

**Protecting the Interests of Homeowners: An Overview of Concerns  
Related to Homeowners Associations**

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## Protecting the Interests of Homeowners:

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### ***Addressing the Concerns of Residential Developments and Homeowners Associations***

#### **Finding a Balance Between HOAs' and Homeowners' Rights**

Most residential developments today are planned to meet community standards, including providing amenities such as clubhouses and other gathering places that belong to everyone who resides in them. These common areas require everyone's help to maintain. This is typically done through homeowners associations (HOAs), which usually have authority to enforce covenants agreed to by homebuyers. A number of issues and concerns related to properties governed by HOAs have surfaced over recent years, from incomplete infrastructure to overzealous regulation. Responding to some of these concerns, the House of Representatives of the 107<sup>th</sup> General Assembly passed a resolution asking the Commission to study HOA rules and regulations and their responsibility to insure their obligations. The House Local Government Subcommittee of the 108<sup>th</sup> General Assembly asked the Commission to study a bill that would have required owners to disclose to buyers whether developments are complete or when they will be completed. The Commission also chose to study a third bill related to regulations and fines.

Homeowners associations are in many ways small, private governments. As Kaid Benfield, writing for *The Atlantic's Citylab*, describes them,

they have taxing power, setting mandatory dues that if not paid can result in the placement of a lien on your property or even foreclosure; they have regulatory authority, setting rules for everything from when you can take out the trash to what color and materials you use in your window treatments to what you can and cannot grow in your yard. They have enforcement power, too, including the right to issue cease and desist orders and to impose financial penalties in the form of fines. One legal observer [Ross Guberman]<sup>1</sup> has called the exercise of quasi-political powers by HOAs "one of the most significant privatizations of local government functions in history." . . .

In a lot of places—probably in most—it's a sort of government-among-friends, where rules are applied and interpreted with good faith and generosity, where neighbors cooperate on upkeep, and where buildings and communities look better and function better because of it.<sup>2</sup>

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<sup>1</sup> Guberman 2004.

<sup>2</sup> Benfield 2013.

## ***Requiring Adequate Insurance***

The record flood that hit the Nashville area in May 2010 caused \$1.5 billion in property damage, including damage to several condominiums near the Harpeth River. The owners of those condominiums discovered that their HOA did not have adequate insurance to repair the buildings' exteriors and complained that their HOA was not responsive to them. In response, Representative Gary Moore introduced House Resolution 170, which the House passed in 2012, calling for the Commission to study HOA rules and regulations and their responsibility to insure their obligations.

While HOAs for condominiums built under Tennessee's Condominium Act, adopted in 2008, are required to carry insurance for common areas, those for condominiums built before January 2, 2009, and for single-family developments are not and, consequently, may not have adequate coverage to pay for repairs of common property or to pay liability claims. All condominium owners can require their HOAs to provide notice of coverage, which would allow them at least to discover whether the property was insured; however, homeowners in single-family developments with HOAs cannot. Although property insurance would not have covered damage caused by the May 2010 flood itself, it would have covered damage caused by the rains.

Like the Condominium Act of 2008, all of the model laws developed by the Uniform Law Commission for HOAs except the Uniform Common Interest Owners Bill of Rights require insurance. Adopting such a provision for condominiums built before January 2, 2009, and for single-family developments would help ensure that adequate funds are available to make necessary repairs and pay liability claims for these developments as well as for condominiums built after that date.

The Condominium Act of 2008 also requires HOAs to provide notice of coverage to all residential condominium owners upon request, but there is no similar requirement for single-family developments. Almost all of the model laws, including those for single-family developments, require insurers to issue a memorandum of insurance to any owner upon request. Adopting such a provision for single-family developments in Tennessee would ensure that all homeowners have access to information about the insurance carried by their HOAs.

## ***Challenges that arise when developers have financial problems***

With the decline in demand for housing and in housing prices that followed the burst of the housing bubble and the Great Recession of 2007-2009, many residential developers began to struggle to meet their obligations to complete infrastructure and maintain common areas. Without the cash flow from the sale of lots or homes, developers simply did not have enough money. Even now, some homeowners continue to live in communities where the infrastructure was never completed and where the common areas are not being maintained. House Bill 2070 by Farmer (Senate Bill 2110 by Bowling) would have addressed this issue by requiring owners to disclose to the buyer whether the development is complete or when it will

be completed. The House Local Government Subcommittee sent this bill to the Commission for study in 2014.

In order to protect their investment, developers maintain control over HOAs during construction until a specified date or some other event specified in the declaration. If a developer refuses to maintain common areas while in control of the HOA, the owners' only recourse is to take the developer to court to force it to maintain the common areas. If the developer has become insolvent, even taking it to court might not work because it won't have the resources to maintain common areas. Homeowners need another way to ensure that common areas are maintained.

Florida, a state with a long history of HOA developments, deals with this problem by enabling transfer of control of HOAs from developers to homeowners when developers abandon their responsibility to maintain the common property or become insolvent. While transferring control of the HOA under these circumstances gives homeowners control over the common areas, it does not ensure that they have the financial means to maintain them. Nevertheless, providing homeowners this option could increase the likelihood that the common areas will not deteriorate.

In order to ensure that funds are available to complete infrastructure when homes in new developments don't sell rapidly enough to pay for it, counties and municipalities routinely require developers to guarantee that funds will be available, usually through letters of credit or surety bonds, to avoid having to use taxpayers' dollars to complete the development. Unfortunately, there have been several instances where developers were unable to finish the infrastructure and local governments had allowed the bond or letter of credit to lapse. One way to avoid a lapse is to use automatically renewing letters of credit rather than surety bonds.

### ***Regulating Homeowners' and Others' Conduct***

The main purpose of HOAs is to protect the investments of the community's homeowners. One of the ways they do this is by restricting conduct or actions that could adversely affect the community as a whole. Homeowners agree to live by these rules when they purchase their homes and grant HOAs power to impose fines to help ensure compliance with these restrictions. From time to time, tensions arise between HOAs and homeowners who think their HOAs have overstepped their bounds.

Senate Bill 2198 by Johnson and its companion, House Bill 2060 by Durham, would have addressed HOA rules by forbidding HOAs to limit or prohibit parking on public streets and the display of political signs unless expressly authorized by the local government. It would have addressed the enforcement of these rules by limiting fines charged by all HOAs to the amount of one month's assessment and requiring a judicial hearing before an HOA could attach a lien.

## **Regulation of Political Signs by Homeowners Associations**

Because they are not subject to the constraints placed on governmental entities by the Constitution, HOAs can ban or regulate political signs. A number of states restrict their right to do this. While the federal and state constitutions prohibit governments from banning the display of political signs but allow reasonable regulations, those prohibitions do not apply to HOAs in Tennessee. Consequently, people can and do contract away their right to display political signs when they buy homes in areas governed by HOAs.

Ten states prohibit outright bans of political signs by HOAs but allow them to regulate the time, place, and manner of display of those signs, which is similar to the constitutional constraint on government regulation of signs, although governments cannot single out political signs. These laws appear to be constitutional despite the fact that they single out political signs because the states are protecting the right to display political signs rather than restricting it. No other state entangles local governments in the decision to ban or restrict political signs. Moreover, involving a government actor in this decision may subject both them and the ban to constitutional challenge.

Any prohibition against HOAs banning political signs should include authorization to determine the time, place, size, number, and manner of display of those signs. In order to avoid entangling Tennessee's cities and counties unnecessarily in the business of HOAs, any such prohibition should not be subject to local government control.

## **HOA Regulation of Parking on Public Streets**

Some HOAs forbid parking on the streets within their boundaries, even where those streets are public, for safety and aesthetic reasons. Vehicles parked along the street obscure the view of drivers, potentially endangering pedestrians and narrowing streets so that emergency vehicles have difficulty navigating them. And some HOA members may simply not like the way cars parked on the street look.

Forbidding HOAs to prohibit all parking on public streets would shift the burden of keeping them clear for safety reasons to local governments. Only two states limit HOAs' power to regulate parking on public streets. HOAs in Nevada can ban parking only of certain large vehicles, while HOAs in Arizona cannot ban any parking on public streets. Restrictions like these would seem to increase the potential for safety problems. Allowing local governments to decide whether HOAs can restrict parking on public streets would seem more prudent.

## **Imposing and Collecting Fines and Other Assessments**

HOA members may be subject to fines if they fail to pay assessments or otherwise don't comply with rules and regulations. Fines can be several hundred dollars or more and some feel that these fines are excessive. Tennessee law does not limit the fines that can be imposed by single-family HOAs and older condominiums, but for condominiums developed after January

1, 2009, the law requires the fines to be reasonable. Six states limit the size of the fines HOAs can impose, ranging between \$50 and \$500 per violation.

Failure to pay these fines or assessments can lead to liens or even foreclosure. For condominiums governed by the Condominium Act of 2008, liens for nonpayment of fines or assessments attach automatically and without notice. In other developments governed by HOAs, the same thing may be allowed by the declaration. The ease with which liens are attached may lead to abuse. To address this, eighteen states require recording and sometimes notice to attach a lien. Two other states completely prohibit the attachment of liens for fines. However, Maryland is the only state that, like Senate Bill 2198, requires a judicial hearing before creating a lien.

Once a lien has attached, an HOA can foreclose on a property. The ease with which an HOA can foreclose could lend itself to abuse. In Tennessee, an HOA could foreclose on a property for failure to pay even a small fine. Nine states limit the ability of HOAs to foreclose on homeowners, commonly by requiring a minimum dollar amount or period of delinquency. The Uniform Common Interest Ownership Act and the Uniform Common Interest Owners Bill of Rights Act, model legislation developed by the Uniform Law Commission but not adopted in Tennessee, also suggest a minimum lien amount before foreclosing and require a judgment before foreclosing certain liens.

Limiting HOAs' ability to impose fines, put liens on homes, and foreclose on them would protect homeowners and help keep the matters out of the court system. However, a specific cap on fines might reduce HOAs' ability to ensure compliance with rules; therefore, they need flexibility to determine the appropriate fine amount as long as they are reasonable. If the reasonableness limitation on fines for newer condominiums was extended to single-family HOAs, it would provide protection to owners while giving single-family HOAs some discretion when setting fines. HOAs should also be required to notify homeowners when liens will attach for unpaid fines and assessments; moreover, foreclosure on liens for unpaid fines and assessments should be limited to some minimum amount and some minimum length of time unpaid.

## **Planned Residential Developments and the HOAs Created to Govern Them**

One of the most significant trends in suburban American history is the use of common ownership plans and deed restrictions as land planning devices. Described by Evan McKenzie in *Privatopia*, the roots of this trend date back to the exclusive neighborhoods with private parks, lakes, and other amenities built in the early 1800s. Examples include Gramercy Park in New York (1831) and Louisburg Square in Boston (1844),<sup>3</sup> where homeowners created America's first HOA to care for a park after the developer failed to arrange for maintenance.

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<sup>3</sup> Weiss and Watts 1989.



Louisburg Square is unusual in that the owners, not the developer, formed the association. Beginning in the mid-19th century St. Louis developers created hundreds of private neighborhoods with such services as street maintenance, snow removal, mowing, tree trimming, and street lighting provided by "private street associations."<sup>4</sup>

By 1928 scores of luxury subdivisions across the country were using deed restrictions . . . as their legal architecture. To guarantee enforcement of the covenants, developers were organizing "homeowner associations" so that residents could sue those who violated the rules.<sup>5</sup>

The 1989 US Advisory Commission on Intergovernmental Relations publication *Residential Community Associations: Private Governments in the Intergovernmental System?* described five historical periods in the history of "residential community associations" or HOAs:

Origins (1830-1910). During this period the modern community association did not really exist. Some subdivisions did have deed restrictions and attempted to enforce them, and some private property owners' neighborhood organizations did provide basic services and own and maintain common facilities, but no compulsory membership homeowner association was constituted through deed restrictions to perform all three of the basic functions of a community association.

