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Arizona Revised Statutes Annotated
Title 33. Property
Chapter 9. Condominiums (Refs & Annos)
Article 2. Creation, Alteration and Termination of Condominiums

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A.R.S. § 33-1228

§ 33-1228. Termination of condominium

Effective: August 3, 2018 to August 26, 2019

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B of this section. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection G of this section. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit. During the period of that occupancy, each unit owner and the successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units that were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F of this section are as follows:

1. Except as provided in paragraph 2 of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the association's appraiser, the unit owner shall submit to arbitration at the association's expense and the arbitration amount is the final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I of this section, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, on foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C, D, E, F, H and I of this section do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contains provisions inconsistent with these subsections.

K. Beginning on the effective date of this amendment to this section, any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy.

Credits

Added by Laws 1985, Ch. 192, § 3, eff. Jan. 1, 1986. Amended by Laws 2018, Ch. 235, § 1.

A. R. S. § 33-1228, AZ ST § 33-1228

Current through legislation effective June 20, 2023 of the First Regular Session of the Fifty-Sixth Legislature (2023)

End of Document

A.R.S. Const. Art. 2 § 17

§ 17. Eminent domain; just compensation for private property taken; public use as judicial question

Currentness

Section 17. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Credits

Amendment approved election Nov. 3, 1970, eff. Nov. 27, 1970.

Notes of Decisions (504)

A. R. S. Const Art. 2 § 17, AZ CONST Art. 2 § 17
Current through legislation effective June 20, 2023 of the First Regular Session of the Fifty-Sixth Legislature (2023)

End of Document

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Review Granted August 22, 2023

253 Ariz. 552
Court of Appeals of Arizona, Division 1.

Jie **CAO**, et al., Plaintiffs/Appellants,
v.
PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.

No. 1 CA-CV 21-0275
|
FILED July 7, 2022

Synopsis
Background: Condominium unit owners brought action against developer and condominium association seeking declaratory judgment that forced sale of owners' condominium violated Arizona Condominium Act, which governed condominium termination, and arguing in the alternative that section of Act governing condominium termination was unconstitutional as applied. Developer and association filed separate motions to dismiss for failure to state a claim, and the Superior Court, Maricopa County, No. CV2019-055353, Daniel Martin, J., granted motions. Owners appealed.

Holdings: The Court of Appeals, McMurdie, J., held that:

[1] section of Act governing condominium termination was not unconstitutional as applied;

[2] section permitted but did not require sale of condominium to include entire condominium; and

[3] Court would vacate and remand for application of 1986 version of section.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (18)

[1] Appeal and Error🔑Failure to state claim, and dismissal therefor

When reviewing dismissal for failure to state claim, Court of Appeals takes facts alleged in complaint as true and views them in light most favorable to plaintiffs.

[2] Appeal and Error🔑Constitutional law
Appeal and Error🔑Constitutional Rights, Civil Rights, and Discrimination in General

Both statutory interpretation and constitutionality issues are questions of law, which the Court of Appeals reviews de novo.

[3] Eminent Domain🔑Public Use

Generally, taking one person's property for another person's private use is plainly prohibited under the Arizona Constitution. Ariz. Const. art. 2, § 17.

[4] Common Interest Communities🔑Involuntary termination of ownership or possession; eviction
Eminent Domain🔑Rent control; housing

Section of Arizona Condominium Act governing condominium termination, which was revised in 2018 to set fair market value of condominium units as final sale amount, was not unconstitutional taking under the Arizona constitution as applied to forced sale of condominium owners' unit, as owners alleged in challenging sale; when owners bought unit in 2018, 1986 version of statute section was in effect, which used fair market value of an owner's unit to calculate proportion of that

owner's interest relative to entire condominium, given that declaration creating condominium did not provide reasonable expectation that it would include 2018 amendments, meaning that owners' purchase agreement per declaration only granted association rights, powers, and duties prescribed by 1986 version of statute. Ariz. Const. art. 2, §§ 17, 25; Ariz. Rev. Stat. Ann. §§ 33-1211, 33-1228, 33-1228(G)(1), 33-1228(K).

[5] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

A statute that authorizes a private party to take another party's property constitutes a taking.

[6] **Appeal and Error** Necessity of presentation in general
Appeal and Error Briefs and argument in general

Waiver of an argument not raised before the superior court or in brief on appeal is procedural, not substantive, and may be suspended at appellate court's discretion.

[7] **Contracts** Application to Contracts in General

Although contracts are generally enforced as written, in special types of contracts, unknown terms which are beyond range of reasonable expectation are not enforced.

[8] **Contracts** Restriction of competition

Covenants not to compete are subject to rule that unknown terms which are beyond range of reasonable expectation are not enforced.

[9] **Statutes** Intent

The primary goal of statutory interpretation is to find and give effect to legislative intent.

[10] **Statutes** Language
Statutes Plain Language; Plain, Ordinary, or Common Meaning

Courts undertaking statutory interpretation start with the statute's plain language and give its words their ordinary meaning.

3 Cases that cite this headnote

[11] **Statutes** Context

Courts interpreting a statute read the statute's words in context.

3 Cases that cite this headnote

[12] **Statutes** Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

If a statute is subject to only one reasonable interpretation, courts apply it without further analysis.

1 Case that cites this headnote

[13] **Statutes**In general; factors considered

If a statute is ambiguous, courts may consider many different factors, including the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose, for purposes of undertaking statutory interpretation.

1 Case that cites this headnote

[14] **Statutes**Uniform and model acts

When statute is based on uniform act, court may infer that legislature intended to adopt construction placed on act by its drafters.

[15] **Common Interest Communities**Consolidation, merger, and termination
Common Interest Communities Involuntary termination of ownership or possession; eviction

Arizona Condominium Act section governing condominium termination agreements permitted but did not require sale of condominium to include entire condominium, nor did anything in statute prohibit sale of less than whole condominium, and thus Act allowed termination agreement to provide for sale of less than all units and common elements, contrary to assertion of condominium unit owners in action challenging forced sale of their condominium unit by condominium association to developer; plain language of statute was permissive, merely stating that a termination agreement was allowed to provide for the sale of all common elements and units of a condominium, and only requirement imposed was that termination agreement should set forth minimum terms of sale. Ariz. Rev. Stat. Ann. § 33-1228(C).

[16] **Appeal and Error**Applicable legal theory or standard in general
Common Interest Communities Allocated interests in general
Common Interest Communities Relationship with unit owners in general

Superior Court dismissed condominium unit owners' complaint challenging forced sale of their unit by condominium association to developer based on inapplicable 2018 version of Arizona Condominium Act section governing condominium termination, not the 1986 version that controlled, and thus Court of Appeals would vacate and remand to Superior Court to apply 1986 version to determine whether association breached its fiduciary obligations via forced sale; by assuming role of trustee, condominium association owed fiduciary duty to all unit owners, but owners only agreed to 1986 version of Act, which used fair market value of owner's unit to calculate proportion of that owner's interest relative to entire condominium, whereas 2018 version set fair market value of units as final sale amount. Ariz. Rev. Stat. Ann. §§ 14-10801, 14-10802, 14-10803, 14-10815(B), 33-1228, 33-1259.

[17] **Common Interest Communities**Relationship with unit owners in general

As trustee, condominium association must carry out sale in good faith, with loyalty, and in interests of unit owners.

[18] **Costs, Fees, and Sanctions**Contracts

Contractual attorney fees provisions are

enforced according to their terms.

****2** Appeal from the Superior Court in Maricopa County, No. CV2019-055353, The Honorable Daniel G. Martin, Judge. **REVERSED AND REMANDED**

Attorneys and Law Firms

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Presiding Judge Paul J. McMurdie delivered the Court's opinion, in which Chief Judge Kent E. Cattani and Vice Chief Judge David B. Gass joined.

OPINION

McMURDIE, Judge:

***554 **3** ¶1 Jie **Cao** and Haining Xia ("Xias") appeal from the superior court's order upholding the forced sale of their Tempe condominium.[1] The court determined that the sale was permissible under A.R.S. § 33-1228, which allows a supermajority of condominium unit owners to approve the termination of a condominium complex, even over the objection of other condominium unit owners.

¶2 In this opinion, we address A.R.S. § 33-1228 and hold that the statute is constitutional when applied to condominium owners who bought a condominium unit subject to terms that incorporate the statute. We also hold, however, that if there have been substantive post-purchase changes to the statute, the version of the statute in place at the time of purchase controls.

¶3 Here, the superior court applied the August 2018 version of A.R.S. § 33-1228 rather than the version in effect when the Xias bought their condominium unit. As a result, because the previous version of the statute potentially provided greater protections to minority shareowners, we reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

¶4 In 2007, a developer completed construction on the **Dorsey** Place Condominiums ("**Dorsey** Place"), a condominium complex in Tempe. The developer recorded a condominium declaration ("Declaration"), establishing the property's terms, covenants, conditions, and restrictions ("CC&Rs"). Anyone who acquired an ownership interest in the condominium complex was subject to the Declaration, which referred to state regulations affecting condominium ownership. In January 2018, the Xias bought a unit at **Dorsey** Place. Under the warranty deed[2] and the Declaration, the Xias took the unit subject to its CC&Rs.

¶5 In November 2018, **PFP** **Dorsey** acquired 90 of the 96 units at **Dorsey** Place. Other individuals owned the remaining units. Under the Declaration, each unit owner is a member of the Association, and each unit equates to one vote within the Association. Thus, the Xias held one vote, as did the other unit owners, while **PFP** **Dorsey** commanded 90 votes within the Association.

¶6 In March 2019, the Association notified its members it would be calling a meeting to discuss terminating the condominium. The notice gave members five appraisal reports and a draft termination agreement proposing to sell the entire condominium to **PFP** **Dorsey** for over $22 million. The appraisal reports listed the appraised values of five unit types, and the Xias' unit type was valued at $234,000.

¶7 The Association held the meeting on April 4, where it presented its members with a modified termination agreement proposing instead to sell "all portions of and interest in [**Dorsey** Place] not already owned by **PFP**

[Dorsey], to PFP [Dorsey], upon termination of the Condominium." The agreement described the purchase price as the aggregate fair market value of the six units to be bought. An independent appraisal would determine each unit's fair market value, but the agreement set forth a process for disapproving owners to obtain another appraisal.

¶8 According to the Declaration, the condominium could "be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in ***555 **4** the Association are allocated." PFP Dorsey was the only member of the Association to sign the termination agreement, but with nearly 94% of the votes, it ratified the termination and sale on April 9. The Association recorded a warranty deed[3] with the Maricopa County Recorder's Office, transferring the title of the Xias' unit to PFP Dorsey. Eventually, PFP Dorsey and the Association changed the locks on the unit and disposed of the Xias' remaining personal property.

¶9 The Xias sued PFP Dorsey and the Association, seeking a declaratory judgment that the transaction violated the Arizona Condominium Act, A.R.S. § 33-1201, *et seq.*, which governs condominium termination. They argued in the alternative that A.R.S. § 33-1228 is unconstitutional as applied. They sought quiet title, ejectment, imposition of a constructive trust, and further alleged civil trespass, conversion, breach of fiduciary duty, unjust enrichment, and wrongful recording, all arising out of an invalid or unconstitutional forced sale of their unit.

¶10 PFP Dorsey and the Association filed separate motions to dismiss under Arizona Rule of Civil Procedure 12(b)(6). Each motion argued that the Xias failed to state a claim upon which relief could be granted because PFP Dorsey and the Association strictly complied with A.R.S. § 33-1228. The superior court granted the motions over the Xias' objection.

¶11 The Xias appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

[1]¶12 When reviewing a dismissal under Rule 12(b)(6), we take the facts alleged in the complaint as true and view them in the light most favorable to the plaintiffs. *Johnson v. McDonald*, 197 Ariz. 155, 157, ¶ 2, 3 P.3d 1075, 1077 (App. 1999).

[2]¶13 On appeal, the Xias argue that (1) A.R.S. § 33-1228 is an unconstitutional taking of private property, and (2) A.R.S. § 33-1228 prohibits PFP Dorsey and the Association from forcing a sale of less than the entire condominium for only the appraised value. Both statutory interpretation and constitutionality issues are questions of law, which we review *de novo*. *Koller v. Ariz. Dep't of Transp.*, 195 Ariz. 343, 345, ¶ 8, 988 P.2d 128, 130 (App. 1999) (statutory interpretation); *Gallardo v. State*, 236 Ariz. 84, 87, ¶ 8, 336 P.3d 717, 720 (2014) (constitutionality).

A. Arizona Revised Statutes Section 33-1228 Is Not Unconstitutional as Applied Because the Xias Agreed to Grant the Association the Rights, Powers, and Duties Prescribed by the 1986 Version of the Statute.

[3] [4]¶14 The Xias argue that A.R.S. § 33-1228 is a taking of private property in violation of the Arizona Constitution. Our Constitution states that "[p]rivate property shall not be taken for private use," except for certain exceptions inapplicable here. Ariz. Const. art. 2, § 17. Generally, "[t]aking one person's property for another person's private use is plainly prohibited." *Bailey v. Myers*, 206 Ariz. 224, 227, ¶ 12, 76 P.3d 898, 901 (App. 2003).

[5]¶15 A statute that authorizes a private party to take another party's property constitutes a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (taking had occurred when, without permission of building owner, media company installed cables on apartment building as authorized by statute). Without an exception to the general rule, A.R.S. § 33-1228 is unconstitutional on its face.

¶16 The Xias argue that A.R.S. § 33-1228 "authorized an impermissible traditional taking" and that without the statute, PFP Dorsey and the Association would have "no authority" to terminate the condominium and force the sale of the Xias' unit. But PFP Dorsey and the Association contend that the authority arises out of contract, so it is not an unconstitutional taking.

***556 **5** ¶17 A condominium may only be created by recording a declaration. A.R.S. § 33-1211. The Declaration here provided that

> [b]y acceptance of a deed or by acquiring any ownership interest in any portion of the Condominium, each Person ... binds himself ... to all of the provisions, restrictions, covenants, conditions, rules and regulations now or hereafter imposed by the Condominium Documents and any amendments thereof.

So when the Xias bought their unit in January 2018, they agreed to be bound by the Declaration, which grants the Association the "rights, powers and duties as are prescribed by the Condominium Act." **PFP Dorsey** and the Association argue that the April 2019 termination and sale was authorized under the Declaration because they strictly followed the provisions of A.R.S. § 33-1228. But **PFP Dorsey** (and the superior court) applied the current version of the statute, even though it reflects an August 2018 amendment that potentially lessened protections for individual condominium unit owners subject to a forced sale. *See* H.B. 2262, 53d Leg., 2d Reg. Sess. (2018).

[6]¶18 The Xias argue that, under *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 506 P.3d 18 (2022), the 2018 amendments to the statute cannot be incorporated into the Declaration.[4] They assert that the 1986 version in effect at the time of their purchase is the one that applies here. **PFP Dorsey** and the Association respond that the Declaration incorporated the 2018 amendments because the Declaration defines the "Condominium Act" as "A.R.S. § 33-1201, et seq., as amended from time to time."

[7] [8]¶19 "Although contracts are generally enforced as written, in special types of contracts, we do not enforce 'unknown terms which are beyond the range of reasonable expectation.' " *Kalway*, 252 Ariz. at 544, ¶ 14, 506 P.3d at 24 (citation omitted) (quoting *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 391, 682 P.2d 388, 396 (1984)). CC&Rs, like the Declaration, are subject to this rule. *Id.* at 544, ¶ 14, 506 P.3d at 24. As a result, we will not "allow[ ] substantial, unforeseen, and unlimited amendments" to the Declaration, as that "would alter the nature of the covenants to which the homeowners originally agreed." *Id.* at 544, ¶ 15, 506 P.3d at 24. We "will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." *Id.* (quoting *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610, 617 (1994)).

¶20 For these reasons, although the Declaration incorporates amendments to the Condominium Act, an amendment will be included only if it falls within the Xias' "reasonable expectations based on the declaration in effect at the time of the purchase." *See Kalway*, 252 Ariz. at 544, ¶ 15, 506 P.3d at 24. We look objectively at the Declaration to determine whether it gave sufficient notice of a future amendment. *Id.* at 544–45, ¶ 16, 506 P.3d at 24–5. The Declaration need not provide notice of the precise details of the amendment, but "it must give notice that a ... covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way." *Id.* at 545, ¶ 17, 506 P.3d at 25. Future amendments, however, "cannot be 'entirely new and different in character,' " otherwise they would exceed the reasonable expectations of the owners. *Id.* (quoting *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill.App.3d 805, 77 Ill.Dec. 68, 459 N.E.2d 1164, 1167 (1984)).

¶21 When the Xias took ownership of their unit in January 2018, the 1986 version was in effect, and A.R.S. § 33-1228(G)(1) provided that

> ***557 **6** the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by an independent appraiser selected by the association. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which fifty percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

After the 2018 amendments and at the time of the proposed termination of the condominium, A.R.S. § 33-1228(G)(1) provided that

> the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the association's appraiser, the unit owner shall submit to arbitration at the association's expense and the arbitration amount is the final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

Thus, the 1986 version used the fair market value of an owner's unit to calculate the proportion of that owner's interest relative to the entire condominium. But the 2018 version appears to set the fair market value of the unit alone as "the final sale amount" to which the owner is entitled, rather than calculating the owner's proportionate share of the sale price of the condominium as a whole.

¶22 The Declaration did not provide sufficient notice of such a substantive amendment. It defined the Condominium Act as the condominium statutes "as amended from time to time." This provision only provides notice that the Condominium Act could be amended by the legislature, which cannot provide "fair notice of any enacted amendment." *See Kalway*, 252 Ariz. at 545, ¶ 19, 506 P.3d at 25 (provision gave insufficient notice when it only stated that the "Declaration may be amended at any time by an instrument executed and acknowledged by the Majority Vote of the Owners"). And the statutory amendments did not merely refine the statutes, correct errors, or fill in gaps, but substantively altered owners' property rights beyond the "owners' expectations of the scope of the covenants." *See Kalway*, 252 Ariz. at 545, ¶ 17, 506 P.3d at 25. Allowing this provision to amend the Declaration would "allow[ ] substantial, unforeseen, and unlimited amendments [that] would alter the nature" of the agreement. *See Kalway*, 252 Ariz. at 544, ¶ 15, 506 P.3d at 24. We conclude, therefore, that the Declaration did not incorporate the 2018 amendments to A.R.S. § 33-1228, and the Xias purchase agreement only granted the Association the rights, powers, and duties prescribed by the 1986 version of the statute.

¶23 But **PFP Dorsey** and the Association claim that the Xias could not contract around the 2018 amendments to subsection (G)(1). They cite A.R.S. § 33-1228(K), which states that "[b]eginning on the effective date of this amendment to this section, [August 3, 2018,] any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy." They maintain that the 2018 version must apply here because the legislature "intended the 2018 version to apply to all condominiums, regardless of the language in their declarations." ****7 *558** As discussed, a forced termination and sale under the statute is unconstitutional but for an owner's contractual agreement under the declaration. And we cannot read A.R.S. § 33-1228(K) to affect agreements already in place because "no ... law impairing the obligation of a contract[ ] shall ever be enacted." Ariz. Const. art. 2, § 25; *see also Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273, 872 P.2d 668, 677 (1994) ("[I]f possible this court construes statutes to avoid rendering them unconstitutional."). *But see Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 119, ¶ 101, 83 P.3d 573, 597 (App. 2004), *as amended on denial of reconsideration* (Mar. 15, 2004) ("Although the language in the contract clauses of the federal and state constitutions is seemingly absolute, the State can impair contract obligations in the exercise of its inherent police power to safeguard vital public interests.").

¶24 The Xias took ownership of their unit in January 2018 subject to the Declaration, which incorporated the Condominium Act. And substantive amendments to the Condominium Act cannot later be incorporated into the agreement without renewed consent. Thus, the 1986 version of A.R.S. § 33-1228 applies.

B. The Authority Granted to the Association Must Be Analyzed Under the 1986 Version of A.R.S. § 33-1228.

¶25 The Xias also argue that A.R.S. § 33-1228 does not authorize the Association to sell the contested unit to **PFP Dorsey** because, under their interpretation, the statute requires that (1) any sale of condominium property must include the entire condominium, and (2) the Association must sell the property on the most favorable terms and distribute the sale's proceeds in proportion to their interests as determined by appraisals.

[9] [10] [11] [12] [13]¶26 The primary goal of statutory interpretation is to "find and give effect to legislative intent." *Secure Ventures, LLC v. Gerlach*, 249 Ariz. 97, 99, ¶ 5, 466 P.3d 874, 876 (App. 2020). We start with the statute's plain language and give its words their ordinary meaning. *Id.* In doing so, we read the statute's words in context. *See* *J.D. v. Hegyi*, 236 Ariz. 39, 40–41, ¶ 6, 335 P.3d 1118, 1119-1120 (2014). "If the statute is subject to only one reasonable interpretation, we apply it without further analysis." *Glazer v. State*, 237 Ariz. 160, 163, ¶ 12, 347 P.3d 1141, 1144 (2015). But if the statute is ambiguous, we may consider many different factors, including "the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991).

[14]¶27 In 1985, the Arizona Legislature adopted a version of the Uniform Condominium Act. *See* 1985 Ariz. Sess. Laws, ch. 192, § 3. When a statute is based on a uniform act, we may infer that the legislature "intended to adopt the construction placed on the act by its drafters." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 332, ¶ 25, 26 P.3d 510, 515 (2001) (quoting *State v. Sanchez*, 174 Ariz. 44, 47, 846 P.2d 857, 860 (App. 1993)). We note, however, that our legislature declined to adopt certain provisions of the uniform act, which likewise guides our interpretation.

1. Arizona Revised Statutes Section 33-1228(C) Allows a Termination Agreement to Include a Provision for the Sale of Any Portion of the Condominium.

[15]¶28 The Xias argue that A.R.S. § 33-1228(C) prohibits the sale of less than the entire condominium. Although the Xias originally made this argument under the 2018 version of the statute, the legislature did not substantively amend the subsections referenced in this argument. As a result, we will address the argument here.

¶29 Section 33-1228(C) reads:

> A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

The plain language of the first sentence allows a termination agreement to provide for the sale of all the common elements and ***559 **8** units. In the context of A.R.S. § 33-1228, this sentence gives an association, via a termination agreement, the power to contract for the sale of the entire property, including the property of unit owners who object to the termination and sale. *See* A.R.S. § 33-1228(A), (B) (contemplating a termination agreement approved by less than all unit owners); A.R.S. § 33-1228(D) (contract for sale binds owners of the property to be sold upon approval under subsections A and B); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167–69 (2012) ("Context is a primary determinant of meaning," and all of a statute "provides the context for each of its parts.").

¶30 The Xias argue that A.R.S. § 33-1228(C) requires that "[i]f ... any real estate is to be sold, it must all be sold." But the subsection's first sentence does not require

anything; the language is permissive. *See* A.R.S. § 33-1228(C) ("A termination agreement *may* provide that all the common elements and units of the condominium shall be sold.") (emphasis added); *see also* Scalia & Garner, *supra*, at 112 ("May" is a permissive word and "permissive words grant discretion."). In the second sentence, the legislature contemplated an agreement under which "*any* real estate in the condominium is to be sold." A.R.S. § 33-1228(C) (emphasis added). And the only requirement imposed is that "the termination agreement shall set forth the minimum terms of the sale." *Id.*; *see also* Scalia & Garner, *supra*, at 112 (Used correctly, "shall" is mandatory, and "[m]andatory words impose a duty.").

¶31 The statute thus permits but does not require a sale to include the entire condominium. And nothing in the statute prohibits the sale of less than the whole condominium. As a result, we read the statute to allow a termination agreement to provide for the sale of less than all the units and common elements.

2. The Superior Court Dismissed the Xias' Complaint Based on an Inapplicable Version of A.R.S. § 33-1228.

[16]¶32 The Xias also argue that the Association owed them a fiduciary duty to act in their best interests and sell the property on the best terms possible. They argue that A.R.S. § 33-1228(D) creates a fiduciary relationship by vesting title to their property in the Association as trustee.

[17]¶33 Under A.R.S. § 33-1228(D), "[i]f any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units." The statute vests title to the real estate in the association so that "the association has all powers necessary and appropriate to effect the sale." A.R.S. § 33-1228(D); *see also* A.R.S. § 33-1259 (Third parties may assume an association is acting properly within its capacity as trustee.). As trustee, an association must carry out a sale in good faith, with loyalty, and in the interests of the unit owners. *See* *Lane Title & Tr. Co. v. Brannan*, 103 Ariz. 272, 278, 440 P.2d 105, 111 (1968) ("[T]he trustee owes the beneficiary a duty of undivided loyalty."); A.R.S. § 14-10801 ("[T]he trustee shall administer the trust in good faith, in accordance with its terms and purposes and in the interests of the beneficiaries."); A.R.S. § 14-10802 (trustee owes a duty of loyalty); A.R.S. § 14-10803 (trustee owes a duty of impartiality); *see also* A.R.S. § 14-10815(B) (describing such duties as "fiduciary duties.").

¶34 The Association concedes that it became a trustee to facilitate the sale, but it argues that A.R.S. § 33-1228 only requires the trustee to "carry out the sale that the members of the Association agreed to when they agreed to terminate the condominium." We disagree. By assuming the role of trustee, the Association owed a fiduciary duty to all unit owners. The Association argues that if it owed the unit owners a fiduciary duty, it did not breach the duty because it strictly complied with the requirements of A.R.S. § 33-1228 by including the sale price and protective measures required by A.R.S. § 33-1228(G). The Association thus argues that it properly terminated and sold the condominium.

¶35 The Association relies, however, on the requirements imposed by the 2018 version of the statute. Likewise, the superior court dismissed the Xias' complaint "for the reasons advanced by [**PFP** **Dorsey** and the Association]," ****9 *560** which included arguments relying on the 2018 version. But as discussed, the Xias only agreed to the 1986 version of the statute. As a result, we vacate and remand to the superior court to apply the 1986 version of A.R.S. § 33-1228 to determine whether the Association breached its fiduciary obligations. Thus, we need not address whether the sale at issue would have fulfilled the Association's fiduciary duty under the 2018 version.

ATTORNEY'S FEES

[18]¶36 The Xias seek attorney's fees on appeal. Contractual attorney's fees provisions are enforced according to their terms. *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994). The Declaration provides that if any unit owner employs attorneys to enforce compliance with the Declaration, the prevailing party has a right to recover its reasonable attorney's fees. Because the Xias are the prevailing party, we award them their reasonable attorney's fees and costs after complying with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶37 We reverse and remand the superior court's dismissal of the Xias' complaint.

All Citations

253 Ariz. 552, 74 Arizona Cases Digest 6, 516 P.3d 1

Footnotes

1 The notice of appeal also named Stone Xia as an appellant, but he did not file an opening brief. Thus, he is dismissed as a party to this appeal. *See* ARCAP 15(a)(1).

2 We take judicial notice of the Xias' warranty deed, Maricopa County Recording Number 20180103716.

3 We take judicial notice of **PFP** **Dorsey's** warranty deed, Maricopa County Recording Number 20190923560.

4 Although the Xias did not raise this argument before the superior court or in their opening brief, they have not waived the argument. Waiver "is procedural, not substantive, ... and may be suspended at an appellate court's discretion." *Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 482, 724 P.2d 562, 568 (1986). We will consider the Xias' argument because it is founded on *Kalway*, which was issued after all parties had filed their initial briefs, and all parties were later "afford[ed] a full opportunity to brief and argue the issue." *See* *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406, n.9, 904 P.2d 861, 868 (1995).

SUPREME COURT OF ARIZONA

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Arizona Supreme Court No. _____ Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

PLAINTIFFS/APPELLANTS JIE CAO AND HAINING "FRAZER" XIA'S PETITION FOR REVIEW

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INTRODUCTION

This case involves the bedrock American principle that one person cannot sell someone else's property. Arizona's takings clause prohibits the government from authorizing that kind of transaction. In A.R.S. § 33-1228, however, the legislature purported to authorize a supermajority of condo owners to sell other people's condominiums against their will.

Misapplying the statute, developers have used this authority to convert condominiums to apartments through a self-dealing scheme that ensures they have nothing to lose and everything to gain. Developers do this over the objections of homeowners who believed they could not be forced from their homes, but who also typically lack the sophistication necessary to challenge the developers' misuse of the statute. Numerous news reports chronicle the vast extent of developers abusing this law to take the homes of people who have missed no payments and done nothing wrong.

In this case, Petitioners Jie Cao and Haining Xia ("Xias") fought back. In an issue of first impression, the court of appeals correctly ruled this statute "unconstitutional on its face" for violating the takings clause. Opinion ¶ 15. Although that should have ended the case, the court of appeals enforced the

unconstitutional statute because the condominium Declaration (condominium CC&Rs) gave the Condominium Association the "rights, powers and duties as are prescribed by" the Condominium Act (including § 33-1228). Opinion ¶¶ 14-17.

Declaring that the Association has the powers "prescribed by" the Act cannot, however, give more powers than the Act *legally* prescribes. By ignoring this, the Opinion subjects most condominiums in Arizona to this unconstitutional statute because most condominium declarations contain a similar phrase. Moreover, the Opinion misinterpreted the statute. The Court should grant review because this unconstitutional law is ruining people's lives.

ISSUES

1. Can a statute that is "unconstitutional on its face" nevertheless be enforced because a contract grants the "rights, powers and duties" prescribed by the unconstitutional statute?

2. If a contract gives a condominium *association* the "rights powers and duties" of an unconstitutional statute, does that also authorize individual unit owners to exercise the same unconstitutional powers?

3. Does A.R.S. § 33-1228(C) require selling "all the common elements and units" as part of a condominium termination, or may a majority owner/developer sell just some units to itself without the homeowners' consent?

FACTS

The Xias owned Unit 106 of Dorsey Place Condominiums, a residential condominium near ASU. After PFP Dorsey Investments, LLC bought 90 of the 96 remaining units, Opinion ¶ 5, it invoked A.R.S. § 33-1228(C), which purports to allow a supermajority of condominium owners to terminate the condominium and sell "all the common elements and units of the condominium."

Although the official notice said that Dorsey Investments would sell the entire condominium for over $22 million, Opinion ¶ 6, Dorsey Investments instead proceeded to sell to itself only the six remaining units it did not already own—at an appraisal price it liked. Opinion ¶ 7. Consequently, by avoiding a public sale, Dorsey Investments faced no risk of losing its property if another developer offered better terms.

Meanwhile, the remaining homeowners wanted to keep their homes, not be forced to move. And if they had to sell, they would rather market and

sell the units to whomever offered the best terms. Bulldozing ahead, Dorsey Investments instead forced the sale of these owners' six units. Dorsey Investments quickly recorded a deed transferring ownership of the Xias' unit to itself, changed the locks, and destroyed the Xias' personal property. Opinion ¶ 8.

The Xias sued, arguing principally that A.R.S. § 33-1228(C) is unconstitutional and that the transaction did not comply with § 33-1228.[1] Opinion ¶ 9. The superior court dismissed their complaint. Opinion ¶ 10.

On appeal, the court of appeals ruled that A.R.S. § 33-1228 is "unconstitutional on its face," but nevertheless enforced it against the Xias because the condominium Declaration gives the Condominium Association the "rights, powers and duties" prescribed by the Condominium Act. Opinion ¶¶ 14-17. As explained below, the court of appeals also misinterpreted § 33-1228(C) to permit developers to sell to themselves only

[1] The Opinion correctly found the statute "unconstitutional on its face." But for purposes of A.R.S. § 12-1841, the Xias brought an as-applied challenge because they sought relief only as to their unit. [IR-40 (APP042).] *See Merrill v. Merrill*, 238 Ariz. 467, 470, ¶ 15 (2015), *vacated on unrelated grounds*, 137 S. Ct. 2156 (2017).

the units they do not already own, thereby blessing the developers' self-dealing scheme. Opinion ¶ 31.

The court of appeals further held that the superior court applied the wrong version of § 33-1228 and remanded regarding fiduciary duties. Opinion ¶ 35. The defendants unsuccessfully sought reconsideration. [APP040.]

REASONS TO GRANT REVIEW

I. The Court should clarify that courts cannot enforce an unconstitutional statute merely because a contract grants the "rights, powers and duties" prescribed by that unconstitutional statute.

A. The court of appeals correctly found A.R.S. § 33-1228(C) unconstitutional because it purports to authorize one person to take another person's property.

In contrast to the "considerably less protecti[ve]" federal constitution, *Bailey v. Myers*, 206 Ariz. 224, 229, ¶ 20 (App. 2003), Arizona's Constitution expressly prohibits almost all takings of private property for private use: "Private property shall not be taken for private use except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes." Ariz. Const. art. 2, § 17. Subject to the enumerated exceptions, its plain text bars "taking one person's property for another person's private use"—regardless of any

compensation. *Bailey*, 206 Ariz. at 227, ¶ 12. This makes Arizona's takings clause one of the most protective in the country.

This protection not only guards against classic takings by the government itself, but also prevents the legislature from authorizing private parties from so doing. In the first case interpreting Arizona's takings clause, this Court recognized that "[t]he Legislature of a state may not take, *or authorize* the taking of private property, except for public use" and the enumerated exceptions. *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 262 (1914) (emphasis added; citation omitted); *see also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021) (regulation authorizing *private* labor organizers to enter farmland); *see also Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (statute authorizing *private* cable companies to place wire across private property).

A.R.S. § 33-1228 allows condominium unit owners to vote to sell property—including property not owned by them. A.R.S. § 33-1228(C) ("A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination."). As the court of appeals correctly held, this statutory authorization to take private property

for private use qualifies as a taking: "Without an exception to the general rule, A.R.S. § 33-1228 is unconstitutional on its face." Opinion ¶ 15.[2]

B. The court of appeals erroneously concluded that if a contract grants the powers prescribed by a statute, then courts may enforce otherwise unconstitutional provisions in the statute.

Despite declaring A.R.S. § 33-1228 "unconstitutional on its face," Opinion ¶ 15, the court held that in this case it "Is Not Unconstitutional as Applied," Opinion at 4, § A, because the Xias agreed (via the Dorsey Place Declaration) that "[t]he Association shall have such rights, powers and duties as are prescribed by the Condominium Act...." [IR-51 at 24 (APP086)]; *see also* Opinion ¶ 23 ("a forced termination and sale under the statute is unconstitutional but for an owner's contractual agreement under the declaration."). This holding makes no sense for numerous reasons, and if left uncorrected would wreak havoc in the law.

For starters, CC&Rs (including the Declaration) are "special types of contracts." *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 538, ¶ 14 (2022). "[F]undmental restrictions" of property rights in a declaration must

[2] The legislature recently amended A.R.S. § 33-1228 to require a 95%-majority vote, up from 80%. *See* Laws 2022, ch. 373, § 2. But that amendment did not solve the constitutional issue; anything shy of 100% still unconstitutionally authorizes taking private property for private use.

be "clear and unambiguous," and must be designed to put purchasers "on notice." *Wilson v. Playa de Serrano*, 211 Ariz. 511, 514-15, ¶¶ 10, 16 (App. 2005). Moreover, courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *State v. Rickman*, 148 Ariz. 499, 503 (1986). A waiver of the takings clause "must contain clear, unambiguous, unmistakable, and conspicuous language." *Missouri v. Muslet*, 213 S.W.3d 96, 99 (Mo. Ct. App. 2006).

