proceeding so reflects, that all or part of a mediation is not privileged, the privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon. However, Sections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

COMMENT

This section is identical to the uniform provision.

SECTION 4. Privilege against disclosure; admissibility; discovery

a. Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

b. In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

c. Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

COMMENT

This section is identical to the uniform provision.

SECTION 5. Waiver and preclusion of privilege

a. A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

b. A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

c. A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

COMMENT

This section is identical to the uniform provision.

SECTION 6. Exceptions to privilege

a. There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove child abuse or neglect in a criminal proceeding or a proceeding in which the Division of Youth and Family Services is a party.

b. There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

c. A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

d. If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

COMMENT

This section is identical to the uniform provision except in regard to subsection (a)(7). In UMA, the exception to privilege applies where the evidence is used “to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party.” The words “abandonment” and “exploitation” have been deleted since they are duplicative and may be confusing because they are not used in this context in New Jersey. More important, the exception has been broadened to include criminal cases involving child abuse or neglect as well as civil child abuse and neglect actions. This expansion is in accord with state policy in regard to child abuse. See N.J.S. 9:6-8.10 requiring any person having information about child abuse to inform authorities. Last, the UMA provides two options for the end of subsection (a)(7) preserving the privilege where an abuse proceeding is mediated with the State protective agency, here the Division of Youth and Family Services. Since such mediations do not occur, the exception in either form is not necessary.

SECTION 7. Prohibited mediator reports

a. Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

b. A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under Section 6; or

(3) a mediation communication evidencing abuse or neglect, of a child to a public agency responsible for protecting individuals against such mistreatment.

c. A communication made in violation of subsection (a) may not be considered by a court, administrative agency, or arbitrator.

COMMENT

This section is identical to the uniform provision except for a small change in subsection (b)(3) in conformance with the change in Section 6, subsection (a)(7).

SECTION 8. Confidentiality

Unless subject to provisions on open public meetings or public records, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

COMMENT

This section is identical to the uniform provision. In place of statutory citations generic references have been used.

SECTION 9. Mediator's disclosure of conflicts of interest, background

a. Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

b. If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

c. At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

d. A person that violates subsection (a), (b), or (g) is precluded by the violation from asserting a privilege under Section 4.

(e) Subsections (a), (b), (c), and (g) do not apply to an individual acting as a judge.

(f) This Act does not require that a mediator have a special qualification by background or profession.

(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.

COMMENT

This section is identical to the uniform provision. Optional subsection (g) has been retained.

SECTION 10. Participation in mediation

An attorney may represent, or other individual designated by a party may accompany the party to, and participate in a mediation. A waiver of representation or participation given before the mediation may be rescinded.

COMMENT

This section is identical to the uniform provision.

SECTION 11. Relation to Electronic Signatures in Global and National Commerce Act

This Act modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but this Act does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

COMMENT

This section is identical to the uniform provision.

SECTION 12. Uniformity of application and construction

In applying and construing this Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

COMMENT

This section is identical to the uniform provision.

SECTION 13. Severability clause

If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

COMMENT

This section is identical to the uniform provision.

SECTION 16. Application to existing agreements or referrals

(a) This Act governs a mediation pursuant to a referral or an agreement to mediate made on or after _____ the effective date of this Act.

(b) On or after [a delayed date], this [Act] governs an agreement to mediate whenever made.