Emergence (1910-1935). In the 1910s and especially the 1920s, the larger scale of high-income suburban subdivision development, and the increased demand for design amenities and sophisticated restrictions, created a greater need for developers to provide for the establishment of homeowner associations. At this time, these associations were generally not standardized and were relatively few in number.

Popularization (1935-1963). Community builders began standardizing homeowner associations, working primarily through the Community Builders' Council of the Urban Land Institute (ULI), and later through the National Association of Home Builders (NAHB). In the 1940s, the ULI strongly endorsed the use of homeowner associations by developers, and published a plan for standardized implementation. At the same time, the Federal Housing Administration (FHA) was strongly promoting the use of deed restrictions in community development, paving the way for homeowner associations as the long-term enforcement mechanism.

Expansion (1963-1973). The FHA and ULI worked together to promote the widespread use of community associations in planned unit developments (PUDs) and in residential condominiums. The latter were first introduced into

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<sup>4</sup> Oakerson 1989.

<sup>5</sup> McKenzie 1994.

the US with FHA approval in 1961. During this period of rapid expansion, many of the community associations were poorly organized, often by much smaller scale developers. This led to a good deal of resident dissatisfaction.

Restructuring (1973-1989). . . . The FHA and the Veterans Administration PA) played an important role in standardizing the implementation of community associations from the 1930s to the 1960s through their mortgage insurance and guarantee functions. Beginning in the late 1970s, two key secondary mortgage market institutions, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) have been very influential in the process of restructuring community association organization, financing, and management to conform to new implementation guidelines. Finally, in the past decade developers have been relinquishing more control of community associations to the property owners at earlier stages, as part of a phased process.

HOAs are organizations created to make and enforce rules and manage common areas in private communities, condominiums as well as single-family residential developments. While they are responsible for the common areas and sometimes provide services such as trash pickup, their main purpose is to protect the investment of the property owners in the community. They do this largely through enforcement of the rules agreed upon in the community's governing document: the declaration of covenants, conditions, and restrictions (CC&R).

In many ways, HOAs are like small, private governments. Their boards of directors enforce CC&Rs, HOAs' equivalent of laws, and are similar to executive branches of public governments. They collect regular assessments from the owners and use them to maintain amenities and provide services, in some cases including private roads and private security, and they can levy special assessments on property owners to pay for unexpected repairs and other expenses. Moreover, like unpaid taxes owed to governments, unpaid fines and assessments owed to HOAs can become a lien on your home and lead to foreclosure. The number of HOAs has grown extensively in the second half of the last century, largely in response to government laws and regulations encouraging or requiring their use, and it has become increasingly difficult to find homes without HOAs in some communities.

### ***Prevalence of HOAs***

Although there were still less than 500 nationwide in 1964<sup>6</sup> by 1970, there were an estimated 10,000 nationwide, serving 2.1 million residents in 701,000 units. By 2013, an estimated 65.7 million people (24% of the US population) lived in 26.3 million units in communities governed by 328,500 HOAs.<sup>7</sup> Single-family residential communities account for about half of those

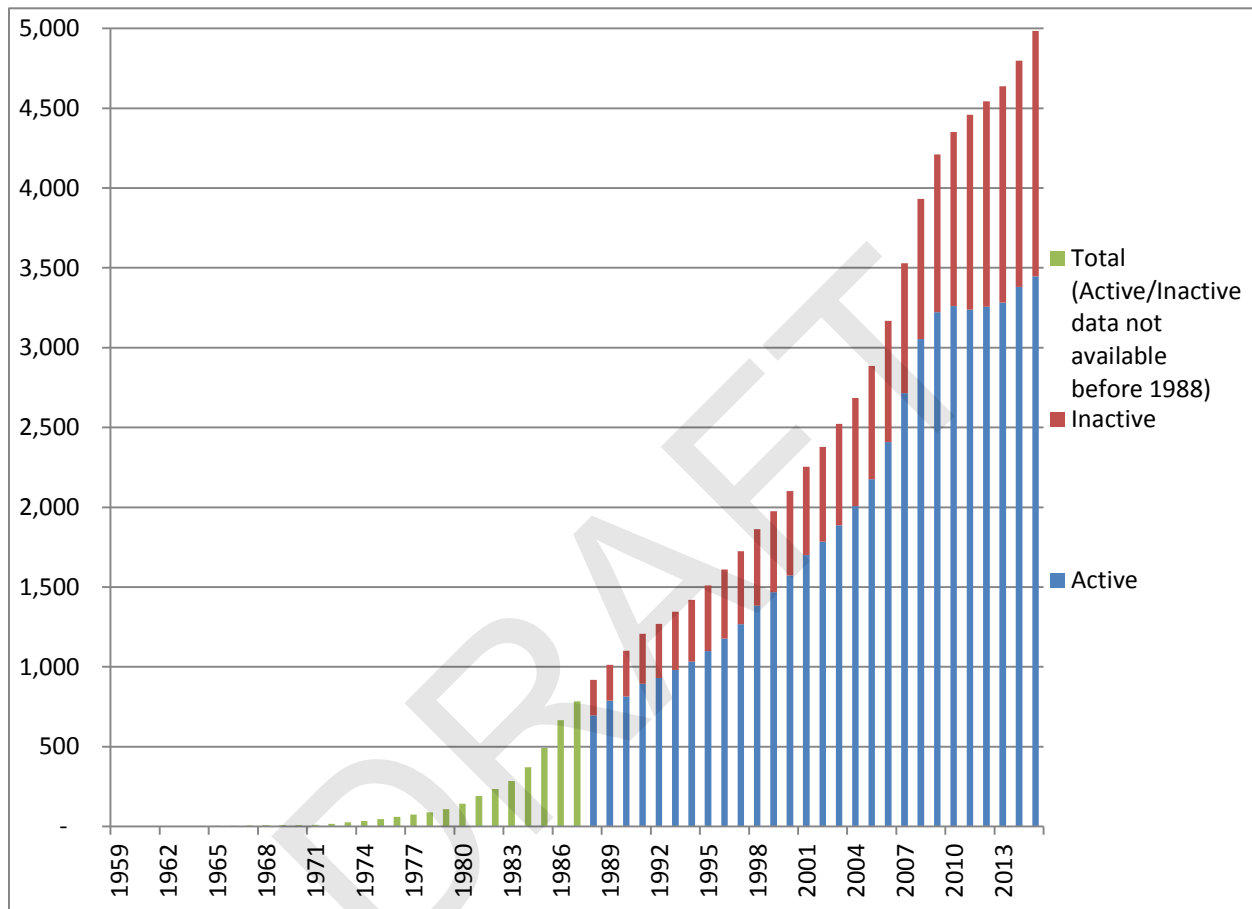
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<sup>6</sup> McKenzie 2011.

<sup>7</sup> Foundation for Community Research 2014a.

totals, condominiums for 45 to 48%, and cooperatives for 3 to 4%. While a comparable breakdown is not available for Tennessee, there are an estimated 930,000 Tennesseans living in communities governed by HOAs.<sup>8</sup> Since the first HOA was incorporated in Tennessee in 1959, 4,985 HOAs have formed in the state, of which, 3,447 are still active.<sup>9</sup> See figure 1.

**Figure 1. Number of Active and Inactive Homeowners Associations in Tennessee**



### ***Model HOA Legislation***

With the increase in number of HOAs, the need for laws addressing them grew. The development of the laws addressing problems with HOAs began with condominiums. Recognizing the potential problems within condominiums early on, the federal government started requiring states to adopt laws governing the management of condominiums as a prerequisite for the Federal Housing Administration providing mortgage insurance for condominiums. The FHA drafted the Model Horizontal Property Act in 1961 to provide a model for states as they drafted their own condominium laws. Tennessee enacted its Horizontal Property Act in 1963, authorizing the creation of condominiums in the state.

<sup>8</sup> Ibid.

<sup>9</sup> Tennessee Secretary of State.

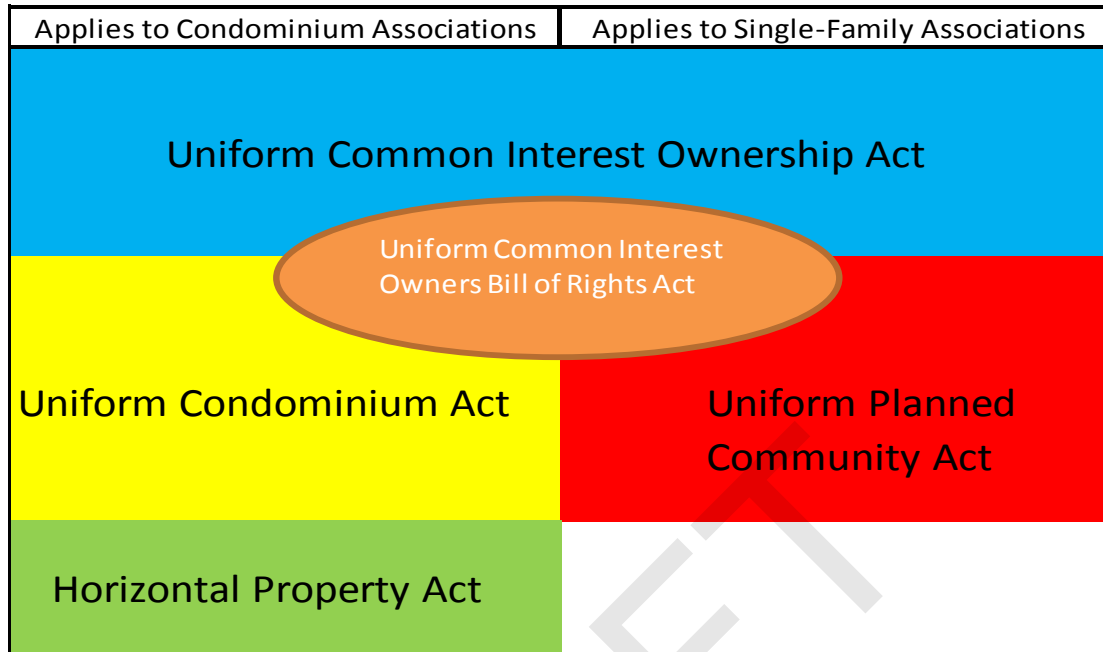
These first condominium laws recognized the legal concept of a condominium but did not address issues such as abuses of operation. The need for a more comprehensive condominium law led the Uniform Law Commission (ULC) to draft the Uniform Condominium Act (UCA) in 1977. The Act covers the creation, alteration, termination, and management of condominiums and the protection of purchasers. The TBA drafted what became the Tennessee Condominium Act of 2008, which is based on language in the UCA, but the Tennessee law omits some of the sections on the management of condominiums, most of the sections on the protection of purchasers, and the entire article establishing an administrative agency to regulate condominiums. See appendix C. The Tennessee Condominium Act was drafted because there were some concerns that the Horizontal Property Act was outdated and did not adequately address the various circumstances under which condominiums were being created. The Horizontal Property Act left many questions unanswered so that builders and owners had very little certainty about how to deal with the issues that arose as more and more condominiums were created.

After drafting the UCA, the ULC drafted a model act for planned communities. In 1980, the ULC drafted the Uniform Planned Community Act (UPCA), based directly on the UCA. The main difference in the UPCA and the UCA is the way common areas are treated since the common areas are vested in homeowners in the case of condominiums and in the HOA in the case of single-family communities.