Here, the Declaration's plain text shows the owners did not contractually agree to permit the Association to sell their homes without their consent (which perhaps they could have done). Instead, they agreed to grant the Association the powers "prescribed by the Condominium Act":

> 6.1 **Rights, Powers and Duties of the Association**. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board of Directors. The Association has the specific duty to make available to Declarant, Eligible Mortgage Holders, Unit Owners and insurers or guarantors of any First Mortgage during normal business hours, current copies of the Condominium Documents and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for copying expense.

[IR-51 at 24 (APP086).]

Given the absence of any relevant "clear, unambiguous, unmistakable, and conspicuous language," *Muslet*, 213 S.W.3d at 99, no one would read § 6.1 of the Declaration as forfeiting the most fundamental property rights—the right to keep one's own real property—especially with the longstanding rules designed to prevent an unknowing waiver of one's constitutional rights and property rights. This short phrase cannot bear so much interpretive weight.

Moreover, under ordinary contract interpretation rules, the determinative question is what does the Condominium Act "prescribe"? If

the relevant portion of the Condominium Act lawfully prescribes nothing *because it is unconstitutional*, then there has been no agreement to grant the association anything.

Numerous examples demonstrate this point. Suppose a court ruled A.R.S. § 33-1228(C) unconstitutional in 2006. Would the Declaration (effective in 2007) authorize taking the Xias' unit (purchased in 2018)? No, because "the rights, powers and duties" prescribed by the Condominium Act do not include an unconstitutional power. So once the court of appeals correctly determined that § 33-1228(C) is unconstitutional, then there were no "rights, powers and duties" to prescribe.

Or suppose this Court had previously interpreted the Condominium Act to give associations far narrower powers than the associations previously claimed they had under the Act. When subsequently determining the legal effect of a declaration that grants the association the powers "prescribed by the Act," it would be plain error for lower courts to ignore those previous decisions when determining the powers prescribed by the Act *under the Declaration*. This is because by relying on the Act, instead of directly addressing the same powers, the Declaration's derivative powers

remain subject to judicial interpretation of the Act, including any constitutional limitations. What the Act *legally* prescribes is all that matters.

To hold otherwise wreaks havoc on how judicial interpretation of contractually incorporated statutes works and leads to absurd results. The Condominium Act expressly states that it applies "to all condominiums created within this state." A.R.S. § 33-1201. In other words, *all* condominium associations already have the powers of the Condominium Act, regardless of whether they so declare. No one would accordingly expect that if an association recites that it has the *same* powers as those "prescribed by the Act," then the association suddenly gains *more* power than the Act prescribes—merely because it uttered that incantation. Yet according to the Opinion, condominiums whose declarations include that incantation can engage in unconstitutional takings, while all others merely have the powers "prescribed by" the Act.

Consider if the Condominium Act unconstitutionally gave condominium associations the power to seize and destroy all firearms in condos. Under the Opinion, residents could not assert the unconstitutionality of this facially unconstitutional statute so long as the

declaration said the association had the powers "prescribed by" statute—as do most Arizona condominium declarations.

But that is not all. The same sentence of the Declaration also gives the Association the powers from all "other applicable laws and regulations," apparently invoking every law under the sun. [IR-51 at 24 (APP086).] Under the Opinion's logic, this means that any unconstitutional statute can be applied against the contracting parties.

None of this makes sense. "[T]he *Constitution* and laws of the State are [already] a part of every contract." *Sch. Dist. No. One of Pima Cnty. v. Hastings*, 106 Ariz. 175, 177 (1970) (emphasis added). Because the Constitution becomes part of the Declaration by operation of law, the Constitutional limitations on statutes necessarily apply to any statutory reference. The Declaration's reference to the "powers" of the Condominium Act, therefore, means only the "powers" consistent with article 2, § 17 of the Constitution. Although the court of appeals treated § 33-1228 differently because the Declaration referenced the Condominium Act, the automatic incorporation of the Constitution means that the constitutional limitations apply equally to the statute and to the contractual reference to the statute.

As a matter of contract law, then, when the Constitution imposes limits on the power prescribed by a statute, contractually giving someone the power prescribed by the statute necessarily includes the constitutional limitations. This is why even though every contract automatically includes Arizona's statutes, that principle extends only to "valid" statutes, not invalid ones. *See Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150, ¶ 15 (App. 2007) ("a *valid* statute is automatically part of any contract affected by it" (emphasis added)).

Instead of holding that if an association declares that it has the powers prescribed by a statute, then it has *more powers* than the statute prescribes, the court of appeals should have viewed the powers prescribed as *derivative*. The Declaration here enumerates many specific powers, but says nothing about forced sales. The Declaration then contains a broad gap-filling provision giving the Association whatever powers associations have under the Condominium Act. Without § 33-1228(C), the Association would have no authority to take private property. The authority necessarily relies on the statute, and it must mirror the statutory power, not become a superpower exempt from ordinary judicial limitations on statutory powers. The

derivative power prescribed by a statute cannot be broader than the principal source of power.

Granted, contracting parties sometimes may agree to otherwise unconstitutional things by giving express, direct, contractual authority. Here, if the Declaration had said, "90% of unit owners may vote to sell any person's unit," then perhaps the Constitution would play no role. But the Declaration says nothing about forced sales. It instead relies solely on the Condominium Act. Because it relies on a power prescribed by statute, that power cannot be greater than what the statute prescribes, and instead remains subject to any constitutional limits on the power granted by the statute.

Because A.R.S. § 33-1228(C) is "unconstitutional on its face," it cannot authorize any forced sales, regardless of whether condominium documents refer to the statute.

C. The effect of referencing unconstitutional statutes in contracts presents an issue of statewide concern because countless Arizona contracts reference A.R.S. § 33-1228 or other unconstitutional statutes.

Although contractual terms ordinarily may not have statewide importance, this one does. Most condominium declarations in Arizona grant

the associations the "rights, powers and duties" that are "prescribed by law"—often using the same section number (6.1) as the Declaration here. The attached Addendum (APP123) lists a small sample from across Arizona, from Esplanade Place in Maricopa County to Morning Sun in Yavapai County.

Whether granting powers "prescribed by" law means what the law legally prescribes, or instead is a standalone contract term that does not depend on the law's interpretation, affects the majority of condominiums in Arizona and has statewide importance. As it stands, the Opinion subjects tens or hundreds of thousands of Arizonans to a law that is "unconstitutional on its face."

The holding also has far-reaching implications beyond condominiums. For example, a contract with a bank may give the bank all powers "prescribed by" A.R.S. Title 6, or a school enrollment agreement may give school administrators all powers "prescribed by" Title 15. Contracting parties across Arizona would be shocked to learn that these boilerplate phrases render meaningless the judiciary's role in "say[ing] what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Court should grant review.

D. Arizonans are losing their homes despite having done nothing wrong.

The Court should also grant review because forced sales of condominiums have run rampant. A dozen news reports show how Arizonans are losing their fully paid-off homes when they have missed no payments and done nothing wrong. ABC15 reported about a 91-year-old woman in a different condominium who was kicked out of the home she "expected to own [] for the rest of her life," along with 71 other owners. ABC15 and Arizona Mirror both reported on Dorsey Place in particular.

II. The Court should grant review to confirm that the common condominium declaration's text does not authorize forced sales.

The Opinion's as-applied constitutional rationale raises another issue warranting review. Even if giving the Association statutory "rights, powers and duties" includes the unconstitutional aspects of § 33-1228(C), that phrase still does not justify forced sales because it does not empower the right party to authorize forced sales.

The Condominium Act gives *unit owners* the power to vote to terminate and sell a condominium: "a condominium may be terminated only by agreement of unit owners." A.R.S. § 33-1228(A). Unit owners *authorize* the sale; an association *carries out* the sale.

But this Declaration (like most in Arizona) says, "[t]he *Association* shall have such rights, powers and duties" of the Condominium Act. [IR-51 at 24 (APP086) (emphasis added).] On its terms, this provision applies only to the *Association*. Giving one party statutory powers does not give power to anyone else. *See* 17A C.J.S. *Contracts* § 419 ("[I]f a written contract refers to another writing for a particularly designated purpose, the other writing becomes a part of the contract only for the purpose specified.").

The unit owners cannot rely on the statute directly because § 33-1228(C) is "unconstitutional on its face." And they cannot rely on the Declaration because it only gives the Association power. Meanwhile, the Association cannot rely on the derivative statutory power because § 33-1228(C) gives the forced-sale vote to unit owners, not associations.

These transactions, occurring throughout the state, are simply unconstitutional. Clarifying this standard template wording is an issue of statewide concern because it affects most condominiums in the state.

III. The Court should grant review to clarify that A.R.S. § 33-1228(C) does not authorize plucking off individual units.

The Court should also grant review because the Opinion misinterprets a statute of statewide importance and blesses a widespread unlawful

practice. If a condominium terminates, A.R.S. § 33-1228 gives owners two options for dealing with the condominium real estate. First, "[a] termination agreement may provide that *all* the common elements and units of the condominium *shall be sold* following termination." A.R.S. § 33-1228(C) (emphasis added). This is the only sentence in § 33-1228 that *authorizes* the sale of units. Other provisions govern title and distributing proceeds "[i]f any real estate is to be sold following termination." A.R.S. § 33-1228(D). Second, "[i]f the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common…." A.R.S. § 33-1228(D). So, under the statute's plain text, owners may terminate and (1) sell all the property, or (2) keep the property for themselves.

In light of this text, the Opinion observed that "nothing in the statute [expressly] *prohibits* the sale of less than the whole condominium." Opinion ¶ 31 (emphasis added). "As a result," the court reasoned, "we read the statute to allow a termination agreement to provide for the sale of less than all the units and common elements." *Id.* But authorization does not follow from the absence of express prohibition. Moreover, the conclusion here gets the background rule backwards: one person cannot sell someone else's

property absent some legally permissible authorization to do so (like a lien). Here, the only authorization the statute grants is the option ("may provide") for owners to sell "all the common elements and units." It does not authorize selling anything less.

So although the statute "permits but does not require a sale to include the entire condominium," (Opinion ¶ 31), that simply means that instead of providing "that *all*…*shall be sold* following termination," A.R.S. § 33-1228(C), owners may instead convert to tenancy in common. The court of appeals also pointed to the "any real estate" phrase above, but that subsection does not authorize any sales. Only subsection C authorizes sales, and it requires selling everything.

This makes sense, too. Selling everything gives everyone the same incentives and prevents self-dealing. If all owners have property at stake, everyone will seek the highest price. If the statute allowed the supermajority to sell to themselves only other people's units, then the supermajority would try to *minimize* the price. This anti-textual interpretation invites the mischief and self-dealing exemplified in this case.

ARCAP 21 NOTICE

The Xias request attorneys' fees under IR-51, ex. 2, § 12; Declaration § 13.15; and A.R.S. §§ 12-1103, 33-420, 12-341.01.

CONCLUSION

The Court should grant review, reverse, and remand.

RESPECTFULLY SUBMITTED this 23rd day of September, 2022.

OSBORN MALEDON, P.A.

By /s/ Eric M. Fraser

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Attorneys for Plaintiffs/Appellants
Jie Cao and Haining "Frazer" Xia

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APPENDIX
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* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

JIE CAO, et al., *Plaintiffs/Appellants*,

v.

PFP DORSEY INVESTMENTS, LLC, et al., *Defendants/Appellees*.

No. 1 CA-CV 21-0275
FILED 7-7-2022

Appeal from the Superior Court in Maricopa County
No. CV2019-055353
The Honorable Daniel G. Martin, Judge

REVERSED AND REMANDED

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OPINION

Presiding Judge Paul J. McMurdie delivered the Court's opinion, in which Chief Judge Kent E. Cattani and Vice Chief Judge David B. Gass joined.

M c M U R D I E, Judge:

¶1 Jie Cao and Haining Xia ("Xias") appeal from the superior court's order upholding the forced sale of their Tempe condominium.[1] The court determined that the sale was permissible under A.R.S. § 33-1228, which allows a supermajority of condominium unit owners to approve the termination of a condominium complex, even over the objection of other condominium unit owners.

¶2 In this opinion, we address A.R.S. § 33-1228 and hold that the statute is constitutional when applied to condominium owners who bought a condominium unit subject to terms that incorporate the statute. We also hold, however, that if there have been substantive post-purchase changes to the statute, the version of the statute in place at the time of purchase controls.

¶3 Here, the superior court applied the August 2018 version of A.R.S. § 33-1228 rather than the version in effect when the Xias bought their condominium unit. As a result, because the previous version of the statute potentially provided greater protections to minority shareowners, we reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

¶4 In 2007, a developer completed construction on the Dorsey Place Condominiums ("Dorsey Place"), a condominium complex in Tempe. The developer recorded a condominium declaration ("Declaration"), establishing the property's terms, covenants, conditions, and restrictions ("CC&Rs"). Anyone who acquired an ownership interest in the condominium complex was subject to the Declaration, which referred to

[1] The notice of appeal also named Stone Xia as an appellant, but he did not file an opening brief. Thus, he is dismissed as a party to this appeal. *See* ARCAP 15(a)(1).

state regulations affecting condominium ownership. In January 2018, the Xias bought a unit at Dorsey Place. Under the warranty deed[2] and the Declaration, the Xias took the unit subject to its CC&Rs.

¶5 In November 2018, PFP Dorsey acquired 90 of the 96 units at Dorsey Place. Other individuals owned the remaining units. Under the Declaration, each unit owner is a member of the Association, and each unit equates to one vote within the Association. Thus, the Xias held one vote, as did the other unit owners, while PFP Dorsey commanded 90 votes within the Association.

¶6 In March 2019, the Association notified its members it would be calling a meeting to discuss terminating the condominium. The notice gave members five appraisal reports and a draft termination agreement proposing to sell the entire condominium to PFP Dorsey for over $22 million. The appraisal reports listed the appraised values of five unit types, and the Xias' unit type was valued at $234,000.

¶7 The Association held the meeting on April 4, where it presented its members with a modified termination agreement proposing instead to sell "all portions of and interest in [Dorsey Place] not already owned by PFP [Dorsey], to PFP [Dorsey], upon termination of the Condominium." The agreement described the purchase price as the aggregate fair market value of the six units to be bought. An independent appraisal would determine each unit's fair market value, but the agreement set forth a process for disapproving owners to obtain another appraisal.

¶8 According to the Declaration, the condominium could "be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated." PFP Dorsey was the only member of the Association to sign the termination agreement, but with nearly 94% of the votes, it ratified the termination and sale on April 9. The Association recorded a warranty deed[3] with the Maricopa County Recorder's Office, transferring the title of the Xias' unit to

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[2] We take judicial notice of the Xias' warranty deed, Maricopa County Recording Number 20180103716.

[3] We take judicial notice of PFP Dorsey's warranty deed, Maricopa County Recording Number 20190923560.

PFP Dorsey. Eventually, PFP Dorsey and the Association changed the locks on the unit and disposed of the Xias' remaining personal property.

¶9 The Xias sued PFP Dorsey and the Association, seeking a declaratory judgment that the transaction violated the Arizona Condominium Act, A.R.S. § 33-1201, *et seq.*, which governs condominium termination. They argued in the alternative that A.R.S. § 33-1228 is unconstitutional as applied. They sought quiet title, ejectment, imposition of a constructive trust, and further alleged civil trespass, conversion, breach of fiduciary duty, unjust enrichment, and wrongful recording, all arising out of an invalid or unconstitutional forced sale of their unit.

¶10 PFP Dorsey and the Association filed separate motions to dismiss under Arizona Rule of Civil Procedure 12(b)(6). Each motion argued that the Xias failed to state a claim upon which relief could be granted because PFP Dorsey and the Association strictly complied with A.R.S. § 33-1228. The superior court granted the motions over the Xias' objection.

¶11 The Xias appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶12 When reviewing a dismissal under Rule 12(b)(6), we take the facts alleged in the complaint as true and view them in the light most favorable to the plaintiffs. *Johnson v. McDonald*, 197 Ariz. 155, 157, ¶ 2 (App. 1999).

¶13 On appeal, the Xias argue that (1) A.R.S. § 33-1228 is an unconstitutional taking of private property, and (2) A.R.S. § 33-1228 prohibits PFP Dorsey and the Association from forcing a sale of less than the entire condominium for only the appraised value. Both statutory interpretation and constitutionality issues are questions of law, which we review *de novo*. *Koller v. Ariz. Dep't of Transp.*, 195 Ariz. 343, 345, ¶ 8 (App. 1999) (statutory interpretation); *Gallardo v. State*, 236 Ariz. 84, 87, ¶ 8 (2014) (constitutionality).

A. Arizona Revised Statutes Section 33-1228 Is Not Unconstitutional as Applied Because the Xias Agreed to Grant the Association the Rights, Powers, and Duties Prescribed by the 1986 Version of the Statute.

¶14 The Xias argue that A.R.S. § 33-1228 is a taking of private property in violation of the Arizona Constitution. Our Constitution states

that "[p]rivate property shall not be taken for private use," except for certain exceptions inapplicable here. Ariz. Const. art. 2, § 17. Generally, "[t]aking one person's property for another person's private use is plainly prohibited." *Bailey v. Myers*, 206 Ariz. 224, 227, ¶ 12 (App. 2003).

¶15 A statute that authorizes a private party to take another party's property constitutes a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (taking had occurred when, without permission of building owner, media company installed cables on apartment building as authorized by statute). Without an exception to the general rule, A.R.S. § 33-1228 is unconstitutional on its face.

¶16 The Xias argue that A.R.S. § 33-1228 "authorized an impermissible traditional taking" and that without the statute, PFP Dorsey and the Association would have "no authority" to terminate the condominium and force the sale of the Xias' unit. But PFP Dorsey and the Association contend that the authority arises out of contract, so it is not an unconstitutional taking.

¶17 A condominium may only be created by recording a declaration. A.R.S. § 33-1211. The Declaration here provided that

> [b]y acceptance of a deed or by acquiring any ownership interest in any portion of the Condominium, each Person . . . binds himself . . . to all of the provisions, restrictions, covenants, conditions, rules and regulations now or hereafter imposed by the Condominium Documents and any amendments thereof.

So when the Xias bought their unit in January 2018, they agreed to be bound by the Declaration, which grants the Association the "rights, powers and duties as are prescribed by the Condominium Act." PFP Dorsey and the Association argue that the April 2019 termination and sale was authorized under the Declaration because they strictly followed the provisions of A.R.S. § 33-1228. But PFP Dorsey (and the superior court) applied the current version of the statute, even though it reflects an August 2018 amendment that potentially lessened protections for individual condominium unit owners subject to a forced sale. *See* H.B. 2262, 53d Leg., 2d Reg. Sess. (2018).

¶18 The Xias argue that, under *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022), the 2018 amendments to the statute cannot be

incorporated into the Declaration.[4] They assert that the 1986 version in effect at the time of their purchase is the one that applies here. PFP Dorsey and the Association respond that the Declaration incorporated the 2018 amendments because the Declaration defines the "Condominium Act" as "A.R.S. §33-1201, et seq., as amended from time to time."

¶19 "Although contracts are generally enforced as written, in special types of contracts, we do not enforce 'unknown terms which are beyond the range of reasonable expectation.'" *Kalway*, 252 Ariz. at 544, ¶ 14 (citation omitted) (quoting *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 391 (1984)). CC&Rs, like the Declaration, are subject to this rule. *Id.* at 544, ¶ 14. As a result, we will not "allow[] substantial, unforeseen, and unlimited amendments" to the Declaration, as that "would alter the nature of the covenants to which the homeowners originally agreed." *Id.* at 544, ¶ 15. We "will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." *Id.* (quoting *Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994)).

¶20 For these reasons, although the Declaration incorporates amendments to the Condominium Act, an amendment will be included only if it falls within the Xias' "reasonable expectations based on the declaration in effect at the time of the purchase." *See Kalway*, 252 Ariz. at 544, ¶ 15. We look objectively at the Declaration to determine whether it gave sufficient notice of a future amendment. *Id.* at 544–45, ¶ 16. The Declaration need not provide notice of the precise details of the amendment, but "it must give notice that a . . . covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way." *Id.* at 545, ¶ 17. Future amendments, however, "cannot be 'entirely new and different in character,'" otherwise they would

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[4] Although the Xias did not raise this argument before the superior court or in their opening brief, they have not waived the argument. Waiver "is procedural, not substantive, . . . and may be suspended at an appellate court's discretion." *Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 482 (1986). We will consider the Xias' argument because it is founded on *Kalway*, which was issued after all parties had filed their initial briefs, and all parties were later "afford[ed] a full opportunity to brief and argue the issue." *See Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406, n.9 (1995).

exceed the reasonable expectations of the owners. *Id.* (quoting *Lakeland Prop. Owners Ass'n v. Larson*, 459 N.E.2d 1164, 1167 (Ill. 1984)).

¶21 When the Xias took ownership of their unit in January 2018, the 1986 version was in effect, and A.R.S. § 33-1228(G)(1) provided that

> the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by an independent appraiser selected by the association. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which fifty percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

After the 2018 amendments and at the time of the proposed termination of the condominium, A.R.S. § 33-1228(G)(1) provided that

> the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the association's appraiser, the unit owner shall submit to arbitration at the association's expense and the arbitration amount is the final sale amount. An additional five percent of

> the final sale amount shall be added for relocation costs for owner-occupied units.

Thus, the 1986 version used the fair market value of an owner's unit to calculate the proportion of that owner's interest relative to the entire condominium. But the 2018 version appears to set the fair market value of the unit alone as "the final sale amount" to which the owner is entitled, rather than calculating the owner's proportionate share of the sale price of the condominium as a whole.

¶22 The Declaration did not provide sufficient notice of such a substantive amendment. It defined the Condominium Act as the condominium statutes "as amended from time to time." This provision only provides notice that the Condominium Act could be amended by the legislature, which cannot provide "fair notice of any enacted amendment." *See Kalway*, 252 Ariz. at 545, ¶ 19 (provision gave insufficient notice when it only stated that the "Declaration may be amended at any time by an instrument executed and acknowledged by the Majority Vote of the Owners"). And the statutory amendments did not merely refine the statutes, correct errors, or fill in gaps, but substantively altered owners' property rights beyond the "owners' expectations of the scope of the covenants." *See Kalway*, 252 Ariz. at 545, ¶ 17. Allowing this provision to amend the Declaration would "allow[] substantial, unforeseen, and unlimited amendments [that] would alter the nature" of the agreement. *See Kalway*, 252 Ariz. at 544, ¶ 15. We conclude, therefore, that the Declaration did not incorporate the 2018 amendments to A.R.S. § 33-1228, and the Xias purchase agreement only granted the Association the rights, powers, and duties prescribed by the 1986 version of the statute.

¶23 But PFP Dorsey and the Association claim that the Xias could not contract around the 2018 amendments to subsection (G)(1). They cite A.R.S. § 33-1228(K), which states that "[b]eginning on the effective date of this amendment to this section, [August 3, 2018,] any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy." They maintain that the 2018 version must apply here because the legislature "intended the 2018 version to apply to all condominiums, regardless of the language in their declarations." As discussed, a forced termination and sale under the statute is unconstitutional but for an owner's contractual agreement under the declaration. And we cannot read A.R.S. § 33-1228(K) to affect agreements already in place because "no . . . law impairing the obligation of a contract[] shall ever be enacted." Ariz. Const. art. 2, § 25; *see also Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273 (1994) ("[I]f possible this court construes statutes to

avoid rendering them unconstitutional."). *But see Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 119, ¶ 101 (App. 2004), *as amended on denial of reconsideration* (Mar. 15, 2004) ("Although the language in the contract clauses of the federal and state constitutions is seemingly absolute, the State can impair contract obligations in the exercise of its inherent police power to safeguard vital public interests.").

¶24 The Xias took ownership of their unit in January 2018 subject to the Declaration, which incorporated the Condominium Act. And substantive amendments to the Condominium Act cannot later be incorporated into the agreement without renewed consent. Thus, the 1986 version of A.R.S. § 33-1228 applies.

B. **The Authority Granted to the Association Must Be Analyzed Under the 1986 Version of A.R.S. § 33-1228.**

¶25 The Xias also argue that A.R.S. § 33-1228 does not authorize the Association to sell the contested unit to PFP Dorsey because, under their interpretation, the statute requires that (1) any sale of condominium property must include the entire condominium, and (2) the Association must sell the property on the most favorable terms and distribute the sale's proceeds in proportion to their interests as determined by appraisals.

¶26 The primary goal of statutory interpretation is to "find and give effect to legislative intent." *Secure Ventures, LLC v. Gerlach*, 249 Ariz. 97, 99, ¶ 5 (App. 2020). We start with the statute's plain language and give its words their ordinary meaning. *Id.* In doing so, we read the statute's words in context. *See J.D. v. Hegyi*, 236 Ariz. 39, 40–41, ¶ 6 (2014). "If the statute is subject to only one reasonable interpretation, we apply it without further analysis." *Glazer v. State*, 237 Ariz. 160, 163, ¶ 12 (2015). But if the statute is ambiguous, we may consider many different factors, including "the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." *Wyatt v. Wehmueller*, 167 Ariz. 281, 284 (1991).

¶27 In 1985, the Arizona Legislature adopted a version of the Uniform Condominium Act. *See* 1985 Ariz. Sess. Laws, ch. 192, § 3. When a statute is based on a uniform act, we may infer that the legislature "intended to adopt the construction placed on the act by its drafters." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 332, ¶ 25 (2001) (quoting *State v. Sanchez*, 174 Ariz. 44, 47 (App. 1993)). We note, however, that our legislature declined to adopt certain provisions of the uniform act, which likewise guides our interpretation.

1. Arizona Revised Statutes Section 33-1228(C) Allows a Termination Agreement to Include a Provision for the Sale of Any Portion of the Condominium.

¶28 The Xias argue that A.R.S. § 33-1228(C) prohibits the sale of less than the entire condominium. Although the Xias originally made this argument under the 2018 version of the statute, the legislature did not substantively amend the subsections referenced in this argument. As a result, we will address the argument here.

¶29 Section 33-1228(C) reads:

> A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

The plain language of the first sentence allows a termination agreement to provide for the sale of all the common elements and units. In the context of A.R.S. § 33-1228, this sentence gives an association, via a termination agreement, the power to contract for the sale of the entire property, including the property of unit owners who object to the termination and sale. *See* A.R.S. § 33-1228(A), (B) (contemplating a termination agreement approved by less than all unit owners); A.R.S. § 33-1228(D) (contract for sale binds owners of the property to be sold upon approval under subsections A and B); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167–69 (2012) ("Context is a primary determinant of meaning," and all of a statute "provides the context for each of its parts.").

¶30 The Xias argue that A.R.S. § 33-1228(C) requires that "[i]f . . . any real estate is to be sold, it must all be sold." But the subsection's first sentence does not require anything; the language is permissive. *See* A.R.S. § 33-1228(C) ("A termination agreement *may* provide that all the common elements and units of the condominium shall be sold.") (emphasis added); *see also* Scalia & Garner, *supra*, at 112 ("May" is a permissive word and "permissive words grant discretion."). In the second sentence, the legislature contemplated an agreement under which "*any* real estate in the condominium is to be sold." A.R.S. § 33-1228(C) (emphasis added). And the only requirement imposed is that "the termination agreement shall set forth the minimum terms of the sale." *Id.*; *see also* Scalia & Garner, *supra*, at 112

(Used correctly, "shall" is mandatory, and "[m]andatory words impose a duty.").

¶31 The statute thus permits but does not require a sale to include the entire condominium. And nothing in the statute prohibits the sale of less than the whole condominium. As a result, we read the statute to allow a termination agreement to provide for the sale of less than all the units and common elements.

2. The Superior Court Dismissed the Xias' Complaint Based on an Inapplicable Version of A.R.S. § 33-1228.

¶32 The Xias also argue that the Association owed them a fiduciary duty to act in their best interests and sell the property on the best terms possible. They argue that A.R.S. § 33-1228(D) creates a fiduciary relationship by vesting title to their property in the Association as trustee.

¶33 Under A.R.S. § 33-1228(D), "[i]f any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units." The statute vests title to the real estate in the association so that "the association has all powers necessary and appropriate to effect the sale." A.R.S. § 33-1228(D); *see also* A.R.S. § 33-1259 (Third parties may assume an association is acting properly within its capacity as trustee.). As trustee, an association must carry out a sale in good faith, with loyalty, and in the interests of the unit owners. *See Lane Title & Tr. Co. v. Brannan*, 103 Ariz. 272, 278 (1968) ("[T]he trustee owes the beneficiary a duty of undivided loyalty."); A.R.S. § 14-10801 ("[T]he trustee shall administer the trust in good faith, in accordance with its terms and purposes and in the interests of the beneficiaries."); A.R.S. § 14-10802 (trustee owes a duty of loyalty); A.R.S. § 14-10803 (trustee owes a duty of impartiality); *see also* A.R.S. § 14-10815(B) (describing such duties as "fiduciary duties.").

¶34 The Association concedes that it became a trustee to facilitate the sale, but it argues that A.R.S. § 33-1228 only requires the trustee to "carry out the sale that the members of the Association agreed to when they agreed to terminate the condominium." We disagree. By assuming the role of trustee, the Association owed a fiduciary duty to all unit owners. The Association argues that if it owed the unit owners a fiduciary duty, it did not breach the duty because it strictly complied with the requirements of A.R.S. § 33-1228 by including the sale price and protective measures required by A.R.S. § 33-1228(G). The Association thus argues that it properly terminated and sold the condominium.

¶35 The Association relies, however, on the requirements imposed by the 2018 version of the statute. Likewise, the superior court dismissed the Xias' complaint "for the reasons advanced by [PFP Dorsey and the Association]," which included arguments relying on the 2018 version. But as discussed, the Xias only agreed to the 1986 version of the statute. As a result, we vacate and remand to the superior court to apply the 1986 version of A.R.S. § 33-1228 to determine whether the Association breached its fiduciary obligations. Thus, we need not address whether the sale at issue would have fulfilled the Association's fiduciary duty under the 2018 version.

ATTORNEY'S FEES

¶36 The Xias seek attorney's fees on appeal. Contractual attorney's fees provisions are enforced according to their terms. *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575 (App. 1994). The Declaration provides that if any unit owner employs attorneys to enforce compliance with the Declaration, the prevailing party has a right to recover its reasonable attorney's fees. Because the Xias are the prevailing party, we award them their reasonable attorney's fees and costs after complying with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶37 We reverse and remand the superior court's dismissal of the Xias' complaint.

AMY M. WOOD • Clerk of the Court
FILED: AA

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DIVISION ONE
FILED: 09/14/2022
AMY M. WOOD, CLERK
BY: KLE

JIE CAO, et al.,	)	Court of Appeals
	)	Division One
Plaintiffs/Appellants,	)	No. 1 CA-CV 21-0275
	)	
v.	)	Maricopa County
	)	Superior Court
PFP DORSEY INVESTMENTS, LLC, et al.,	)	No. CV2019-055353
	)	
	)	
Defendants/Appellees.	)	
	)	

ORDER DENYING MOTION FOR RECONSIDERATION, GRANTING ATTORNEY'S FEES AND COSTS

The court, Presiding Judge Paul J. McMurdie, Chief Judge Kent E. Cattani, and Vice Chief Judge David B. Gass, has received and considered Plaintiffs/Appellants' application for attorney's fees and costs, Defendants/Appellees' objection and motion for reconsideration, and Plaintiffs/Appellants' reply. After deliberation,

IT IS ORDERED denying Defendants/Appellees' motion for reconsideration.

IT IS FURTHER ORDERED granting Plaintiffs/Appellants' unopposed motion for extension of time.

IT IS FURTHER ORDERED granting Plaintiffs/Appellants' reasonable fees and costs in the amount of $230,000.

/s/
PAUL J. McMURDIE, Presiding Judge

A copy of the foregoing
was sent to:

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JIE CAO and HAINING "FRAZER" XIA, a married couple; STONE XIA, an individual, **Plaintiffs;** **vs.** **PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company; DORSEY PLACE CONDOMINIUM ASSOCIATION, an Arizona nonprofit corporation;** **Defendants.**	**Case No.: CV2019-055353** **SECOND AMENDED COMPLAINT** **(Assigned to the Honorable Daniel Martin)** **(Tier II Case)** **(Jury Trial Requested)**

Plaintiffs Jie Cao, Haining "Frazer" Xia, and Stone Xia (collectively "Plaintiffs") hereby file their Second Amended Complaint against Defendants PFP Dorsey Investments, LLC and Dorsey Place Condominium Association (collectively "Defendants").

PARTIES, JURISDICTION AND VENUE

1. Plaintiffs Jie Cao ("J. Cao") and Haining "Frazer" Xia ("Xia") are a married couple residing in Maricopa County, Arizona at all relevant times.

2. Plaintiff Stone Xia ("S. Xia") is an individual residing in Maricopa County, Arizona at all relevant times. Stone Xia is the son of Plaintiffs Jie Cao and Frazer Xia.

3. Defendant Dorsey Place Condominium Association ("the Condo Association") is an Arizona nonprofit corporation. The Condo Association has conducted business in Maricopa County, Arizona at all relevant times herein.

4. Defendant PFP Dorsey Investments, LLC ("PFP Dorsey") is a Delaware limited liability company, registered in Arizona as a foreign limited liability company and member-managed. PFP Dorsey has conducted business in Maricopa County, Arizona at all relevant times herein.

5. This Court has jurisdiction of the subject matter of this action and of the persons and entities named as Defendants.

6. Jurisdiction is proper in this Court pursuant to Article 6 § 14, of the Arizona Constitution and given that all defendants are either Arizona residents or caused acts or events that occurred in Maricopa County, State of Arizona. Further, venue is proper in Maricopa County pursuant to A.R.S. § 12-401.

GENERAL ALLEGATIONS

7. On or around January 30, 2018, Haining Xia and Jie Cao purchased Unit 106 at 1275 E. University Drive, Tempe, Arizona 85281 ("Xia Condo"), at the Dorsey Place Condominiums ("Dorsey Place").

8. The Warranty Deed for the Xia Condo was recorded with the Maricopa County Recorder's Office on February 9, 2018, bearing recording number 2018-0103716 ("Warranty Deed").

9. The Xia Condo is a high-end condominium, with high-end appliances, access to a heated swimming pool, and conveniently located within walking distance of Arizona State University's Tempe campus.

10. In or around 2007, Dorsey Place was completed at a cost of approximately twenty-three million dollars ($23,000,000). At least six condominiums were sold by the developer for prices in excess of four hundred thousand dollars ($400,000).

11. On or around December 15, 2006, the Board of the Condo Association adopted bylaws ("Bylaws").

12. The Bylaws discuss the Annual Member Meeting under Section 3.3, stating, "The annual meeting of the Members shall be held in the month of March each year, beginning in March, 2006, with the exact date to be determined each year by the Board, provided that the Board may elect to delay the annual meeting past March in any given year (but in no event later than May 31) if necessary to permit preparation of financial statements or budgets, or for such other reason as may be determined by the Board, in its good faith discretion. At each annual meeting the Members shall elect the Board and transact such other business as may properly be brought before the meeting."