Rather than focus on one kind of development, the Uniform Common Interest Ownership Act (UCIOA), originally drafted in 1982, governs both condominiums and planned communities—and the ULC intended it to “succeed and subsume” both the UCA and the UPCA. It was drafted “to address a growing demand in the states for a legislative solution for growing tensions between the elected directors of unit owners’ associations and dissident individual unit owners within those associations.” It also addresses issues that were not addressed by the Tennessee Condominium Act.

The ULC drafted the Uniform Common Interest Owner Bill of Rights Act in 2008 for states unwilling to enact the entire UCIOA. The Bill of Rights Act addresses some of the same issues as the UCIOA but omits some of the general provisions and sections on the management of communities with HOAs; almost all of the protections of purchasers; all of the sections on the creation, alteration, and termination of communities; and the entire article establishing an administrative state agency to oversee these developments. Currently, the Tennessee Bar Association is working on legislation that would apply to single-family residential developments governed by an HOA.

Figure 2. Model HOA Laws



## Single family development HOAs in Tennessee aren't required to have insurance

Tennessee requires HOAs of condominiums built after January 1, 2009, to have property and liability insurance but does not require this for older condominiums and single-family residential communities.<sup>10</sup> It is important for HOAs to carry property and liability insurance on common areas because they are responsible for maintaining their common property and could be held liable for injuries suffered in the common areas. HOAs without property insurance may not be able to pay for repairs or replacements when disasters occur, and the regular assessments that homeowners pay to HOAs may not be adequate to pay for insurable losses. In those cases, homeowners might have to pay a special assessment to the HOA or leave the common property unrepaired. Cities could decide to step in and repair common property to address health and safety hazards but would likely assess homeowners for the expense.

Without liability insurance, homeowners are responsible for paying liability claims against their HOA. The HOA would be responsible for paying the claim, but HOAs typically do not have monetary reserves that are not already dedicated to expected expenses. Like with property damage, HOAs would likely have to charge homeowners a special assessment or increase the amount of the regular assessment. Either way, homeowners would pay liability claims that could have been covered by insurance.

<sup>10</sup> Tennessee Code Annotated Section 66-27-413.

Recognizing the importance of HOAs having adequate coverage, the Tennessee House of Representatives passed House Resolution 170 in 2012, directing the Commission to study the responsibility of HOAs to insure their obligations. The resolution was the result of concerns raised following the May 2010 flood when homeowners complained that their HOAs were not adequately insured to cover damage by the flood. State law does not require HOAs to purchase flood insurance, but federal law does require it for properties in flood plains in order for those properties to be eligible for mortgage insurance.<sup>11</sup>

House Resolution 170 also requested that the Commission recommend solutions that would enable individual homeowners, upon request, to obtain at regular intervals from their respective HOAs a report citing a certificate or memoranda of insurance; proof of policy coverage available; and names, addresses, and phone numbers for HOAs' designated insurance carriers and banking institutions holding funds in escrow. Currently, insurers of residential condominium HOAs are required to provide their insurance information to any owner upon request, but HOAs of single-family developments are not.<sup>12</sup> Thirty-one other states require insurance notifications be provided to condominium owners.<sup>13</sup> Five of those states go further by requiring that all condominium unit owners be notified if there is any change in coverage.<sup>14</sup> Sixteen states extend the notification upon request requirement to single-family residential communities.<sup>15</sup> California is the only state that also extends to single-family HOAs the requirement that they notify homeowners if there is any change in coverage.<sup>16</sup>

Like Tennessee, most states require condominium HOAs to maintain property and liability insurance. Thirty-three other states require condominium HOAs to maintain property insurance;<sup>17</sup> thirty-one of those states require liability insurance.<sup>18</sup> Unlike Tennessee, thirteen of those states also require single-family HOAs to maintain both property and liability

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<sup>11</sup> 42 U.S. Code Section 4012a.

<sup>12</sup> Tennessee Code Annotated Sections 66-27-502 and 66-27-503.

<sup>13</sup> Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Virginia, Washington, West Virginia.

<sup>14</sup> California, Colorado, Indiana, New Hampshire, New York.

<sup>15</sup> Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, Texas, Utah, Vermont, West Virginia.

<sup>16</sup> California Civil Code Section 5810.

<sup>17</sup> Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, and West Virginia.

<sup>18</sup> Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, and West Virginia.

insurance.<sup>19</sup> Only one state's law, Connecticut, requires all HOAs to have flood insurance if it is in a flood plain.<sup>20</sup> Hawaii requires it for condominiums.<sup>21</sup>

Most of the uniform acts recommend that states require HOAs to maintain insurance and enable owners to get insurance coverage information. The Uniform Condominium Act (UCA), Uniform Planned Community Act (UPCA), and Uniform Common Interest Ownership Act (UCIOA) require HOAs to maintain property and liability insurance on the common areas.<sup>22</sup> These acts also include language that insurers must provide information about HOAs' insurance coverage to owners upon request. The Uniform Common Interest Owners Bill of Rights Act (Bill of Rights) does not address the issue of insurance coverage.

## **Challenges that arise when developers have financial problems**

With the decline in demand for housing and in housing prices that followed the burst of the housing bubble and the Great Recession of 2007-2009, many residential developers began to struggle to meet their obligations to complete infrastructure and maintain common areas. Without the cash flow from the sale of lots or homes, developers simply did not have enough money. Making matters worse, in some cases, the bonds guaranteeing the completion of infrastructure were allowed to lapse, and even now, some homeowners continue to live in communities where the infrastructure was never completed and where the common areas are not being maintained.

### ***Guaranteeing construction of subdivision infrastructure***

HOAs remain under the control of developers until a time or condition designated in the communities' governing documents, such as a certain number of properties or units sold. During this time, they are completing the infrastructure and are responsible for the common areas. Counties and municipalities that regulate the subdivision of land routinely require them to guarantee that funds will be available to complete any infrastructure included in the subdivision plan,<sup>23</sup> usually through letters of credit or surety bonds. Unfortunately, there have been several instances in Tennessee where developers have become insolvent or filed for bankruptcy and were, therefore, unable to complete the planned infrastructure. When this happens, owners won't be able to sue and get funds to complete the infrastructure.

To ensure infrastructure is completed, the state has already authorized local governments to require developers to guarantee that funds will be available to complete the infrastructure,

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<sup>19</sup> Alaska, California, Colorado, Connecticut, Delaware, Minnesota, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia.

<sup>20</sup> Connecticut General Statutes, Section 47-83, 47-255.

<sup>21</sup> Hawaii Revised Statutes Annotated, Section 514-A-86(a).

<sup>22</sup> Section 3-113.

<sup>23</sup> Tennessee Code Annotated Sections 13-3-403 and 13-4-303.

usually through letters of credit or surety bonds.<sup>24</sup> Other methods, including escrow accounts, cashier's checks, and certificates of deposit, are used far less often because they tie up developers' financial resources. The traditional method of guaranteeing infrastructure is through surety bonds, but they are falling out of favor partly because local governments sometimes have to sue to cash the bond. A surety bond is obtained from a surety company, and the company is then obligated to pay the agreed upon amount to complete the project.<sup>25</sup>

Letters of credit are the most popular method because they can be less costly for developers and are easier for local government to cash than surety bonds. A letter of credit is simply a promise to pay issued in the form of a letter.<sup>26</sup> Banks issue letters of credit, in this case to guarantee completion of infrastructure, to credit-worthy customers as a way to ensure the infrastructure work that the customer has promised to complete is actually completed. In order to collect on a letter of credit the local government presents the issuing bank with proof of the default of the developer, and the local government is issued a check for the amount indicated in the letter. It may be easier for developers with good credit but little performance history to get letters of credit. Additionally, local government can require that developers obtain letters of credit that automatically renew, preventing the possibility of the coverage lapsing.

### ***Ensuring that common areas are maintained***

Developers maintain control over HOAs during construction until a specified date or some other event in order to protect their investment. They must transfer control to the owners on that specified date or the occurrence of that event. The event or date is specified in the declaration in single-family residential and older condominium developments in Tennessee. The transfer requirements for newer condominiums constructed after January 1, 2009 are outlined in the law. The developer must transfer control 120 days after 75% of units have sold or five to seven years after the first sale.<sup>27</sup>

The provisions in Tennessee's law are similar to the language in the uniform acts. The UCA, UPCA, and UCIOA all require the developer to transfer control after 75% of units have sold but requires this transfer to take place 60 days after the event instead of 120 days as required by Tennessee's law. These acts also require the transfer to occur two years after the last sale instead of five or seven years after the first sale as in Tennessee. The uniform acts also require a transfer to occur two years after the right to add new units was last exercised; there is no similar language in Tennessee's law. The Bill of Rights does not address the transfer issue.

Currently, when developer controlled HOAs fail to maintain the common areas, homeowners cannot force a transfer of HOA control and are left with litigation as the only remaining course

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<sup>24</sup> Ibid.

<sup>25</sup> Pealer 2006.

<sup>26</sup> Ibid.

<sup>27</sup> Tennessee Code Annotated Section 66-27-403.



of action. They could sue the developer controlled HOA for breach of covenant. They could also sue it for breach of duty because Tennessee law imposes a fiduciary duty on developer controlled HOAs in newer condominium developments.<sup>28</sup> The developer controlled board is held to a higher duty than residents because the board is not elected by the homeowners. Owners in other developments may also be able to sue for a breach of duty to maintain the common areas if the HOA is organized as a nonprofit corporation, for-profit corporation, or director managed LLC.<sup>29</sup> These may not be good options if the developer is insolvent or has filed for bankruptcy.

Florida's law provides another option for owners in this situation. Owners can force a transfer of HOA control from the developer to the owners when the developer fails to maintain the common areas.<sup>30</sup> There is a rebuttable presumption that the developer has abandoned the common areas if he or she failed to pay the assessments for two years or more. Transfer is also required when the developer files Chapter 7 bankruptcy, the property is foreclosed on, or a receiver is appointed for the developer. While transferring control of the HOA under these circumstances gives homeowners control over the common areas, it does not ensure that they have the financial means to maintain them. Nevertheless, providing homeowners this option could increase the likelihood that the common areas will not deteriorate.

If Tennessee's legislature were to adopt a law similar to Florida's, there may be a constitutional issue for older condominiums and single-family developments if the event triggering the transfer is specified in the declaration. Article I, Section 10 of the United States Constitution and Article I, Section 20 of the Tennessee Constitution forbid state legislation that would impair the obligations of existing contracts. To determine whether legislation impairs a contract, the courts will normally ask two questions: Has the value of the contract been lessened,<sup>31</sup> and has the right existing at the time the contract was executed been diminished?<sup>32</sup> If the law in questions does either of these things, then it is unconstitutional. However, impairment of a contract is constitutional so long as the law is an exercise of the state's police power to protect the health, morals, and general welfare of the people.<sup>33</sup> If law affecting transfers does not follow under the police power exception, it could only be applicable to condominiums and single-family developments created after the passage of the law.

## **Authority of HOAs over homeowner conduct and penalties for violations**

The role of HOAs is enforce the rules in the declaration of covenants, conditions, and restrictions (CC&R). Homeowners contractually agree to follow these rules when they

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<sup>28</sup> Tennessee Code Annotated Section 66-27-403.

<sup>29</sup> Tennessee Code Annotated Sections 48-58-403, 48-18-403 and 48-239-115.

<sup>30</sup> Florida Statutes Section 720.307.

<sup>31</sup> *Lake County v. Morris*, 160 Tenn. 619, 28 S.W.2d 351 (1930).