13. The Bylaws discuss Special Meetings of the Members under Section 3.4, stating "Unless otherwise prescribed by Arizona statute or by the Articles, special meetings of the Members, for any purpose or purposes, may be called by: (a) the president; (b) a majority of the directors; or (c) after the Declaration is recorded, Members having at least ten percent (10%) of all votes in the Association (as determined in accordance with the Declaration)."

14. The Bylaws also discuss the requirements of Notice of Members Meetings under Section 3.5, stating "Not less than ten (10) nor more than fifty (50) days before the date of any annual or special meeting of the Members, either the secretary or any other officer of the Association shall cause written notice stating the place, date and time of the meeting (and, in the case of a special meeting, the items on the agenda, including, but not limited to, the general nature of any proposed amended to the Declaration, Articles or Bylaws, any budget changes and any proposal to remove a director or officer) to be hand-delivered or sent prepaid by United States

mail to the last known mailing address of each Ember, as shown in the Association records, or to the mailing address of such Member's Unit). If mailed, such notice shall be deemed to be delivered when mailed. Business transacted at any special meeting of Members shall be limited to the items stated in the notice unless determined otherwise by a unanimous vote of the Members present at such meeting."

15. The Bylaws provide that directors are to be elected at the Annual Meeting: "The business and affairs of the Association shall be managed, conducted and controlled by the Board. The directors shall be appointed or elected as provided in the Declaration, and for the term(s) specified therein. Except as provided in the Declaration, each director shall be elected at the annual meeting of Members concurrent with the expiration of the term of the director he or she is to succeed, and, except as otherwise provided in these Bylaws or in the Articles or the Declaration, shall hold office until his or her successor is elected and qualified." Section 4.1, Bylaws.

16. On or around August 15, 2017, Dorsey Place recorded a Declaration of Condominium for Dorsey Place with the Maricopa County Recorder's Office, bearing recording number 2007-0921387 ("Declaration").

17. The Declaration was amended with a first amendment on July 31, 2009, and recorded with the Maricopa County Recorder's Office, bearing recording number 2009-0825688 ("First Amendment to Declaration").

18. The Declaration and First Amendment to Declaration were amended with a second amendment on August 15, 2011, and recorded with the Maricopa County Recorder's Office, bearing recording number 2012-0168217 ("Second Amendment to Declaration").

19. The Declaration, First Amended to Declaration, and Second Amendment to Declaration were amended with a third amendment on February 9, 2018, and recorded with the Maricopa County Recorder's Office, bearing recording number 2018-0161234 ("Third Amendment to Declaration") (the Declaration, First Amendment to Declaration, Second

Amendment to Declaration, and Third Amendment to Declaration shall be referred to herein as the "Declaration with Amendments").

20. Under Section 6.4 of the Declaration with Amendments, each "Unit Owner shall be a Member of the Association. The membership of the Association shall, at all times, consist exclusively of the Unit Owners."

21. Under Section 6.7 of the Declaration with Amendments provided each Unit Owner with one vote for each Unit owned by the Unit Owner on "any Association matter which is put to a vote of the membership in accordance with this Declaration, the Articles and/or Bylaws."

22. Under Section 13.4 of the Declaration with Amendments, "the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated. An agreement to terminate the Condominium must be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed by the requisite number of Unit Owners."

23. Under Section 2.4 of the Third Amendment to Declaration, there were ninety-six (96) units in the Condo Association consisting of Units 101 through 121, Units 201 through 225, Units 301 through 325, and Units 401 through 425.

24. In or around 2011, Pathfinder Partners LLC, a California limited liability company, acquired Dorsey Place from the original developer for approximately eleven million three hundred thousand dollars ($11,300,000). The six additional units stayed with their current owners and were not part of this transaction by Pathfinders Partners, LLC.

25. On information and belief, at some time Dorsey Place was transferred from Pathfinder Partners LLC, to the Condo Association, PFP Dorsey, PFP LP, and/or PFP LLC.

26. In or around March 2019, a 2019 Annual Meeting Notice was noticed, to be held on April 4, 2019 ("Notice"). The letter notifying the members of the meeting listed seven items on the agenda, as follows:

1. Call to Order and Verification of Quorum
2. Introduction of Board Members and Management Company Representatives
3. Presentation of the Affidavit of Mailing
4. Financial Review
5. Status of the Community
6. Discussion on proposed termination of condominium
    a. Motion to adopt appraisal and terminate the condominium
        i. Vote to adopt the independent appraisal* procured to determine the fair market value of the Condominium;
        ii. Vote to ratify a termination agreement* whereby the condominium will be terminated and sold in accordance with the Arizona Condominium Act (A.R.S. § 33-1228 *et seq*.)
7. Adjournment

*For your convenience and in preparation of the Annual Meeting as scheduled herein, the following documents are enclosed: 1) Official Ballot for matters to be voted upon; 2) Appraisal of Property; and 3) Proposed Condominium Termination Agreement.

27. This Notice did not include a notice to elect directors, consistent with the requirement of Annual Meetings under Section 4.1 of the Bylaws.

28. Therefore, this Notice was for a Special Meeting, rather than an Annual Meeting of the Members.

29. Along with the Notice, a draft Condominium Termination Agreement was sent to the members ("Draft Condominium Termination Agreement"); five appraisal reports prepared by K & T Appraisals dated February 5, 2019; and an incomplete and misleading copy of A.R.S. § 33-1228.

30. The Draft Condominium Termination Agreement stated that the Condo Association was agreeing to sell all ninety units to PFP Dorsey for twenty-two million six hundred forty-six thousand dollars ($22,646,000).

31. The Draft Condominium Termination Agreement stated that at least ninety (90%) percent of the Unit Owners voted to approve the Draft Condominium Termination Agreement.

32. Further, the Draft Condominium Termination Agreement provided that the distribution of the sale shall be allocated to unit owners of five different types of property: Owners

of a Type A Unit will receive $234,000 and their proportional interest in the Common Elements; Owners of a Type B Unit will receive $236,000 and their proportional interests in the Common Elements; Owners of a Type C Unit will receive $224,000 and their proportional interests in the Common Elements; Owners of a Type D Unit will receive $244,000 and their proportional interests in the Common Elements; and Owners of a Type E Unit will receive $244,000 and their proportional interests in the Common Elements.

33. The Xia Condo was determined to be a Type A Unit.

34. Plaintiffs were present at the April 4, 2019 Special Meeting ("Special Meeting").

35. At the Special Meeting, the members were provided with a modified Condominium Termination Agreement ("Modified Condominium Termination Agreement"). The Modified Condominium Termination Agreement provided that the Condo Association were agreeing to sell all interests of Dorsey Place that were not already owned by PFP Dorsey.

36. Under Section 3.5 of the Condo Association's bylaws, "business transacted at any special meeting of Members shall be limited to the items stated in the notice unless determined otherwise by a unanimous vote of the Members present at such meeting."

37. The members of the Condo Association did not take a vote at the Special Meeting to introduce the Modified Condominium Termination Agreement.

38. Had a vote of the Members been taken at the Special Meeting, the Plaintiffs would have objected to introducing the Modified Condominium Termination Agreement, thereby preventing the business to be transacted as indicated in Section 3.5 of the Bylaws.

39. Plaintiffs informed the Defendants that they were only obligated to sell the Xia Condo if following the termination of the condominium, the entire project would be sold, similar to a drag-along clause by the super majority.

40. On or around January 2, 2020, Plaintiffs learned that the Defendants changed the locks on the Xia Condo; and destroyed and/or disposed of personal property in the Xia Condo.

41. On May 6, 2020, Plaintiffs provided notice to PFP Dorsey of its wrongful recording under A.R.S. § 33-420.

42. To date, PFP Dorsey has not corrected or released its wrongful recording.

COUNT I

Declaratory Judgment

43. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

44. There exists a real and justiciable controversy regarding whether Defendant Dorsey Condo Association validly terminated the condominium and validly transferred title of the Plaintiffs' real property to PFP Dorsey.

45. Under A.R.S. § 33-1228(A), "a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies."

46. In the event the termination is not completed in accordance with the Condo Association's bylaws and requirements, any termination agreement that is recorded is invalid and void. 6

47. Under the Condo Association bylaws, a special meeting may only be held to conduct business as demonstrated in the notice for special meeting.

48. The special meeting may conduct business that is outside of the special meeting notice only if the members present at the special meeting unanimously vote to amend the special meeting notice.

49. The Condo Association called for a special meeting to be held on April 4, 2019.

50. The Condo Association stated that the members would vote on the Draft Condominium Termination Agreement.

51. On April 4, 2019, at the Special Meeting ("Special Meeting"), the members voted on the Condominium Termination Agreement.

52. At the Special Meeting, the members did not unanimously vote to amend the special meeting notice.

53. The Condo Association did not notice a separate board meeting or special meeting to vote on the Condominium Termination Agreement.

54. On November 15, 2019, the Condo Association recorded a Warranty Deed with the Maricopa County Recorder's Office, bearing recording number 2019-0923560, granting the Xia Condo to PFP Dorsey.

55. Plaintiffs contend that this conduct violated the bylaws, rendering the proceedings of the Condo Association board, and the subsequent purported transfer of title, invalid.

56. Under A.R.S. § 33-1228(D), "If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units."

57. Under A.R.S. § 33-1228(E),"If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests…"

58. A.R.S. § 33-1228 provides only for the sale of "all the common elements and units of the condominium," together; and as trustee, the condo association's fiduciary duties require that the entire real estate be sold for the highest possible price.

59. Plaintiffs contend that the Defendant Condo Association violated A.R.S. § 33-1228, and breached its fiduciary duties to Plaintiffs, by forcibly selling the Plaintiffs' unit to PFP Dorsey, at a price determined by the Condo Association; rather than offering the entire "real estate constituting the condominium" for sale, and selling for the highest price.

60. To the extent that A.R.S. § 33-1228 could be construed as giving Defendants the power to compel Plaintiffs to transfer their real property to PFP Dorsey, it is tantamount to an unconstitutional taking that lacks a public purpose and the statute is therefore

invalid/unenforceable. Because Plaintiffs do not allege a facial challenge to the statute, but rather an "as-applied" challenge, A.R.S. § 12-1841 does not apply.

COUNT II

Quiet Title

61. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

62. The Plaintiffs are credibly informed and believe Defendants have made claims adverse to the Plaintiffs' interests in the Xia Condo.

63. The Plaintiffs requests that the Court order that Plaintiffs are the lawful owners of the Xia Condo (and/or, of an undivided interest in the real estate formerly constituting the condominium).

64. The Plaintiffs request that the Defendant be barred and forever estopped from having or claiming any right or title to the Xia Condo adverse to Plaintiffs.

65. The Plaintiffs request an award of their attorneys' fees and costs pursuant to A.R.S. § 12-1103.

COUNT III

Civil Trespass, Conversion

66. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

67. On January 30, 2018, Plaintiffs acquired title to the Xia Condo.

68. On April 9, 2019, the Defendants recorded the Condominium Termination Agreement with the Maricopa County Recorder's Office, bearing recording number 2019-0248170.

69. The Condominium Termination Agreement was not adopted by the Condo Association consistent with the Declaration with Amendments or the Bylaws and Arizona statute, and therefore invalid.

70. As of April 9, 2019, the Plaintiffs still held title to the Xia Condo.

71. On or before January 2, 2020, Defendants caused the locks on the Xia Condo to be changed.

72. On or before January 2, 2020, Defendants destroyed personal property and belongings, which were in the Xia Condo and belonged to Plaintiffs.

73. According to a representative of PFP Dorsey, the personal property and belongings were either thrown away or donated.

74. The Defendants took these actions, because they knew that the Plaintiffs were disputing the Condominium Termination Agreement, and because a Complaint had been filed in this action in November 2019.

75. The Defendants took these actions with malice, fraud, oppression, and with a conscious and wanton disregard for the rights and interests of Plaintiffs because they disputed the Condominium Termination Agreement and because the Complaint had been filed in this Action. Therefore, Plaintiffs are entitled to an award of punitive and exemplary damages.

Count IV

Breach of Fiduciary Duty

76. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

77. Plaintiffs were minority members of the Condo Association, a nonprofit corporation.

78. As a majority member of the Condo Association, PFP Dorsey owed fiduciary duties to the Plaintiffs.

79. If the condominium were validly terminated, and any real estate in the condominium were to be legally sold following termination, then the Condo Association became a "trustee for the holders of all interest in the units," including Plaintiffs, by which it owed them a fiduciary duty.

80. Defendants breached their fiduciary duties by forcing Plaintiffs to involuntarily sell their condo to PFP Dorsey, at a price that it determined, and without publicly offering the entire real estate constituting the condominium for sale, in order to obtain the best price.

81. Defendants breached their fiduciary duties by deliberately conducting invalid condo association meeting(s) over Plaintiffs' objection.

82. Defendants breached their fiduciary duties by destroying and/or otherwise disposing of the Plaintiffs' personal property.

83. Plaintiffs are therefore entitled to a constructive trust over the Xia Condo (and/or the real estate formerly constituting the condominium), and damages in an amount to be determined at trial.

84. The Defendants took these actions with malice, fraud, oppression, and with a conscious and wanton disregard for the rights and interests of Plaintiffs because they disputed the Condominium Termination Agreement and because the Complaint had been filed in this Action. Therefore, Plaintiffs are entitled to an award of punitive and exemplary damages.

COUNT V

Unjust Enrichment

85. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

86. Defendant PFP Dorsey, by its actions, has been unjustly enriched.

COUNT VI

Ejectment, Constructive Trust

87. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

88. Plaintiffs have a valid subsisting interest in the Xia Condo and a right to immediate possession thereof. They are therefore entitled to recover possession from Defendants.

89. Defendants have obtained, or sought to obtain title to the Xia Condo through actual fraud, misrepresentation, concealment, undue influence, duress and other means which render it unconscionable for Defendants to continue to retain and enjoy its beneficial interest.

90. Plaintiffs therefore seek an order of ejectment and the imposition of a constructive trust over the Xia Condo.

COUNT VII

Wrongful Recording

91. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

92. PFP Dorsey purports to claim an interest in, or a lien or encumbrance against, the Xia Condo (and/or real estate formerly constituting the condominium), and caused a document asserting that claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, or contains a material misstatement or false claim.

93. Plaintiffs provided notice to PFP Dorsey on May 6, 2020 pursuant to A.R.S. § 33-420, with regard to the wrongful recording.

94. PFP Dorsey has not corrected the recording which is forged, groundless, or contains a material misstatement or false claim.

95. PFP Dorsey is therefore liable to Plaintiffs, as the owner or beneficial title holder of the real property, for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

GENERAL PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully seek a judgment against Defendants that:

A. Quiets title to the Xia Condo in their favor (and/or their undivided interest of the real estate formerly constituting the condominium); declares that the termination of

the condominium was invalid; and/or imposes a constructive trust over the Xia Condo (or real estate formerly constituting the same);

B. Declares that, to the extent A.R.S. § 33-1228 could be construed as giving Defendants the power to compel Plaintiffs to transfer their real property to PFP Dorsey, it is tantamount to an unconstitutional taking that lacks a public purpose and the statute is therefore invalid/unenforceable;

C. Provides that Plaintiffs are entitled to recover possession of the Xia Condo, and/or imposes a constructive trust over the Xia Condo;

D. For damages in an amount to be determined at trial, including punitive damages;

E. For attorneys' fees and costs under any applicable authority, including A.R.S. §§ 12-1103, 12-341, 33-420, and 12-341.01;

F. For such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED July 6, 2020.

WILENCHIK & BARTNESS, P.C.

/s/ John D. Wilenchik

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ELECTRONICALLY filed July 6, 2020, via AZTurboCourt.com.

COPY electronically transmitted by the Clerk of the Court via AZTurboCourt.com to the Honorable Daniel Martin

COURTESY COPY emailed on July 6, 2020, to:

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By */s/ Christine M. Ferreira*

EXHIBIT 1

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WHEN RECORDED, MAIL TO:

D. Randall Stokes
Lewis and Roca LLP
40 North Central Avenue
Phoenix, Arizona 85004

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
2007-0921387 08/15/07 04:38 PM
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DECLARATION OF CONDOMINIUM

FOR

DORSEY PLACE CONDOMINIUMS

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DECLARATION OF CONDOMINIUM FOR DORSEY PLACE CONDOMINIUMS

This Declaration of Condominium for Dorsey Place Condominiums is made this 15th day of August, 2007, by Dorsey Place Condominiums, L.L.C., an Arizona limited liability company.

ARTICLE 1 DEFINITIONS

1.1 **General Definitions.** Capitalized terms not otherwise defined in this Declaration shall have the meanings specified for such terms in the Arizona Condominium Act, A.R.S. §33-1201, et seq., as amended from time to time.

1.2 **Defined Terms.** The following capitalized terms shall have the general meanings described in the Condominium Act and for purposes of this Declaration shall have the specific meanings set forth below:

1.2.1 **"Architectural Committee"** means the Architectural Committee established pursuant to Section 6.12 of this Declaration.

1.2.2 **"Articles"** means the Articles of Incorporation of the Association as amended from time to time.

1.2.3 **"Assessments"** means the Common Expense Assessments and Special Assessments levied and assessed against each Unit pursuant to Article 7 of this Declaration.

1.2.4 **"Assessment Lien"** means the lien granted to the Association by the Condominium Act to secure the payment of Assessments.

1.2.5 **"Association"** means Dorsey Place Condominium Association, an Arizona nonprofit corporation, its successors and assigns.

1.2.6 **"Board of Directors"** means the Board of Directors of the Association.

1.2.7 **"Buildings"** means the structures which are hereafter constructed on the Property to the extent such buildings are designated or shown as buildings on the Condominium Plat.

1.2.8 **"Bylaws"** means the Bylaws of the Association, as amended from time to time.

1.2.9 **"Commercial Unit"** shall mean Unit 1, as shown on the Condominium Plat, as may be further subdivided by the Declarant.

1.2.10 **"Common Elements"** means all portions of the Condominium other than the Units.

1.2.11 **"Common Expenses"** means expenditures made by or financial liabilities of the Association, together with any allocations for reserves.

1.2.12 **"Common Expense Assessment"** means the assessment levied against the Units pursuant to Section 7.2 of this Declaration.

1.2.13 **"Common Expense Liability"** means the liability for Common Expenses allocated to each Unit by this Declaration.

1.2.14 **"Condominium"** means the Property together with all Buildings and other Improvements located thereon.

1.2.15 **"Condominium Act"** means the Arizona Condominium Act, A.R.S. §33-1201, et seq., as amended from time to time.

1.2.16 **"Condominium Documents"** means this Declaration and the Articles, Bylaws and the Rules.

1.2.17 **"Condominium Plat"** means the condominium plat for Dorsey Place Condominiums, recorded in Book 938 of Maps, Page 7, in the Official Records of the Maricopa County Recorder, Maricopa County, Arizona, and any replats, amendments, supplements and corrections thereto.

1.2.18 **"Declarant"** means Dorsey Place Condominiums, L.L.C., an Arizona limited liability company, and its successors and any person or entity to whom either such party may transfer any Special Declarant Rights. For purpose of Article 12 only, any contractor(s) which are affiliated with Declarant and which construct a Unit or any Common Elements shall also be deemed to be a Declarant.

1.2.19 **"Declaration"** means this Condominium Declaration, as amended from time to time.

1.2.20 **"Development Rights"** means any right or combination of rights reserved by or granted to the Declarant in this Declaration to do any of the following: (i) add real estate to the Condominium; (ii) create easements, licenses, Units, Common Elements or Limited Common Elements within the Condominium; (iii) subdivide and re-subdivide Units; (iv) convert Units into Common Elements or convert Common Elements into Units; (v) withdraw real estate from the Condominium and this Declaration; (vi) amend the Declaration during the Period of Declarant Control to comply with the Condominium Act or any other applicable law or to correct any error or inconsistency in the Declaration provided such amendment does not adversely affect the rights of any Unit Owner; (vii) amend the Declaration during the Period of Declarant Control to comply with the rules or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments, including, without limitation, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration or the Veterans Administration; and (viii) make the Condominium part of a larger condominium.

1.2.21 **"Eligible Insurer or Guarantor"** means an insurer or governmental guarantor of a First Mortgage who has requested notice of certain matters in accordance with Section 11.1 of this Declaration.

1.2.22 **"Eligible Mortgage Holder"** means a First Mortgagee who has requested notice of certain matters from the Association in accordance with Section 11.1 of this Declaration.

1.2.23 **"First Mortgage"** means any mortgage or deed of trust on a Unit with first priority over any other mortgage or deed of trust on the same Unit.

1.2.24 **"First Mortgagee"** means the holder of any First Mortgage.

1.2.25 **"Garage"** shall mean the underground parking garage constructed as part of the Condominium, as depicted on the Condominium Plat.

1.2.26 **"Improvement"** means any physical structure, fixture, facility or improvement existing or constructed, placed, erected or installed on the land included in the Condominium, including, but not limited to, Buildings, roadways, driveways, parking areas, sidewalks, paving, fences, walls, recreational amenities, lighting fixtures, sprinkler and irrigation systems, hedges, plants, trees, shrubs and landscaping of every type and kind.

1.2.27 **"Lessee"** means any Person who is the tenant or lessee under a written lease of a Unit.

1.2.28 **"Limited Common Elements"** means a portion of the Common Elements specifically designated in this Declaration as a Limited Common Element and allocated by this Declaration or by operation of the Condominium Act for the exclusive use of one or more but fewer than all of the Units.

1.2.29 **"Member"** means any Person who is or becomes a member of the Association.

1.2.30 **"Period of Declarant Control"** means the time period commencing on the date this Declaration is recorded with the County Recorder of Maricopa County, Arizona, and ending on the earlier of: (i) Ninety (90) days after the conveyance to Unit Owners other than a Declarant of seventy-five percent (75%) of the Units which may be created, or (ii) five (5) years after the date of the Recording of this Declaration.

1.2.31 **"Person"** means a natural person, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency or other legal or commercial entity.

1.2.32 **"Property"** means the real property described on Exhibit "A" attached to this Declaration together with all Improvements situated thereon and all easements and rights appurtenant thereto.

1.2.33 **"Purchaser"** means any Person, other than a Declarant or any affiliate of a Declarant, who by means of a voluntary transfer becomes a Unit Owner, except any Person who purchases a Unit and then leases it to a Declarant for use as a model in connection with the sale of other Units, and except any Person who, in addition to purchasing a Unit, is assigned any Special Declarant Rights.

1.2.34 **"Recording"** means placing an instrument of public record in the office of the County Recorder of Maricopa County, Arizona, and **"Recorded"** means having been so placed of public record.

1.2.35 **"Resident"** means any person, other than a Declarant and any Unit Owners, who resides in a Unit for a period of thirty (30) days or more in a twelve (12) month period, or who occupies or is in possession of a Unit, whether as a Lessee, guest or otherwise.

1.2.36 **"Residential Dwelling"** means the dwelling structure (including, without limitation, a garage) and all related Improvements located on or consisting of a Unit and which is intended for use and occupancy as a residence.

1.2.37 **"Rules"** means the rules and regulations adopted by the Association, as amended from time to time.

1.2.38 **"Service and Amenity Common Area"** means the area or areas as depicted on the Condominium Plat which shall be for the use of the Unit Owners and Residents and shall (i) be a Common Element, (ii) contain the mailbox for each Unit, and (iii) contain such other amenities for the sole use of the Unit Owners and the Residents as determined by the Board of Directors.

1.2.39 **"Single Family"** means a group of one or more persons each related to the other by blood, marriage or legal adoption, or a group of not more than five (5) persons not all so related, who maintain a common household in a Unit.

1.2.40 **"Special Declarant Rights"** means any right or combination of rights reserved by or granted to the Declarant in this Declaration or by the Condominium Act to do any of the following: (i) construct Improvements provided for in this Declaration or shown on the Condominium Plat; (ii) exercise any Development Right; (iii) maintain sales offices, management offices, models and signs advertising the Condominium; (iv) use easements through the Common Elements for the purpose of making Improvements within the Condominium; and (v) appoint and remove any officer of the Association or any member of the Board of Directors during the Period of Declarant Control.

1.2.41 **"Unit"** means the portions of the Condominium as described in this Declaration and as designated on the Condominium Plat as Units and which are designated for separate ownership and occupancy, the boundaries of which are more thoroughly described in Section 2.5 of this Declaration.

1.2.42 **"Unit Owner"** means the record owner, whether one or more Persons, of beneficial or equitable title (and legal title if the same has merged with the beneficial or equitable title) to the fee simple interest of a Unit. Unit Owner shall not include Persons having an interest

in a Unit merely as security for the performance of an obligation or a Lessee or tenant of a Unit. Unit Owner shall include a purchaser under a contract for the conveyance of real property, a contract for deed, a contract to convey or an agreement for sale subject to A.R.S. §33-741, et seq. Unit Owner shall not include a purchaser under a purchase contract and receipt, escrow instructions or any similar executory contract which is intended to control the rights and obligations of the parties to executory contracts pending the closing of a sale or purchase transaction. In the case of Units the fee simple title to which is vested in a trustee pursuant to A.R.S. §33-801 et seq., the Trustor shall be deemed to be the Unit Owner. In the case of Units the fee simple title to which is vested in a trustee pursuant to a subdivision trust agreement or similar agreement, the beneficiary of any such trust who is entitled to possession of the Unit shall be deemed to be the Unit Owner.

ARTICLE 2
SUBMISSION OF PROPERTY; UNIT BOUNDARIES; ALLOCATION OF PERCENTAGE INTERESTS, VOTES AND COMMON EXPENSE LIABILITIES

2.1 **Creation of Condominium.** Declarant hereby submits the Property and all easements, rights and appurtenances thereto, to the provisions of the Condominium Act for the purpose of creating a condominium in accordance with the provisions of the Condominium Act and hereby declares that the Property shall be held and conveyed subject to the terms, covenants, conditions and restrictions set forth in this Declaration. By acceptance of a deed or by acquiring any ownership interest in any portion of the Condominium, each Person, for himself, his heirs, personal representatives, successors, transferees and assigns, binds himself, his heirs, personal representatives, successors, transferees and assigns, to all of the provisions, restrictions, covenants, conditions, rules and regulations now or hereafter imposed by the Condominium Documents and any amendments thereof. In addition, each such Person, by accepting a deed or by acquiring any ownership interest in any portion of the Condominium, thereby acknowledges that the Condominium Documents set forth a general scheme for the improvement and development of the Condominium and hereby evidences his intent that all the restrictions, conditions, covenants, rules and regulations contained in the Condominium Documents shall run with the land and be binding on all subsequent and future Unit Owners, grantees, purchasers, assignees and transferees thereof. Furthermore, each such Person fully understands and acknowledges that the Condominium Documents shall be mutually beneficial, prohibitive and enforceable by the Association and the various subsequent and future Unit Owners. Declarant and its respective successors, assigns and grantees, covenant and agree that the Units and the membership in the Association and the other rights created by the Condominium Documents which are appurtenant to a Unit shall not be separated or separately conveyed, and each shall be deemed to be conveyed or encumbered with its respective Unit even though the description in the instrument of conveyance or encumbrance may refer only to the Unit.

2.2 **Name of Condominium.** The name of the Condominium created by this Declaration is Dorsey Place Condominiums.

2.3 **Name of Association.** The name of the Association is Dorsey Place Condominium Association.

2.4 **Identifying Numbers of Units**. The identifying numbers of the Units within the Property as of the date of this Declaration are Units 101 through 115, inclusive, Units 201 through 225, inclusive, Units 301 through 325, inclusive, Units 401 through 425, inclusive, as shown on the Condominium Plat.

2.5 **Unit Boundaries and Description.**

2.5.1 The lower horizontal boundary of each story or level of living space of each Unit is the top of the unfinished floors thereof.

2.5.2 The upper horizontal boundary of each story or level of living space of each Unit is the bottom of the finished ceilings thereof.

2.5.3 The lateral boundaries of each the attached Units, though appearing to share a single common wall, are actually separated by an approximately one-inch airspace between two parallel vertical walls. The vertical boundaries between such attached Units shall consist of a vertical plane bisecting that airspace, such that the entire wall on a Unit's side of that vertical plane is within and a part of that Unit (as are any and all pipes, wires, conduits and other utility or other systems within that wall). All other vertical boundaries of a Unit shall consist of a plane defined by the unfinished exterior surface of the exterior walls of such Unit, including any exterior plywood sheathing and studs, but excluding exterior styrofoam or other exterior insulation materials, lath, stucco and exterior paint; thus, such plywood sheathing and studs (and any and all pipes, wires, conduits and other utility or other systems within such exterior walls) are a part of the Unit, while such exterior styrofoam or other exterior insulation materials, lath, stucco and exterior paint are a part of the Common Elements. The lateral boundary of an unattached Units are the unfinished interior surfaces of the perimeter walls, windows and doors thereof and vertical planes coincidental with the unfinished interior surfaces of the perimeter walls thereof extended upwards and downwards to intersect the upper and lower horizontal boundaries.

2.5.4 Each Unit includes the surfaces so described and the airspace contained within said boundaries. All furring, drywall, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces of the walls, floor and ceiling are part of the Unit. Each Unit shall also include the range, garbage disposal units, dishwasher, microwave, water heaters, elevator, if any, and other facilities, systems and other appliances lying within the boundaries of the Unit.

2.5.5 Unless otherwise indicated, all airspace boundary lines intersect at approximately right angles.

2.5.6 The following are not part of a Unit but rather are Common Elements: structural parts of the Building of which the Unit is a part, bearing walls, columns, vertical supports, roofs, floors, foundations, slabs, all waste, water and gas pipes, fire sprinkler system, tubing for delivery of insecticide, ducts, flues, chimneys, conduits, wires and other utility and installation lines wherever located, except the lines, outlets and traps thereof when located within the Unit. Air conditioning and heating units located on a Common Element or a Limited Common Element and not within a Unit are owned by and shall be maintained, repaired and

replaced by the Unit Owner served by same. The existing physical boundaries of a Unit constructed or reconstructed in substantial accordance with the original plans thereof shall be conclusively presumed to be its boundaries rather than the description expressed in any deed, plat, plan or declaration, regardless of settling or lateral movement of the Building, and regardless of minor variances between the boundaries as shown on same and those of the Unit.

2.5.7 Declarant reserves the right to relocate the boundaries of Units owned by a Declarant and to reallocate each such Unit's Common Element interest, votes in the Association and Common Expense Liabilities subject to and in accordance with A.R.S. Section 33-1222 of the Condominium Act as it may be amended.

2.6 **Description and Allocation of Common Element Interests and Common Expense Liabilities**. The Common Elements shall include all portions of the Condominium other than the Units, including, without limitation, the land upon which the Buildings are located, the structural part of Buildings, all bearing walls, columns, vertical supports, roofs, space above the upper horizontal boundaries of Units (except as provided below), floors, foundations, slabs, all waste, water and gas pipes, ducts, flues, chimneys, (except those within the boundaries of a Unit) conduits and wires, fire sprinkler system, swimming pool and pool equipment, recreation buildings, cabanas, landscaping, exterior lighting (including lights attached to the Buildings although the electricity for such lighting will be the responsibility of the applicable Unit Owner), fences, walkways, streets, private drives, guest parking spaces, utility meters, outdoor cooking facilities, patios and all other devices and premises not situated within a Unit; provided, however, air conditioning and heating units not located within a Unit but serving only the Unit are owned by the Unit Owner. The space between the bottom of the unfinished ceiling of living space on a lower floor and the top of the unfinished floor of an upper story of living space is not part of a Unit but rather are Common Elements. The undivided interests in the Common Elements and in the Common Expenses of the Association shall be allocated equally among the Units. Accordingly, the fraction of undivided interest in the Common Elements and in the Common Expenses of the Association for each Unit shall be $1/97^{th}$.

2.7 **Allocation of Votes in the Association**. The total votes in the Association shall be equal to the number of Units. The votes in the Association shall be allocated equally among all the Units with each Unit having one (1) vote. Notwithstanding the foregoing, during the Period of Declarant Control, Declarant shall be entitled to three (3) votes for each Unit owned by Declarant.

2.8 **Allocation of Limited Common Elements.**

2.8.1 The following portions of the Common Elements are Limited Common Elements and are allocated to the exclusive use of one Unit as follows, except that the Commercial Unit(s) shall only have use of the Limited Common Elements that are located outside of the fenced area for the Residential Dwellings:

(i) Any entryways, doorsteps, patios, decks, stoops, porches and balconies, and any other fixtures and facilities designed to exclusively serve or benefit a single Unit, if and to the extent located outside the boundary of the Unit, are Limited Common Elements allocated exclusively to the Unit and their use is limited to that Unit.

(ii) Any chute, flue, pipe, duct, wire, conduit or other fixtures (including, but not limited to, gas, cable television, water and electric pipes, lines or meters) which lie outside the designated boundaries of a Unit and which serve only the Unit is a Limited Common Element allocated solely to the Unit.

(iii) The mailbox designated with the corresponding Unit number located in the Service and Amenities Common Area.

(iv) Space within the Common Elements of a size and location adequate to install, operate and maintain air conditioning and heating units and appurtenant facilities, said areas to be as originally designed, designated and installed by or on behalf of Declarant or as subsequently approved by the Board of Directors. The air conditioning and heating units and appurtenant facilities shall be owned and maintained by the Unit Owner.

(v) The utility meter serving the Unit as originally designed, designated and installed by or on behalf of Declarant and as may thereafter be modified with the approval of the Architectural Committee.

(vi) Any light(s) attached to a Building shall be for the exclusive use of the Units in that Building.

(vii) Any parking space allocated to a designated Unit located in the garage. Declarant, during the Period of Declarant Control, and thereafter the Board, shall allocate each Unit Owner one (1) designated parking space in the garage. Additional parking spaces may be assigned by Declarant during the Period of Declarant Control, and thereafter the Board, on a first-come, first serve basis at a monthly rental amount and payment terms as determined by Declarant, during the Period of Declarant Control, and thereafter the Board. Such additional parking spaces shall not be deemed "Limited Common Elements," but each Owner to whom such an additional parking space is assigned shall have the same maintenance and other obligations with respect thereto as if such space were a Limited Common Element allocated to such Owner's Unit. Storage of items, materials, or non-working vehicles by any Unit Owner, Resident, family or guests thereof is not permitted on any allocated, assigned or unassigned parking space located in the garage at any time.

2.8.2 A Limited Common Element may be reallocated by an amendment to this Declaration made in accordance with the provisions of A.R.S. § 33-1218(B) of the Condominium Act, except that a parking space allocated as Limited Common Elements pursuant to Section 2.8.1(vii) may be reallocated (with the consent of each Owner to whom such space was allocated or is being reallocated) by Declarant, during the Period of Declarant Control, and thereafter the Board.

2.8.3 The Board of Directors shall have the right, without a vote of the Members, to allocate as a Limited Common Element any portion of the Common Elements not previously allocated as a Limited Common Element. Any such allocation by the Board of

Directors shall be made by an amendment to this Declaration and an amendment to the Condominium Plat if required by the Condominium Act.