<sup>32</sup> *Hannum v. McInturf*, 65 Tenn. 225 (1873).

<sup>33</sup> *Marr v. Bank of W. Tenn.*, 72 Tenn. 578 (1880); *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 28 S.W. 668 (1894).

purchase their homes. The CC&R typically gives the HOA the power to impose fines to help ensure compliance with these restrictions. These restrictions can become a source of tension when some owners do not approve of them. Associations may restrict conduct, such as placing political signs on an owner's private property, and it may even restrict the use of public property, such as public streets, within its boundaries. Some homeowners do not believe that this is fair and are especially upset because these restrictions can lead to fines, liens, and eventually foreclosure on their property.

Other states have passed laws limiting HOAs' power to regulate parking, signs, or to impose fines, liens, and foreclose on homeowners' properties. If Tennessee's legislature were to adopt similar laws, there might be an impairment of contracts issue for existing developments. These laws could likely only be applicable to condominiums and single-family developments created after the passage of the law.

### ***Regulation of Political Signs by Homeowners Associations***

Residents in some developments want to put up political signs but can't because of their developments' rules, and there are no limits on HOAs' ability to restrict free speech in Tennessee. The First Amendment of the US Constitution and Article 1, Section 19, of the Tennessee Constitution protect free speech rights from restriction by government actors. A government-imposed restriction or ban on political signs would be subject to the highest judicial scrutiny and would almost certainly be unconstitutional. However, HOAs are private entities established by individuals, not an arm of government, and can therefore regulate or ban political signs. Nevertheless, two states have held that HOAs are government actors under their state constitutions,<sup>34</sup> and another two have held that HOAs must comply with the First Amendment as a matter of public policy.<sup>35</sup> Each of these states' constitutions are written with a positive rather than a negative protection of speech. These states grant a right to freedom of speech rather than prohibiting the government from infringing that right.

Even though a handful of state courts have held that HOAs cannot restrict freedom of speech and Tennessee's constitution is nearly identical to theirs, no Tennessee court has done the same. Furthermore, courts have consistently affirmed that individuals may waive their First Amendment rights by contract, although that waiver must be clear.<sup>36</sup> Individuals can contract away their right to display political signs when they buy homes in developments governed by HOAs in Tennessee.

In order to protect homeowners, Senate Bill 2198 by Johnson, House Bill 2060 by Durham would have forbidden HOAs to limit or prohibit the display of political signs unless expressly

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<sup>34</sup> *Gerber v. Longboat Harbour N. Condo., Inc.*, 757 F. Supp. 1339 (M.D. Fla. 1991); *Laguna Publ'g Co. v. Golden Rain Found.*, 182 Cal. Rptr. 813 ( Cal. Ct. App. 1982).

<sup>35</sup> *Lamprecht v. Tiara at the Abbey Homeowners Ass'n*, unpublished, 12 JE-CC00227 (MO Cir. Ct. Oct. 3, 2013); *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 2010 N.J. Super. Unpub. LEXIS 2170 (App.Div. Sept. 1, 2010).

<sup>36</sup> *Cowen v. Cowles Media*, 501 U.S. 663 (1991); see also *Nat'l Polymer Products v. Borg-Warner*, 641 F.2d 418 (6th Cir. 1981).

authorized by the local government. No other state requires local governments to authorize HOA rules on political signs. Furthermore, involving local governments in the decision to allow bans may subject both them and the ban to constitutional challenge. It is uncertain if a local government determination to allow banning political signs would qualify as a state action. Case law indicates that mere permission does not amount to state action.<sup>37</sup> However, the First Amendment is given greater protection than many other constitutional rights at the both state and federal level.<sup>38</sup> Therefore, a court could find that this local government authorization violates the state or federal constitution.

No other state involves local governments in these decisions, but ten states allow HOAs to regulate the time, place, and manner of display of those signs. Five of these states have laws that apply to all HOAs.<sup>39</sup> Indiana, Maryland, and North Carolina regulate only single-family HOAs while Arizona and North Dakota regulate condominiums only. The “reasonable” size of a sign ranges between four and twenty-four square feet, or is described as what is “commonly displayed during election campaigns.”<sup>40</sup> Of the states that allow size restrictions, six also allow restrictions on the number of signs to be displayed, but the number cannot be less than one or the number allowed by applicable city law.<sup>41</sup> Eight states allow HOAs to regulate the time period during which signs may be displayed.<sup>42</sup> These states ban associations from prohibiting signage during a period of forty-five to ninety days before an election and up to ten days after an election. Delaware also allows regulation of the time, place, size, number, and manner of displaying signs, but its statute gives no guidance as to the implementation of these restrictions.

The Uniform Common Interest Ownership Act (UCIOA) and the Uniform Common Interest Owners Bill of Rights Act (Bill of Rights) also include language that protects homeowners’ right to display political signs. Both acts contain identical language forbidding HOAs from banning “signs regarding candidates for public or association office or ballot questions” but allowing reasonable time, place, and manner regulations.<sup>43</sup> Senate Bill 2198 defines political signs more broadly as “a sign advocating for or against a political candidate or a political issue,” not limiting political issues to ballot questions. Neither the Uniform Condominium Act (UCA) nor the Uniform Planned Community Act (UPCA) contain similar provisions.

These laws appear to be constitutional because the states are protecting the right to display political signs rather than restricting it. While restrictions on speech must normally be content-neutral in order to withstand constitutional review, these rules are often relaxed for laws that

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<sup>37</sup> *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 US 40, 143 L. Ed. 2d 130, 119 S. Ct. 977 (1999).

<sup>38</sup> See *Leech v. American Booksellers Association*, 582 S.W.2d 738 (Tenn. 1979).

<sup>39</sup> Colorado, Delaware, Kansas, Nevada, Texas.

<sup>40</sup> Indiana.

<sup>41</sup> Arizona, Colorado, Indiana, Nevada, North Carolina.

<sup>42</sup> Arizona, Colorado, Kansas, Maryland, North Carolina, North Dakota, Texas.

<sup>43</sup> UCIOA Section 3-120(d); Bill of Rights Section 17.

promote speech without preference for a specific viewpoint.<sup>44</sup> Furthermore, both the US Supreme Court<sup>45</sup> and Tennessee Supreme Court have held that all speech is subject to reasonable regulation and have upheld time, place, and manner restrictions.<sup>46</sup>

### ***HOA Regulation of Parking on Public Streets***

HOAs often forbid parking on the streets within their boundaries for safety and aesthetic reasons. Vehicles parked along the street obscure the view of drivers, potentially endangering pedestrians by increasing the likelihood of “dart-out” accidents. If streets are clogged with parked vehicles, it might be difficult for emergency vehicles to reach residents. Some people may also not like the look of vehicles parked on the streets.

Tennessee law does not prevent, restrain, or limit the power of HOAs to regulate parking, even on public streets. The condominium laws do not address this issue and the state courts have not addressed it. Therefore, owners are free to grant their HOAs the right to regulate parking on streets by contract. Depending on the language in the covenant, an owner might even be responsible for a guest’s violation of the parking rules. Senate Bill 2198 would have changed this and forbidden HOAs to prohibit parking on public streets unless expressly authorized to do so by the county or municipal legislative body. More of the burden of keeping them clear for safety reasons would rest solely on local governments.

Case law in other states seems to suggest that HOAs can regulate parking on public streets as long there is no state law to the contrary. Courts in Missouri<sup>47</sup> and New Jersey<sup>48</sup> have held that HOAs may regulate parking on public streets. In both cases, HOAs fined homeowners for parking commercial vehicles on public streets in violation of the associations’ regulations. The courts concluded that the public ownership of the streets was irrelevant. The association was not precluded from enforcing a valid contract between the parties.

Only two states limit HOAs’ power to regulate parking on public streets by statute. A new Arizona law will prohibit HOAs from enforcing parking on public streets once the period of developer control has ended.<sup>49</sup> It does not apply to condominiums. In Nevada, HOAs cannot regulate the parking of passenger vehicles, and there are severe restrictions on HOAs’ power to regulate the parking of utility vehicles under certain weight limits, emergency and law enforcement vehicles, and vehicles used for official state business. However, they can regulate the parking of recreational vehicles, trailers, watercraft, and commercial vehicles.<sup>50</sup>

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<sup>44</sup> Ammori 2009.

<sup>45</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038 (1994).

<sup>46</sup> *H & L Messengers, Inc. v. Brentwood*, 577 S.W.2d 444 (Tenn. 1979); See also *Freeman v. Burson*, 802 S.W.2d 210 (Tenn. 1990).

<sup>47</sup> *Maryland Estates Homeowners’ Ass’n v. Puckett*, 936 S.W.2d 218 (Mo. Ct. App. 1996).

<sup>48</sup> *Verna v. Links at Valleybrook Neighborhood Ass’n*, 371 N.J. Super. 77, 52 A.2d 202 (NJ App. Div. 2004).

<sup>49</sup> Arizona Revised Statutes, Section 33-1818.

<sup>50</sup> Nevada Revised Statutes Annotated, Section 116.350.

## ***Unpaid fines can lead to liens and even foreclosure***

If owners fail to pay assessments or fail to comply with rules and regulations, they may be subject to fines. Tennessee law does not restrict fine amounts that can be imposed by single-family HOAs and condominiums built before January 2, 2009. For condominiums developed after January 1, 2009, the law requires the fines to be reasonable.<sup>51</sup> However, no statute or case law defines what a reasonable fine is; therefore, fines can be several hundred dollars or more. Some owners feel the fines they have to pay are excessive.

Senate Bill 2198 would have addressed this concern by limiting fines charged by all HOAs to the amount of one month's assessment. This would effectively impose a cap on fines by HOAs and provide owners with a sense of predictability. However, associations with low monthly dues could have difficulty using fines as an effective rule-enforcement tool. Because methods for calculating monthly dues may vary within associations, for example based on a home's square footage, it is possible that some members of the association would be subject to heavier penalties than others. Furthermore, the law as written would restrict HOAs' power to levy fines for continuing violations, which could otherwise build up to exceed monthly assessments. Moreover, placing restrictions on HOA fines would not prevent those fines from becoming liens or foreclosures.

Only six states place a cap on HOA fines by statute; no states tie it to monthly assessments. Florida<sup>52</sup> and Nevada<sup>53</sup> allow HOAs to impose fines up to \$100. Fines for continuing violations are capped at \$1,000 unless specifically authorized in the association's bylaws. If the violation in question has a "substantial adverse effect on the health, safety or welfare" of the association's members, Nevada will not apply the \$1,000 cap so long as the fine is "commensurate with the severity of the violation." North Carolina caps daily damages at \$100, and Rhode Island and Utah law caps daily damages at \$500. Finally, Virginia places the heaviest restrictions on HOAs by capping fines for single occurrences at \$50, by capping fines for continuing violations at \$10 per day, and by limiting the period that HOAs can fine continuing violations to 90 days.

Owners who fail to pay fines or monthly assessments could be subject to liens on their properties. For newer condominiums, liens for nonpayment of fines or assessments attach automatically and without notice as soon as the fine or assessment becomes due, even if it is only a few dollars.<sup>54</sup> In other developments governed by HOAs, the same thing may be done by the declaration. These liens are automatically removed when the fines or assessments are paid, but homeowners who don't pay will have to go to court to get their liens removed.

Senate Bill 2198 would have made it more difficult for an HOA to attach a lien by requiring a judicial hearing before a lien could attach. The HOA would have to prove by clear and

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<sup>51</sup> Tennessee Code Annotated, Section 66-27-402.

<sup>52</sup> Florida Statutes, Section 720.305.