2.9 **As-Built Conditions**. Various engineering and architectural plans pertaining to the Condominium, including, but not limited to, the Condominium Plat, subdivision maps, grading plans, plot plans, improvement plans and building plans (collectively, the "Plans"), contain dimensions regarding certain aspects of the Common Elements, the Units and other parts of the Condominium. By accepting a deed to a Unit, each Unit Owner shall be deemed to have acknowledged and agreed that (a) if there is a discrepancy between the Plans and the actual as-built conditions of any Unit, Residential Dwelling, Common Element or any other Improvement within the Condominium, the as-built conditions will control and be deemed to be accepted as-is by the Unit Owner; (b) the usable or buildable area, location and configuration of the Units, Common Elements and any other Improvements located within the Condominium may deviate from the Plans or from any other display or configuration related thereto; (c) the location, size, height and composition of all walls and fences to be constructed on or as part of a Unit or adjacent thereto shall be determined by Declarant in its sole and absolute discretion. Despite the Plans or any other materials that may exist, Declarant shall be deemed to have made no representations, warranties or assurances with respect to any such matters or with respect to the size, height, location or composition of any wall or fence to be constructed on or adjacent to any Units; and (d) each Unit Owner waives the right to make any demands of or claims against Declarant as a result of any discrepancies between the Plans and any actual as-built conditions of any Unit.

ARTICLE 3
EASEMENTS AND DEVELOPMENT RIGHTS

3.1 **Utility Easement**. There is hereby created an easement upon, across, over and under the Common Elements for reasonable ingress, egress, installation, replacing, repairing or maintaining of all utilities, including, but not limited to, gas, water, sewer, telephone, cable, television and electricity. By virtue of this easement, it shall be expressly permissible for the providing utility company to erect and maintain the necessary equipment on the Common Elements and the Units, but no sewers, electrical lines, water lines or other utility or service lines may be installed or located on the Common Elements and the Units except as initially designed, approved and constructed by the Declarant or as approved by the Board of Directors. This easement shall in no way affect any other Recorded easements on the Common Elements.

3.2 **Easements for Ingress and Egress**. There is hereby created easements for ingress and egress for pedestrian traffic over, through and across streets, driveways, sidewalks, paths, walks and lanes that from time to time may exist upon the Common Elements. There is also created an easement for ingress and egress for pedestrian and vehicular traffic over, through and across such driveways and parking areas as from time to time may be paved and intended for such purposes provided that such easements shall be subject to all other restrictions and provisions contained in this Declaration, and provided further that such easements shall not extend to any Limited Common Elements. Such easements shall run in favor of and be for the

benefit of the Unit Owners and Residents and their guests, families, tenants and invitees and in favor of Declarant.

3.3 **Unit Owners' Easements of Enjoyment.**

3.3.1 Every Unit Owner shall have a right and easement of enjoyment in and to the Common Elements, which right and easement shall be appurtenant to and shall pass with the title to every Unit, subject to the following provisions:

(i) The right of the Association to adopt reasonable rules and regulations governing the use of the Common Elements to the extent consistent with applicable laws including, without limitation, the right to suspend or deny access to certain recreational Common Elements by any Unit Owner (including any Lessee or Resident of such Unit Owner's Unit) who fails to timely pay any Assessments or who otherwise is in breach of any covenants, restrictions or obligations under this Declaration;

(ii) The right of the Association to convey the Common Elements or subject the Common Elements to a mortgage, deed of trust or other security interest in the manner and subject to the limitations set forth in the Condominium Act, but in no event, without the vote or written assent of those Unit Owners representing at least eighty percent (80%) of the votes in the Association and of Declarant during the Period of Declarant Control and, in all events, subject to a Unit Owner's easement for ingress and egress if access to such Unit Owner's Residential Dwelling is through the Common Elements to be so conveyed or mortgaged.

(iii) All rights and easements set forth in this Declaration including, but not limited to, the rights and easements granted to the Declarant by Sections 3.4 and 3.5 of this Declaration;

(iv) The right of the Association to suspend the right of a Unit Owner and any Resident or Lessee to use the Common Elements for any period during which the Unit Owner, a Resident or Lessee is in violation of any provision of the Condominium Documents.

3.3.2 If a Unit is leased or rented, the Lessee and the members of his family residing with the Lessee shall have the right to use the Common Elements during the term of the lease, and the Unit Owner shall have no right to use the Common Elements until the termination or expiration of the lease.

3.3.3 The guests and invitees of a Unit Owner, Lessee or Resident entitled to use the Common Elements pursuant to Subsection 3.3.1 of this Declaration may use the Common Elements provided they are accompanied by a Member, Lessee or Resident entitled to use the Common Elements pursuant to Subsection 3.3.1 or 3.3.2 of this Declaration.

3.3.4 A Unit Owner's right and easement of enjoyment in and to the Common Elements shall not be conveyed, transferred, alienated or encumbered separate and apart from a Unit. Such right and easement of enjoyment in and to the Common Elements shall be deemed to be conveyed, transferred, alienated or encumbered upon the sale, transfer or encumbrance of any

Unit, notwithstanding that the description in the instrument of conveyance, transfer, alienation or encumbrance may not refer to such right and easement.

3.3.5 Any lease by a Unit Owner of a Unit shall be in writing and shall expressly state that the lease is subject to the requirements of this Declaration, the Association's Articles and Bylaws, the Condominium Plat and all Rules promulgated by the Board of Directors, and that all such tenants will comply with all requirements of the foregoing.

3.4 **Declarant's Rights and Easements for Sales and Leasing Purposes.**

3.4.1 Declarant shall have the right and an easement to maintain sales or leasing offices, management offices and models throughout the Condominium and to maintain advertising signs on the Common Elements while a Declarant is marketing Units in the Condominium. Declarant reserves the right to place models and sales offices in any Units owned by the Declarant and on any portion of the Common Elements in such number, of such size and in such locations as the Declarant deems appropriate.

3.4.2 Declarant may from time to time relocate models, sales offices and management offices to different locations within the Condominium. Upon the relocation of a model, management office or sales office constituting a Common Element, Declarant may remove all personal property and fixtures therefrom.

3.4.3 So long as the Declarant is marketing Units in the Condominium, Declarant shall have the right to restrict the use of the parking spaces within the Condominium. Such right shall include reserving such spaces for use by prospective Unit purchasers, employees of the Declarant and others engaged in sales, maintenance, construction or management activities.

3.4.4 Declarant reserves the right to retain all personal property and equipment used in the sales, management, construction and maintenance of the Condominium that has not been represented to the Association as property of the Association. Declarant reserves the right to remove from the Condominium any and all goods and Improvements used in development, marketing and construction, whether or not they have become fixtures.

3.4.5 In the event of any conflict or inconsistency between this Section 3.4 and any other provision of the Condominium Documents, this Section 3.4 shall control and prevail over such other provisions.

3.5 **Declarant's Development Rights and Easements.**

3.5.1 Declarant shall have the right and an easement on and over the Condominium to construct the Common Elements and the Units shown on the Condominium Plat and all other Improvements the Declarant may deem necessary, and to use the Common Elements and any Units owned by a Declarant for construction or renovation related purposes including the storage of tools, machinery, equipment, building materials, appliances, supplies and fixtures and the performance of work in the Condominium.

3.5.2 Declarant shall have the right and an easement on, over and under those portions of the Common Elements not located within any Buildings for the purpose of maintaining and correcting drainage of surface, roof or storm water. The easement created by this Subsection expressly includes the right to cut any trees, bushes or shrubbery, to grade the soil or to take any other action the Association deems reasonably necessary.

3.5.3 Declarant shall have an easement through the Units for any access necessary to complete any renovations, warranty work or modifications to be performed by a Declarant.

3.5.4 Declarant shall have the right and an easement on, over and through the Common Elements as may be reasonably necessary for the purpose of discharging their obligations and exercising Special Declarant Rights whether arising under the Condominium Act or reserved in this Declaration.

3.5.5 Declarant reserves the right to exercise any Development Rights and Special Declarant Rights and to exercise the rights of the Declarant as provided for in this Declaration and to subdivide Units pursuant to A.R.S. Section 33-1223, relocate boundaries between adjoining Units pursuant to A.R.S. Section 33-1222, and to convert Units into Common Elements and Common Elements into Units subject to any further restrictions set forth in this Declaration, the Condominium Act and by applicable City of Tempe zoning ordinances.

3.5.6 Declarant shall have the right to create additional Units, Common Elements and Limited Common Elements within the Condominium.

3.5.7 To the extent not expressly reserved by or granted to Declarant by other provisions of this Declaration, Declarant reserves all Development Rights and Special Declarant Rights.

3.5.8 In the event of any conflict or inconsistency between this Section 3.5 and any other provision of the Condominium Documents, this Section 3.5 shall control and prevail over such other provisions.

3.6 **Declarant's Use of Recreational Facilities**. So long as a Declarant is marketing Units for sale, such Declarant shall have the right to the exclusive use, without charge, of any portion of the recreational facilities, if any, within the Common Elements on a short-term basis for employee meetings, administrative purposes, special events or any other purpose, subject to the following: (i) the availability of the facilities at the time a request is submitted by such Declarant to the Association; (ii) the Declarant using such facilities shall indemnify the Association against any loss or damage resulting from such Declarant's use thereof; and (iii) the Declarant using such facilities shall return the facilities to the Association in the same condition as existed prior to such Declarant's use thereof. The rights of the Declarant set forth in this Section 3.6 shall be enforceable by injunction, by any other remedy in law or in equity and/or by any other means provided in this Declaration. In the event of any conflict or inconsistency between this Section 3.6 and any other provision of the Condominium Documents, the provisions of this Section 3.6 shall control and prevail over other such provisions.

3.7 **Easement for Support.** To the extent necessary, each Unit shall have an easement for structural support over every other Unit in the same Building as the Unit, and over the Common Elements and the Limited Common Elements, and each Unit and the Common Elements shall be subject to an easement for structural support in favor of every other Unit in the Building, if any, the Common Elements and the Limited Common Elements.

3.8 **Common Elements Easement in Favor of the Association.**

3.8.1 The Common Elements and the Units shall be subject to an easement in favor of the Association and the agents, employees and independent contractors of the Association for the purpose of the inspection, upkeep, maintenance, repair and replacement of the Common Elements and for those components of the Units which the Association is obligated to maintain pursuant to this Declaration and for the purpose of exercising all rights of the Association and discharging all obligations of the Association.

3.8.2 Each Unit shall be subject to an easement in favor of the Association and the agents, employees and contractors of the Association for the purpose of performing such pest control activities as the Association may deem necessary to control or prevent the infestation of the Condominium by insects, rodents or other pests or to eradicate insects, rodents or other pests from the Condominium.

3.9 **Common Elements Easement in Favor of Unit Owners.** The Common Elements shall be subject to the following easements in favor of the Units benefited:

3.9.1 For the installation, repair, maintenance, use, removal or replacement of pipes, ducts, heating and air conditioning systems, electrical, telephone and other communication wiring and cables and all other utility lines and conduits which are a part of or serve any Unit and which pass across or through a portion of the Common Elements.

3.9.2 For the installation, repair, maintenance, use, removal or replacement of lighting fixtures, electrical receptacles, panel boards and other electrical installations which are a part of or serve any Unit but which are situated within or encroach onto any Common Element; provided that the installation, repair, maintenance, use, removal or replacement of any such item does not unreasonably interfere with the common use of any part of the Common Elements, adversely affect either the thermal or acoustical character of any Building or Unit or impair or structurally weaken any Building or Unit.

3.9.3 For the performance of the Unit Owners' obligation to maintain, repair, replace and restore those portions of the Units and the Limited Common Elements that the Unit Owners are obligated to maintain under Section 5.2 of this Declaration.

3.10 **Units and Limited Common Elements Easement in Favor of Association.** The Units and the Limited Common Elements are hereby made subject to the following easements in favor of the Association and its directors, officers, agents, employees and independent contractors:

3.10.1 For inspection of the Units and Limited Common Elements in order to verify the performance by Unit Owners of all items of maintenance and repair for which they are responsible.

3.10.2 For inspection, maintenance, repair and replacement of the Common Elements or the Limited Common Elements situated in, on, under or above or which is accessible from such Units or Limited Common Elements;

3.10.3 For correction of emergency conditions in one or more Units or Limited Common Elements or casualties to the Common Elements, the Limited Common Elements or the Units.

3.10.4 For the purpose of enabling the Association, the Board of Directors or any other committees appointed by the Board of Directors to exercise and discharge their respective rights, powers and duties under the Condominium Documents.

3.10.5 For inspection, at reasonable times and upon reasonable notice to the Unit Owner, of the Units and the Limited Common Elements in order to verify that the provisions of the Condominium Documents are being complied with by the Unit Owners and Residents, and their guests, tenants, invitees and the other occupants of the Unit.

3.11 **Easement for Unintended Encroachments.** To the extent that any Unit or Common Element encroaches on any other Unit or Common Element as a result of original construction, shifting or settling or alteration or restoration authorized by this Declaration or any reason other than the intentional encroachment on the Common Elements or any Unit by a Unit Owner, a valid easement for the encroachment, and for the maintenance thereof, exists.

ARTICLE 4
USE AND OCCUPANCY RESTRICTIONS

The following covenants, conditions and restrictions shall apply to the Property and to the Unit Owners, Residents and Lessees thereof.

4.1 **Residential Use.** All Units shall be used, improved and devoted exclusively to residential use by a Single Family. No trade or business may be conducted on any Unit or in or from any Unit, except that a Unit Owner or other Resident may conduct a business activity within a Unit so long as: (i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Residential Dwelling; (ii) the business activity conforms to all applicable zoning ordinances and requirements for the Condominium; (iii) the business activity does not involve more than one (1) employee working on or from such Unit who is not a Resident thereof; (iv) the volume of vehicular or pedestrian traffic or parking generated by such trade or business does not result in congestion or parking violations; (v) the business activity does not involve persons coming onto the Unit or the door-to-door-solicitation of Unit Owners or other Residents in the Condominium; and (vi) the business activity is consistent with the residential character of the Condominium and does not constitute a nuisance or a hazardous or offensive use or threaten security or safety of other Residents in the Condominium, as may be determined from time to time in the sole discretion of the Board of Directors. The terms "business" and "trade" as used in this Section shall be construed to have

ordinary, generally accepted meanings and shall include, without limitation, any occupation, work or activity undertaken on an ongoing basis which involves the provision of goods or services to persons other than the provider's family and for which the provider receives a fee, compensation or other form of consideration, regardless of whether: (i) such activity is engaged in full or part time; (ii) such activity is intended or does generate a profit; or (iii) a license is required for such activity. The leasing of a Unit by the Unit Owner thereof shall not be considered a trade or business within the meaning of this Section.

4.2 **Antennae**. Declarant has or shall enter into one or more agreements with providers of television, broadcast satellite, cable and internet services (the "Master Technology Agreements") pursuant to which the provider(s) identified in the Master Technology Agreements shall have the exclusive right to (a) provide for the Condominium television, cable, satellite and internet services and any other services involving the providing of television service, broadcast satellite service, video programming service, multitechnical multipoint distribution service and internet service (the "Technology Services") and (b) install any cable, antenna, satellite dish or television dish and equipment other devices and improvements for the providing of such Technology Services. The Master Technology Agreements may, subject to the terms and provisions contained therein, be modified and/or replaced as the Board of Directors may deem appropriate. As the Units do not include any exterior components of any Buildings, Unit Owners are prohibited from installing or locating or causing to be installed or located on any Building, Common Element or Limited Common Element, any cable, antenna, dish, or other devise, equipment or improvement for the providing of Technology Services.

4.3 **Utility Service**. Except for lines, wires and devices existing on the Condominium as of the date of this Declaration or hereafter constructed by Declarant and except for maintenance and replacement of the same, no lines, wires or other devices for the communication or transmission of electric current or power, including telephone, television and radio signals, shall be erected, placed or maintained anywhere in or upon the Condominium unless they are installed and maintained underground or concealed in, under or on Improvements or other structures permitted under this Declaration. No provision hereof shall be deemed to forbid the erection of temporary power or telephone structures incident to the construction of Improvements by Declarant or structures approved by the Architectural Committee.

4.4 **Maintenance, Improvements and Alterations.**

4.4.1 Any Unit Owner may make nonstructural additions, alterations and improvements within his Unit without the prior written approval of the Architectural Committee, but such Unit Owner shall, to the extent permitted under Arizona law, be responsible for any damage to other Units and to the Common Elements which results from any such alterations, additions or improvements. No Unit Owner shall make any structural additions, alterations or improvements within a Unit, unless prior to the commencement of each addition, alteration or improvement, the Unit Owner receives the prior written approval of the Architectural Committee and unless an architect or engineer, licensed in Arizona, certifies that such addition, alteration or improvement will not impair the structural integrity of the Building and Unit within which such addition, alteration or improvement is to be made. The Unit Owner shall, to the extent permitted by Arizona law, be responsible for any damage to other Units and to the Common Elements which results from any such additions, alterations or improvements. Notwithstanding the

foregoing, no addition, alteration or improvement to any Unit, whether structural or not, which would be visible from the exterior of the Unit, shall be made without the prior written approval of the Architectural Committee, which approval may be granted only if the Architectural Committee affirmatively finds that the proposed addition, alteration or improvement is aesthetically pleasing and in harmony with the surrounding Improvements. Each Unit Owner shall maintain his or her Unit in good condition and repair. Except for a Unit Owner's obligation to maintain his or her Unit and any Limited Common Element for his Unit, no Unit Owner shall make any addition, alteration or improvement to the Common Elements without the prior written approval of the Architectural Committee. No exterior components of any of the Buildings are part of any Units but rather are part of the Common Elements. Accordingly, no Unit Owner shall have any right or obligation to repair, improve, paint, refinish or modify in any way any exterior components of the Buildings. All windows, exterior doors, garage doors, roof materials and other exterior surfaces and finishes of any Buildings may only be replaced by the Association and any such replacement shall be with materials of the same design, appearance, color and quality unless the Architectural Committee approves different materials and finishes.

4.4.2 The Architectural Committee shall consider and act upon any and all plans and specifications submitted for its approval under this Declaration and perform such other duties as from time to time shall be assigned to it by the Board of Directors, including the inspection of construction in progress to assure its conformance with plans approved by the Architectural Committee. No construction, alteration, location, relocation, repainting, demolishing, addition, installation, modification, decoration, redecoration or reconstruction of an Improvement, which is subject to the Architectural Committee's review as provided in this Section, shall be commenced or maintained until the plans and specifications therefor showing the nature, kind, shape, height, width, color, materials and location of the same have been submitted to the Architectural Committee and approved by the Architectural Committee. It shall be the responsibility of the Unit Owner to submit the written plans and specifications to an authorized agent of the Architectural Committee. Until changed by the Board of Directors, the address for the submission of such plans and specifications shall be the principal office of the Association. The Architectural Committee may condition its approval of proposals or plans and specifications for any Improvement (i) upon the Unit Owner's furnishing the Association with security acceptable to the Association against any mechanics' liens or other encumbrance which may be Recorded against the Condominium as a result of such work; (ii) on such changes therein as it deems appropriate; (iii) upon the Unit Owner's agreement to complete the proposed work within a stated period of time; or (iv) any or all of the above, and may require submission of additional plans and specifications or other information prior to approving or disapproving material submitted.

4.4.3 The Architectural Committee may issue Architectural Committee Rules setting forth procedures for the submission of plans for approval. The Architectural Committee shall impose a reasonable fee for the review of any submitted plans and shall require that such fee accompany each application for approval. The Architectural Committee shall also be entitled to impose additional requirements and state additional factors which it will take into consideration in reviewing submissions.

4.4.4 Notwithstanding the foregoing provisions of this Section, Improvements within a Unit which are damaged or destroyed may be fully repaired, restored, replaced and/or

reconstructed in conformance with previously approved plans, specifications and materials without the necessity of submitting additional plans and specifications to the Architectural Committee or obtaining the Committee's approval.

4.4.5 Until receipt by the Architectural Committee of any required plans and specifications, the Architectural Committee may postpone review of any plans submitted for approval. Decisions of the Architectural Committee and the reasons therefore shall be transmitted by the Architectural Committee to the Unit Owner at the address set forth in the application for approval within forty-five (45) days after receipt by the Architectural Committee of all materials required by the Architectural Committee. Any application submitted pursuant to this Section shall be deemed disapproved unless written approval thereof has been transmitted by the Architectural Committee to the Unit Owner within forty-five (45) days after date of receipt by the Architectural Committee of all required materials. If any Unit Owner resubmits an application which was deemed disapproved pursuant to the preceding sentence, and in the event the Architectural Committee fails to approve or disapprove in writing such resubmitted application within thirty (30) days after the receipt by the President of the Association and any management company retained by the Association of a complete resubmitted application, duly prepared in accordance with the rules promulgated by the Declarant or the Board of Directors, as the case may be, the application shall be deemed approved by the Architectural Committee, provided such improvement, addition or alteration described in the resubmitted application is carried out in precise conformity with such application.

4.4.6 The approval of the Architectural Committee of any proposals or plans and specifications or drawings for any work done or proposed or in connection with any other matter requiring the approval and consent of the Architectural Committee shall not be deemed to constitute a waiver of any right to withhold approval or consent to any similar proposals, plans and specifications, drawings or matters subsequently or additionally submitted for approval or consent. The approval by the Architectural Committee of any construction, installation, addition, alteration, repair, change or other work pursuant to this Section shall not be deemed a warranty or representation by the Architectural Committee as to the quality of such construction, installation, addition, alteration, repair, change or other work or that such construction, installation, addition, alteration, repair, change or other work conforms to any applicable building codes or other federal, state or local law, statute, ordinance, rule or regulation.

4.4.7 The Architectural Committee may authorize variances from compliance with any of the architectural provisions of this Declaration when circumstances such as topography, natural obstructions, hardship, aesthetic or environmental considerations may require. Such variances must be evidenced in writing and must be signed by a majority of the members of the Architectural Committee. After the Period of Declarant Control expires, the Board of Directors must approve any variance recommended by the Architectural Committee before any such variance shall become effective. If such variances are granted, no violation of the covenants, conditions and restrictions contained in this Declaration shall be deemed to have occurred with respect to the matter for which the variance was granted. The granting of such a variance shall not operate to waive any of the terms and provisions of this Declaration for any purpose except as to the particular Improvement and provision hereof covered by the variance, nor shall it affect in any way the Unit Owner's obligation to comply with all governmental laws and regulations affecting the use of his Unit.

4.4.8 Decisions of the Architectural Committee may be appealed to the Board of Directors. After the Period of Declarant Control expires or is terminated, the Board of Directors may adopt Rules for the appeal of Architectural Committee decisions for reconsideration by the Board of Directors.

4.4.9 Following the approval by the Architectural Committee and/or the Board of Directors of any plans for Improvements, and as a condition of commencement of construction pursuant to such approved plans, the Unit Owner shall pay to the Association a construction deposit (the "Construction Deposit") in an amount equal to the greater of (a) ten percent (10%) of the anticipated cost of the proposed improvements and (b) twelve (12) times the then current monthly Common Expense Assessment. Each Unit Owner shall be fully responsible for any damage to the Condominium and any loss, fees, costs, and expenses that may be incurred as a result of any work performed by, on behalf of, or at the request of such Unit Owner, and in the event that such amounts are not timely paid to the Association, the Association may, in addition to any other remedies the Association may have, deduct such amounts from the Construction Deposit. Upon the completion of construction, any unused portion of the Construction Deposit shall be returned to the Unit Owner.

4.4.10 No Unit Owner, other than Declarant, may subdivide his Unit without the written approval of the Architectural Committee.

4.4.11 Declarant is exempt from the provisions of this Section and need not seek nor obtain the Architectural Committee's approval of any Improvements constructed on the Condominium by Declarant.

4.5 **Trash Containers and Collection**. No garbage or trash shall be placed or kept outside of any Unit except in centralized trash containers of a type, size and style to be approved by the Board of Directors and to be situated within the Condominium at locations to be designated by the Board of Directors, provided, however, following the expiration of the Period of Declarant Control, if any change is proposed with respect to the number, location or type of trash, recycling, or compaction containers or processes, such change shall require the written approval of the City. The Board of Directors shall have the right to sign leases and/or other agreements to subscribe to trash compaction, pickup and related services for the use and benefit of the Association and all Unit Owners and Residents, and to adopt and promulgate rules and regulations regarding garbage, trash, compaction and recycling, containers, processes and collection. No incinerators shall be kept or maintained in any Unit and all Unit Owners and Residents shall comply with all trash disposal and compaction requirements and all recycling requirements contained in such rules and regulations.

4.6 **Machinery and Equipment**. No machinery or equipment of any kind shall be placed, operated or maintained upon the Condominium except such machinery or equipment as is usual and customary in connection with the use, maintenance or construction of buildings, improvements or structures which are within the uses permitted by this Declaration, and except that which a Declarant or the Association may require for the construction, operation and maintenance of the Common Elements.

4.7 **Animals**. No animals, birds, fowl, poultry or livestock shall be maintained or kept in any Units or on any other portion of the Condominium except that no more than two Permitted Pets may be kept or maintained in a Unit if they are kept, bred or raised solely as domestic pets and not for commercial purposes. For purposes of this Section, a "Permitted Pet" shall only mean a dog weighing no more than 35 pounds, a cat or a household bird. No Permitted Pet shall be allowed to make an unreasonable amount of noise, cause an odor or become a nuisance. All Permitted Pets shall be kept on a leash not to exceed six (6) feet in length when outside a Unit, and all Permitted Pets shall be directly under the Unit Owner's or Resident's control at all times. If the pet of a Unit Owner or any Lessee or Resident or any pet of any guest of a Unit Owner, Lessee or Resident relieves itself on any portion of the Condominium, the Unit Owner, Lessee, Resident or guest of the Unit Owner shall immediately pick up and properly dispose of such pet waste. No structure for the care, housing, confinement or training of any animal or pet shall be maintained in or on any Unit so as to be visible from any Common Element or any other Unit. Upon the written request of any Unit Owner, the Board of Directors shall determine whether, for the purposes of this Section, a Permitted Pet is a nuisance or is making an unreasonable amount of noise or causing an odor.

4.8 **Temporary Occupancy**. No trailer, tent, shack, garage or other structure on the Condominium and no temporary Improvement of any kind shall be used at any time for a residence, either temporarily or permanently.

4.9 **Clothes Drying Facilities**. Outside clotheslines or other outside facilities for drying or airing clothes shall not be erected, placed or maintained on the Condominium.

4.10 **Mineral Exploration**. No portion of the Condominium shall be used in any manner to explore for or to remove any water, oil or other hydrocarbons, minerals of any kind, gravel, earth or any earth substance of any kind.

4.11 **Diseases and Insects**. No Unit Owner shall permit any thing or condition to exist upon the Condominium which could induce, breed or harbor infectious plant diseases or noxious insects. Each Unit Owner shall perform such pest control activities as may be necessary to prevent insects, rodents and other pests from being present in his Unit.

4.12 **Vehicle and Parking Restrictions**. Except as otherwise provided in this Section, and except as otherwise expressly mandated by applicable state law with respect to certain utility service and/or emergency vehicles, all Vehicles (as defined below) must be parked only in the Garage (or, if applicable, in surface parking spaces within the Condominium, subject to the Rules). For purposes of this Section and Section 4.13 below, the terms "Vehicle" and "Vehicles" include any domestic or foreign car, station wagon, sport wagon, pickup truck of less than one (1) ton capacity with camper shells not exceeding seven (7) feet in height measured from ground level, mini-van, jeep, sport utility vehicle, motorcycle motorbikes, mopeds, mini-bikes, motor scooters, motorhomes, recreational vehicles, trailers, travel trailers, tent trailers, camper shells, detached campers, boats, boat trailers, mobile homes, or other similar machinery or equipment, whether motorized or not and similar non-commercial and non-recreational vehicles that are used by a Unit Owner for family and domestic purposes and which are used on a regular and recurring basis for basic transportation. Except for emergency repairs, no Vehicle shall be repaired, constructed or reconstructed within the Condominium.

4.13 **Towing of Vehicles**. The Board has the right, without notice, to have any Vehicle which is parked, kept, maintained, constructed, reconstructed or repaired in violation of the Condominium Documents towed away at the sole cost and expense of the owner of the Vehicle. Any expense incurred by the Association in connection with the towing of any Vehicle must be paid to the Association upon demand by the owner of the Vehicle. If the Vehicle is owned (or leased) by a Unit Owner (or by a resident of a Unit Owner), any amounts payable to the Association will be secured by the Assessment Lien against that Unit Owner's Unit, and the Association may enforce collection of those amounts in the same manner provided for in this Declaration for the collection of Assessments.

4.14 **Parking Spaces.** Except for parking spaces assigned as contemplated by Section 2.8.1(vii), the parking spaces in the Common Elements are unreserved parking spaces to be used for parking by guests and invitees of Unit Owners, Lessees, and Residents, and in no event shall such parking spaces be used by Unit Owners, Lessees, or Residents, as such persons may only park vehicles owned, leased, used, operated or controlled by them in the parking space(s) assigned to the respective Units subject, however, to the other covenants and restrictions contained in this Declaration. Notwithstanding the foregoing, parking by guests and patrons of the Commercial Unit shall only be permitted in marked spaces on non-gated portions of the Common Elements, and the Board of Directors may post signs to designate parking spaces for the Commercial Unit.

4.15 **Signs and Flags**. Except as may otherwise be permitted with respect to the Commercial Unit by this Declaration, the Board, or the Rules, and subject to the requirement of applicable law, no signs, (including, but not limited to, "For Sale" or "For Rent" or "For Lease" signs), stickers, billboards or flags of any kind shall be displayed to the public view on any exterior portion (or interior portion of a Unit if the sign would be visible from the exterior of the Building in which the Unit is located) of the Condominium except for: (i) signs as may be required by legal proceedings; (ii) not more than two (2) signs for each Unit for identification of the address of such Unit with a combined total face area of eighty-four (84) square inches or less; (iii) such signs as may be erected by a Declarant in connection with the development of any Unit or the Condominium or the sale by Declarant of any Unit; (iv) signage for the Condominium at such locations designated or installed by a Declarant; and (v) American flags attached to a Unit and displayed in a manner consistent with the federal flag code, 4 U.S.C. § 4-10, and any other flags an Owner or Occupant is specifically authorized by applicable Arizona law to display; provided, however, that except as otherwise provided by applicable law, the Architectural Committee may adopt reasonable rules and regulations regarding the placement and manner of display of any American or other flag(s) and may regulate the location and size of flagpoles to be attached to any Unit; (vi) not more than two (2) security signs and stickers with maximum dimensions of six (6) inches by six (6) inches for professional security companies which may be retained by Unit Owners to provide security monitoring services; and (vii) such other signs, the nature, number and location of which shall have been approved in advance by the Association. The Board, or the Rules, may designate a "Notice Board" for the use of the Owners or Occupants of a Unit to post a notice that a Unit is available for sale, rent or lease, and the location and installation of such Notice Board shall be determined by the Board. All signs permitted under this Section shall require the approval of the Architectural Committee as to the size, color, design, message content, location, type and hours of display.

4.16 **Lawful Use**. No unlawful use shall be made of any part of the Condominium. All laws, zoning ordinances and regulations of all governmental bodies having jurisdiction over the Condominium shall be observed. Any violation of such laws, zoning ordinances or regulations shall be a violation of this Declaration.

4.17 **Nuisances and Offensive Activity**. No nuisance shall be permitted to exist or operate upon the Condominium, and no activity shall be conducted upon the Condominium which is offensive or detrimental to any portion of the Condominium or any Unit Owner or other occupant of the Condominium or is an annoyance to any Unit Owner or other Resident. No exterior speakers, horns, whistles, bells or other sound devices, including those for security purposes, shall be located, used or placed on the Condominium except inside of Units.

4.18 **Window Coverings**. The Declarant shall initially install draperies or suitable window treatments on all windows facing the streets and Common Elements adjacent to its Unit. A Unit Owner may replace any such drapery or window treatment with a drapery or window treatment of equal of better quality, subject to further regulation by the Board. Any such replacement window treatment which is visible from neighboring property must be neutral in color. No bed sheets, blankets, bedspreads or other items not designed for use as curtains or other window coverings may be used. No reflective coating, materials or covering may be placed on the interior or exterior of any window of any Unit or other improvement. No external window covering may be placed, or permitted to remain, on any window of any Unit or other improvement without the prior written approval by the Architectural Committee.

4.19 **Limitation on Leasing or Rental of Units**. A Unit Owner may rent or lease the entire Unit, or a portion of a Unit as described below, and if so rented or leased, the occupancy thereof shall be limited to the Lessee under the lease, or leases, and his family and guests. A Unit Owner may lease a portion of a Unit, although the total number of Persons permitted to be Residents of a Unit shall not exceed five (5). Notwithstanding the foregoing, no Unit Owner shall be permitted to lease a Unit for transient or hotel purposes. All lease agreements shall be in writing, shall be for terms of at least six (6) months and shall provide that the terms of the Lease shall be subject in all respects to the provisions of this Declaration and the Condominium Documents and any failure by Lessee to comply with the terms of such documents shall be a default under the lease. For purposes of this Declaration, "lease" shall mean any agreement for the leasing or rental of a Unit. Upon leasing his Unit or a portion of his Unit, a Unit Owner shall promptly notify the Association in writing of the commencement date and termination date of the lease, together with the names of each Lessee or other person who will be occupying the Unit during the term of the lease. The Board reserves the right to modify the permitted number of Residents per Unit.

4.20 **Porches, Balconies, Patios**. Subject to further regulation by the Board, acceptable items to be kept on any porch, balcony or patio include patio furniture, potted plants, and small barbeques, which items must at all times be in good condition and repair and kept in an orderly and uncluttered fashion. The Board of Directors may require that an item be removed from any porch, balcony or patio if such item is deemed to be a hazard to the Condominium, or if such item is a nuisance to other Unit Owners or Residents.

4.21 **Declarant Approval Required**. After the expiration of the Period of Declarant Control and for so long as a Declarant owns any Unit, any action for which the consent or approval of the Board of Directors is required under this Declaration may be taken only if such action is also consented to or approved by the Declarant.

4.22 **Basketball Goals**. No basketball goals of any type (whether portable or permanent) may be installed, placed, situated or kept on any Unit or within the Condominium.

4.23 **Commercial Unit**. As of the date this Declaration is Recorded, the property comprising the Condominium is located within the MU-4 zone ("MU-Zone"), as more particularly described in the City of Tempe Land Use Code. References in this Section 4.23 to the "Code" shall mean the City of Tempe Land Use Code as in effect on the date this Declaration is Recorded, and references in this Section 4.23 to the MU-Zone shall mean such zone, as defined and described in the Code as of the date this Declaration is Recorded. No use of any Unit, including but not limited to the Commercial Unit, shall be permitted if that use (a) is prohibited by the Code within the MU-Zone, or (b) would require a special exception approval procedure under the Code, or (c) violates any conditions or restrictions placed by the City of Tempe on the property comprising the Condominium as a part of any zoning or subdivision approval process or procedure; or (d) is a Secondary Land use in the MU-Zone under the Code. Further, only the following uses, as defined and described in the Code for the MU- Zone, shall be permitted within the Commercial Unit:

(a) Administrative and Professional;

(b) Childcare Center; Tutoring and After School Learning Center;

(c) Financial Services (but not drive through);

(d) Clinic (medical, dental, veterinary (small animals);

(e) Religious Use; and

(f) Services (i.e. Fitness Studio, Barber/Beauty Salon).

Notwithstanding the foregoing, or any other provision of this Declaration, to the contrary, no change in the use of the Commercial Unit shall be made or permitted unless and until: (a) the Owner thereof (or its designee) has provided written notice to the Board of the proposed new use, which notice shall provide a reasonably detailed description of the proposed new use and shall list and describe any new, additional or replacement permits, approvals or requirements imposed or required by the City of Tempe or any other municipal or other governmental agency in connection with the proposed new use; and (b) the Owner thereof (or its designee) has demonstrated, to the reasonable satisfaction of the Board, either: (i) that the proposed new use will not, under applicable codes, ordinances or stipulations, require an increase in parking spaces available for the Commercial Unit and its employees, guests, customers and invitees, and will not otherwise impose any greater adverse impact or use of other parking spaces in the Condominium by the Owners of the other Units and their permitted residents, occupants, tenants, guests and invitees than existed for the use to be supplanted by the proposed new use; or (ii) the

manner in which the Owner will accommodate any such increase in parking requirements (such as, but without limitation, through use of valet services and agreements with owners of property outside the condominium for use of parking facilities on such property). The Board may also impose such reasonable rules and regulations (as a part of the Rules) on the uses and operation of or in the Commercial Unit as the Board reasonably deems necessary for the protection, preservation and general benefit of the Condominium as a whole and all Unit Owners, including, without limitation, reasonable rules and regulations on parking within the parking spaces in the Condominium or other portions of the property comprising the Condominium by employees and customers.

ARTICLE 5
MAINTENANCE AND REPAIR OF COMMON ELEMENTS AND UNITS

5.1 **Duties of the Association**. Except as otherwise specifically set forth in this Declaration the Association shall maintain, repair and make necessary improvements to all Common Elements including, without limitation, the exteriors of all Buildings, all windows and exterior doors within the Condominium, all Limited Common Elements, the Private Street, all parking spaces, sidewalks, landscaping, street lights, lighting and light fixtures in the Common Elements, and all other Improvements within the Condominium. All items to be maintained by the Association under this Declaration must be maintained in a first class manner in accordance with applicable requirements of the City of Tempe, and in substantial conformance with the original plans for such Common Elements and all applicable warranty manuals. The cost of all such repairs and maintenance shall be a Common Expense and shall be paid for by the Association. Subject to the foregoing, the Board of Directors shall determine, in its sole discretion, the level and frequency of maintenance of the Common Elements. No Unit Owner, Lessee, Resident or other Person shall construct or install any Improvements on the Common Elements or alter, modify or remove any Common Elements without the written approval of the Board of Directors. No Unit Owner, Lessee, Resident or other Person shall obstruct or interfere with the Association in the performance of the Association's maintenance, repair and replacement of the Common Elements. The Association shall be responsible for all costs to water any landscaping on the Common Elements.

5.2 **Duties of Unit Owners**. Each Unit Owner shall (i) maintain his Unit in good condition and repair, (ii) maintain all sewer taps, lines and facilities located within its Unit and all sewer taps, lines and facilities situated outside of its Unit but which serve only its Unit, including, without limitation, the sewer tap, lines and facilities serving its Unit which are located in the Common Elements. In addition to the foregoing, each Unit Owner is responsible for maintaining and repairing and is liable for any expense related to the utility connections within his Unit or which serve his Unit exclusively, the sewer clean-out, the water box and the power meter appurtenant to said Unit, except to the extent the regulated utility maintains the same. Each Unit Owner is responsible for all mold remediation in such Unit Owner's Unit.

5.3 **Repair or Restoration Necessitated by Unit Owner**. Each Unit Owner shall be liable to the Association, to the extent permitted by Arizona law, for any damage or excessive wear and tear to the Common Elements or the Improvements thereon, the Unit Owner's allocable Limited Common Elements, or any other part of the Condominium (including without limitation, windows, and exterior doors) the Association is responsible to maintain, repair, paint

and replace to the extent such damage or excessive wear and tear results from the negligence, neglect, abuse or willful conduct of the Unit Owner or of any Lessee or Resident of a Unit, and any guest or invitee of a Unit Owner. An amount equal to one hundred twenty percent (120%) of the cost to the Association of any repair, painting, maintenance or replacements required by the act of a Unit Owner, or a Lessee, family member, guest or invitee of a Unit Owner or of any other occupant of a Unit Owner's Unit shall be paid by the Unit Owner, upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

5.4 **Unit Owner's Failure to Maintain**. If a Unit Owner fails to maintain in good condition and repair his Unit or any Limited Common Element or any other portion of the Condominium he is obligated to maintain under this Declaration, and the required maintenance, repair or replacement is not performed within fifteen (15) days after written notice has been given to the Unit Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. An amount equal to one hundred twenty percent (120%) of the cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to Subsection 7.2.4 of this Declaration.

ARTICLE 6
THE ASSOCIATION; RIGHTS AND DUTIES, MEMBERSHIP

6.1 **Rights, Powers and Duties of the Association**. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board of Directors. The Association has the specific duty to make available to Declarant, Eligible Mortgage Holders, Unit Owners and insurers or guarantors of any First Mortgage during normal business hours, current copies of the Condominium Documents and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for copying expense.

6.2 **Directors and Officers.**

6.2.1 During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the Association who do not have to be Unit Owners.

6.2.2 Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors, which must consist of at least five (5) members, at least a majority of whom must be Unit Owners. Of the five members of the Board, one (1) shall be elected by a majority vote of the Owners of the Commercial Unit, and the remainder shall be elected by a majority vote of the remaining owners. If, after termination of the Period of Declarant Control any seat on the Board becomes vacant due to the death, removal or resignation of a director, the replacement for that director will be selected in the following manner: if the vacant seat was held by a director elected by the Unit Owners of the Commercial Unit, the replacement for such director shall be selected by the vote or written consent of the Unit Owners of a majority of the Commercial Unit, and if the vacant seat was held by a director elected by the Unit Owners of the other Units, the replacement for such director shall be selected by the vote or written consent of the Unit Owners of a majority of the Units excluding the Commercial Unit. In any such case, the replacement director shall serve for the remainder of the term of the director he or she was selected to replace (but shall not be disqualified from being elected to a new term upon the completion of the remainder of his or her predecessor's term). The Board of Directors elected by the Unit Owners shall then elect the officers of the Association. The terms of the Directors shall be staggered as set forth in the Bylaws.

6.2.3 The Declarant may voluntarily surrender its right to appoint and remove the members of the Board of Directors and the officers of the Association before the termination of the Period of Declarant Control, and in that event, the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board of Directors, as described in a Recorded instrument executed by the Declarant, be approved by the Declarant before they become effective.

6.3 **Rules**. The Board of Directors, from time to time and subject to the provisions of this Declaration and the Condominium Act, may adopt, amend and repeal rules and regulations. The Rules may, among other things, restrict and govern the use of any area by any Unit Owner, Resident, by the family of such Unit Owner or Resident, or by any invitee, licensee or Lessee of such Unit Owner; provided, however, that the Rules may not unreasonably discriminate among Unit Owners and shall not be inconsistent with the Condominium Act, the applicable federal and state Fair Housing Acts, this Declaration, the Articles or Bylaws. A copy of the Rules, as they may from time to time be adopted, amended or repealed, shall be mailed or otherwise delivered to each Unit Owner and may be Recorded.

6.4 **Composition of Members**. Each Unit Owner shall be a Member of the Association. The membership of the Association shall, at all times, consist exclusively of the Unit Owners. Membership in the Association is mandatory, and the allocated interests thereof are appurtenant thereto, and may not be separated from, ownership of the Unit; provided, however, the allocated interests of Units from time to time may be modified or changed as expressly permitted in this Declaration and authorized under the Condominium Act. No Unit

Owner, during his ownership of a Unit, shall have the right to relinquish or terminate his membership in the Association.

6.5 **Personal Liability**. Neither Declarant nor any member of the Board of Directors, the Architectural Committee or of any other committee of the Association, any officer of the Association nor any manager or other employee of the Association shall be personally liable to any Member or to any other Persons, including the Association, for any damage, loss or prejudice suffered or claimed on account of any act, omission, error or negligence of Declarant, the Association, the Board of Directors, the managing agent, any representative or employee of the Association or any committee, committee member or officer of the Association; provided, however, the limitations set forth in this Section 6.5 shall not apply to any Person who has failed to act in good faith or has engaged in willful or intentional misconduct.

6.6 **Implied Rights**. The Association may exercise any right or privilege given to the Association expressly by the Condominium Documents and every other right or privilege reasonably to be implied from the existence of any right or privilege given to the Association by the Condominium Documents or reasonably necessary to effectuate any such right or privilege.

6.7 **Voting Rights**. Subject to Section 6.8, and except as may be otherwise provided in this Declaration, each Unit Owner of a Unit, including the Declarant, shall be entitled to cast one (1) vote for each Unit owned by such Unit Owner, on any Association matter which is put to a vote of the membership in accordance with this Declaration, the Articles and/or Bylaws.

6.8 **Voting Procedures**. No change in the ownership of a Unit shall be effective for voting purposes unless and until the Board is given actual written notice of such change and is provided satisfactory proof thereof. The vote for each such Unit must be cast as a unit, and fractional votes shall not be allowed. In the event that a Unit is owned by more than one (1) Person and such Persons are unable to agree among themselves as to how the vote for their Unit shall be cast, they shall lose their right to vote on the matter in question. If any Member casts a vote representing a certain Unit, it will thereafter be conclusively presumed for all purposes that such Unit Owner was acting with the authority and consent of all other Unit Owners of the same Unit unless objection thereto is made at the time the vote is cast. In the event more than one (1) vote is cast by a Member for a particular Unit, none of the votes shall be counted and all of the votes shall be deemed void.

6.9 **Transfer of Membership**. The rights and obligations of any Member other than the Declarant shall not be assigned, transferred, pledged, conveyed or alienated in any way except upon transfer of ownership of a Unit Owner's Unit, and then only to the transferee of ownership of the Unit. A transfer of ownership of a Unit may be effected by deed, intestate succession, testamentary disposition, foreclosure of a mortgage or deed of trust of record, or such other legal process as now in effect or as may hereafter be established under or pursuant to the laws of the State of Arizona. Any attempt to make a prohibited transfer shall be void. Any transfer of ownership of a Unit shall operate to transfer the membership appurtenant to said Unit to the new Unit Owner thereof. Each Purchaser of a Unit shall notify the Association of its purchase within ten (10) days after becoming the Unit Owner of a Unit.

6.10 **Suspension of Voting Rights**. If any Unit Owner fails to pay any Assessments or other amounts due to the Association under the Condominium Documents within fifteen (15) days after such payment is due or if any Unit Owner violates any other provision of the Condominium Documents and such violation is not cured within fifteen (15) days after the Association notifies the Unit Owner of the violation, the Board shall have the right to suspend such Unit Owner's right to vote until such time as all payments, including interest and attorneys' fees, are brought current, and until any other infractions or violations of the Condominium Documents are corrected.

6.11 **Conveyance or Encumbrance of Common Elements**. The Common Elements shall not be conveyed or subjected to a mortgage, deed of trust or security interest without the prior written consent or affirmative vote of Unit Owners representing at least eighty percent (80%) of the votes allocated to Unit Owners other than the Declarant. In addition, any conveyance, encumbrance, judicial sale or other transfer (whether voluntary or involuntary) of an individual interest in the Common Elements shall be void unless the Unit to which that interest is allocated also is transferred.

6.12 **Architectural Committee**. The Board of Directors shall establish an Architectural Committee consisting of not less than three (3) members appointed by the Board of Directors to regulate the external design, appearance, use and maintenance of the Condominium and to perform such other functions and duties as are imposed upon it by the Condominium Documents or the Board of Directors. Plans submitted to the Committee may be approved with the consent of a majority of Committee members. Subject to the right and power of the Board of Directors to remove and replace, at any time, any member of the Architectural Committee, Committee members shall serve one (1) year terms. If the Board of Directors does not appoint an Architectural Committee at any time, then the Board of Directors members shall serve as the Architectural Committee. Notwithstanding any provision contained in this Declaration, Declarant shall, as long as it owns any Unit or any Annexable Property, have the exclusive right to appoint the members of the Architectural Committee and such persons need not be Unit Owners.

6.13 **Management and Maintenance Contracts**. The Association shall enter into a management agreement with a professional management company to manage the operation and affairs of the Association, and in no event shall the Association be self-managed unless a self-management agreement program is approved by at least two-thirds (2/3) of the Unit Owners. The management company must (a) have significant experience in managing communities such as the Condominium; (b) be bonded and maintain insurance in amounts acceptable to the Association, which at a minimum shall include general liability insurance with coverage equal to or exceeding $1,000,000 per occurrence and $2,000,000 in the aggregate; (c) require its financial accounting services be completed by a degreed accountant and be reviewed at year end by a Certified Public Accountant; and (d) possess such qualifications as deemed necessary and appropriate by the Association. The Association shall also enter into a landscaping agreement with a professional landscape company to provide all landscaping services for the Common Elements. The landscape company must (a) be a licensed Arizona contractor, and (b) must maintain insurance acceptable to the Association; (c) employ an Arizona Certified Landscape Professional and an Arborist certified by the International Society of Arboriculture; and (d) shall possess such other qualifications and certifications as the Association shall deem necessary and

appropriate. Any agreement for professional management of the Association or any other Association contract or lease executed by a Declarant or any member, agent or representative of Declarant during the Period of Declarant Control must allow for termination by either party without cause and without payment of a termination fee upon thirty (30) days or less written notice.

ARTICLE 7
ASSESSMENTS

7.1 Preparation of Budget.

7.1.1 At least thirty (30) days before the beginning of each fiscal year of the Association, commencing with the fiscal year in which the first Unit is conveyed to a Purchaser, the Board of Directors shall adopt a budget for the Association containing an estimate of the total amount of funds which the Board of Directors believes will be required during the ensuing fiscal year to pay all Common Expenses, including, but not limited to: (i) the amount required to pay the cost of maintenance, management, operation, repair and replacement of the Common Elements, Limited Common Elements and those parts of the Units, if any, which the Association has the responsibility of maintaining, repairing and replacing; (ii) the cost of wages, materials, insurance premiums, services, supplies and other expenses required for the administration, operation, maintenance and repair of the Condominium; (iii) the amount required to render to the Unit Owners all services required to be rendered by the Association under the Condominium Documents; and (iv) such amounts as may be necessary to provide general operating reserves and reserves for contingencies, major repairs and replacements, including for the Common Elements and Limited Common Elements. The amount budgeted for reserves shall be established in accordance with Section 7.13 of this Declaration. The budget shall separately reflect any Common Expenses to be assessed against less than all of the Units pursuant to Subsection 7.2.4 or 7.2.5 of this Declaration and must include an adequate allocation to reserves as part of the Common Expense Assessment.

7.1.2 Upon the adoption of a budget, the Board of Directors shall make available to each Unit Owner a summary of the budget and a statement of the amount of the Common Expense Assessment assessed against the Unit of the Unit Owner in accordance with Section 7.2 of this Declaration. The failure or delay of the Board of Directors to prepare or adopt a budget for any fiscal year shall not constitute a waiver or release in any manner of a Unit Owner's obligation to pay his allocable share of the Common Expenses as provided in Section 7.2 of this Declaration, and each Unit Owner shall continue to pay the Common Expense Assessment against his Unit as established for the previous fiscal year until a notice of the Common Expense Assessment for the new fiscal year has been established by the Board of Directors.

7.1.3 The Board of Directors is expressly authorized to adopt and amend budgets for the Association, and no ratification of any budget by the Unit Owners shall be required.

7.2 Common Expense Assessment.

7.2.1 For each fiscal year of the Association commencing with the fiscal year in which the first Unit is conveyed to a Purchaser, the total amount of the estimated Common Expenses set forth in the budget adopted by the Board of Directors (except for the Common Expenses which are to be assessed against less than all of the Units pursuant to Subsections 7.2.4 and 7.2.5 of this Declaration) shall be assessed against each Unit based upon the type of each Unit in proportion to the Unit's Common Expense Liability as set forth in Section 2.11 of this Declaration. The amount of the Common Expense Assessment assessed pursuant to this Subsection 7.2.1 shall be in the sole discretion of the Board of Directors; provided, however, the Common Expense Assessment for each Unit shall be during each year following the year of the conveyance of the first Unit to a Purchaser be increased in accordance with Section 7.2.2 of this Declaration. If the Board of Directors determines during any fiscal year that its funds budgeted or available for that fiscal year are, or will become, inadequate to meet all Common Expenses for any reason, including, without limitation, nonpayment of Assessments by Members, it may increase the Common Expense Assessment for that fiscal year and the revised Common Expense Assessment shall commence on the date designated by the Board of Directors.

7.2.2 The Common Expense Assessments shall commence as to all Units on the first day of the month following the conveyance of the first Unit to a Purchaser; provided, however, the Common Expense Assessment for any Unit which has not been conveyed to an initial Purchaser shall be an amount equal to twenty-five percent (25%) of the Common Expense Assessments for Units. So long as any Unit owned by the Declarant qualifies for the reduced Common Expense Assessment provided for in this Subsection 7.2.2, Declarant shall be obligated to pay to the Association any deficiency in the monies of the Association due to the Declarant having paid a reduced Common Expense Assessment and necessary for the Association to be able to timely pay all Common Expenses. The first Common Expense Assessment shall be adjusted according to the number of months remaining in the fiscal year of the Association. Declarant shall receive a credit toward any obligation of Declarant to pay Assessments or any subsidy for the amount of any Common Expenses advanced or paid by Declarant, but Declarant shall have no obligation whatsoever to make any such advances or payments. Declarant shall also receive a credit toward any assessment or subsidy for any "in-kind" contributions by Declarant of goods or services, which shall be valued at the fair market value of the goods and services contributed. The Board of Directors may require that the Common Expense Assessments or Special Assessments be paid in monthly, quarterly, semi-annual or annual installments. Upon commencement of the first fiscal year of the Association immediately following the conveyance of the first Unit to a Purchaser, the maximum monthly assessment payment for the Common Expense Assessment payable by each Unit Owner shall be in such amount as determined by the Board of Directors prior to such first conveyance. Upon the commencement of the first fiscal year of the Association immediately following the conveyance of the first Unit to a Unit Owner and at the commencement of each and every fiscal year thereafter, the Board of Directors may increase the maximum Common Expense Assessments payable by each Unit Owner by any amount determined by the Board of Directors to be appropriate in order to maintain the Condominium and operate the Association subject to any limits imposed by applicable law.

7.2.3 Except as otherwise expressly provided for in this Declaration, all Common Expenses, including, but not limited to, Common Expenses associated with the

maintenance, repair and replacement of a Limited Common Element, shall be assessed against all of the Units in accordance with Subsection 7.2.1 of this Declaration.

7.2.4 If any Common Expense is caused by the negligence, omission or misconduct of any Unit Owner, the Association shall assess that Common Expense exclusively against his Unit.

7.2.5 Assessments to pay a judgment against the Association may be made only against the Units in the Condominium at the time the judgment was entered in proportion to their Common Expense Liabilities.

7.2.6 All Assessments, monetary penalties and other fees and charges levied against a Unit shall be the personal obligation of the Unit Owner at the time the Assessments, monetary penalties or other fees and charges become due. The personal obligation of a Unit Owner for Assessments, monetary penalties and other fees and charges levied against his Unit shall not pass to the Unit Owner's successors in title unless expressly assumed by them.

7.2.7 Any funds in the Association's operating account at the end of such fiscal year which are not needed to pay Common Expenses payable within thirty (30) days shall be deposited into the Association's Working Capital Account to be established pursuant to Section 7.10 below.

7.3 **Special Assessments.** In addition to Common Expense Assessments, the Association may levy in any fiscal year of the Association a special assessment applicable to that fiscal year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement of the Common Elements, including landscaping, fixtures and personal property related thereto, or for any other lawful Association purpose; provided that any Special Assessment (other than a Special Assessment levied pursuant to Article 9 of this Declaration as a result of the damage or destruction of all or part of the Common Elements) shall have first been approved by Unit Owners representing two-thirds (2/3) of the votes in the Association who are voting in person or by proxy at a meeting duly called for such purposes. Special Assessments shall be allocated among the Units in accordance with the Units' respective shares of Common Expense Assessments. Unless otherwise specified by the Board of Directors, Special Assessments shall be due thirty (30) days after they are levied by the Association and notice of the Special Assessment is given to the Unit Owners.

7.4 **Effect of Nonpayment of Assessments; Remedies of the Association.**

7.4.1 Any Assessment or any installment of an Assessment which is not paid within fifteen (15) days after the Assessment first became due shall be deemed delinquent and shall bear interest from the date of delinquency at the highest rate which the Association is entitled to charge or at such lower rate of interest as may be established from time to time by the Board of Directors. In addition to or in lieu of interest, the Board of Directors may establish a reasonable late fee for delinquent assessments to be charged to a Unit Owner and assessed against his Unit as part of the Assessment Lien for each installment of an Assessment not paid within fifteen (15) days of its due date.

7.4.2 All Assessments, monetary penalties and other fees and charges imposed or levied against any Unit or Unit Owner shall be secured by the Assessment Lien as provided for in the Condominium Act. The recording of this Declaration constitutes record notice and perfection of the Assessment Lien, and no further recordation of any claim of lien shall be required. Although not required in order to perfect the Assessment Lien, the Association shall have the right but not the obligation to record a notice setting forth the amount of any delinquent Assessments, monetary penalties or other fees or charges imposed or levied against a Unit or the Unit Owner which are secured by the Assessment Lien.

7.4.3 The Association shall have the right, at its option, to enforce collection of any delinquent Assessments, monetary penalties and all other fees and charges owed to the Association in any manner allowed by law, including, but not limited to: (i) bringing an action at law against the Unit Owner personally obligated to pay the delinquent amounts and such action may be brought without waiving the Assessment Lien securing any such delinquent amounts; (ii) bringing an action to foreclose its Assessment Lien against the Unit in the manner provided by law for the foreclosure of a realty mortgage; and (iii) suspending voting and recreational amenities use rights as provided in the Bylaws. The Association shall have the power to bid in at any foreclosure sale and to purchase, acquire, hold, lease, mortgage and convey any and all Units purchased at such sale.

7.5 **Subordination of Assessment Lien to Mortgages**. The Assessment Lien shall be subordinate to the lien of any First Mortgage. Any First Mortgagee or any other party acquiring title or coming into possession of a Unit through foreclosure of a First Mortgage, purchase at a foreclosure sale or trustee sale, or through any equivalent proceedings, such as, but not limited to, the taking of a deed in lieu of foreclosure, shall acquire title free and clear of any claims for unpaid Assessments, monetary penalties and other fees and charges against the Unit which became payable prior to such sale or transfer. Any delinquent Assessments, monetary penalties and other fees and charges which are extinguished pursuant to this Section may be reallocated and assessed to all Units as a Common Expense. Any Assessments, monetary penalties and other fees and charges against the Unit which accrue prior to such sale or transfer shall remain the obligation of the defaulting Unit Owner.

7.6 **Exemption of Unit Owner**. No Unit Owner may exempt himself from liability for payment of Assessments, monetary penalties and other fees and charges levied pursuant to the Condominium Documents by waiver and nonuse of any of the Common Elements and facilities or by the abandonment of his Unit.

7.7 **Certificate of Payment**. The Association, upon written request, shall furnish or cause the Association's management company to furnish, to a lienholder, Unit Owner or person designated by a Unit Owner a recordable statement setting forth the amount of unpaid Assessments against his Unit. The statement shall be furnished within fifteen (15) days after receipt of the request and is binding on the Association, the Board of Directors and every Unit Owner. The Association or the Association's management company, as the case may be, may charge a reasonable fee in an amount established or approved by the Board of Directors for each such statement.

7.8 **No Offsets**. All Assessments, monetary penalties and other fees and charges shall be payable in accordance with the provisions of this Declaration, and no offsets against such Assessments, monetary penalties and other fees and charges shall be permitted for any reason, including, without limitation, a claim that the Association is not properly exercising its duties and powers as provided in the Condominium Documents or the Condominium Act.

7.9 **Working Capital Assessments.** To insure that the Association shall have adequate funds to meet its expenses and to purchase necessary materials and services and to meet unforeseen expenditures, each Unit Owner who purchases a Unit from Declarant (an "Initial Purchaser") shall pay to the Association, immediately upon becoming the Unit Owner, a sum equal to one-sixth (1/6) of the then current annual Common Expense Assessment for the Unit. With respect to conveyances of a Unit following the conveyance of the Unit to the Initial Purchaser, each such subsequent Purchaser of a Unit shall pay to the Association at the closing of its purchase of the Unit a Working Capital Assessment in such amount as is established from time to time by the Board of Directors but which Working Capital Assessment shall not exceed one-sixth (1/6 of the then current annual Common Expense Assessment for the Unit. The Working Capital Assessment described in the immediately preceding sentence of this Section, shall not be payable with respect to (a) the transfer or conveyance of a Unit by device or intestate succession; (b) a transfer or conveyance of a Unit to a family trust, family limited partnership or other Person for bona fide estate planning purposes; (c) a transfer or conveyance of a Unit to a corporation, partnership or other entity in which the grantor owns a majority interest unless the Board of Directors determines, in its sole discretion, that a material purpose of the transfer or conveyance was to avoid payment of any Assessments or a Working Capital Assessment; (d) the conveyance of a Unit by a trustee's deed following a trustee's sale under a deed of trust; or (e) a conveyance of a Unit as a result of the foreclosure of a realty mortgage or the forfeiture or foreclosure of a purchaser's interest under a Recorded contract for the conveyance of real property subject to A.R.S. § 33-741, et seq. All Working Capital Assessments shall be non-refundable and shall not be considered as an advance payment of any Assessments levied by the Association pursuant to this Declaration. The Association shall establish a separate working capital account (the "Working Capital Account") into which all working capital assessments shall be deposited. The Board of Directors may use the Working Capital Assessments deposited in the Working Capital Account for any lawful purpose.

7.10 **Monetary Penalties**. In accordance with the procedures set forth in the Bylaws, the Board of Directors shall have the right to levy reasonable monetary penalties against a Unit Owner for violations of the Condominium Documents.

7.11 **Transfer Fee**. Each Unit Owner other than Declarant shall pay to the Association immediately upon becoming the Unit Owner a transfer fee in an amount determined by the Board of Directors to cover administrative costs incurred by the Association in connection with such transfer. The transfer fee provided for above shall be in addition to, and shall not be offset against or considered as an advance payment of any Assessment levied by the Association pursuant to this Declaration.

7.12 **Utility Charges**. Each Unit Owner shall be responsible for separately paying all utility bills for his or her Unit, and the Association shall have no involvement with the providing of and billing for utility services.

7.13 **Reserves**. The Assessments shall include reasonable amounts as determined by the Board of Directors to be collected as reserves for the future periodic maintenance, repair or replacement of all or a portion of the Common Elements, or any other purpose as determined by the Board of Directors. All amounts collected as reserves, whether pursuant to this Section or otherwise, shall be deposited by the Board of Directors in a separate bank account to be held in trust for the purposes for which they are collected and which are to be segregated from and not commingled with any other funds of the Association. Such reserves shall be deemed a contribution to the capital account of the Association by the Members. The Board of Directors shall not expend funds designated as reserve funds for any purpose other than those purposes for which they were collected and except as authorized in a Resolution of the Board of Directors. The Board of Directors shall obtain a reserve study at least once every three (3) years following the expiration of the Period of Declarant Control, which study shall be prepared by an independent company experienced and qualified to prepare such studies and which study shall, at a minimum, include (a) reserves of the major components of the Common Elements identified on Exhibit B to this Declaration which the Association is obligated to repair, replace, restore or maintain; (b) identification of the probable remaining useful life of the identified major components as of the date of the study; (c) an estimate of the cost of repair, replacement, restoration or maintenance of the identified major components during and at the end of their useful life; (d) an estimate of the total annual contribution necessary to defray the cost to repair, replace, restore, or maintain the identified major components during and at the end of their useful life, after subtracting total reserve funds as of the date of the study. The Board of Directors shall modify the budget in accordance with the findings of the reserve study.

ARTICLE 8
INSURANCE

8.1 **Scope of Coverage.**

8.1.1 Commencing not later than the date of the first conveyance of a Unit to a Purchaser, the Association shall maintain, to the extent reasonably available, the following insurance coverage:

(i) A blanket causes of loss – special form policy of property insurance with sprinkler leakage, debris removal and water damage endorsements, insuring the entire Condominium, except for (i) options, extras, additions, alterations and improvements supplied or installed by or at the request of the Unit Owners; and (ii) furniture, furnishings or other personal property of the Unit Owners. Such property insurance shall cover the interests of the Association, the Board of Directors and all Unit Owners and their mortgagees, as their interests may appear (subject, however, to the loss payment adjustment provisions in favor of an Insurance Trustee), in an amount equal to one hundred percent (100%) of the then current replacement cost of the Condominium (exclusive of the land, excavations, foundations and other items normally excluded from such coverage), without deduction for depreciation. The replacement cost shall be reviewed annually by the Board of Directors with the assistance of the insurance company affording such coverage. The Board of Directors shall also obtain and maintain such coverage on all personal property owned by the Association.

(ii) Commercial general liability insurance, for a limit to be determined by the Board of Directors, but not less than $1,000,000 for any single occurrence and $2,000,000 general aggregate and an umbrella policy in the amount of not less than $1,000,000. Such insurance shall cover all occurrences commonly insured against for death, bodily injury and property damage arising out of or in connection with the use, ownership or maintenance of the Common Elements. Such policy shall include (i) a cross liability clause to cover liabilities of the Unit Owners as a group to a Unit Owner, (ii) medical payments insurance and contingent liability coverage arising out of the use of hired and non-owned automobiles, (iii) coverage for any legal liability that results from lawsuits related to employment contracts in which the Association is a party; and (iv) a waiver of the contractual liability exclusion for personal injury.

(iii) Workmen's compensation insurance to the extent necessary to meet the requirements of the laws of Arizona and a policy of employer's liability insurance with coverage limits determined by the Board of Directors.

(iv) Directors' and officers' liability insurance covering all the directors and officers of the Association in such limits as the Board of Directors may determine from time to time, but not less than $1,000,000.

(v) Such other insurance as the Association shall determine from time to time to be appropriate to protect the Association, the members of the Board of Directors, the members of any committee of the Board of Directors and the Unit Owners, including, without limitation, umbrella general liability insurance which would provide general liability coverage in excess of the coverage provided by the policy to be obtained pursuant to Section 8.1.1(i) above.

(vi) The insurance policies purchased by the Association shall, to the extent reasonably available, contain the following provisions:

(a) Each Unit Owner shall be an insured under the policy with respect to liability arising out of his ownership of an undivided interest in the Common Elements or his membership in the Association.

(b) There shall be no subrogation with respect to the Association, its agents, servants and employees against Unit Owners and members of their household.

(c) No act or omission by any Unit Owner, unless acting within the scope of his authority on behalf of the Association, shall void the policy or be a condition to recovery on the policy.

(d) The coverage afforded by such policy shall be primary and shall not be brought into contribution or proration with any insurance which may be purchased by Unit Owners or their mortgagees or beneficiaries under deeds of trust.

(e) A "severability of interest" endorsement which shall preclude the insurer from denying the claim of a Unit Owner because of the negligent acts of the Association or other Unit Owners.

(f) The Association shall be the insured for use and benefit of the individual Unit Owners (designated by name if required by the insurer).

(g) For policies of property insurance, a standard mortgagee clause providing that the insurance carrier shall notify the Association and each First Mortgagee named in the policy at least ten (10) days in advance of the effective date of any substantial change in coverage or cancellation of the policy.

(h) Any Insurance Trust Agreement will be recognized by the insurer.

(vii) If applicable, pressured, mechanical and electrical equipment coverage on a comprehensive form in an amount not less than $500,000 per accident per location.

(viii) If required by any governmental or quasi-governmental agency (including, without limitation, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation) flood insurance in accordance with the applicable regulations of such agency.

(ix) Such other insurance as may be required to be carried by the Association in order for the Association to be in compliance with all applicable requirements established by the Federal Housing Administration, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association or any other governmental agency, except to the extent such coverage is not reasonably available or has been waived in writing by such agencies, as applicable.

(x) "Agreed Amount" and "Inflation Guard" endorsements, except where not applicable or available.

8.1.2 If, at the time of a loss insured under an insurance policy purchased by the Association, the loss is also insured under an insurance policy purchased by a Unit Owner, the Association's policy shall provide primary coverage.

8.1.3 The Board of Directors may select deductibles applicable to the insurance coverage to be maintained by the Association pursuant to this Section 8.1 in order to reduce the premiums payable for such insurance. The Unit Owner which is the subject of any claim shall be responsible for paying or reimbursing the Association for any deductible payable in connection with such claim. In the event any single claim is made with respect to more than one (1) Unit and only a single deductible is charged by the insurance carrier, the deductible amount shall be assessed in equal shares to each of the affected Units. The deductible payable with respect to

damage to Common Elements shall be a Common Expense, but the Association may assess to a Unit Owner any such deductible amount necessitated by the negligence, misuse or neglect for which such Unit Owner is responsible. Each Unit Owner will be responsible for any and all deductibles for all insurance maintained by a Unit Owner pursuant to Section 8.4.

8.1.4 Notwithstanding any of the other provisions of this Article 8 to the contrary, there may be named as an insured, on behalf of the Association, the Association's authorized representative, including any trustee with whom the Association may enter into any Insurance Trust Agreement or any successor to such trustee who shall have exclusive authority to negotiate losses under any policy providing such property or liability insurance and to perform such other functions as are necessary to accomplish such purpose. Each Unit Owner appoints the Association, as attorney-in-fact for the purpose of purchasing and maintaining such insurance, including: (a) the collection and appropriate disposition of the proceeds thereof; (b) the negotiation of losses and execution of releases of liability; (c) the execution of all documents; and (d) the performance of all other acts necessary to accomplish such purpose.

8.1.5 The Association and its directors and officers shall have no liability to any Unit Owner or First Mortgagee or other Person having a lien on a Unit if, after a good faith effort, (a) the Association is unable to obtain insurance required hereunder because the insurance is no longer available; (b) if available, the insurance can be obtained only at a cost that the Board of Directors, in its sole discretion, determines is unreasonable under the circumstances; or (c) the Members fail to approve any increase in the Common Expense Assessment needed to pay the insurance premiums.

8.1.6 The Board of Directors shall determine annually whether the amounts and types of insurance the Association has obtained provide adequate coverage in light of increased construction costs, inflation, practice in the area in which the Condominium is located, or any other fact which tends to indicate that either additional insurance policies or increased coverage under existing policies are necessary or desirable to protect the interests of the Unit Owners and of the Association.