<sup>53</sup> Florida Statutes, Section 720.305; Nevada Revised Statutes, Section 116.31031 and 116B.430.

<sup>54</sup> Tennessee Code Annotated, Section 66-27-415.

convincing evidence that the homeowner was past due on required payments before attaching a lien. Maryland is the only state that requires a judicial hearing before attaching a lien.<sup>55</sup>

Many states limit the ability of HOAs to attach liens or require HOAs to provide notice when a lien attaches. Eighteen states require HOAs to record their liens.<sup>56</sup> Seven of these eighteen states also require the HOA to send the homeowner notice of the lien.<sup>57</sup> Nevada requires only condominium HOAs to record their liens. Michigan<sup>58</sup> and Oregon<sup>59</sup> require liens to be recorded before foreclosure but do not otherwise require recording. Arizona<sup>60</sup> and California<sup>61</sup> do not allow HOAs to attach liens for fines, only unpaid monthly assessments. Florida single-family HOAs cannot attach liens for fines less than \$1,000 and condominiums cannot attach liens for fines at all.<sup>62</sup> New Jersey does not allow liens for late fees.<sup>63</sup>

In Tennessee, once a lien has attached, an HOA can foreclose on a property.<sup>64</sup> An HOA may exercise judicial foreclosure or, if its declaration provides, it may exercise non-judicial foreclosure. The ease with which an HOA can foreclose could lend itself to abuse.

Two of the uniform acts, UCIOA and the Bill of Rights, have language in them to prevent abuse of the power of foreclosure by HOAs. They require that the lien be equal to three months' assessments before foreclosing. They also do not allow foreclosure on fines until the HOA has a judgment against the owner.

Other states protect homeowners by requiring a minimum lien amount before foreclosure can take place or by otherwise restricting the power of HOAs to foreclose. Arizona<sup>65</sup> and California<sup>66</sup> do not allow foreclosure for liens less than \$1,200 or \$1,800 respectively, or until the amount has been delinquent for one year. Georgia requires at least a \$2,000 lien.<sup>67</sup> Delaware<sup>68</sup> and Vermont<sup>69</sup> require the lien to be equal to three months' assessments before foreclosing. Maryland does not allow foreclosure of liens that include fines.<sup>70</sup> Hawaii,<sup>71</sup> North

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<sup>55</sup> Maryland Real Property Code Annotated, Section 14-203.

<sup>56</sup> California, Connecticut, Florida, Idaho, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Virginia, West Virginia, Wisconsin

<sup>57</sup> California, Maryland, Massachusetts, North Carolina, Oklahoma, Virginia, West Virginia

<sup>58</sup> Michigan Compiled Laws Service, Section 559.208.

<sup>59</sup> Oregon Revised Statutes, Section 94.709 and 100.450.

<sup>60</sup> Arizona Revised Statutes, Section 33-1256 and 33-1807.

<sup>61</sup> California Civil Code, Section 5725 and 6824.

<sup>62</sup> Florida Statutes, Section 718.303 and 720.305.

<sup>63</sup> New Jersey Statutes, Section 46:8B-21.

<sup>64</sup> Tennessee Code Annotated, Section 66-27-415.

<sup>65</sup> Arizona Revised Statutes, Section 33-1256 and 33-1807.

<sup>66</sup> California Civil Code, Section 5720.

<sup>67</sup> Official Code of Georgia Annotated, Section 44-3-109 and 44-3-232.

<sup>68</sup> 25 Delaware Code Annotated, Section 81-316.

<sup>69</sup> 27A Vermont Statutes Annotated, Section 3-116.

<sup>70</sup> Maryland Real Property Code Annotated, Section 14-204.

<sup>71</sup> Hawaii Revised Statutes, Section 514B-146.

Carolina,<sup>72</sup> and Vermont<sup>73</sup> do not allow non-judicial foreclosure for liens composed entirely of fines while Nevada does not allow single-family HOAs to exercise non-judicial foreclosure on liens for fines unless there is a public safety risk.<sup>74</sup>

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<sup>72</sup> North Carolina General Statutes, Section 47C-3-116 and 47F-3-116.

<sup>73</sup> 27A Vermont Statutes Annotated, Section 3-116.

<sup>74</sup> Nevada Revised Statutes Annotated, Section 116.31162.

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## **Persons Interviewed**

Steven Baker, Attorney  
Waller Lansden Dortch and Davis

Kathryn Baldwin, Director of Community Development  
City of Oak Ridge

Winston Blazer, General Manager  
Tellico Village Property Owners Association

Lee Corbett, Attorney  
Corbett Crockett

Darren DoVanne, President  
North Point Homeowners Association

Jeremy Durham, State Representative  
State of Tennessee

Andrew Farmer, State Representative  
State of Tennessee

Scott Ghertner, Co-President  
Ghertner and Company

Alvin Harris, Attorney  
Berry & Harris

Roger Horner, City Attorney  
City of Brentwood

David Ives, Assistant City Attorney  
City of Murfreesboro

Bill Ketron, State Senator  
State of Tennessee

Linda Klingman, Homeowner

Sabrina Langlois, Legislative Analyst  
Senator Janice Bowling

Susan McGannon, City Attorney  
City of Murfreesboro

Wade Morrell, Executive Vice President-CFO  
Tennessee Municipal Bond Fund

John Pitner, Planning Director  
Fayette County

Jeremy Pyper, Senior Counsel  
Tennessee Attorney General's Office

Alan Ramsaur, Executive Director  
Tennessee Bar Association

Susan Ritter, Executive Vice President  
Tennessee Home Builders Association

Sabra Slayton, Homeowner

Mike Wagner, Mayor  
City of Westmoreland

Jenna Watson, President  
Rivers Run Villa Homeowners Association

Joe Wise, General Manager  
Wise Property Solutions

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## Appendix A. Legislation Included in This Study

### HOUSE RESOLUTION 170

By Moore

A RESOLUTION to direct the Tennessee Advisory Committee on Intergovernmental Relations to study the responsibility of homeowners associations to insure their obligations and homeowners associations' rules and regulations.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE ONE HUNDRED SEVENTH GENERAL ASSEMBLY, that the Tennessee Advisory Committee on Intergovernmental Relations (TACIR) is directed to perform a study relative to homeowners associations that shall include, but not be limited to, rules and regulations adopted by homeowners associations that control homeowners' use and enjoyment of their real property, state and local regulations covering homeowners associations, and the responsibility of homeowners associations to insure their obligations against the event of damages, including repair of association owned property.

BE IT FURTHER RESOLVED, that as part of the study TACIR is also directed to conduct a survey of neighboring states as to statutes, rules and regulations that require homeowners associations to maintain insurance coverage to discharge contractual obligations in the event of damage as well as other statutes that regulate the adoption of homeowners associations' rules and regulations.

BE IT FURTHER RESOLVED, that TACIR is also requested to recommend solutions that would enable individual homeowners, upon request, to obtain at regular intervals from their respective homeowners associations a report citing: (1) a certificate or memoranda of insurance; (2) proof of policy coverage available; and (3) names, addresses and phone numbers for the homeowners association's designated insurance carriers and banking institutions holding funds in escrow.

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BE IT FURTHER RESOLVED, that in conducting the study TACIR shall hold public hearings and receive written and oral testimony from individual members of homeowners associations, official representatives of homeowners associations, and any other interested parties.

BE IT FURTHER RESOLVED, that it is the legislative intent that this study be conducted from TACIR's existing resources.

BE IT FURTHER RESOLVED, that all appropriate state departments and agencies shall provide assistance to TACIR.

BE IT FURTHER RESOLVED, that TACIR is requested upon the conclusion of its study to report its findings and recommendations, including any proposed legislation, to the members of the 108<sup>th</sup> General Assembly.



SENATE BILL 2110  
By Bowling

HOUSE BILL 2070

By Farmer

AN ACT to amend Tennessee Code Annotated, Title 5;  
Title 6; Title 7; Title 13; Title 48 and Title 66,  
relative to homeowners associations.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 66-5-213(b), is amended by adding the following language to the end of the subsection:

The owner of the residential property shall also, prior to entering a contract with a buyer, disclose in writing whether the PUD is complete, and if the PUD is not complete, the date in which all property located in a PUD will be developed.

SECTION 2. This act shall take effect July 1, 2014, the public welfare requiring it.

SENATE BILL 2198

By Johnson

AN ACT to amend Tennessee Code Annotated, Title 20;  
Title 25; Title 48 and Title 66, relative to  
homeowners associations.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 66, Chapter 27, is amended by adding  
the following language as a new part:

66-27-601.

As used in this part, "homeowners' association" means an incorporated  
or unincorporated entity upon which responsibilities are imposed, which includes  
managing, maintaining, or improving the property, and of which the voting  
membership is comprised of persons owning separate lots or units who are  
required to pay dues to the association for the purposes delineated in the  
governing documents of the association.

66-27-602.

(a) A homeowners' association shall not prohibit any person from parking  
on any public street located within any county or municipality of this state unless  
expressly authorized by the legislative body of the county or municipality.

(b) Except as provided by subsection (a), any provision of a governing  
document of a homeowners' association that restricts parking on any public  
street is declared null and void. Unless expressly authorized by the legislative  
body of the county or municipality, any fees or fines imposed by any  
homeowners' association for any public street parking violation shall be  
unenforceable and of no legal effect in a court of law.

(c)

(1) A homeowners' association shall not penalize or fine any persons in an amount exceeding the required monthly amount of dues owed by persons owning separate lots or units within the respective homeowners' association.

(2) Any provision of a governing document of a homeowners' association that penalizes or fines persons in an amount exceeding the required monthly amount of monthly dues owed by persons owning separate lots or units with the respective homeowners' association is declared null and void. Any penalty or fine imposed in violation of this section shall be unenforceable and of no legal effect in a court of law.

66-27-603.

(a) A homeowners' association shall not attach an assessment lien on any real property in this state unless the homeowners' association or its designee demonstrates to a court by clear and convincing evidence that a person owning a separate lot or unit within the homeowners' association is past due on required monthly payments owed to the homeowners' association.

(b) Any provision of a governing document that allows for the automatic creation and attachment of any lien to real property located within a homeowners' association for the nonpayment of required dues is declared null and void.

66-27-604.

Unless expressly authorized by the legislative body of the county or municipality, no governing document of a homeowners' association shall limit or prohibit, or be construed to limit or prohibit, the display of any political sign on privately owned property within the boundaries of the respective homeowners' association. For purposes of this section, "political sign" means a sign advocating for or against a political candidate or a political issue.

SECTION 2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it, and unless otherwise prohibited by the United States or Tennessee constitution, it is the intent of the general assembly that all applicable provisions be given retroactive application.

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## **Appendix B. Glossary**

### **Assessment**

Mandatory payments made by association members to cover the costs of maintaining common areas

### **Board of Directors**

The governing body of the homeowners association

### **Bylaws**

The bylaws are the regulations for the administration of the association and address such topics as procedures for conducting meetings and electing board members.

### **Common Areas or Common Elements**

In a condominium, it means all portions of the condominium development except the units individually owned by people. In a planned community, it means any real estate within the community owned by the association.

### **Common Interest Community (CIC) or Common Interest Development (CID)**

A community in which a person, by virtue of the person's ownership of a unit or lot in that community, is obligated to pay for a share of the expenses of the common elements

### **Condominium**

A community where each property owner owns their individual unit space and all the owners share ownership of areas of common areas.