8.2 **Fidelity Bonds.**

8.2.1 The Association shall maintain blanket fidelity bonds for all officers, directors, trustees and employees of the Association and all other persons handling or responsible for funds of or administered by the Association, including, but without limitation, officers, directors and employees of any management agent of the Association, whether or not they receive compensation for their services. The total amount of the fidelity bonds maintained by the Association shall be based upon the best business judgment of the Board of Directors, and shall not be less than the greater of the estimated maximum funds, including reserve funds, in the custody of the Association or the management agent, as the case may be, at any given time during the term of each bond, or the sum equal to three (3) months aggregate Common Expense Assessments on all Units plus reserve funds. Fidelity bonds obtained by the Association must comply with all requirements imposed by governmental agencies which insure home mortgages and must also meet the following requirements:

(i) The fidelity bonds shall name the Association as an obligee;

(ii) The bonds shall contain waivers by the issuers of the bonds of all defenses based upon the exclusion of persons serving without compensation from the definition of "employees" or similar terms or expressions; and

(iii) The bonds shall provide that they may not be canceled or substantially modified (including cancellation from nonpayment of premium) without at least ten (10) days prior written notice to the Association and each First Mortgagee.

8.2.2 The Association shall require any management agent of the Association to maintain its own fidelity bond in an amount equal to or greater than the amount of the fidelity bond to be maintained by the Association pursuant to Subsection 8.2.1. The fidelity bond maintained by the management agent shall cover funds maintained in bank accounts of the management agent and need not name the Association as an obligee.

8.3 **Payment of Premiums.** Premiums for all insurance obtained by the Association pursuant to this Article shall be Common Expenses and shall be paid for by the Association.

8.4 **Insurance Obtained by Unit Owners.** Each Unit Owner shall be responsible for: (a) property insurance on his personal property located in his Unit and elsewhere on the Condominium; (b) property insurance on any options, extras, additions, alterations and improvements to his Unit (whether installed by a Declarant, by such Unit Owner or any prior Unit Owner); and (c) comprehensive general liability insurance to the extent not covered by the policies of liability insurance obtained by the Board of Directors for the benefit of all of the Unit Owners. Each Unit Owner shall be responsible for any and all deductibles for any insurance obtained by the Unit Owner and maintained on the Unit. All policies of property insurance carried by a Unit Owner shall be without contribution with respect to the policies of property insurance obtained by the Board of Directors for the benefit of all of the Unit Owners. No Unit Owner shall separately insure his Unit against loss by fire or other casualty covered by any insurance carried by the Association. If any Unit Owner violates this provision, any diminution in insurance proceeds otherwise payable under the Association's policies that results from the existence of other insurance will be chargeable to the Unit Owner who acquired other insurance.

8.5 **Reporting a Claim.** No Unit Owner or Resident may make any claim against any Association policy without first conferring with the Board of Directors.

8.6 **Payment of Insurance Proceeds.** Any loss covered by property insurance obtained by the Association in accordance with this Article shall be adjusted with the Association and the insurance proceeds shall be payable to the Association and not to any mortgagee or beneficiary under a deed of trust. The Association shall hold any insurance proceeds in trust for Unit Owners and lienholders as their interests may appear, and the proceeds shall be disbursed and applied as provided for in A.R.S. Section 33-1253 of the Condominium Act.

8.7 **Certificate of Insurance.** An insurer that has issued an insurance policy pursuant to this Article 8 shall issue certificates or memoranda of insurance to the Association and, on written request, to any Unit Owner, mortgagee or beneficiary under a deed of trust. The insurer issuing the policy shall not cancel or refuse to renew it until thirty (30) days after notice of the

proposed cancellation or nonrenewal has been mailed to the Association, each Unit Owner and each mortgagee or beneficiary under a deed of trust to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

8.8 **Annual Insurance Review.** After the termination of the Period of Declarant Control, the Board of Directors shall determine annually whether the amounts and types of insurance it has obtained provide adequate coverage in light of increased construction costs, inflation, practice in the area in which the Condominium is located, or any other factor which tends to indicate that either additional insurance policies or increased coverage under existing policies are necessary or desirable to protect the interests of the Unit Owners and of the Association.

ARTICLE 9
DESTRUCTION OF IMPROVEMENTS

9.1 **Automatic Reconstruction.** Any portion of the Condominium for which insurance is maintained by the Association which is damaged or destroyed shall be repaired or replaced promptly by the Association unless (i) the Condominium is terminated, (ii) repair or replacement would be illegal under any state or local health or safety statute or ordinance or (iii) eighty percent (80%) of the Unit Owners' vote not to rebuild. The cost of repair or replacement of the damaged or destroyed portion of the Condominium in excess of insurance proceeds and reserves shall be a Common Expense and shall be assessed to the Members as a Special Assessment pursuant to Section 7.3 of this Declaration.

9.2 **Determination Not to Reconstruct without Termination.** If eighty percent (80%) of the Unit Owners vote not to rebuild and the Condominium is not terminated in accordance with the Condominium Act, the insurance proceeds shall be distributed to the Unit Owners of the Units and/or Limited Common Elements destroyed in proportion to their respective share of Common Expense Liability relative to the total share of Common Expense Liability allocated to such Units, or to lienholders as their interests may appear. The remainder of the proceeds shall be distributed to all Unit Owners or lienholders in proportion to their respective obligation for Common Expense Liability bears to the Common Expense Liability for all the Units.

9.3 **Distribution of Insurance Proceeds in the Event of Termination of the Condominium.** Notwithstanding any provisions of this Article 9 to the contrary, the distribution of insurance proceeds resulting from the damage or destruction of all or any part of the Common Elements shall be distributed as provided in the Condominium Act in the event of a termination of the Condominium.

9.4 **Negotiations with Insurer.** The Association shall have full authority to negotiate in good faith with representatives of the insurer of any totally or partially destroyed portion of the Common Elements and to make settlements with the insurer for less than full insurance coverage on the damage to such Common Elements. Any settlement made by the Association in good faith shall be binding upon all Unit Owners and First Mortgagees. Insurance proceeds for any damage or destruction of any part of the Condominium covered by property insurance maintained by the Association shall be paid to the Association and not to any First Mortgagee or

other lienholder. The Association shall hold any proceeds in trust for the Unit Owners and lienholders as their interests may appear. Except as otherwise provided in Sections 9.1 and 9.2 of this Declaration, all insurance proceeds shall be disbursed first for the repair or restoration of the damaged Common Elements, and Unit Owners and lienholders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the damaged or destroyed Common Elements have been completely repaired or restored or the Condominium is terminated.

9.5 **Repair of Units**. Installation of improvements to, and repair of any damage to, a Unit shall be made by and at the individual expense of the Unit Owner of that Unit and shall be completed as promptly as practicable and in a lawful and workmanlike manner.

9.6 **Priority**. Nothing contained in this Article shall entitle a Unit Owner to priority over any lender under a lien encumbering his Unit as to any portion of insurance proceeds allocated to such Unit.

ARTICLE 10
EMINENT DOMAIN

10.1 **Total Taking of a Unit**. If a Unit is acquired by eminent domain, or if part of a Unit is acquired by eminent domain leaving the Unit Owner with a remnant which may not be practically or lawfully used for any purpose permitted by this Declaration, the award must compensate the Unit Owner for his Unit and interest in the Common Elements, regardless of whether any Common Elements are taken. Upon such a taking, unless the decree otherwise provides, that Unit's allocated interests in the Common Elements and the Common Expenses shall automatically be reallocated to the remaining Units in proportion to their respective allocated interests immediately before the taking. Upon such a taking, the Association shall prepare, execute and record an amendment to the Declaration in compliance with the Condominium Act. Any remnant of a Unit remaining after part of a Unit is taken shall become a Common Element.

10.2 **Partial Taking of a Unit**. Except as provided in Section 10.1, if part of a Unit is acquired by eminent domain, the award must compensate the Unit Owner for the reduction in the value of his Unit and interest in the Common Elements, regardless of whether any Common Elements are taken.

10.3 **Taking of Common Elements**. If part of the Common Elements is acquired by eminent domain, the portion of the award attributable to the Common Elements taken shall be paid to the Association for the benefit of the Unit Owners, and any portion of the award attributable to the acquisition of a Limited Common Element shall be equally divided among the Unit Owners of the Units to which that Limited Common Element was allocated at the time of the acquisition.

10.4 **Taking of Entire Condominium**. In the event the Condominium in its entirety is acquired by eminent domain, the Condominium shall be terminated and the provisions of A.R.S. Section 33-1228 of the Condominium Act shall apply.

10.5 **Priority and Power of Attorney.** Nothing contained in this Article shall entitle a Unit Owner to priority over any First Mortgagee under a lien encumbering his Unit as to any portion of any condemnation award allocated to such Unit. Each Unit Owner hereby appoints the Association as attorney-in-fact for the purpose of negotiations and settlement with the condemning authority for the acquisition of the Common Elements or any part thereof. This power of attorney is coupled with an interest, shall be irrevocable, and shall be binding on any heirs, personal representatives, successors or assigns of a Unit Owner.

ARTICLE 11
RIGHTS OF FIRST MORTGAGEES

11.1 **Notification to First Mortgagees.** Upon receipt by the Association of a written request from a First Mortgagee or insurer or governmental guarantor of a First Mortgage informing the Association of its correct name and mailing address and number or address of the Unit to which the request relates, the Association shall provide such Eligible Mortgage Holder or Eligible Insurer or Guarantor with timely written notice of the following:

11.1.1 Any condemnation loss or any casualty loss which affects a material portion of the Condominium or any Unit on which there is a First Mortgage held, insured or guaranteed by such Eligible Mortgage Holder or Eligible Insurer or Guarantor;

11.1.2 Any delinquency in the payment of Assessments or charges owed by a Unit Owner subject to a First Mortgage held, insured or guaranteed by such Eligible Mortgage Holder or Eligible Insurer or Guarantor or any other default in the performance by the Unit Owner of any obligation under the Condominium Documents, which delinquency or default remains uncured for a period of sixty (60) days;

11.1.3 Any lapse, cancellation or material modification of any insurance policy or fidelity bond maintained by the Association; and

11.1.4 Any proposed action which requires the consent of a specified percentage of Eligible Mortgage Holders as set forth in this Declaration.

11.2 **Approval Required for Amendment to Declaration, Articles or Bylaws.**

11.2.1 The approval of Eligible Mortgage Holders holding First Mortgages on Units, the Unit Owners of which have at least fifty-one percent (51%) of the votes in the Association allocated to Units Owners of all Units subject to First Mortgages held by Eligible Mortgage Holders, shall be required to add or amend any material provisions of the Declaration, Articles or Bylaws which establish, provide for, govern or regulate any of the following:

(i) Voting rights;

(ii) Assessments, Assessment Liens or subordination of Assessment Liens;

(iii) Reserves for maintenance, repair and replacement of Common Elements;

(iv) Insurance or fidelity bonds;

(v) Responsibility for maintenance and repairs;

(vi) Expansion or contraction of the Condominium, the addition or annexation of property to the Condominium, or the withdrawal of property from the Condominium;

(vii) Boundaries of any Unit;

(viii) Reallocation of interests in the Common Elements or Limited Common Elements or rights to their use;

(ix) Convertibility of Units into Common Elements or of Common Elements into Units;

(x) Leasing of Units;

(xi) Imposition of any restrictions on a Unit Owner's right to sell, lease or transfer his Unit;

(xii) A decision by the Association to establish self-management when professional management had been required previously by an Eligible Mortgage Holder;

(xiii) Restoration or repair of the Condominium (after a hazard damage or partial condemnation) in a manner other than that specified in the Condominium Documents;

(xiv) Any action to terminate the legal status of the Condominium after substantial destruction or condemnation occurs;

(xv) Any provisions which expressly benefit First Mortgagees, Eligible Mortgage Holders or Eligible Insurers or Guarantors.

11.2.2 Any action to terminate the legal status of the Condominium for reasons other than substantial destruction or condemnation of the Condominium must be approved by Eligible Mortgage Holders holding First Mortgages on Units, the Unit Owners of which have at least sixty-seven percent (67%) of the votes in the Association allocated to Unit Owners of all Units subject to First Mortgages held by Eligible Mortgage Holders.

11.2.3 Any First Mortgagees who receives a written request to approve additions or amendments to the Declaration, Articles or Bylaws, which additions or amendments are not material, who does not deliver or mail to the requesting party a negative response within thirty (30) days, shall be deemed to have approved such request. Any addition or amendment to the Declaration, Articles or Bylaws shall not be considered material if it is for the purpose of correcting technical errors or for clarification only.

11.2.4 The provisions of this Section 11.2 shall not affect or apply to the amendments that may be executed by Declarant in the exercise of its Development Rights.

11.3 **Prohibition Against Right of First Refusal**. The right of a Unit Owner to sell, transfer or otherwise convey his Unit shall not be subject to any right of first refusal or similar restriction.

11.4 **Right of Inspection of Records**. Any Unit Owner, First Mortgagee or Eligible Insurer or Guarantor will, upon written request, be entitled to: (i) inspect the current copies of the Condominium Documents and the books, records and financial statements of the Association during normal business hours, provided that the Association shall have up to ten (10) days after any such request to make such items available for inspection; (ii) receive within ninety (90) days following the end of any fiscal year of the Association, an audited financial statement of the Association for the immediately preceding fiscal year of the Association, free of charge to the requesting party; and (iii) receive written notice of all meetings of the Members of the Association and be permitted to designate a representative to attend all such meetings.

11.5 **Prior Written Approval of First Mortgagees**. Except as provided herein or by statute in case of condemnation or substantial loss to the Units or the Common Elements and unless at least two-thirds (2/3) of all First Mortgagees (based upon one (1) vote for each First Mortgage owned) and at least two-thirds (2/3) of all Unit Owners (other than Declarant or other sponsor, developer or builder of the Condominium) of the Units have given their prior written approval, the Association shall not be entitled to:

11.5.1 By act or omission, seek to abandon or terminate this Declaration or the Condominium;

11.5.2 Change the pro rata interest or obligations of any individual Unit for the purpose of: (i) levying Assessments or charges or allocating distributions of hazard insurance proceeds or condemnation awards or (ii) determining the pro rata share of ownership of each Unit in the Common Elements;

11.5.3 Partition or subdivide any Unit;

11.5.4 By act or omission, seek to abandon, partition, subdivide, encumber, sell or transfer the Common Elements. The granting of easements for public utilities or for other public purposes consistent with the intended use of the Common Elements shall not be deemed a transfer within the meaning of this Subsection;

11.5.5 Use hazard insurance proceeds for losses to any Units or the Common Elements for any purpose other than the repair, replacement or reconstruction of such Units or the Common Elements.

Nothing contained in this Section or any other provisions of this Declaration shall be deemed to grant the Association the right to partition any Unit without the consent of the Unit Owners thereof. Any partition of a Unit shall be subject to such limitations and prohibitions as may be set forth elsewhere in this Declaration or as provided under Arizona law.

11.6 **Liens Prior to First Mortgage**. All taxes, assessments and charges which may become liens prior to the First Mortgage under local law shall relate only to the individual Unit and not to the Condominium as a whole.

11.7 **Condemnation or Insurance Proceeds**. No Unit Owner or any other party shall have priority over any rights of any First Mortgagee of the Unit pursuant to its mortgage in the case of a distribution to such Unit Owner of insurance proceeds or condemnation awards for losses to or a taking of Units and/or Common Elements.

11.8 **Limitation on Partition and Subdivision**. No Unit shall be partitioned or subdivided without the prior written approval of the Holder of any First Mortgage on such Unit.

11.9 **Conflicting Provisions**. In the event of any conflict or inconsistency between the provisions of this Article and any other provision of the Condominium Documents, the provisions of this Article shall prevail; provided, however, that in the event of any conflict or inconsistency between the different Sections of this Article or between the provisions of this Article and any other provision of the Condominium Documents with respect to the number or percentage of Unit Owners, First Mortgagees, Eligible Mortgage Holders or Eligible Insurers or Guarantors that must consent to (i) an amendment of the Declaration, Articles or Bylaws, (ii) a termination of the Condominium or (iii) certain actions of the Association as specified in Subsections 11.2 and 11.5 of this Declaration, the provision requiring the consent of the greatest number or percentage of Unit Owners, First Mortgagees, Eligible Mortgage Holders or Eligible Insurers or Guarantors shall prevail; provided, however, that Declarant, without the consent of any Unit Owner being required, shall have the right to amend this Declaration, the Articles or the Bylaws during the Period of Declarant Control in order to (i) comply with the Condominium Act or any other applicable law if the amendment does not adversely affect the rights of any Unit Owner, (ii) correct any error or inconsistency in the Declaration, the Articles or the Bylaws if the amendment does not adversely affect the rights of any Unit Owner, (iii) comply with the requirements or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments including, without limitation, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration and the Veterans Administration or (iv) the rules or requirements of any federal, state or local governmental agency whose approval of the Condominium or the Condominium Documents is required by law or requested by Declarant.

ARTICLE 12
DISPUTE RESOLUTION FOR DEVELOPMENT AND CONSTRUCTION RELATED MATTERS

It is the Declarant's intent that all Improvements constructed by any builder who may construct a Unit within the Condominium including the Declarant (each, a "Builder" and, collectively, the "Builders") shall be built in compliance with all applicable building codes and ordinances and will be of a quality that is consistent with good construction and development practices. Nevertheless, disputes may arise as to whether a defect exists with respect to the construction by a Builder of any of the Improvements constructed within the Condominium and a Builder's responsibility therefore. It is the intent of the Builders that all disputes and claims

regarding Alleged Defects (as defined below) be resolved amicably, and without the necessity of time-consuming and costly litigation. Accordingly, the Association, the Board of Directors, the Builders and all Unit Owners shall be bound by the claim resolution procedures, provisions and limitations set forth or described in this Article 12. Nothing in this Article 12 shall be amended, revised, revoked or modified in any respect except with the express written consent of the Owners of all Units.

12.1 **Limitation on Unit Owners' Remedies**. In the event that the Association, the Board of Directors or any Unit Owner (collectively, "Claimant") claims, contends or alleges that any portion of a Unit, the Common Elements or any other part of any Condominium is defective or that one or more of the Builders, their agents, consultants, contractors or subcontractors (collectively, "Agents") were negligent in the planning, design, engineering, grading, construction or other development thereof (collectively, an "Alleged Defect"), the only right or remedy that any Claimant shall have with regard to any such Alleged Defect is the right to have the Alleged Defect repaired and/or replaced by the Builder which was responsible for the construction of the Improvement which is the subject of the Alleged Defect, but such right or remedy shall only be available if and to the extent such Builder is, at that time, still obligated to repair such Alleged Defect pursuant to applicable statutes or common law or pursuant to any applicable rules, regulations and guidelines imposed by the Arizona Registrar of Contractors (the "Applicable Laws"). By accepting a deed to a Unit, each Unit Owner shall, with respect to any Alleged Defect(s), be deemed to have waived the right to seek damages or other legal or equitable remedies from any Builder or from any affiliates, subcontractors, agents, vendors, suppliers, design professionals and materialmen of any Builder under any common law, statutes and other theories of liability, including, but not limited to, negligence, tort and strict liability. Under no circumstances will any Builder or Declarant be liable for any consequential, indirect, special, punitive or other damages, including, but not limited to, any damages based on a claim of diminution in the value of the Claimant's Unit and each Unit Owner, by accepting a deed to a Unit, shall be deemed to have waived its right to pursue any such damages. It shall be a condition to a Claimant's rights and a Builder's obligations under this Article that the Claimant fully and timely abide by the requirements and conditions set forth in this Article. To accommodate the Builders' right to repair and/or replace an Alleged Defect, the Builders hereby reserve the right for themselves to be notified of all such Alleged Defects and to enter onto the Condominium, Common Elements and Units to inspect, repair and/or replace such Alleged Defect(s) as set forth herein.

12.2 **Notice of Alleged Defect**. In the event that a Claimant discovers any Alleged Defect, Claimant shall within fifteen (15%) days of discovery of the Alleged Defect provide the Builder which constructed the Improvement which is the subject of the Alleged Defect with written notice of the Alleged Defect, and of the specific nature of such Alleged Defect ("Notice of Alleged Defect").

12.3 **Right to Enter, Inspect, Repair and/or Replace**. Within a reasonable time after the receipt by a Builder of a Notice of Alleged Defect, or the independent discovery of any Alleged Defect by a Builder, such Builder shall have the right, upon reasonable notice to Claimant and during normal business hours, to enter onto or into, as applicable, the Unit, Common Element or other part of the Condominium as may be necessary or appropriate for the purposes of inspecting and/or conducting testing and, if deemed necessary by the Builder,

repairing and/or replacing such Alleged Defect. In conducting such inspection, testing, repairs and/or replacements, Builder shall be entitled to take any actions as it shall deem reasonable and necessary under the circumstances to repair or correct any such Alleged Defect.

12.4 **No Additional Obligations; Irrevocability and Waiver of Right**. Nothing set forth in this Section shall be construed to impose any obligation on Builders to inspect, test, repair or replace any item or Alleged Defect for which Builders are not otherwise obligated to do so under Applicable Laws or by contract. Specifically, a Builder's obligation to repair and/or replace an Alleged Defect shall expire upon the expiration of any applicable warranty provided by Builder for such item, if any, or on any later applicable date which the Applicable Laws specify or recognize as the date(s) through which a contractor is responsible for such Alleged Defect. The right of Builders to enter, inspect, test, repair and/or replace reserved hereby shall be irrevocable and may not be waived or otherwise terminated except by a writing, in recordable form, executed and recorded by Builders.

12.5 **Tolling of Statutes of Limitations**. In no event shall any statutes of limitations be tolled during the period in which a Builder conducts any inspection or testing of any Alleged Defects.

12.6 **Binding Arbitration**. In the event of a dispute between or among a Builder, its contractors, subcontractors or brokers or their agents or employees, on the one hand, and any Unit Owner or the Association, on the other hand, regarding any controversy or claim between the parties, including any claim based on contract, tort, statute or any other theory of liability arising out of or relating to the rights or duties of the parties under this Declaration, the design or construction of the Condominium, any Unit, any Common Element or any part of the Condominium or an Alleged Defect, the matter shall be resolved by binding arbitration conducted in accordance with the requirements, terms and provisions set forth in this Section 12.6.

12.6.1 Initiation of Arbitration. The arbitration shall be initiated by either party delivering to the other a Notice of Intention to Arbitrate as provided for in the American Arbitration Association ("AAA") Commercial Arbitration Rules, as amended from time to time (the "AAA Rules").

12.6.2 Condition to Initiation of Arbitration. In the event a dispute arises regarding an Alleged Defect and the Claimant is the Association, the Association must provide written notice to all Members prior to initiation of any proceeding or arbitration against a Builder which notice shall (at a minimum) include (i) a description of the Alleged Defect; (ii) a description of the Builder's position related to such Alleged Defect and any attempts of the affected Builder to correct such Alleged Defect and the opportunities provided to the affected Builder to correct such Alleged Defect; (iii) a certification from an engineer licensed in the State of Arizona, confirming its opinion of the existence of such Alleged Defect and a resume of such engineer; (iv) the estimated cost to repair such Alleged Defect; (v) the name and professional background of the attorney retained by the Association to pursue the claim against the Builder and a description of the relationship between such attorney and member(s) of the Board of Directors, if any; (vi) a thorough description of the fee arrangement or proposed fee arrangement between such attorney and the Association; (vii) the estimated attorneys' fees and expert fees and

costs necessary to pursue the claim against Builder(s) and the source of the funds which will be used to pay such fees and expenses; (viii) the estimated time necessary to conclude the action against Builder; and (ix) an affirmative statement from the Board of Directors that the action is in the best interests of the Association and its Members. In the event the Association recovers any funds from Declarant(s) (or any other Person) to repair an Alleged Defect, any excess funds remaining after repair of such Alleged Defect shall be paid into the Association's reserve fund.

12.6.3 Governing Procedures. The arbitration shall be conducted in accordance with the AAA Rules and A.R.S. Section 12-1501 *et. seq.* In the event of a conflict between the AAA Rules and this Section, the provisions of this Section shall govern.

12.6.4 Appointment of Arbitrator. The parties shall appoint a single Arbitrator by mutual agreement. If the parties have not agreed within ten (10) days of the date of the Notice of Intention to Arbitrate on the selection of an arbitrator willing to serve, the AAA shall appoint a qualified Arbitrator to serve. Any arbitrator chosen in accordance with this Subsection is referred to in this Section as the "Arbitrator".

12.6.5 Qualifications of Arbitrator. The Arbitrator shall be neutral and impartial. The Arbitrator shall be fully active in such Arbitrator's occupation or profession, knowledgeable as to the subject matter involved in the dispute and experienced in arbitration proceedings. The foregoing shall not preclude otherwise qualified retired lawyers or judges.

12.6.6 Disclosure. Any candidate for the role of Arbitrator shall promptly disclose to the parties all actual or perceived conflicts of interest involving the dispute or the parties. No Arbitrator may serve if such person has a conflict of interest involving the subject matter of the dispute or the parties. If an Arbitrator resigns or becomes unwilling to continue to serve as an Arbitrator, a replacement shall be selected in accordance with the procedure set forth in Subsection 12.6.4 above.

12.6.7 Compensation. The Arbitrator shall be fully compensated for all time spent in connection with the arbitration proceedings in accordance with the Arbitrator's hourly rate, unless otherwise agreed to by the parties, for all time spent by the Arbitrator in connection with the arbitration proceeding. Pending the final award, the Arbitrator's compensation and expenses shall be advanced equally by the parties.

12.6.8 Preliminary Hearing. Within thirty (30) days after the Arbitrator has been appointed, a preliminary hearing among the Arbitrator and counsel for the parties shall be held for the purpose of developing a plan for the management of the arbitration, which shall then be memorialized in an appropriate order. The matters which may be addressed include, in addition to those set forth in the AAA Guidelines, the following: (i) definition of issues; (ii) scope, timing and types of discovery, if any; (iii) schedule and place(s) of hearings; (iv) setting of other timetables; (v) submission of motions and briefs; (vi) whether and to what extent expert testimony will be required, whether the Arbitrator should engage one or more neutral experts and whether, if this is done, engagement of experts by the Parties can be obviated or minimized; (vii) whether and to what extent the direct testimony of witnesses will be received by affidavit or written witness statement; and (viii) any other matters which may promote the efficient, expeditious and cost-effective conduct of the proceeding.

12.6.9 Management of the Arbitration. The Arbitrator shall actively manage the proceedings as the Arbitrator deems best so as to make the proceedings expeditious, economical and less burdensome than litigation.

12.6.10 Confidentiality. All papers, documents, briefs, written communication, testimony and transcripts as well as any and all arbitration decisions shall be confidential and not disclosed to anyone other than the Arbitrator, the parties and the parties attorneys and expert witnesses (where applicable to their testimony), except that, upon the prior written consent of all parties, such information may be divulged to additional third parties. All third parties shall agree in writing to keep such information confidential.

12.6.11 Hearings. Hearings may be held at any place within the State of Arizona designated by the Arbitrator and, in the case of particular witnesses not subject to subpoena at the usual hearing site, at a place where such witnesses can be compelled to attend.

12.6.12 Final Award. The Arbitrator shall promptly, within sixty (60) days of the conclusion of the proceedings or such longer period as the parties mutually agree, determine the claims of the parties and render a final award in writing. The Arbitrator may award the prevailing party in the proceeding all or a part of such party's reasonable attorneys' fees and expert witness fees, taking into account the final result of arbitration, the conduct of the parties and their counsel in the course of the arbitration and other relevant factors. The Arbitrator shall have absolutely no ability or authority to award any damages of any kind except for the actual cost to repair any defect for which a Builder is found to be responsible and which such Builder fails to correct. Accordingly, except for the actual damages referred to in the preceding sentence, the Arbitrator shall not award indirect, consequential, special, punitive or other damages. The Arbitrator shall assess the costs of the proceedings (including, without limitation, the fees of the Arbitrator) against the non-prevailing party.

12.6.13 Statute of Limitations. All statutes of limitation applicable to claims which are subject to binding arbitration pursuant to this Section shall apply to the commencement of arbitration proceedings under this Section. If arbitration proceedings are not initiated within the applicable period, the claim shall forever be barred.

12.7 **Approval of Legal Proceedings**. The Association shall not incur attorneys' fees or other legal expenses in connection with any legal proceedings without the written approval of Unit Owners holding more than two-thirds (2/3) of the total votes in the Association, excluding the vote of any Unit Owner who would be a defendant in such proceedings. The Association must finance any such legal proceeding with monies that are specifically collected for same and may not borrow money or use working capital or reserve funds or other monies collected for specific Association obligations other than legal fees. In the event that the Association commences any legal proceedings, all Unit Owners must notify prospective purchasers of the existence of such legal proceedings and must provide such prospective purchasers with a copy of any applicable notice provided by the Association in accordance with Section 12.6.2 of this Declaration. This Section shall not apply to legal proceedings initiated by the Association to collect any unpaid Assessments levied pursuant to this Declaration or to enforce against any Unit Owners (other than Declarant or a Builder) any covenants, conditions, restrictions or easements contained in this Declaration.

12.8 **Repurchase Option for Alleged Defect Claims**. Notwithstanding anything in this Declaration to the contrary, in the event any Unit Owner, either directly or through the Association, shall commence an action against a Builder in connection with any Alleged Defects in such Unit Owner's Unit, the Builder (or any assignee of such Builder) that constructed and/or sold such Unit shall have the option (but not the obligation) to purchase such Unit on the following terms and conditions:

12.8.1 The purchase price shall be an amount equal to the sum of the following less any sums paid to such Unit Owners under any homeowner's warranty in connection with the Alleged Defect:

(i) The purchase price paid to the Builder by the original Unit Owner which purchased the Unit from a Builder;

(ii) The value of any documented Improvements made to the Unit by third-party contractors or decorators that added an ascertainable value to the Unit;

(iii) The Unit Owner's reasonable moving costs; and

(iv) Any reasonable and customary closing costs, including loan fees and/or "points" incurred by the Unit Owner in connection with the purchase of another primary residence within ninety (90) days after the closing of the repurchase provided for herein.

12.8.2 Close of escrow shall not occur later than forty-five (45) days after written notice from Builder to the Unit Owner of Builder's intent to exercise the option herein.

12.8.3 Title to the Unit shall be conveyed to the applicable Builder free and clear of all monetary liens and encumbrances other than non-delinquent real estate taxes.

12.8.4 All closing costs in connection with the repurchase shall be paid by the applicable Builder.

12.8.5 Exercise of the repurchase option as provided hereinabove shall constitute full and final satisfaction of all claims relating to the subject Unit, including claims relating to the Alleged Defect. The Unit Owner (or Association, as applicable) shall promptly execute and deliver any notice of dismissal or other document necessary or appropriate to evidence such satisfaction.

12.9 **As-Built Conditions**. Various engineering and architectural plans pertaining to the Condominium, including, but not limited to, the Plat, subdivision maps, grading plans, plot plans, improvement plans and building plans (collectively, the "Plans"), contain dimensions regarding certain aspects of the Units, Common Elements and other parts and aspects of the Condominium. By accepting a deed to a Unit, each Unit Owner shall be deemed to have acknowledged and agreed that (a) if there is a discrepancy between the Plans and the actual as-built conditions of any Unit, Common Element or any other Improvement within the Condominium, the as-built conditions will control and be deemed to be accepted as-is by the Unit Owner; (b) the usable or buildable area, location and configuration of the Unit, Common Elements and any other Improvements located within the Condominium may deviate from the

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Plans or from any other display or configuration related thereto; (c) the location, size, height and composition of all walls and fences to be constructed on or as part of a Unit or adjacent thereto shall be determined by Builders in their sole and absolute discretion. Despite the Plans or any other materials that may exist, Builders shall be deemed to have made no representations, warranties or assurances with respect to any such matters or with respect to the size, height, location or composition of any wall or fence to be constructed on or adjacent to any Units; and (d) each Unit Owner waives the right to make any demands of or claims against Builders as a result of any discrepancies between the Plans and any actual as-built conditions of any Unit.

12.10 **Limitation on Declarant's and Builders' Liability**. Notwithstanding anything to the contrary herein, it is expressly agreed, and each Unit Owner, by accepting title to a Unit and becoming a Unit Owner, and each other person, by acquiring any interest in the Condominium, acknowledges and agrees, that neither Declarant nor Builders (including, but not limited to, any assignee of the interest of Declarant or a Builder) nor any partner, shareholder, officer, director, employee or affiliate of Declarant or a Builder shall have any personal liability to the Association, or to any Unit Owner, Member or other person, arising under or in connection with this Declaration or resulting from any action or failure to act with respect to this Declaration, the Association or the Committee except, in the case of Declarant and Builders (or their assignees), to the extent of their respective interests in the Condominium; and, in the event of a judgment against any such parties no execution or other action shall be sought or brought thereon against any other assets, nor be a lien upon such other assets, of the judgment debtor. Neither Declarant nor the Association shall be liable for any theft, vandalism, disturbance, accident, unauthorized entrance or other similar occurrence or breach of the peace or security which may occur or take place within the Condominium.

ARTICLE 13
GENERAL

13.1 **Enforcement**. The Association, or any Unit Owner, shall have the right to enforce by any proceeding, at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of the Condominium Documents. Failure by the Association or by any Unit Owner to enforce any covenant or restriction contained in the Condominium Documents shall in no event be deemed a waiver of the right to do so thereafter.

13.2 **Severability**. Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions, which shall remain in full force and effect.

13.3 **Duration**. The covenants and restrictions of this Declaration, as amended from time to time, shall run with and bind the Condominium in perpetuity unless the Condominium is terminated as provided in Section 13.4.

13.4 **Termination of Condominium**. Except in the case of a taking of all the Units by eminent domain, the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated. An

agreement to terminate the Condominium must be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed by the requisite number of Unit Owners.

13.5 **Amendment.**

13.5.1 Except in cases of amendments that may be executed by a Declarant in the exercise of its Development Rights or under A.R.S. Section 33-1220 of the Condominium Act, by the Association under A.R.S. Section 33-1206 or A.R.S. Section 33-1216(D) of the Condominium Act, or by certain Unit Owners under A.R.S. Sections 33-1218(B), 33-1222, 33-1223 or 33-1228(B) of the Condominium Act, the Declaration, including the Condominium Plat, may be amended only by a vote of the Unit Owners to which at least sixty-seven percent (67%) of the votes in the Association are allocated (which must include, in the event the amendment would change provisions of this Declaration or the Condominium Plat relating to the Commercial Unit [as opposed to those relating generally to all Residential Units], the affirmative vote of the Owner(s) holding all votes assigned to the Commercial Unit (including, if applicable, any further Units created by a subdivision of the Commercial Unit).

13.5.2 Except to the extent expressly permitted or required by the Condominium Act, an amendment to the Declaration shall not create or increase Special Declarant Rights, increase the number of Units or change the boundaries of any Unit, the allocated interest of a Unit or the use as to which any Unit is restricted, in the absence of unanimous written consent of all Unit Owners and of Declarant.

13.5.3 An amendment to the Declaration shall not terminate or decrease any unexpired Development Right, Special Declarant Right or Period of Declarant Control unless the Declarant approves the amendment in writing. In addition, any amendment to this Declaration adopted during the Period of Declarant Control must be approved in writing by Declarant, and no amendment to Article 12 shall be effective unless Declarant approves the amendment in writing even if Declarant no longer owns any Unit at the time of such Amendment.

13.5.4 During the Period of Declarant Control, Declarant shall have the right to unilaterally, without the consent of any other Unit Owner, amend the Condominium Plat, the Declaration and any of the other Condominium Documents to (i) comply with the Condominium Act or any other applicable law if the amendment does not adversely affect the rights of any Unit Owner, (ii) correct any error or inconsistency in the Declaration if the amendment does not adversely affect the rights of any Unit Owner or (iii) comply with the rules or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments including, without limitation, the Veterans Administration, the Federal Housing Administration, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

13.5.5 Any amendment adopted by the Unit Owners pursuant to Subsection 13.5.1 of this Declaration shall be signed by the President or Vice President of the Association and shall be Recorded. Any such amendment shall certify that the amendment has been approved as required by this Section. Any amendment made by Declarant pursuant to

Subsection 13.5.4 of this Declaration or the Condominium Act shall be executed by Declarant and shall be Recorded.

13.5.6 Until Declarant no longer owns any portion of the Property, prior written approval by the Declarant is required for any amendment to this Declaration which would impair or diminish the Declarant's rights to complete the development of the Condominium as Declarant deems appropriate or to sell or lease Units therein in accordance with this Declaration. In addition, notwithstanding any other provisions in this Declaration, until such time as Declarant no longer owns any Units, the following actions, before being undertaken by the Association, must first be approved in writing by Declarant: (a) any amendment or action requiring the approval of First Mortgagees pursuant to this Declaration; (b) the annexation to the Condominium of real property; (c) the levy of any assessment for the construction of new facilities not constructed on the Common Elements by Declarant; and (d) any significant reduction of the Association's maintenance of the Common Elements or other services of the Association.

13.5.7 Notwithstanding anything to the contrary in this Section 13.5 or elsewhere in this Declaration, no amendment to this Declaration that would alter any provisions hereof relating to maintenance shall be effective unless and until such amendment receives the written consent of the City Attorney's Office of the City of Tempe.

13.6 **Remedies Cumulative**. Each remedy provided herein is cumulative and not exclusive.

13.7 **Notices**. All notices, demands, statements or other communications required to be given to or served on a Unit Owner under this Declaration shall be in writing and shall be deemed to have been duly given and served if delivered personally or sent by United States mail, postage prepaid, return receipt requested, addressed to the Unit Owner, at the address which the Unit Owner shall designate in writing and file with the Association, or if no such address is designated, at the address of the Unit of such Unit Owner. A Unit Owner may change address on file with the Association for receipt of notices by delivering a written notice of change of address to the Association pursuant to this Section. A notice given by mail, whether regular, certified or registered, shall be deemed to have been received by the Person to whom the notice was addressed on the earlier of the date the notice is actually received or three (3) days after the notice is mailed. If a Unit is owned by more than one person, notice to one of the Unit Owners shall constitute notice to all Unit Owners of the same Unit. Each Unit Owner shall file his correct mailing address with the Association and shall promptly notify the Association in writing of any subsequent change of address.

13.8 **Binding Effect**. By acceptance of a deed or by acquiring any ownership interest in any portion of the Condominium, each Person, for himself, his heirs, personal representatives, successors, transferees and assigns, to all of the provisions, restrictions, covenants, conditions, rules and regulations now or hereafter imposed by the Condominium Documents and any amendments thereof. In addition, each such Person by so doing thereby acknowledges that the Condominium Documents set forth a general scheme for the improvement and development of the real property covered thereby and hereby evidences his interest that all the restrictions, conditions, covenants, rules and regulations contained in the Condominium Documents shall run

with the land and be binding on all subsequent and future Unit Owners, grantees, purchasers, assignees and transferees thereof. Furthermore, each such Person fully understands and acknowledges that the Condominium Documents shall be mutually beneficial, prohibitive and enforceable by the various subsequent and future Unit Owners. Declarant, its successors, assigns and grantees, covenants and agrees that the Units and the membership in the Association and the other rights created by the Condominium Documents shall not be separated or separately conveyed, and each shall be deemed to be conveyed or encumbered with its respective Unit even though the description in the instrument of conveyance or encumbrance may refer only to the Unit.

13.9 **Gender**. The singular, wherever used in this Declaration, shall be construed to mean the plural when applicable and the necessary grammatical changes required to make the provisions of this Declaration apply either to corporations or individuals, or men or women, shall in all cases be assumed as though in each case fully expressed.

13.10 **Topic Headings**. The marginal or topical headings of the sections contained in this Declaration are for convenience only and do not define, limit or construe the contents of the sections or of this Declaration.

13.11 **Survival of Liability**. The termination of membership in the Association shall not relieve or release any such former Unit Owner or Member from any liability or obligation incurred under, or in any way connection with, the Association during the period of such ownership or membership, or impair any rights or remedies which the Association may have against such former Unit Owner or Member arising out of, or in any way connected with, such ownership or membership and the covenants and obligations incident thereto.

13.12 **Construction**. In the event of any discrepancies, inconsistencies or conflicts between the provisions of this Declaration and the Articles, Bylaws or the Association Rules, the provisions of this Declaration shall prevail.

13.13 **Joint and Several Liability**. In the case of joint ownership of a Unit, the liabilities and obligations of each of the joint Unit Owners set forth in or imposed by the Condominium Documents shall be joint and several.

13.14 **Guests and Tenants**. Each Unit Owner shall be responsible for compliance by his agents, tenants, guests, invitees, licensees and their respective servants, agents and employees with the provisions of the Condominium Documents. A Unit Owner's failure to insure compliance by such Person shall be grounds for the same action available to the Association or any other Unit Owner by reason of such Unit Owner's own noncompliance.

13.15 **Attorneys' Fees**. In the event Declarant, the Association or any Unit Owner employs an attorney or attorneys to enforce a lien or to collect any amounts due from a Unit Owner of to enforce compliance with or recover damages for any violation or noncompliance with the Condominium Documents, the prevailing party in any such action shall be entitled to recover from the other party his reasonable attorneys' fees incurred in the action.

13.16 **Number of Days**. In computing the number of days for purposes of any provision of the Condominium Documents, all days shall be counted, including Saturdays,

Sundays and holidays; provided, however, that if the final day of any time period falls on a Saturday, Sunday or holiday, then the next day shall be deemed to be the next day which is not a Saturday, Sunday or holiday.

13.17 **Notice of Violation**. The Association shall have the right to record a written notice of a violation by any Unit Owner of any restriction or provision of the Condominium Documents. The notice shall be executed and acknowledged by an officer of the Association and shall contain substantially the following information: (i) the name of the Unit Owner; (ii) the legal description of the Unit against which the notice is being Recorded; (iii) a brief description of the nature of the violation; (iv) a statement that the notice is being recorded by the Association pursuant to this Declaration; and (v) a statement of the specific steps which must be taken by the Unit Owner to cure the violation. Recordation of a Notice of Violation shall serve as a notice to the Unit Owner and to any subsequent purchaser of the Unit that there is a violation of the provisions of the Condominium Documents. If, after the recordation of such notice, it is determined by the Association that the violation referred to in the notice does not exist or that the actual violation referred to in the notice has been cured, the Association shall record a notice of compliance which shall state the legal description of the Unit against which the Notice of Violation was Recorded and the recording data of the Notice of Violation and shall state that the violation referred to in the Notice of Violation has been cured, or if such be the case, that it did not exist.

13.18 **Declarant's Right to Use Similar Name**. The Association hereby irrevocably consents to the use by any other nonprofit corporation which may be formed or incorporated by Declarant of a corporate name which is the same or deceptively similar to the name of the Association, provided one or more words are added to the name of such other corporation to make the name of the Association distinguishable from the name of such other corporation. Within five (5) days after being requested to do so by Declarant, the Association shall sign such letters, documents or other writings as may be required the Arizona Corporation Commission in order for any other nonprofit corporation formed or incorporated by Declarant to use a corporate name which is the same or deceptively similar to the name of the Association.

13.19 **Development and Special Declarant Rights**. Notwithstanding anything to the contrary within the Condominium Documents, Declarant hereby expressly reserves the right, but not the obligation, to exercise the Development Rights and the Special Declarant Rights.

13.20 **Disclaimer Regarding Gated Entrances**. The Declarant may construct access gates at the entrances to the Condominium in order to limit access and provide more privacy for the Unit Owners and the other residents and occupants of the Units. The access gate shall be part of the Common Elements and shall be maintained, repaired and replaced by the Association. The Association shall have the right, but not the obligation, to provide guard service for the Condominium at such times and upon such terms as are approved by the Board. Each Unit Owner and other resident or occupant of a Unit acknowledges and agrees that neither any access gate nor any guard service that may be provided by the Association guarantees the safety or security of the Unit Owners and other occupants of the Condominium or their guests or guarantees that no unauthorized person will gain access to the Condominium. Each Unit Owner and resident, for themselves and their families, invitees and licensees, acknowledge that the gated entrances may restrict or delay entry into the Condominium by the police, fire department,

ambulances and other emergency vehicles or personnel. Each Unit Owner and resident, for itself and its families, invitees and licensees, agrees to assume the risk that the gated entrances will restrict or delay entry to the Condominium by emergency vehicles and personnel. Neither the Declarant Parties, the Association nor any director, officer, agent or employee of the Association shall be liable to any Unit Owner, resident or its family, invitees or licensees for any claims or damages resulting, directly or indirectly, from the construction, existence or maintenance of the gated entrances. Each Unit Owner and resident hereby releases the Declarant Parties and the Association from any and all claims, actions, suits, demands, causes of action, losses, damages or liabilities related to or arising in connection with any nuisance, inconvenience, disturbance, injury or damage resulting from the gated entrances.

13.21 **Required Consent of Unit Owners for Legal Action**. Notwithstanding anything to the contrary contained in this Declaration, any action or claim instituted by the Association against any one or more of the Declarant Parties, relating to or arising out of the Condominium, the Declaration or any other Condominium Documents, the use or condition of the Condominium or the design or construction of or any condition on or affecting the Condominium, including, but not limited to, construction defects, surveys, soils conditions, grading, specifications, installation of Improvements (including, but not limited to, Units) or disputes which allege negligence or other tortious conduct, breach of contract or breach of implied or express warranties as to the condition of the Condominium or any Improvements, shall have first been approved by Unit Owners representing seventy-five percent (75%) of the votes in the Association who are voting in person or by proxy at a meeting duly called for such purpose.

13.21.1 Notice to Unit Owners.

(i) Prior to obtaining the consent of the Unit Owners in accordance with Section 13.23 the Association must provide written notice to all Unit Owners which notice shall (at a minimum) include (1) a description of the nature of any action or claim (the "Claim"), (2) a description of the attempts of the Declarant to correct such Claim and the opportunities provided to the Declarant to correct such Claim, (3) a certification from an engineer licensed in the State of Arizona that such Claim is valid along with a description of the scope of work necessary to cure such Claim and a resume of such engineer, (4) the estimated cost to repair such Claim, (5) the name and professional background of the attorney proposed to be retained by the Association to pursue the Claim against the Declarant and a description of the relationship between such attorney and member(s) of the Board (if any), (6) a description of the fee arrangement between such attorney and the Association, (7) the estimated attorneys' fees and expert fees and costs necessary to pursue the Claim against the Declarant and the source of the funds which will be used to pay such fees and expenses, (8) the estimated time necessary to conclude the action against the Declarant, and (9) an affirmative statement from the Board that it has determined that the action is in the best interest of the Association and its Members.

(ii) In the event the Association recovers any funds from the Declarant (or any other person or entity) to repair a Claim, any excess funds remaining after repair of such Claim shall be paid into the Association's reserve fund.

13.21.2 Notification to Prospective Purchasers. In the event that the Association commences any action or claim, all Unit Owners must notify prospective purchasers of such action or claim and must provide such prospective purchasers with a copy of the notice received from the Association in accordance with Subsection 13.22.1.

13.22 **Effect of Declaration**. The Declarant makes no warranties or representations, express or implied, as to the binding effect or enforceability of all or any portion of this Declaration, or as to the compliance of any of these provisions with public laws, ordinances and regulations applicable thereto.

13.23 **No Representations or Warranties**. No representations or warranties of any kind, express or implied, have been given or made by the Declarant or its agents, consultants or employees in connection with the Condominium, or any portion thereof, its physical condition, zoning, compliance with applicable laws, fitness for intended use, or in connection with the subdivision, sale, operation, maintenance, costs of maintenance, taxes or regulation thereof, except as specifically and expressly set forth in this Declaration.

13.24 **Right to Configure Project**. To the extent permitted by law, the Declarant shall have the right, at any time, to change the design, size and configuration, or make any other changes as it deems appropriate, of the Condominium. There is no guarantee that the Condominium will be developed as originally planned.

13.25 **Indemnification**. The Association will indemnify each and every officer and director of the Association and each and every member of any committee appointed by the Board (including, for purposes of this Section 13.27, former officers and directors of the Association and former members of committees appointed by the Board) (collectively, "Association Officials" and individually an "Association Official") against any and all expenses, including attorneys' fees, reasonably incurred by or imposed upon an Association Official in connection with any action, suit or other proceeding (including settlement of any suit or proceeding, if approved by the Board serving at the time of such settlement) to which he or she may be a party by reason of being or having been an Association Official, except for his or her own individual willful misfeasance, malfeasance, misconduct or bad faith. No Association Official will have any personal liability with respect to any contract or other commitment made by them or action taken by them, in good faith, on behalf of the Association (except indirectly to the extent that such Association Official may also be a Member of the Association and therefore subject to Assessments hereunder to fund a liability of the Association), and the Association will indemnify and forever hold each such Association Official free and harmless from and against any and all liability to others on account of any such contract, commitment or action. Any right to indemnification provided for herein is not exclusive of any other rights to which any Association Official may be entitled. If the Board deems it appropriate, in its sole discretion, the Association may advance funds to or for the benefit of any Association Official who may be entitled to indemnification hereunder to enable such Association Official to meet on-going costs and expenses of defending himself or herself in any action or proceeding brought against such Association Official by reason of his or her being, or having been, an Association Official. In the event it is ultimately determined that an Association Official to whom, or for whose benefit, funds were advanced pursuant to the preceding sentence does not qualify for indemnification pursuant to this Section 13.27 or otherwise under the Articles, Bylaws, Rules or applicable law,

such Association Official must promptly upon demand repay to the Association the total of such funds advanced by the Association to him or her, or for his or her benefit, with interest (should the Board so elect) at a rate not to exceed ten percent (10%) per annum from the date(s) advanced until paid.

13.26 **No Partition**. No Person acquiring any interest in the Property or any part thereof will have a right to, nor may any person seek, any judicial partition of the Common Elements, nor will any Unit Owner sell, convey, transfer, assign, hypothecate or otherwise alienate all or any of such Unit Owner's interest in the Common Elements or any funds or other assets of the Association except in connection with the sale, conveyance or hypothecation of such Unit Owner's Unit (and only appurtenant thereto), or except as otherwise expressly permitted herein. This Section must not be construed to prohibit the Board from acquiring and disposing of tangible personal property nor from acquiring or disposing of title to real property which may or may not be subject to this Declaration.

13.27 **References to this Declaration in Deeds**. Deeds to and instruments affecting any Unit or any other part of the Condominium may contain the covenants, conditions and restrictions herein set forth by reference to this Declaration, but whether or not any such reference is made in any deed or instrument, each and all of the provisions of this Declaration are and will be binding upon the grantee-Unit Owner or other Person claiming through any instrument and his, her or its heirs, executors, administrators, successors and assigns.

13.28 **Laws, Ordinances and Regulations**.

13.28.1 The covenants, conditions and restrictions set forth in this Declaration and the provisions requiring Unit Owners and other Persons to obtain the approval of the Board or any committee appointed by the Board with respect to certain actions are independent of the obligation of the Owners and other Persons to comply with all applicable laws, ordinances and regulations, and compliance with this Declaration will not relieve a Unit Owner or any other Person from the obligation also to comply with all applicable laws, ordinances and regulations.

13.28.2 Any violation of any state, municipal or local law, ordinance or regulation pertaining to the ownership, occupation or use of any property within the Condominium is hereby declared to be in violation of this Declaration and subject to any or all of the enforcement proceedings set forth herein.

13.28.3 If and to the extent applicable Arizona law requires or mandates specific procedures for the enforcement, interpretation or application of this Declaration, that conflict with provisions in this Declaration, such mandated or required procedures shall be followed and this Declaration shall be deemed modified or amended in such regard, but to the minimum extent reasonably necessary to give effect to such required or mandated procedure.

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IN WITNESS WHEREOF, Declarant has executed this Declaration on the day and year first written above.

DORSEY PLACE CONDOMINIUMS, L.L.C.,
an Arizona limited liability company

By: Gardner Capital Partners, L.P., an Arizona limited partnership, a Member

By: Gardner Financial Corporation, an Arizona corporation,
its General Partner

Douglas D. Gardner
President

By: ACHEN CAPITAL PARTNERS, L.P., an Arizona limited partnership, a Member

By: Achen Financial Corporation, its General Partner

Sanders T. Achen
President

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STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 14th day of May, 2007, by Douglas D. Gardner, President of Gardner Financial Corporation, an Arizona corporation, the general partner of Gardner Capital Partners, L.P., an Arizona limited partnership, a Member of Dorsey Place Condominiums, L.L.C., an Arizona limited liability company, as duly authorized, for and on behalf of the company.

Notary Public

My Commission Expires:
May 7, 2009

OFFICIAL SEAL
KERRY RODERICK
NOTARY PUBLIC – ARIZONA
MARICOPA COUNTY
My Comm. Expires May 7, 2009

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 14th day of May, 2007, by Sanders T. Achen, President of Achen Financial Corporation, an Arizona corporation, the general partner of Achen Capital Partners, L.P., an Arizona limited partnership, a Member of Dorsey Place Condominiums, L.L.C. as a Member of Dorsey Place Condominiums, L.L.C., an Arizona limited liability company, as duly authorized, for and on behalf of the company.

Notary Public

My Commission Expires:
May 7, 2009

OFFICIAL SEAL
KERRY RODERICK
NOTARY PUBLIC – ARIZONA
MARICOPA COUNTY
My Comm. Expires May 7, 2009

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APPROVED AS TO FORM:

CITY ATTORNEY FOR CITY OF TEMPE, ARIZONA

By: _____
Name: CYNTHIA Y. McCOY
Title: ASSIT CITY ATTORNEY

DEVELOPMENT SERVICES MANAGER FOR THE CITY OF TEMPE

By: _____
Name: CHRISTOPHER J. ANAKAOAN
Title: DEVELOPMENT SERVICES MANAGER

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[SIGNATURE PAGE APPROVING AS TO FORM]

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EXHIBIT "A"

Legal Description of the Property Submitted to Condominium

THAT PART OF THE NORTHWEST QUARTER OF SECTION 23, TOWNSHIP 1 NORTH, RANGE 4 EAST, OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTH QUARTER CORNER OF SECTION 23;

THENCE NORTH 89' 54` 28" WEST ALONG THE NORTH LINE OF SAID NORTHWEST QUARTER, A DISTANCE OF 52.93 FEET; THENCE SOUTH 0' 05` 32" WEST, A DISTANCE OF 55.00 FEET TO THE SOUTH RIGHT OF WAY LINE OF UNIVERSITY DRIVE AND THE POINT OF BEGINNING;

THENCE SOUTH 45' 56` 37" EAST, A DISTANCE OF 28.28 FEET TO A POINT ON THE WEST RIGHT OF WAY OF DORSEY LANE;

THENCE SOUTH 00' 01` 53" WEST, A DISTANCE OF 230.02 FEET;

THENCE NORTH 89' 54` 28" WEST; A DISTANCE OF 342.25 FEET;

THENCE NORTH 00' 05` 32" EAST, A DISTANCE OF 250.00 FEET TO SAID SOUTH RIGHT OF WAY LINE OF UNIVERSITY DRIVE;

THENCE SOUTH 89' 54` 28" EAST, A DISTANCE OF 322.00 FEET TO THE POINT OF BEGINNING.

ADDENDUM:
Examples of condominium declarations with similar statements purporting to grant statutory rights to condominium associations

Condominium	Text
Edison Midtown Maricopa County Recorder No. 20150906439	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary to effectuate the objectives and purposes of the Association as set forth in this Declaration and in the Condominium Act." [APP126]
Orpheum Lofts Maricopa County Recorder No. 20021080763	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP128]
Regatta Point Maricopa County Recorder No. 20000921821	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP130]
Esplanade Place Maricopa County Recorder No. 20010143899	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP132]
Biltmore Square Maricopa County Recorder No. 2005-0795411	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP134]
Verde Park Maricopa County Recorder No. 20190377363	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP137]

3rd Avenue Palms Maricopa County Recorder No. 20051708788	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP140]
Desert Breeze Maricopa County Recorder No. 2005-1687475	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP142]
Morning Sun Condominium Yavapai County Recorder No. 8818779	§ 6.0: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP144]
Moon Valley Pinal County Recorder No. 2006-111648	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP146]
The Views at Butler Coconino County Recorder No. 3925269	§ 5.1: "The Association shall be organized as a nonprofit Arizona corporation vested with the rights, powers and duties prescribed by law and set forth in the Condominium Documents and Condominium Act together with such rights, powers, and duties as may be implied and reasonably necessary to effectuate the same, including but not limited to including the management and maintenance of the Common Elements." [APP148]
Ocotillo Business Center Condo Mohave County Recorder No. 2004052717	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP150]

CK Cabins Condominium Apache County Recorder No. 2016-005571	§ 9.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP152]
Casa Blanca Condos, Phase 1 Graham County Recorder No. 2008-05236	§ 6.0: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP154]
Insight/Out Living Condominiums La Paz County Recorder No. 2008-00602	§ 6.0: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP156]
Stone Curves Condominium Pima County Recorder No. 20031520156	§ 6.1: "The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act." [APP158]

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WHEN RECORDED, RETURN TO:

Jason F. Wood, Esq.
Titus Brueckner & Levine PLC
8355 E. Hartford Drive, Suite 200
Scottsdale, AZ 85255

DECLARATION OF CONDOMINIUM AND

COVENANTS, CONDITIONS, AND RESTRICTIONS

FOR

EDISON MIDTOWN CONDOMINIUMS

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and thereafter the Board of Directors.

(G) In the event any party wall encroaches upon a Unit, a valid easement for such encroachment and for the maintenance of the party wall shall and does exist in favor of the Owners of the Units which share such party wall.

ARTICLE 6

THE ASSOCIATION; RIGHTS AND DUTIES; MEMBERSHIP

6.0 Existence, Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary to effectuate the objectives and purposes of the Association as set forth in this Declaration and in the Condominium Act. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board of Directors. Notwithstanding anything herein to the contrary, so long as the Declarant owns any Unit, the prior written consent of the Declarant shall be required to any decision by the Association to establish self-management when professional management previously had been in place. The Association has the specific duty to make available to Declarant, Eligible Mortgage Holders, Unit Owners, and Eligible Insurers or Guarantors of any First Mortgage during normal business hours, current copies of the Condominium Documents and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for copying and administrative expense.

(A) The Association, as the agent and representative of the Unit Owners, shall have the right, but not the obligation, to enforce the provisions of this Declaration. Further, Declarant or any other Unit Owner, so long as Declarant or such other Unit Owner owns property within the Condominium, shall have the right and authority, but not the obligation, to enforce the provisions of this Declaration.

(B) Subject to the restrictions and limitations contained herein, or in the Articles, the Bylaws, and the laws of the State of Arizona, the Association may enter into contracts or other transactions with other parties, including Declarant or its affiliated companies. Such contracts or other transactions shall not be void or voidable because one or more directors or officers of the Association are employed by, have a financial interest in or are otherwise affiliated with such other parties, including Declarant or its affiliates (even if such officer(s) or director(s) is present and/or votes at the meeting of the Board of Directors or committee which authorizes the contract or transaction), if (i) the fact of such interest has been previously disclosed or made known to the other members of the Board of Directors or the committee acting upon such contract or transaction, and

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WHEN RECORDED, RETURN TO:

Donald E. Dyekman, Esq.
Mariscal, Weeks, McIntyre & Friedlander, P.A.
2901 North Central Avenue
Suite 200
Phoenix, Arizona 85012

1/(050007770

CONDOMINIUM DECLARATION

FOR

ORPHEUM LOFTS,
a condominium

Declaration as a Limited Common Element shall be maintained, repaired and replaced by the Owner of the Unit served.

ARTICLE 6

THE ASSOCIATION

6.1 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the affirmative vote of Unit Owners holding more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, the Board of Directors may act in all instances on behalf of the Association.

6.2 Directors and Officers. During the Period of Declarant Control, Declarant shall have the right to appoint and remove the m the Board of Directors and the officers of the Association who do not have to be Unit Owners. Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors which must consist of at least five (5) members, all of whom must be Unit Owners. For purposes of election the Board of Directors by the Members, the Units will be divided into two classes with one class consisting of the Residential Units and the other class consisting of the Commercial Units. The Owners of the Residential Units shall elect three (3) directors, and the Owners of the Commercial Units shall elect two (2) directors. The Board of Directors elected by the Unit Owners shall elect the officers of the Association. Declarant may voluntarily surrender the right to appoint and remove the members of the Board of Directors and the officers of the Association before termination of the Period of Declarant Control, and in that event Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board of Directors, as described in a Recorded instrument executed by Declarant, be approved by Declarant before they become effective.

6.3 Rules. The Board of Directors, from time to time and subject to the provisions of this Declaration and the Condominium Act, may adopt, amend, and repeal rules and regulations. The Rules may, among other things, restrict and govern the use of the Units and the Common Elements.

6.4 Identity of Members. Each Unit Owner shall be a member of the Association. The membership of the Association at all times shall consist exclusively of the Unit Owners. Membership in the Association shall be mandatory. An Owner shall automatically, upon

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WHEN RECORDED, RETURN TO:
LAWYERS TITLE OF ARIZONA, INC.
Picerne-Rio Salado, LLC
Attn: Laurie Dryden
1420 East Missouri, Suite 100
Phoenix, AZ 85014
604795 - RLC DO/

CONDOMINIUM DECLARATION

FOR

REGATTA POINTE CONDOMINIUMS

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5.6 Cooperation of Association. If Developer, or its successors and assigns, brings any action before the Arizona Registrar of Contractors against a contractor or subcontractor performing work within the Condominium or Areas of Association Responsibility, the Association and any affected Owner of a Unit shall cooperate in such action including, but not limited to, providing access to the Condominium, Areas of Association Responsibility, a Unit, or Association books and records.

ARTICLE 6
THE ASSOCIATION; RIGHTS AND DUTIES, MEMBERSHIP

6.1 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Owners representing more than fifty percent (50%) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board. Notwithstanding anything herein to the contrary, so long as Declarant owns any Unit, the prior written consent of Declarant shall be required to any decision by the Association to establish self-management when professional management previously had been in place. The Association has the specific duty to make available, during normal business hours, to Declarant, Eligible Mortgage Holders, Owners, and Eligible Insurers or Guarantors, current copies of the Declaration, Bylaws, Articles, Rules and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for copying expenses.

6.2 Directors and Officers.

6.2.1 During the Period of Declarant Control, Declarant shall have the right to appoint and remove the members of the Board of Directors, officers of the Association, and members of the Architectural Committee who do not have to be Owners.

6.2.2 Upon the termination of the Period of Declarant Control, the Owners shall elect the Board of Directors which must consist of at least three (3) members, at least a majority of whom must be Owners. The Board of Directors elected by the Owners shall then elect the officers of the Association. In addition, at any time prior to or upon termination of the Period of Declarant Control, Declarant shall have the right to appoint the members of a transition committee consisting of unaffiliated Owners. The transition committee shall represent the Owners and shall have the authority to negotiate a binding transition agreement with Declarant.

6.2.3 Declarant may voluntarily surrender its right to appoint and remove the

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WHEN RECORDED, RETURN TO:

LAWYERS TITLE OF ARIZONA, INC.

Donald E. Dyekman, Esq.
Dyekman, Curtis & Cohen, P.L.C.
6750 E. Camelback Road
Suite 104
Scottsdale, Arizona 85251

605326 Dej

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Jo

AMENDED AND RESTATED

CONDOMINIUM DECLARATION

FOR

ESPLANADE PLACE,
a condominium

Go to Previous View

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All pipes, heads and other parts of the sprinkler system (whether located within or outside of the Unit) shall be part of the Common Elements and shall be maintained, repaired and replaced by the Association. If a Unit Owner, Lessee or Occupant of a Unit or their Invitees causes the sprinkler system to be activated (except in the case of a fire) or damages or destroys any part of the sprinkler system, the Unit Owner shall be responsible for the cost of any repairs to the sprinkler system made by the Association and for all other losses or damages resulting from such actions.

ARTICLE 6

THE ASSOCIATION

6.1 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the affirmative vote of Unit Owners holding more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, the Board of Directors may act in all instances on behalf of the Association. The Association is the Owner of the Parcel for the purposes of the Camelback Esplanade Declaration, and only the Association and not any Unit Owner may act as the Owner for the purposes of the Camelback Esplanade Association.

6.2 Directors and Officers.

6.2.1 During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the Association who do not have to be Unit Owners. Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors which must consist of at least three members, all of whom must be Unit Owners. The Board of Directors elected by the Unit Owners shall then elect the officers of the Association.

6.2.2 The Declarant may voluntarily surrender the right to appoint and remove the members of the Board of Directors and the officers of the Association before termination of the Period of Declarant Control, and in that event the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board of Directors, as described in a Recorded instrument executed by the Declarant, be approved by the Declarant before they become effective.

~~Held~~ for p/u

When recorded ~~mail~~ to:

Name: Warner Angle

Address: 3550 N Central Ave. #1500

City/State/Zip: Phoenix, AZ 85012

M

2005-0795411 06/13/05 15:02

1 OF 1

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this area reserved for county recorder

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DECLARATION OF CONDOMINIUM AND COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT OF EASEMENTS

FOR

BILTMORE SQUARE CONDOMINIUMS, a condominium

June 9, 2005

DISCLOSURE: THIS DECLARATION AND THE PROJECT DOCUMENTS DESCRIBED IN THIS DECLARATION CONTAIN ALTERNATIVE DISPUTE RESOLUTION PROCEDURES THAT ARE APPLICABLE TO CLAIMS AND DISPUTES ARISING OUT OF OR UNDER THE DECLARATION AND OTHER PROJECT DOCUMENTS. THESE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES ARE CONTAINED IN ARTICLE XII OF THE DECLARATION AND IN THE BYLAWS OF THE ASSOCIATION (WHICH ARE PART OF THE PROJECT DOCUMENTS).

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5.7 General Standards. Except as may be otherwise provided in this Declaration or the other Condominium Documents, each respective Unit Owner shall maintain the areas they are respectively responsible for at a level of general maintenance at least equal to that prevailing with respect to areas of a similar nature located in residential and commercial communities commonly and generally deemed to be of the same quality as the Condominium.

5.8 Utilities. Utility costs that are metered collectively for the Common Elements and paid by the Association shall be a Common Expense. Electricity for individual Units will be metered separately to each Unit and will be the responsibility of the respective Unit Owners for payment. Utilities that are utilized by individual Units, but not separately metered, shall be a Common Expense.

ARTICLE 6
THE ASSOCIATION

6.1 Rights, Powers and Duties of the Association. No later than the date that the first Unit is conveyed to an individual Purchaser for use as a condominium (as distinguished from sales of all or substantially all of the Project), the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the affirmative vote of Unit Owners holding more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents, or the Condominium Act, specifically require a vote of the Members, the Board of Directors may act in all instances on behalf of the Association, including but not limited to the following:

6.1.1 Common Elements. Maintain and otherwise manage the Common Elements and all other real and personal property that may be acquired by the Association;

6.1.2 Legal and Accounting Services. Obtain legal, accounting, and other services deemed by the Board of Directors, in its discretion, to be necessary or desirable in the operation of the Association and the Common Elements;

6.1.3 Easements. Subject to the limitations, if any, imposed by the Condominium Documents, grant easements where necessary for utilities, sewer facilities, and CATV on, under, over, through, upon, or across the Common Elements to serve the Common Elements or any Unit;

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When recorded return to:
Margaret L. Steiner
Lane & Nach, P.C.
2001 East Campbell Avenue
Suite 103
Phoenix, Arizona 85016

CONDOMINIUM DECLARATION
FOR
RESIDENCY AT VERDE PARK CONDOMINIUMS

any such maintenance, repair or replacement shall be assessed against the nonperforming unit Owner pursuant to Section 7.4.D hereof.

5.5 Sewer Lines. As used in this Section, the term "**Sewer Facilities**" means all sewer lines and appurtenant facilities within the boundaries of the Condominium, except for: (a) any sewer lines and appurtenant facilities which serve only one Unit and which are located within the boundaries of the Unit or are part of the Common Elements but are allocated to the Unit by this Declaration as a Limited Common Element; and (b) any sewer lines and appurtenant facilities which have been accepted by and are the responsibility of a governmental or private sewer company. The Association shall be responsible for the operation, maintenance, repair and replacement of the Sewer Facilities in compliance with all applicable federal, state and local laws, ordinances and regulations. If the Sewer Facilities have a design flow or more than ten thousand (10,000) gallons per day, then the Association shall operate and maintain the Sewer Facilities in accordance with the operation and maintenance plan for the Sewer Facilities approved by the Maricopa County Environmental Services department in connection with the approval and installation of the Sewer Facilities. The Association will advise any utility company or other entity to which the Association gives permission to make additional improvements to the Condominium that the services which are available under Arizona law to located and mark underground utility lines and facilities within dedicated public rights-of-way are not available to located the Sewer Facilities, and, therefore, a private person or entity will need to be employed for such purpose. Sewer lines and appurtenant facilities which serve only (1) Unit and which are located within the boundary of a Unit or which are part of the Common Elements but are allocated to the Unit by this Declaration as a Limited Common Element shall be maintained, repaired and replaced by the Owner of the Unit served.

5.6 Utilities. The Association shall acquire and pay for the following: (A) water and sewer, for the Units and the Common Elements; (B) electrical service, and refuse and rubbish collection for the Common Elements, and (C) if the Association installs electrical charging stations in the Parking Spaces, the electric service for such charging stations. Each Unit Owner shall be responsible for electrical service for such Owner's Unit, and for obtaining any telephone, cable television or internet service (including individual hookup charges for any master service provided by the Association) that such Owner may desire, and the costs of any such services shall be the responsibility of the Unit Owner.

ARTICLE 6
ASSOCIATION

6.1 Rights, Powers and Duties of the Association. No later than the date on which the first (1st) Unit is conveyed to a Purchaser, the Association shall be incorporated as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to

effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act, including, without limitation, the following: (A) commence and maintain actions or restrain and enjoin any actual or threatened breach of this Declaration and enforce, by mandatory injunction or otherwise, all of the provisions of this Declaration; (B) pay taxes, capital improvement assessments or special assessments and other liabilities which are or would become a lien on any portion of the Condominium owned or maintained by the Association; (C) levy Assessments and perfect and enforce liens as hereinafter provided; (D) enter into contracts including, but not limited to, management contracts; (E) perform the duties set forth herein, including but not limited to, maintenance and repair of the Common Elements and the obtaining of insurance; and (F) adopt, amend and repeal Rules as it deems reasonable. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the affirmative vote of Unit Owners holding more than sixty-seven percent (67%) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, the Board of Directors may act in all instances on behalf of the Association.