### **Covenants, Conditions and Restrictions (CC&Rs)**

These are written rules, limitations and restrictions on use, agreed to by all property owners in a common interest community (CIC). Also known as "declaration of covenants, conditions, and restrictions"

### **Declarant**

The person or entity that created the planned community or condominium development

### **Declarant Control**

The period of time in which the declarant has the right to appoint board members to the association

## **Declaration**

The document that contains the rules, limitations and restrictions on use, agreed to by all property owners in a planned community or condominium community. Also known as Short name for “declaration of conditions, covenants and restrictions” or “CC&Rs”

## **Governing Documents**

The documents of a homeowners association that includes the declaration and the bylaws

## **Homeowners Association (also known as Condominium Association, Property Owners Association, Community Association, Unit Owners Association, or Owners Association)**

The association that governs a planned community or condominium development, maintains the common areas, and enforces the covenants, conditions, and restrictions (CC&R).

## **Limited Common Element**

The portion of the common area allocated by the declaration for the exclusive use of one or more but fewer than all of the owners. An example of a limited common element would be a parking space.

## **Planned Community**

A common interest community where each property owner owns their individual home and the homeowners association owns the common areas.

## **Planned Unit Development (PUD)**

A development of land to be planned and developed as a whole according to a detailed plan that may include single-family homes, multi-family dwellings, commercial activities, mixed uses, and common areas maintained by an HOA.

## **Reserves**

Funds set aside for deferred maintenance and capital expenditures.

## **Rules and Regulations**

The part of the governing documents that specify how owners and their guests and tenants conduct themselves within the HOA, and the remedies for noncompliance

## **Special Assessment**

An assessment that is imposed on owners for a particular purpose other than the common expenses that makes up an association’s budget.

**Tennessee Condominium Act**

The law that governs condominiums created after January 1, 2009.

**Tennessee Horizontal Property Act**

The law that governs condominiums created before January 2, 2009.

**Unit**

The portion of a common interest community set aside for separate ownership by a property owner

**Uniform Condominium Act (UCA)**

A model piece of legislation drafted by the Uniform Law Commission that addresses condominiums

**Uniform Common Interest Ownership Act (UCIOA)**

A model piece of legislation drafted by the Uniform Law Commission that addresses common interest communities

**Uniform Common Interest Owners Bill of Rights Act (Bill of Rights)**

A model piece of legislation drafted by the Uniform Law Commission that addresses issues related to owners in common interest communities

**Uniform Planned Community Act (UPCA)**

A model piece of legislation drafted by the Uniform Law Commission that addresses planned communities

## Appendix C. Uniform Condominium Act Sections Not in the Tennessee Condominium Act of 2008.

Topic	Description
Easement for Encroachments (2-114)	Creates easements for discrepancies between physical boundaries and what is shown on the plat. Tennessee Code Annotated Section 66-27-314 uses monuments as boundaries for the same purpose.
Surplus Funds (3-114)	The declaration either specifies the use of association funds in excess of common expenses and reserves or the funds shall be paid back to the unit owners.
Other Liens (3-117)	Judgments against associations are a direct lien against each individual unit.
Public Offering Statement (4-102 to 4-107)	Requires the declarant to provide potential purchasers with a description of the condominium's buildings, finances, assessments, pending lawsuits, insurance coverages, and all unusual and material circumstances.
Purchaser's Right to Cancel (4-108)	Gives purchasers 15 days to cancel the contract to purchase after receiving the public offering statement.
Resale of Units (4-109)	Requires a private unit owner to provide information to the purchaser a copy of the declaration (other than the plats and plans), bylaws, rules, and finances of the association.
Release of Liens (4-111)	Sellers required to make a public offering statement must also release liens unless the purchasers agrees to assume the liens.
Warranties of Quality (4-113 to 4-116)	Describes how implied and express warranties of quality are created, how implied warranties are modified, and the statute of limitation on warranties.
Effect of Violations on Rights of Action (4-117)	Persons adversely affected by violations of the Act may make a claim in court.
Labeling of Promotional Material (4-118)	If "NEED NOT BE BUILT" is on the plat, it must also be on promotional material.



Topic	Description
Substantial Completion of Units (4-120)	A unit may be conveyed only after it is substantially complete and the declaration is recorded.
Administration and Registration of Condominiums (Article 5)	Assigns an agency or creates a new agency to regulate condominiums.

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## Appendix D. 50 States' Condominium and Homeowners Associations Law

State	Condominium	Single-family
Alabama	<i>Title 35, Chapters 8 and 8A</i>	none
Alaska	Title 34, Chapters 7 and 8	<i>Title 34, Chapter 8</i>
Arizona	<i>Title 33, Chapter 9</i>	Title 33, Chapter 16
Arkansas	Title 18, Subtitle 2, Chapter 13	none
California	Civil Code, Division 4, Part 5	Civil Code, Division 4, Part 5
Colorado	Title 38, Chapters 33 and 33.3	<i>Title 38, Article 33.3</i>
Connecticut	Title 47, Chapters 825 and 828	<i>Title 47, Chapter 828</i>
Delaware	Title 25, Part II, Chapter 22 and Part VII, Chapter 81	<i>Title 25, Part VII, Chapter 81</i>
Florida	Title XL, Chapter 718	Title XL, Chapter 720
Georgia	Title 44 Chapter 3 Article 3	Title 44, Chapter 3, Article 6
Hawaii	Division 3, Title 28, Chapters 514A and 514B	Division 2, Title 23, Chapter 421J
Idaho	Title 55, Chapter 15	none
Illinois	Chapter 765, ILCS 160 and 605	Chapter 765, ILCS 160
Indiana	Title 32, Article 25	Title 32, Article 25.5
Iowa	Title XII, Subtitle 3, Chapter 499B	none
Kansas	Chapter 58, Articles 31, 37, and 46	Chapter 58, Article 46
Kentucky	<i>Title XXXII Chapter 381 Sections 805-910 and 9101-9207</i>	none
Louisiana	Title 9, Book 2, Title 1, Chapter 1, Part 2	Title 9, Book 2, Title 1, Chapter 1, Part 2-B
Maine	<i>Title 33, Chapters 10 and 31</i>	none
Maryland	Real Property Code, Title 11	Real Property Code, Title 11B
Massachusetts	Chapter 183A	none
Michigan	Chapter 559	none
Minnesota	<i>Chapters 515A and 515B</i>	<i>Chapter 515B</i>
Mississippi	Title 89, Chapter 9	none
Missouri	<i>Chapter 448</i>	none
Montana	Title 70, Chapter 23	none
Nebraska	<i>Chapter 76, Article 8</i>	none
Nevada	Title 10, Chapters 116A, 116B, and 117	<i>Title 10, Chapters 116 and 116A</i>
New Hampshire	Title XXXI, Chapter 356-B	none
New Jersey	Title 46, Subtitle 2, Chapter 8A and	Title 45, Subtitle 2, Chapter 22A

State	Condominium	Single-family
	8B	
New Mexico	<i>Chapter 47, Articles 7A-D</i>	Chapter 47, Article 7E
New York	Real Property Law, Article 9-B	none
North Carolina	Chapters 47A and 47C	Chapter 47F
North Dakota	Title 47, Chapter 47-04.1	none
Ohio	Title 53, Chapter 5311	Title 53, Chapter 5312
Oklahoma	Title 60, Chapter 11	Title 60, Chapter 17
Oregon	Title 10, Chapter 100	Title 10, Chapter 94, Planned Communities
Pennsylvania	<i>Title 68, Part 2, Subpart B, Chapter 31-34</i>	Title 68, Part 2, Subpart D
Rhode Island	<i>Title 34, Chapters 36 and 36.1</i>	none
South Carolina	Title 27, Chapter 31	none
South Dakota	Title 43, Chapter 43-15A	none
Tennessee	Title 66, Chapter 27	none
Texas	<i>Property Code, Title 7</i>	Property Code, Title 11
Utah	Title 57, Chapter 8	Title 57, Chapter 8a
Vermont	Title 27, Chapter 15 and Title 27A	<i>Title 27A</i>
Virginia	<i>Title 55, Chapters 4.1 and 4.2</i>	Title 55, Chapters 26 and 29
Washington	<i>Title 64, Chapters 64.32 and 64.34</i>	Title 64, Chapter 64.38
West Virginia	<i>Chapter 36A and 36B</i>	<i>Chapter 36B</i>
Wisconsin	Chapter 703	none
Wyoming	Title 34 Chapter 20	none

## Appendix E. Uniform Laws Section Comparison

Section	Uniform Condominium Act (1980)	Uniform Planned Community Act (1980)	Uniform Common Interest Ownership Act (2008)	Uniform Common Interest Ownership Bill of Rights Act (2008)
<b>Definitions and Other General Provisions</b>				
Short Title	1-101	1-101	1-101	Section 1
Applicability	1-102	1-102	1-102	
Definitions	1-103	1-103	1-103	Section 2
No Variation by Agreement	1-104	1-104	1-104	Section 3
Separate Titles and Taxation	1-105	1-105	1-105	
Applicability of Local Ordinances, Regulations, and Building Codes	1-106	1-106	1-106	
Eminent Domain	1-107	1-107	1-107	
Supplemental General Principles of Law Applicable	1-108	1-108	1-108	Section 22
Construction Against Implicit Repeal	1-109	1-109	1-109	
Uniformity of Application and Construction	1-110	1-110	1-110	Sections 23, 24, and 25
Severability	1-111	1-111	1-111	
Unconscionable Agreement or Term of Contract	1-112	1-112	1-112	
Obligation of Good Faith	1-113	1-113	1-113	Section 4
Remedies to be Liberally Administered	1-114	1-114	1-114	Section 21
Adjustment of Dollar Amounts		1-115	1-115	
Relation to Electronic Signatures in Global and National Commerce Act			1-116	Sections 23, 24, and 25
<b>Applicability</b>				
Applicability to New Common Interest Communities			1-201	Section 5
Exception for Small Cooperatives			1-202	
Exception for Small and Limited Expense Liability Planned Communities			1-203	
Applicability to Pre-Existing Common Interest Communities			1-204	
Applicability to Small Preexisting Cooperatives and Planned Communities			1-205	Section 6
Amendments to Governing Instruments			1-206	Section 6

Section	Uniform Condominium Act (1980)	Uniform Planned Community Act (1980)	Uniform Common Interest Ownership Act (2008)	Uniform Common Interest Ownership Bill of Rights Act (2008)
Applicability to Nonresidential and Mixed-use Common Interest Communities			1-207	
Applicability to Out-of-state Common Interest Communities			1-208	
Other Exempt Real Estate Arrangements			1-209	Section 7
Other Exempt Covenants			1-210	Section 7
<b>Creation , Alteration, and Termination of Planned Communities</b>				
Creation of Common Interest Communities	2-101	2-101	2-101	
Unit Boundaries	2-102	2-102	2-102	
Construction and Validity of Declaration and Bylaws	2-103	2-103	2-103	
Description of Units	2-104	2-104	2-104	
Contents of Declaration	2-105	2-105	2-105	
Leasehold Common Interest Communities	2-106	2-106	2-106	
Allocation of Allocated Interests	2-107	2-107	2-107	
Limited Common Elements	2-108	2-108	2-108	
Plats and Plans	2-109	2-109	2-109	
Exercise of Development Rights	2-110	2-110	2-110	
Alteration of Units	2-111	2-111	2-111	
Relocation of Unit Boundaries	2-112	2-112	2-112	
Subdivision of Units	2-113	2-113	2-113	
Easement for Encroachments	2-114 (Alternative A)	2-114 (Alternative A)	2-114 (Alternative A)	
Monuments as Boundaries	2-114 (Alternative B)	2-114 (Alternative B)	2-114 (Alternative B)	
Use for Sales Purposes	2-115	2-115	2-115	
Easement and Use Rights	2-116	2-116	2-116	
Amendment of Declaration	2-117	2-117	2-117	
Termination of Common Interest Community	2-118	2-118	2-118	
Rights of Secured Lenders	2-119	2-119	2-119	
Master Associations	2-120	2-120	2-120	

Section	Uniform Condominium Act (1980)	Uniform Planned Community Act (1980)	Uniform Common Interest Ownership Act (2008)	Uniform Common Interest Ownership Bill of Rights Act (2008)
Merger or Consolidation of Common Interest Communities	2-121	2-121	2-121	
Addition of Unspecified Real Estate		2-122	2-122	
Master Planned Communities			2-123	
Termination Following Catastrophe			2-124	
<b>Management of the Common Interest Community</b>				
Organization of Unit Owners Association	3-101	3-101	3-101	Section 9
Powers and Duties of Unit Owners Association	3-102	3-102	3-102	Section 8
Executive Board Members and Officers	3-103	3-103	3-103	Section 9
Transfer of Special Declarant Rights	3-104	3-104	3-104	
Termination of Contracts and Leases	3-105	3-105	3-105	
Bylaws	3-106	3-106	3-106	Section 10
Upkeep of Common Interest Community	3-107	3-107	3-107	
Meetings	3-108	3-108	3-108	Sections 11 and 12
Quorum	3-109	3-109	3-109	Section 13
Voting; Proxies; Ballots	3-110	3-110	3-110	Section 14
Tort and Contract Liability; Tolling of Limitation Period	3-111	3-111	3-111	
Conveyance or Encumbrance of Common Elements	3-112	3-112	3-112	
Insurance	3-113	3-113	3-113	
Surplus Funds	3-114	3-114	3-114	
Assessments	3-115	3-115	3-115	
Lien for Sums Due Association; Enforcement	3-116	3-116	3-116	Section 15
Other Liens	3-117	3-117	3-117	
Association Records	3-118	3-118	3-118	Section 16
Association as Trustee	3-119	3-119	3-119	
Rules			3-120	Section 17
Notice to Unit Owners			3-121	Section 18
Removal of Officers and Directors			3-122	Section 19
Adoption of Budgets; Special Assessments			3-123	Section 20
Litigation Involving Declarant			3-124	

Section	Uniform Condominium Act (1980)	Uniform Planned Community Act (1980)	Uniform Common Interest Ownership Act (2008)	Uniform Common Interest Ownership Bill of Rights Act (2008)
<b>Protection of Purchasers</b>				
Applicability; Waiver	4-101	4-101	4-101	
Liability for Public Offering Statement Requirements	4-102	4-102	4-102	
Public Offering Statement; General Provisions	4-103	4-103	4-103	
Same; Common Interest Communities Subject to Development Rights	4-104	4-104	4-104	
Same; Time Shares	4-105	4-105	4-105	
Same; Common Interest Communities Containing Conversion Buildings	4-106	4-106	4-106	
Same; Common Interest Community Securities	4-107	4-107	4-107	
Purchaser's Right to Cancel	4-108	4-108	4-108	
Resale of Units	4-109	4-109	4-109	
Escrow of Deposits	4-110	4-110	4-110	
Release of Liens	4-111	4-111	4-111	
Conversion Buildings	4-112	4-112	4-112	
Express Warranties of Quality	4-113	4-113	4-113	
Implied Warranties of Quality	4-114	4-114	4-114	
Exclusion or Modification of Implied Warranties of Quality	4-115	4-115	4-115	
Statute of Limitations for Warranties	4-116	4-116	4-116	
Effect of Violations on Rights of Action; Attorney's Fees	4-117	4-117	4-117	Section 21
Labeling of Promotional Material	4-118	4-118	4-118	
Declarant's Obligation to Complete and Restore	4-119	4-119	4-119	
Substantial Completion of Units	4-120	4-120	4-120	
<b>Administration and Registration of Common Interest Communities</b>				
Administrative Agency	5-101	5-101	5-101	
Registration Required	5-102	5-102	5-102	
Application for Registration; Approval of Uncompleted Units	5-103	5-103	5-103	
Receipt of Application; Order of Registration	5-104	5-104	5-104	
Cease and Desist Orders	5-105	5-105	5-105	

Section	Uniform Condominium Act (1980)	Uniform Planned Community Act (1980)	Uniform Common Interest Ownership Act (2008)	Uniform Common Interest Ownership Bill of Rights Act (2008)
Revocation of Registration	5-106	5-106	5-106	
General Powers and Duties of Agency	5-107	5-107	5-107	
Investigative Powers of Agency	5-108	5-108	5-108	
Annual Report and Amendments	5-109	5-109	5-109	
Agency Regulation of Public Offering Statement	5-110	5-110	5-110	

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## Appendix F. Condominium Act Summary

The current law pertaining to condominiums remains inchoate and incomplete in most jurisdictions.<sup>75</sup> Even those jurisdictions which have pioneered condominium legislation have not developed fully comprehensive acts. It is the purpose of the Uniform Condominium Act (UCA) (1980) to provide the needed comprehensive body of law.

The character of ownership in condominiums is multiple. There is the individual unit owned by the individual buyer, and there is the common area owned jointly by all. If that seems already complex, there are also the interests of the promoter, who first establishes condominiums as the form of ownership for the project, and of subsequent unit buyers and additions to the ownership group. If a building is converted from other uses, there are the interests of tenants before conversion. Some units may be rented by individual unit owners, creating absolutely new landlord and tenant relationships. In addition, the lenders who financed the total development will have secured interests in the real estate. Each unit owner will generally have a creditor with an interest. Overlaying all of this is the owner's association with governing powers over a development during its life as a condominium. The owners' association also has the power to create liens upon individual units. It is to organize and sort out these interests that the UCA has been developed.

A condominium has four critical phases: creation, financing, management, and termination. A comprehensive act deals with each phase and with the problems of consumer protection and regulation.

A condominium is created by recording a "declaration" in the appropriate land records. The declaration serves as notice of the creation. It describes the property in specific terms, and states a formula for allocation of individual interests in the common property of the condominium.

Of primary importance to financing condominiums is clarification of priorities between creditors. The UCA does not upset ordinary priorities based on recordation and/or the time a lien is created, except in one instance. A limited priority, even over recorded first mortgages, exists for the statutory lien of the owners' association for unpaid assessments. It is prior for the six month period immediately preceding an action to enforce the lien, only.

This limited first priority, in reality, is designed for protection of all creditors. Interruption of the owners' association cash flow jeopardizes maintenance of the development. That affects the value of other units and the condominium development as a whole. Other creditors, particularly those with secured interests, are thereby threatened. This limited priority to the owners' association helps prevent such loss of value.

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<sup>75</sup> This information in this section came directly from the Uniform Law Commission website: <http://www.uniformlawcommission.com/ActSummary.aspx?title=Condominium Act>

Management of a condominium development under the UCA descends from the developer to the owners' association. To assure that the developer cannot unduly control the owners' association, control must be transferred no later than the time 75 percent of the units are sold, or two years after essential declarant interests terminate, whichever comes sooner. The UCA provides broad management powers to the association, which is governed by an elected executive board. It is responsible for upkeep for the budget, and for setting and collecting assessments. The UCA provides the basis for all procedures necessary to govern a development. Included among these provisions are those for limitation of liability and insurance. The bylaws, adopted by the association, permit further refinement of the governing process.

Nobody buys a condominium unit expecting termination of the project, but it must be considered as a possibility. The UCA provides for termination only by agreement of at least 80 percent of the unit owners. The termination provisions then provide for any sale of real estate, protection of creditors, distribution of proceeds, and division of interests among the owners. Their interests are to be valued, basically, at the fair market value for their shares.

The UCA utilizes two basic concepts for consumer protection, although many of the provisions on management and relinquishment of developer control are really buyer protections, too. But basic to consumer protections are disclosure and warranties.

Disclosure of the terms of sale and of the condition of the property is accomplished through the public offering statement. It is a detailed prospectus concerning the condominium development and the specific unit sold. The information given mainly concerns the financial condition of the owners' association and any restrictions or problems which might affect the development of any units. If a declarant reserves development rights, these must be disclosed in detail. If the building is a conversion, substantial information on the condition of the building should be included.

Warranties include both express warranties, based on asserted facts or promises of the seller, and implied warranties of fitness. Implied warranties may be disclaimed in writing, but no general disclaimer is effective for residential units. Defects must be specifically disclaimed for the residential units.

There are also protections for tenants in residential units of buildings which are to be converted to condominiums. Tenants must be given notice at least 120 days before they must vacate the property. They also have a right to purchase for 60 days after notice is tendered.

The UCA devotes a final article to regulation of condominiums. It is an optional article because the ULC is well aware that new agencies, or even new responsibilities for old ones, are not fiscally possible or desirable in many jurisdictions. For those jurisdictions which desire greater regulation, the UCA provides one which registers all condominium developments. It has the power to hear consumer complaints, to investigate for alleged abuses, to issue cease and desist orders, and to go to court. The agency has limited rule-making powers.

No summary can contain the entire range of provisions for an act as comprehensive as the UCA. Only the general character can be outlined. There are many unique features of the UCA which have not been discussed. The UCA answers many questions which have plagued condominium law, and it solves many problems—sometimes in surprising ways. It should have a profound effect as it is considered in all the legislatures.

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## Appendix G. Uniform Planned Community Act Summary

Although American property law allows an infinite variety of ownership and financing arrangements for real property, little variety appeared in residential real property development until the decade of the 1970s.<sup>76</sup> Sales were characterized by transfers of fee simple ownership. The other alternative was renting.

In the 1970s, the term "condominium" changed all of that. It introduced the American public to a kind of multiple ownership that has become as familiar as the simpler, traditional forms of real estate development. The condominium movement created other opportunities. New ideas, such as real estate time-sharing, followed, but old ideas which had never fully caught on have, also, been dusted off. There is growing interest in real estate cooperatives, for example.

One form to be dusted off for the future is the multi-unit residential "planned community." This common law form couples private ownership of individual units with ownership of the "common elements" or the property used in common by all residents, in the owners' association. The community is held together with a set of covenants, conditions, and restrictions which accompany each sale of a unit and which "run with the land." These are the glue which holds the community together.

This is in contrast to condominiums which vest ownership in individual units in each owner, coupled with tenancies-in-common in the common elements, which are then governed by the owners' association. Ownership is the common glue in a condominium development.

Although condominiums and planned communities are based on differing arrangements of ownership, they function on the practical level pretty much identically. They have the same critical phases—creation, financing, management, and termination. Both depend upon an owners' association for governance. Usually, the owners are assessed regularly for the maintenance of the development. Similar amenities can be, and are, offered to buyers to make life in these developments attractive. Conversely, most of the potential problems are identical, including inordinate developer control, difficulties with management, and long-term maintenance.

Once the NCCUSL addressed condominiums in the Uniform Condominium Act (UCA), it had to consider planned communities. It has now promulgated the Uniform Planned Community Act (UPCA).

UCA served as the direct model for UPCA. Creation of a planned community occurs when a declaration is recorded in the same manner as a deed. This is exactly the way a condominium development is begun under UCA. The declaration contains the location of the planned community, the name of the planned community, a description of the real estate, and a

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<sup>76</sup> This information came directly from the Uniform Law Commission website:  
[http://www.uniformlawcommission.com/ActSummary.aspx?title=Planned Community Act](http://www.uniformlawcommission.com/ActSummary.aspx?title=Planned%20Community%20Act)

description of relevant development rights. The declaration is the fundamental instrument in both UPCA and UCA.

For lenders, the basic concern in both Acts is priority between all lenders and those with other liens against the property. The basic principle is simple, that is, reliance upon the existing priorities except where necessary for the operation of the Act. As in the Uniform Condominium Act, UPCA gives a very limited first priority for the owners' association's lien for assessments due. This priority, which exists for only six months of past due assessments, is meant to protect the solvency of the owners' association. Its solvency is essential to the security for all other mortgages and liens on units in the development. This priority, therefore, protects lenders' interests in the whole development.

Power over a planned community transfers from the developer to an owners' association in UPCA exactly as it does under UCA. All power transfers by a set time, when 75% of the units have been sold or two years after essential developer interests end. Management vests in the owners' association. It has broad powers to operate the development. Both Acts handle liability and insurance in a similar fashion.

Termination provisions are, also, nearly identical. Termination cannot occur without the concurrence of at least 80% of the owners. There are similar provisions in each Act for carrying out the termination, including sale of property, taking care of creditors, and distributing proceeds to owners. Again, the parallels between the Acts are very close.

Consumer protection in UPCA follows the basic pattern of UCA. There are two basic concepts—disclosures and warranties. Disclosure is accomplished through the public offering statement, a detailed listing of facts and figures pertinent to purchasing a unit. Special disclosure provisions apply to buildings converted from other uses. Warranties in UPCA include both express and implied warranties of sale. Any affirmation of fact or a promise made by the seller to the buyer is the basis of express warranties. Implied warranties of fitness will apply, without overt affirmation by the seller. Implied warranties may be disclaimed, however, if done clearly for specific defects. The UCA does not vary these provisions in any significant way from UPCA.

Both UCA and UPCA, also, have optional articles which establish an administrative agency for condominiums and planned communities. All projects are registered with the agency. It can investigate complaints, issue cease and desist orders, and sue for violations of the Act. This article is optional, because it is recognized that new administrative agencies or new duties given to old administrative agencies may not be fiscally feasible in many jurisdictions. The Act provides for individual enforcement through the courts so that the need for an agency is minimized.

The differences between UPCA and UCA are rooted in the basic distinction between a planned community annealed by conditions, covenants, and restrictions, and a condominium development bound together by tenancies-in-common. Because a planned community may

have limited common elements, physically and fiscally, an exception is created for planned communities with fewer than twelve units, or for which the liability for common expenses is less than \$100 per year per unit. These kinds of planned communities are not subject to the Act except for the provisions on separate titles and taxation, applicability of building codes, and eminent domain. A de minimus planned community is no more than a group of individual units with a minor commitment to some common property or use. For such a planned community, the total application of this Act is over-kill.

Condominiums, in contrast, vest ownership rights in all common elements. This kind of joint ownership makes a de minimus condominium not feasible. A planned community is easily tail-ored to a de minimus regime.

Of course, common elements cannot be dealt with identically under these two forms of ownership, either. Since common elements are owned by the association in a planned community, the declaration and public offering statement must reflect this. Also, in a planned community, owners must have a statutory easement to protect their individual interests in the common elements.

Under UPCA, as opposed to UCA, real estate may be added without describing its location in the original declaration. An addition may not exceed 10% of the total designated development area, and the declarant cannot increase the number of units established in the original declaration. In effect, it allows added real estate to the common elements. In a condominium development, adding real estate requires adjustment for each unit owner's share. In a planned community, since the owners' association owns the common elements" no such adjustment is necessary, and adding small amounts of real estate to the common elements is feasible.

The UPCA and UCA parallels and identical organization are very much intended. The law should favor no particular development scheme over another. Each scheme should stand on the merits of its own advantages versus its own disadvantages. The way UPCA and UCA are structured guarantees this neutrality in the law. It puts the emphasis upon real advantages when a developer contemplates a project and sales to consumers.

## Appendix H. Uniform Common Interest Ownership Act Summary

The Uniform Law Commission (ULC) promulgated the original version of the Uniform Common Interest Ownership Act in 1982.<sup>77</sup> UCIOA succeeded and subsumed several older ULC acts, including the Uniform Condominium Act (1977 and 1980 versions), the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. UCIOA is a comprehensive act that governs the formation, management, and termination of common interest communities, whether that community is a condominium, planned community, or real estate cooperative.

In 1994, the ULC promulgated a series of amendments to UCIOA. The 1994 amendments did not change the general structure or format of the original act, but were designed to reflect the experience of those states that had adopted UCIOA (or one or more of its predecessor acts), and scholarly commentary and analyses surrounding the act. Issues addressed by the 1994 act included: increasing declarant responsibility for large and non-residential projects; allowing subdivision and expansion of projects; improving procedures for addressing use and occupancy restrictions in units; easing the process for projects begun in states prior to the adoption of UCIOA to opt in to the act; empowering the association to deal with tenants in rented units; and clarifying the standard of care that applied to association directors.

In 2004, the ULC approved a new drafting committee to consider and promulgate further amendments to UCIOA. The primary purpose of the proposed amendments was to address a growing demand in the states for a legislative solution for growing tensions between the elected directors of unit owners' associations and dissident individual unit owners within those associations. In keeping with the aims of the 1982 and 1994 versions of the act, the new amendments also reflect a comprehensive review of states' experience with UCIOA and its predecessor acts over the last 30 years.

The ULC approved these amendments at its Annual Meeting in 2008. They incorporate non-substantive, style changes to update the act and harmonize it with state legislative developments and terminology changes. The 2008 UCIOA amendments also incorporate a considerable number of substantive amendments, including the following highlights:

- Among new general provisions, the definition of "common interest community" is revised to confirm that unit owners' mutual obligations to share the costs of services provided by the association is sufficient, without more, to create a common interest community. However, by reference to sections 1-209 and 1-210, the definition confirms that cost-sharing agreements between two associations, or an association and a separate owner of real estate, do not require creation of a separate common interest community. The term "special declarant right" adds new rights granted to a declarant. Several new definitions are added, including treatment of the term "record" as a noun for e-signature purposes, and the new act includes standard

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<sup>77</sup> This information came directly from the Uniform Law Commission website:  
[http://www.uniformlawcommission.com/ActSummary.aspx?title=Common Interest Ownership Act \(2008\)](http://www.uniformlawcommission.com/ActSummary.aspx?title=Common%20Interest%20Ownership%20Act%20(2008))

language on interaction with the federal Electronic Signatures in Global and National Commerce Act (ESIGN).

- Selected 2008 amendments are made retroactive to all residential common interest communities created before adoption of UCIOA in a particular state; these include sections 1-206 (governing instruments for older projects), 2-102 (unit boundaries), 2-117(h) and (i) (amendment to declaration), 2-124 (termination following catastrophe), 3-103 (executive board members and officers), 3-108 (meetings) and 3-124 (litigation involving the declarant). The amendments also grant greater flexibility to nonresidential projects by allowing the declaration to provide that only Articles 1 and 2 of UCIOA (definitions and general provisions, development flexibility, and title safeguards) apply.
- The 2008 amendments revise UCIOA's treatment of the creation, alteration, and termination of common interest communities. Declarations are now required to authorize a process for association administration of any design criteria and building approval process, or for the enforcement of aesthetic standards; those that fail to do so will not have the authority to enforce such requirements. Also, the declaration may restrict unit owners' use of common elements, in addition to existing restrictions on limited common elements, and common elements may now be restricted to use for "the purposes for which they were intended."
- Residential projects may now benefit from increased flexibility in the percentage of unit owners required to amend the declaration. Now, consent may be presumed from lenders, where lender consent is necessary for amendment, with proper notice and 60 days of silence. The amendments also clarify that special declarant rights reserved in the declaration may not be amended without consent of the beneficiary.
- The 2008 amendments expand UCIOA's treatment of association bylaws, rulemaking, operation and governance, notice methods, meetings, meeting and voting procedures, and the adoption of budgets and special assessments. The Act adopts important 'open meeting' requirements for both unit owner and executive board meetings, and greatly limits the use of executive sessions. The changes made by the 2008 amendments mandate that each unit owners association have an executive board, and expand the forms that unit owners associations may organize as, to include limited liability companies or any other form permitted by state law. The declaration may provide for direct election of the association's executive board officers by unit owners, and also allows the declaration to provide for a limited number of independent outside directors, apart from those elected by unit owners or appointed by the declarant.
- Mandatory and discretionary association actions are clarified, as are certain rules regarding investment and borrowing practice, and an association's right to suspend a unit owner's privileges (within limitations) is confirmed. The executive board of a unit owners association is given flexibility in determining whether to enforce the letter of each provision of its declaration, bylaws, or rules, or decline to enforce or compromise them. The association is given greater flexibility to seek payment of the costs for damage resulting from willful



misconduct or gross negligence directly from a unit owner instead of filing a claim with the association's insurer. The status of an association's statutory lien for all sums due from unit owners is clarified, and the right of an association to proceed in foreclosure on a lien against a unit owner is significantly limited.

- Record keeping requirements and guidance are provided in greater detail, and are drawn from FOIA requirements and other sources.
- Liability is expanded for declarants for false or misleading statements made in public offering statements, and increased financial disclosures are required. Minor changes are made with regard to express warranties of quality, allowing a model or description to clearly state that it is only "proposed" or "subject to change."

In addition to the 2008 amendments to UCIOA, a new Uniform Common Interest Owners Bill Of Rights Act (UCIOBORA) was also drafted that draws together a number of the existing provisions of UCIOA as well as many of the 2008 amendments that, together, provide significant rights to unit owners in all common interest communities. UCIOBORA can be enacted by states as a stand-alone act when it is deemed not feasible to adopt all of UCIOA. The UCIOBORA would then supplement existing state law with many of the most important updates and protections of the 2008 act.

The 2008 UCIOA amendments seek to address critical aspects of association governance, with particular focus on the relationship between the association and its individual members, foreclosures, election and recall of officers, and treatment of records. There are a significant number of other amendments, style and substantive, to clarify and modernize the operation and governance of common interest associations. Taken as a whole, the aggregate of these amendments is a stronger UCIOA that better serves those governed by the act's provisions. It should be considered in every jurisdiction that has not already adopted it in the United States.

## Appendix I. Uniform Common Interest Owners Bill of Rights Act

The Uniform Law Commission (ULC) promulgated the original version of the Uniform Common Interest Ownership Act in 1982.<sup>78</sup> UCIOA succeeded and subsumed several older ULC acts, including the Uniform Condominium Act (1977 and 1980 versions), the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. UCIOA is a comprehensive act that governs the formation, management, and termination of common interest communities, whether that community is a condominium, planned community, or real estate cooperative. In 1994, the ULC promulgated a series of amendments to UCIOA. The 1994 amendments did not change the general structure or format of the original act, but were designed to reflect the experience of those states that had adopted UCIOA (or one or more of its predecessor acts), and scholarly commentary and analyses surrounding the act.

In 2004, the ULC approved a new drafting committee to consider and promulgate further amendments to UCIOA. At its Annual Meeting in 2008, the ULC promulgated the amendments to UCIOA, along with a new Common Interest Owners Bill of Rights Act (UCIOBORA).

UCIOBORA was drafted so that it can be enacted by states as a stand-alone act when it is not feasible to enact all of UCIOA. The UCIOBORA is drawn from the provisions of UCIOA, and supplements existing state law with many of the most important updates and protections of the 2008 updates.

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<sup>78</sup> This information came directly from the Uniform Law Commission website:  
[http://www.uniformlawcommission.com/ActSummary.aspx?title=Common Interest Owners Bill of Rights](http://www.uniformlawcommission.com/ActSummary.aspx?title=Common%20Interest%20Owners%20Bill%20of%20Rights)