6.2 Directors and Officers. During the Period of Declarant Control, Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the Association, none of whom are required to be Unit Owners. Upon the termination of the Period of Declarant Control, the Members shall elect the Board of Directors which shall consist of three (3) Members, all of whom must be Unit Owners. The Board of Directors elected by the Members shall elect the officers of the Association. Declarant may voluntarily surrender the right to appoint and remove the members of the Board of Directors and the officers of the Association prior to termination of the Period of Declarant Control, and in that event Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board of Directors, as described in a Recorded instrument executed by Declarant, be approved by Declarant before they become effective.

6.3 Membership. Each Owner shall be a member of the Association. Such membership shall automatically terminate when an Owner ceases for any reason to be an Owner, and such Owner's successor-in-interest shall likewise automatically succeed to such membership in the Association. No Owner shall transfer membership in the Association, except upon the sale or conveyance of the Unit to which it is appurtenant. Any attempt to make a prohibited transfer of a membership will be void and will not be recognized by or reflected upon the books and records of the Association.

6.4 Personal Liability. No member of the Board of Directors, or any officer of the Association, or any Manager, or Declarant, or any agent of Declarant, shall be personally liable to any Owner, or to any other party, including the Association, for any damage, loss or prejudice suffered or claimed on account of any act, omission, error or negligence of any such person or entity if such person or entity has, on the basis of such information as may be possessed by him or it, acted in good faith without willful or intentional misconduct.

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The Talon Group

FIRST AMERICAN TITLE

When recorded mail to:

The Talon Group
3200 E. Camelback Rd., #200
Phoenix, Arizona 85018
Attn: Angela Wellman
4592764

RE- RECORDING
OF

DECLARATION OF CONDOMINIUM AND COVENANTS, CONDITIONS AND RESRICTIONS AND GRANT OF EASEMENTS
FOR
3RD AVENUE PALMS CONDOMINIUMS,
A CONDOMINIUM

This document is being re-recorded for the sole purpose of deleting previous Exhibit "B" and adding correct Exhibit "B".

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6.1 Rights, Powers and Duties of the Association. No later than the date that the first Unit is conveyed to an individual Purchaser for use as a condominium (as distinguished from sales of all or substantially all of the Project), the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the affirmative vote of Unit Owners holding more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents, or the Condominium Act, specifically require a vote of the Members, the Board of Directors may act in all instances on behalf of the Association, including but not limited to the following:

6.1.1 Common Elements. Maintain and otherwise manage the Common Elements and all other real and personal property that may be acquired by the Association;

6.1.2 Legal and Accounting Services. Obtain legal, accounting, and other services deemed by the Board of Directors, in its discretion, to be necessary or desirable in the operation of the Association and the Common Elements;

6.1.3 Easements. Subject to the limitations, if any, imposed by the Condominium Documents, grant easements where necessary for utilities, sewer facilities, and CATV on, under, over, through, upon, or across the Common Elements to serve the Common Elements or any Unit;

6.1.4 Employment of Managers. Employ affiliated or third-party managers or other persons and contract with independent contractors or managing agents to perform all or any part of the duties and responsibilities of the Association;

6.1.5 Purchase Insurance. Purchase insurance for the Common Elements for risks, with companies, and in amounts as required by this Declaration and/or applicable law or otherwise as the Board of Directors determines to be necessary, desirable, or beneficial;

6.1.6 Other. Perform other acts authorized expressly or by implication under this Declaration and the other Condominium Documents including, without limitation, the right to construct improvements on the Units and Common Elements; and

6.1.7 Enforcement. Enforce the provisions of this Declaration and the other Condominium Documents by all legal means, including, without limitation, the expenditure of funds of the Association, the employment of legal counsel, the

WHEN RECORDED, RETURN TO:

D. Randall Stokes
Lewis and Roca LLP
40 North Central Avenue
Phoenix, AZ 85004-4429

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CONDOMINIUM DECLARATION

FOR

DESERT BREEZE, A CONDOMINIUM

Go to Previous View

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ARTICLE 6

THE ASSOCIATION; RIGHTS AND DUTIES, MEMBERSHIP

6.1 **Rights, Powers and Duties of the Association**. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board. Notwithstanding anything herein to the contrary, so long as the Declarant owns any Unit, the prior written consent of the Declarant shall be required to any decision by the Association to establish self-management when professional management previously had been in place. The Association has the specific duty to make available to the Declarant, Eligible Mortgage Holders, Unit Owners, and Eligible Insurers or Guarantors, current copies of the Declaration, Bylaws, Articles, Rules and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for reasonable copying expenses.

6.2 **Directors and Officers**.

6.2.1 During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board and the officers of the Association, who do not have to be Unit Owners.

6.2.2 Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board which must consist of at least three members, all of whom must be Unit Owners. The Board elected by the Unit Owners shall then elect the officers of the Association.

6.2.3 The Declarant may, by a specific written instrument delivered to the Board, voluntarily surrender his right to appoint and remove the members of the Board and the officers of the Association before termination of the Period of Declarant Control, and in that event the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board, as described in a recorded instrument executed by the Declarant, be approved by the Declarant before they become effective.

6.3 **Rules**. The Board, from time to time and subject to the provisions of this Declaration and the Condominium Act, may adopt, amend, and repeal rules and regulations. The Rules may, among other things, restrict and govern the use of any area by any Unit Owner, by the family of such Unit Owner, or by any invitee, licensee or lessee of such Unit Owner; provided, however, that the Rules may not unreasonably discriminate among Unit Owners and shall not be inconsistent with the Condominium Act, this Declaration, the Articles or Bylaws. A copy of the Rules as they may from time to time be adopted, amended or repealed, shall be mailed or otherwise delivered to each Unit Owner and may be recorded.

6.4 **Composition of Members**. Each Unit Owner shall be a Member of the Association. The membership of the Association at all times shall consist exclusively of all the Unit Owners. A Unit Owner (including the Declarant) of a Unit shall automatically, upon becoming the Unit Owner thereof, be a Member of the Association and shall remain a Member of the Association until such time as such Unit Owner's ownership ceases for any reason, at which time such Unit Owner's membership in the Association shall automatically cease.

WHEN RECORDED RETURN TO:

Donald E. Dyekman
One East Camelback Road
Suite 1100
Phoenix, Arizona 85012-1656

5338

$49	1 ✓ P	4 ✓ Co	5 St
Bk	Map		Pcl

CONDOMINIUM DECLARATION

FOR

MORNING SUN CONDOMINIUM

INSTRUMENT # 8818779
OFFICIAL RECORDS OF
YAVAPAI COUNTY
PATSY C. JENNEY
REQUEST OF:
ROBERT HALL
DATE: 05/26/88 TIME: 10:30
FEE: 49.00
BOOK 2046 PAGE 932 PAGES: 049

BOOK 2046 PAGE 932

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obligation, to perform the required maintenance, repair or replacement. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to Section 7.1(E) of this Declaration.

ARTICLE 6

THE ASSOCIATION; RIGHTS AND DUTIES, MEMBERSHIP

6.0. Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than fifty percent (50%) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board.

6.1. Directors and Officers.

(A) During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the Association who do not have to be Unit Owners.

(B) Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors which must consist of at least three members, all of whom must be Unit Owners. The Board of Directors elected by the Unit Owners shall then elect the officers of the Association.

(C) The Declarant may voluntarily surrender his right to appoint and remove the members of the Board of Directors and the officers of the Association before termination of the Period of Declarant Control, and in that event the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or

[redacted]

PINAL COUNTY RECORDER
LAURA DEAN-LYTLE

When recorded mail to:

THOMAS WHELAN
ATTORNEY AT LAW
2058 S. DOBSON RD STE 9
MESA, AZ. 85202

DATE/TIME: 08/08/06 1300
FEE: $45.00
PAGES: 36
FEE NUMBER: 2006-111648

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CONDOMINIUM DECLARATION FOR MOON VALLEY IV CONDOMINIUMS

DO NOT DISCARD THIS PAGE. THIS COVER PAGE IS RECORDED AS PART OF YOUR DOCUMENT. THE CERTIFICATE OF RECORDATION WITH THE FEE NUMBER IN THE UPPER RIGHT CORNER IS THE PERMANENT REFERENCE NUMBER OF THIS DOCUMENT IN THE PINAL COUNTY RECORDER'S OFFICE.

Form RE-49

5.4 Unit Owner's Failure to Maintain. If a Unit Owner fails to maintain in good condition and repair his Unit or any Limited Common Element which he is obligated to maintain under this Declaration and the required maintenance, repair or replacement is not performed within fifteen (15) days after written notice has been given to the Unit Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to Subsection 7.2.4.

ARTICLE 6
THE ASSOCIATION

6.1 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the affirmative vote of Unit Owners holding more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, the Board of Directors may act in all instances on behalf of the Association.

6.2 Directors and Officers.

6.2.1 During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the Association who do not have to be Unit Owners. The initial directors and officers of the Association shall be designated in the Articles, and such designation shall constitute the appointment of such persons by the Declarant. The initial directors and officers shall serve until their death, resignation or removal from office. Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Directors.

6.2.2 The Declarant may voluntarily surrender the right to appoint and remove the members of the Board of Directors and the officers of the Association before termination of the Period of Declarant Control, and in that event the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board of Directors, as described in a Recorded instrument executed by the Declarant, be approved by the Declarant before they become effective.

6.3 Rules. The Board of Directors, from time to time and subject to the provisions of this Declaration and the Condominium Act, may adopt, amend, and repeal rules and regulations. The Rules may, among other things, restrict and govern the use of the Units and the Common Elements.

Return to:
Miramonte Beaver, LLC
102 S. Mike's Pike
Flagstaff, AZ 86001

DECLARATION OF COVENANTS,

CONDITIONS, RESTRICTIONS AND EASEMENTS

FOR

THE VIEWS AT BUTLER

ARTICLE 5 THE CONDOMINIUM ASSOCIATION

5.1 **Rights, Powers and Duties of the Association.**

5.1.1. The Association shall be the entity through which the Owners act. The Association shall be organized as a nonprofit Arizona corporation vested with the rights, powers and duties prescribed by law and set forth in the Condominium Documents and Condominium Act together with such rights, powers, and duties as may be implied and reasonably necessary to effectuate the same, including but not limited to including the management and maintenance of the Common Elements.

5.1.2. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Owners representing more than seventy-five (75%) of the votes in the Association.

5.2 **Board of Directors and Officers.**

5.2.1. The business of the Association shall be conducted by the Board and the Board officers as elected or appointed in accordance with the Bylaws. Unless the Condominium Documents or applicable laws specifically require a vote of the Members, approvals, or actions to be given or taken by the Association shall be valid if given or taken by the Board.

5.2.2. During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board and the officers of the Association, and such directors and officers do not have to be Owners.

5.2.3. The Declarant may voluntarily surrender the right to appoint and remove the members of the Board and the officers of the Association before the expiration of the Period of Declarant Control. In that event, the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board be approved by the Declarant before they become effective.

5.2.4. When the Period of Declarant Control expires, the Members shall elect the Board, a majority of whom must be Owners. The Board elected by the Owners shall then elect the officers of the Association.

5.3 **Management.** The Board may appoint or engage a manager or management company to be responsible for the day-to-day operation of the Association and the Common Elements.

5.4 **Committees.** The Board may appoint additional committees at its sole and absolute discretion.

5.5 **Personal Liability.** No Board member, officer, committee member, employee, representative of the Association, or the Association, shall be personally liable to any Owner, Occupant, or to any other Person, including the Association, for any damage, loss, costs, fees

ded at the request of *Capital Title Agency Inc.*
when recorded mail to
OCOTILLO CENTRE PARTNERS LLC
ATTN: Gerald J. Visconti
22019 Vanowen Street, Suite A
Canoga Park, California 91303

2004-032717 BK 5056 PG 27
OFFICIAL RECORDS OF MOHAVE COUNTY
JOAN MC CALL, MOHAVE COUNTY RECORDER
06/09/2004 03:25P PAGE 1 OF 50
CAPITAL TITLE AGENCY INC
RECORDING FEE 59.00

CONDOMINIUM DECLARATION
FOR
OCOTILLO BUSINESS CENTER CONDOMINIUM ASSOCIATION

Escrow No. **15032004**

This Condominium Declaration recorded June 4, 2004 in Book 5049, Page 115 is being re-recorded to correct page 5, 1.2.36., to add the legal description, and to add Exhibit "C"- Site Plan.

5.5 Sprinkler System and Fire Alarm System. In accordance with the requirements of applicable laws, each Building is equipped with a sprinkler system and a fire alarm system. The heads of the sprinkler system will intrude into the Units. All pipes, heads and other parts of the sprinkler system (whether located within or outside of a Unit) and all control panels, wiring and other components of the fire alarm system (whether located within or outside of a Unit) shall be part of the Common Elements and shall be maintained, repaired and replaced by the Association. If an Owner, Lessee or Occupant or their Invitees causes the sprinkler system or the fire alarm system to be activated (except in the case of a fire) or damages or destroys any part of the sprinkler system or the fire alarm system, the Owner of the Unit shall be responsible for the cost of any repairs to the sprinkler system or the fire alarm system made by the Association and for all other losses or damages resulting from such actions.

ARTICLE 6

THE ASSOCIATION

6.1 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owner shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may reasonably be necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the affirmative vote of Unit Owners holding more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically required a vote of the Members, the Board of Directors may act in all instances on behalf of the Association.

6.2 Directors and Officers.

6.2.1. During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the Association who do not have to be Unit Owners. The initial directors and officers of the Association shall be designated in the Articles, and such persons, shall serve until their death, resignation or removal from office. Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors, which must consist of at least three members, all of whom must be a Unit Owner but not more than one Unit Owner of a Unit may be in the Board of Directors at the same time. The Board of Directors elected by the Unit Owners shall then elect the officers of the Association.

6.2.2. The Declarant may voluntarily surrender the right to appoint and remove the members of the Board of Directors and the officers of the Association before termination of the Period of Declarant Control, and in that event the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board of Directors, as described in a Recorded instrument executed by the Declarant, be approved by the Declarant before they become effective.

2016-005571
Page 1 of 42
OFFICIAL RECORDS OF APACHE COUNTY
LENORA Y. FULTON, RECORDER
10-31-2016 01:43 PM Recording Fee $46.00

Recording Requested By:
Empire West Title Agency

And When Recorded Mail to:
Douglas C Sandahl
CK Cabins LLC
PO Box 80316
Phoenix, AZ 85060
6124SEW

2.3

AMENDED
DECLARATION OF CONDOMINIUM AND OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR CK CABINS CONDOMINIUM

DATED

October 30, 2016

upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

8.4 Unit Owner's Failure to Maintain. If a Unit Owner fails to maintain in good condition and repair his Unit or any Limited Common Element which he is obligated to maintain under this Declaration and the required maintenance, repair or replacement is not performed within thirty (30) days after written notice has been given to the Unit Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to Section 10.4(D) of this Declaration.

ARTICLE IX

THE ASSOCIATION; RIGHTS AND DUTIES; MEMBERSHIP

9.1 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital Improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than fifty percent (50%) of the votes in the Association and by Declarant during the Period of Declarant Control. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board. The Association has the specific duty to make available to Declarant, Eligible Mortgage Holders, and Unit Owners during normal business hours, current copies of the Condominium Documents and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for copying expenses and the reasonable cost of postage, shipping or transmission of the information requested.

9.2 Directors and Officers.

(A) During the Period of Declarant Control, Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the Association, and such appointed members and officers need not be Unit Owners.

(B) Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors which must consist of at least three (3) members, all of whom must be Unit Owners, or an individual designated by a corporation, partnership or other non-individual Unit Owner. The Board of Directors elected by the Unit Owners shall then elect the officers of the Association.

2008-05236
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Requested By: JACK H RUBIN
Wendy John, Graham County Recorder
07-11-2008 12:52 PM Recording Fee $54.00

When recorded return to:
Jack Rubin
9502 North 106th Place
Scottsdale, Arizona 85258

45

CAPTION HEADING: DECLARATION OF CONDOMINIUM AND OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR CASA BLANCA CONDOS, PHASE 1

DO NOT REMOVE

This is part of the official document.

maintenance of the concrete slabs or finished flooring of, the patio areas and/or balcony areas (except for repair to the structural portions thereof); (ii) maintenance, repair and replacement of all doors and windows of the Unit, including Entrance Area doors; and (iii) the air conditioning unit (including compressors and condensers), heater and hot water heater servicing the Unit and, to the extent not included within the categories described in this Section 5.1(B), the Limited Common Elements of the type described in Sections 2.1 (B) and (D) above. No Unit Owner may paint or change the exterior color scheme or surfacing materials of his patio areas or balcony areas or any portion of the Limited Common Elements allocated to his Unit visible from the Common Elements or any other Unit without the prior written consent of the Board.

(C) Each Unit Owner shall take all necessary action to keep his Unit and the Limited Common Elements which he is obligated to maintain under this Section 5.1 dean and free from unsightly accumulations of trash, furniture in weathered or poor condition, and litter.

5.2 Repair or Restoration Necessitated by Unit Owner. Each Unit Owner shall be liable to the Association, to the extent permitted by Arizona law, for any damage to the Common Elements or the Improvements, or equipment thereon, which results from the negligence or willful misconduct or omission of the Unit Owner or that Owner's family members, tenants, guests, invitees and pets. The cost to the Association of any such repair, maintenance or replacement required by such act or omission of a Unit Owner shall be paid by the Unit Owner, upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

5.3 Unit Owner's Failure to Maintain. If a Unit Owner fails to maintain in good condition and repair his Unit or any Limited Common Element which he is obligated to maintain under this Declaration in the manner set forth in this Declaration and the required maintenance, repair or replacement is not performed within thirty (30) days after written notice has been given to the Unit Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to Section 7.1(E) of this Declaration.

ARTICLE 6
THE ASSOCIATION; RIGHTS AND DUTIES; MEMBERSHIP

6.0 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital Improvements in the Condominium by encumbering future Assessments if such

When recorded return to:
7135 W. Manchester AVE
Suite 6 Westchester CA 90045
(Final Recording)

2008-00602
Page 1 of 39
Requested By: DEVRIK WILLIAMS
SHELLY D BAKER, RECORDER
OFFICIAL RECORDS OF LA PAZ COUNTY, AZ
02-08-2008 02:35 PM Recording Fee $46.00

DECLARATION OF CONDOMINIUM
AND
COVENANTS, CONDITIONS AND RESTRICTIONS FOR
INSIGHT/OUT LIVING CONDOMINIUMS

Amends-2008-00369

THIS DECLARATION OF CONDOMINIUM AND OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR INSIGHT/OUT LIVING CONDOMINIUMS is made this 6th day of February, 2008 by **INSIGHT/OUT LIVING, LLC**, an Arizona limited liability company (the "Declarant").

WITNESSETH:

WHEREAS, the Declarant is the fee owner of that certain real property situated in Parker, La Paz County, Arizona, described on Exhibit "A" attached hereto.

WHEREAS, Declarant desires to develop the subject property, together with all Buildings and improvements now or hereafter constructed on the property, and all easements and rights appurtenant thereto (hereinafter collectively referred to as "the Property") as a residential condominium, and

WHEREAS, Declarant desires to establish for its own benefit and for the mutual benefit of all future Owners who hold their interest subject to this Declaration, which is recorded in furtherance of establishing the general plan of condominium ownership for the Property and for establishing rules for the use, occupancy and management thereof, all for the purpose of enhancing and protecting the value, utility, desirability, and attractiveness of the Property.

ARTICLE 1
DEFINITIONS

1.0 General Definitions. Capitalized terms not otherwise defined in this Declaration shall have the meanings specified for such terms in the Arizona Condominium Act, A.R.S. §§ 33-1201 et seq., as the same may be amended from time to time (the "Condominium Act").

adjacent to the rear wall of the Garage.

5.2 Repair or Restoration Necessitated by Unit Owner. Each Unit Owner shall be liable to the Association, to the extent permitted by Arizona law, for any damage to the Common Elements or the Improvements, or equipment thereon, which results from the negligence or willful misconduct or omission of the Unit Owner or that Owner's family members, tenants, guests, invitees and pets. The cost to the Association of any such repair, maintenance or replacement required by such act or omission of a Unit Owner shall be paid by the Unit Owner, upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

5.3 Unit Owner's Failure to Maintain. If a Unit Owner fails to maintain in good condition and repair his Unit or any Limited Common Element which he is obligated to maintain under this Declaration or to keep the Garage in the manner set forth in this Declaration and the required maintenance, repair or replacement is not performed within thirty (30) days after written notice has been given to the Unit Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to Section 7.1 (E). of this Declaration.

ARTICLE 6
THE ASSOCIATION; RIGHTS AND DUTIES; MEMBERSHIP

6.0 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital Improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than fifty percent (50%) of the votes in the Association and by Declarant during the Period of Declarant Control. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board. The Association has the specific duty to make available to the Declarant, Eligible Mortgage Holders, Unit Owners, and Eligible Insurers or Guarantors during normal business hours, current copies of the Condominium Documents and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for copying expenses and the reasonable cost of postage, shipping or transmission of the information requested.

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F. ANN RODRIGUEZ, RECORDER
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4558 N. First Avenue
Suite 150
Tucson, Arizona 85718-5607

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

FOR

STONE CURVES CONDOMINIUM

5.2 **Duties of Unit Owners.** Each Unit Owner shall maintain, repair and replace, at his own expense, all portions of his Unit. In addition, each Unit Owner shall be responsible for the maintenance and repair of the Limited Common Elements allocated to his Unit pursuant to Subsections 2.8.1(a) and (b); the exterior doors and door frames and windows allocated to the Unit as Limited Common Elements pursuant to Section 2.8.1(c) and the frames and glass for such windows and the hardware for the exterior doors; the interior of the patio allocated to the Unit by Subsection 2.8(d), as well as any walls enclosing the patios allocated to the exclusive use of the Unit.

5.3 **Repair or Restoration Necessitated by Owner.** Each Unit Owner shall be liable to the Association for any damage to the Common Elements or the Improvements, landscaping or equipment thereon which results from the negligence or willful misconduct of the Unit Owner. The cost to the Association of any such repair, maintenance or replacements required by such act of a Unit Owner shall be paid by the Unit Owner, upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

5.4 **Unit Owner's Failure to Maintain.** If a Unit Owner fails to maintain in good condition and repair his Unit or any Limited Common Element which he is obligated to maintain under this Declaration and the required maintenance, repair or replacement is not performed within fifteen (15) days after written notice has been given to the Unit Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming unit Owner pursuant to Subsection 7.2.4 of this Declaration.

ARTICLE 6.
THE ASSOCIATION; RIGHTS AND DUTIES; MEMBERSHIP

6.1 **Rights, Powers and Duties of the Association.** No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing at least eighty percent (80%) of the votes in the Association. Unless the Condominium Documents or the

Condominium Act specifically require a vote of the Members, the Board of Directors may act in all instances on behalf of the Association.

6.2 **Rules.** The Board of Directors, from time to time and subject to the provisions of this Declaration and the Condominium Act, may adopt, amend, and repeal rules and regulations. The Rules may, among other things, restrict and govern the use of any area by any Unit Owner, by the family of such Unit Owner, or by any invitee, licensee or lessee of such Unit Owner.

6.3 **Composition of Members.** Each Unit Owner shall be a Member of the Association. The membership of the Association at all times shall consist exclusively of all the Unit Owners. Membership in the Association shall be mandatory. A Unit Owner shall automatically, upon becoming a Unit Owner, be a member of the Association and shall remain a member of the Association until such time as his/her ownership ceases for any reason, at which time his/her membership in the Association shall automatically cease. Membership in the Association shall be appurtenant to each Unit and may not be separately assigned, transferred or conveyed.

ARTICLE 7.
ASSESSMENTS

7.1 **Preparation of Budget.** An annual budget shall be prepared under the supervision of the Treasurer and the Budget Committee. The Board of Directors shall present the budget to the annual meeting of the Association.

7.1.2 Contents of Budget. The budget shall clearly state the projects and maintenance items to be performed during the coming year and their estimates of cost. The budget shall contain:

7.1.2.1 estimated revenue and expenses which the Board of Directors believes will be required during the ensuing fiscal year to pay all Common Expenses including, but not limited, to: (A) the amount required to pay the cost of maintenance, management, operation, repair and replacement of the Common Elements and those parts of the Units, if any, which the Association has the responsibility of maintaining, repairing and replacing; (B) the cost of wages, materials, insurance premiums, services, supplies and other expenses required for the administration, operation, maintenance and repair of the Condominium; and (C) the amount required to render to the Unit Owners all services required to be rendered by the Association under the Condominium Documents; and

SUPREME COURT OF ARIZONA

JIE CAO, et al., Plaintiffs/Appellants/ Cross-Respondents, v. **PFP DORSEY INVESTMENTS, LLC, et al.,** Defendants/Appellees/ Cross-Petitioners.	Arizona Supreme Court No. CV-22-0228-PR Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

DEFENDANT/APPELLEE/CROSS-PETITIONER PFP DORSEY INVESTMENTS, LLC COMBINED RESPONSE TO PLAINTIFFS/APPELLANTS' PETITION FOR REVIEW and CROSS-PETITION FOR REVIEW

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RESPONSE TO PLAINTIFFS/APPELLANTS' PETITION FOR REVIEW

INTRODUCTION

According to Plaintiffs, review is warranted because "one person cannot sell someone else's property." Petition p. 6. However, there is no "taking" of Plaintiffs' property—Plaintiffs contractually agreed to the terms under which their ownership rights would be terminated when they took ownership subject to the Declarations, which voluntarily incorporated the statutory protections and procedures, and received compensation for their property. The question below was not whether the termination and sale were legally permissible in general. Rather, the only question at issue on appeal was whether the Association's termination and sale of Plaintiffs' unit comports with the applicable statute to which Plaintiffs agreed to be bound. Having properly found the statute is not unconstitutional *as applied*, there are no grounds to warrant review of Plaintiffs' issues on their Petition.

RELEVANT FACTS TO THE PETITION AND CROSS-PETITION

Accepting the facts alleged in the complaint as true for purposes of a dismissal under Arizona Rules of Civil Procedure, Rule 12(b)(6), the following is a summary of the factual background.

Plaintiffs Haining Xia and Jie Cao were the owners of Unit 106 at Dorsey Place Condominiums prior to the termination of the condominium, and pursuant to the warranty deed and Declaration, Plaintiffs owned the unit subject to its

Declarations. Opinion ¶ 4. PFP Dorsey Investments, LLC ("PFP") was also an owner of Dorsey Place Condominiums, acquiring 90 of the 96 units prior to the termination of the condominium. Opinion ¶ 5. Pursuant to the Bylaws for the Association, each "Unit Owner shall be a Member of the Association. The membership of the Association shall, at all times, consist exclusively of the Unit Owners." [IR-40 at 5, ¶ 20 (APP046)]. Thus, Plaintiffs and PFP, as Unit Owners, were members of the Association.

On April 4, 2019, the Association held a Meeting for its members and presented its members with a termination agreement proposing to sell all portions of and interest in Dorsey Place not already owned by PFP, to PFP upon termination of the Condominium. Opinion ¶ 7. Pursuant to the Association's Declaration with Amendments, Article 13.4 states, "the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated. Opinion ¶ 8 (APP111). The Agreement to terminate and sell Dorsey Place was approved and ratified by 93.75% of the Unit Owners. Opinion ¶ 8.

Plaintiffs sued PFP and the Association, seeking a declaratory judgment that the transaction violated the Arizona Condominium Act, or in the alternative, that A.R.S. §33-1228, which allows a supermajority of condominium unit owners to approve the termination and sale of a condominium, is unconstitutional *as applied*.

Opinion ¶ 10. PFP and the Association filed separate motions to dismiss under Rule 12(b)(6), which the Trial Court granted.

On appeal, Plaintiffs preserved and raised ***only two issues***: (1) as applied, is A.R.S. §33-1228 an unconstitutional taking of private property; and (2) does A.R.S. §33-1228 prohibit PFP and the Association from forcing a sale of less than the entire condominium for only the appraised value. Opinion ¶ 13. On both issues, the Court of Appeals rejected Plaintiffs' arguments, answering both in the negative. The Court of Appeals specifically held A.R.S. §33-1228 "is constitutional when applied to condominium owners who bought a condominium unit subject to terms that incorporate the statute." Opinion ¶ 2. Further, the Court of Appeals held the statute "permits but does not require a sale to include the entire condominium. And nothing in the statute prohibits the sale of less than the whole condominium." Opinion ¶ 31.

Although the Court of Appeals rejected Plaintiffs' arguments on appeal, it raised an entirely new issue, and ultimately reversed and remanded finding the Superior Court applied the wrong version of A.R.S. §33-1228 because the statutory amendments were not incorporated into the Declaration. The Court of Appeals stated:

> We also hold, however, that if there have been substantive post-purchase changes to the statute, the version of the statute in place at the time of purchase controls.
>
> Here, the superior court applied the August 2018 version of A.R.S. §33-1228 rather than the version in effect [i.e., 1986] when the Xias bought their condominium unit. As a result, because the previous

> version of the statute potentially provided greater protections to minority shareholders, we reverse and remand.

Opinion ¶¶ 2, 3. The Court of Appeals' ultimate opinion (the "Opinion") to remand was premised upon an issue that Plaintiffs never originally raised. At the superior court level and at the Court of Appeals, Plaintiffs themselves relied on the 2018 version of A.R.S. §33-1228 in making their arguments. Opinion ¶ 18, n. 4. Remarkably, the Court of Appeals first raised the issue when it issued an Order for Additional Briefing (PFP.APP035-037) to the parties ***after*** oral argument, concluding that because it allowed briefing on the issue, Plaintiffs did not waive it.[1] *Id.*

Despite the fact that Plaintiffs did not succeed on their constitutional issue or interpretation of the statutory language (as they are seeking appeal with this Court on these issues), but rather on an issue never raised by the Plaintiffs, the Court of Appeals found Plaintiffs to be the prevailing party and awarded them $230,000 in fees and costs. (APP040).

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[1] The Court of Appeals subsequently issued another order, Order Re: Supplemental Authority (PFP.APP038-039), requesting the parties to address the effects of the *Kalway* opinion on the issues raised in the supplemental-briefing order.

REASONS THE COURT SHOULD DENY REVIEW OF PLAINTIFFS' PETITION FOR REVIEW

I. Plaintiffs Overstate the Court of Appeals' Opinion in an Attempt to Create an Issue Worthy of this Court's Consideration.

The Court of Appeals held that A.R.S. §33-1228 "is constitutional when applied to condominium owners who bought a condominium unit subject to terms that incorporate the statute." Opinion ¶ 2. Yet, Plaintiffs characterize the Opinion as "correctly" holding that A.R.S. 33-1228 is "unconstitutional on its face" under the takings clause, Ariz. Const. art. II § 17. Petition p. 6. In so doing, Plaintiffs take the language of the Opinion out of context to cobble together a ruling that the Court of Appeals did not make upon an issue that Plaintiffs never raised, briefed, or argued below. Because Plaintiffs seek review of a holding which the Court of Appeals did not in fact issue, Plaintiffs' Petition for Review should be denied.

A. The express incorporation of the Condominium Act into the Declaration leaves no doubt that the power to terminate and sell the condominium exists and thus, A.R.S. §33-1228 is constitutional as applied.

Plaintiffs' entire Petition for Review rests precariously upon six words *of dictum* from the Opinion: "A.R.S. §33-1228 is unconstitutional on its face." However, this artful contrivance fails to account for the entire sentence, which reads: "Without an exception to the general rule, A.R.S. §33-1228 is unconstitutional on its face." Opinion ¶ 15. Plaintiffs fail to recognize a private contractual agreement exists between the parties, which provides for the right to terminate and sell the

condominium. The Opinion makes clear that an agreement between two parties for the termination and sale of a condominium is constitutional and enforceable. *See* Opinion ¶ 2 ("the statute is constitutional when applied to condominium owners who bought a condominium unit subject to terms that incorporate the statute"); Opinion p. 4 ("Arizona Revised Statutes Section 33-1228 Is Not Unconstitutional as Applied Because the Xias Agreed to Grant the Association the Rights, Powers, and Duties Prescribed by the 1986 Version of the Statute."); Opinion ¶ 23 ("a forced termination and sale under the statute is unconstitutional *but for an owner's contractual agreement under the declaration*.").

When Plaintiffs purchased their unit, they agreed to be bound by the Association's Declaration. That Declaration provides that the Association has "the rights, powers, and duties prescribed by the Condominium Act," which necessarily includes the power to terminate the Association pursuant to A.R.S. §33-1228. (APP086). Thus, Plaintiffs agreed to the contract that granted Defendants the power to terminate and sell the property, not the Condominium Act alone. The Declaration is the mechanism that allows for the termination and sale of the Condominium. A.R.S. §33-1228 in and of itself does not authorize the sale of the condominium; rather, it reflects the Legislature's expression of the delicate weighing of rights and protections in the process of terminating and selling a condominium, pursuant to the declaration, to ensure that any termination or sale is conducted in compliance with

statutory safeguards. The statute is permissive, not mandatory in allowing for termination and/or sale of a condominium. *See* A.R.S. §33-1228(A) ("[A] condominium ***may*** be terminated"); A.R.S. §33-1228(C) ("A termination agreement ***may*** provide that all the commons and units of the condominium shall be sold following termination.") (emphasis added). The reason the statute is permissive is because a termination or sale cannot occur without a super-majority of unit owners agreeing to the termination and sale of the condominium, pursuant to the Declaration. Said differently, the Legislature did not authorize a taking of Plaintiffs' personal property for private use. Rather, Plaintiffs agreed to be bound by a private contract which granted the Association the powers prescribed by A.R.S. §33-1228, including the power to terminate the association and sell the units—that power is akin to a partition action, a receiver, or 51% of the shareholders of a corporation authorizing the sale of all its assets. No one argues that the foregoing are "takings," because they are all controlled by private contractual rights.

When reading the Opinion for what was actually decided—that parties are bound to their contractual agreements—there is no issue of constitutional statewide importance or improper application of the law that warrants consideration of Plaintiffs' Petition.

/ / /

B. Plaintiffs have only raised an "as-applied" challenge, which was properly decided in finding the statute constitutional.

Plaintiffs have argued repeatedly that they are only challenging the statute on an as-applied basis. They likely are taking this position because they have not complied with A.R.S. §12-1841 by timely notifying the Attorney General and State Legislature of their challenge in order to afford the State an opportunity to be heard. Regardless of Plaintiffs' reasoning, an as-applied challenge to the statute is not of statewide importance as *the issues are limited to the specific language of the Declaration*. Any argument or attempt to now make a facial challenge has been waived and this Court should abstain from granting review of Plaintiffs' Petition. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 599-600, 399 P.3d 663 ¶ 45 (2017) (explaining that the Court should exercise judicial restraint in abstaining from deciding important constitutional issues or to upset established precedent when no party has raised or argued such issues).

II. The Court of Appeals Correctly Held the Association's Authority to Terminate and Sell the Condominium Arises from the Agreed-Upon Declaration, Even If the Statute is Deemed Unconstitutional on its Face.

Plaintiffs' reliance on Arizona cases involving the takings clause are distinguishable from this case as those cases did not involve a contractual agreement allowing for the sale or transfer of their property. *See Inspiration Consol. Copper Co. adv. New Keystone Copper Co.*, 16 Ariz. 257, 262-63 (Ariz. 1914) (finding the

Constitution provides that "[p]rivate property shall not be taken for private use ***unless by consent of the owner***" (emphasis added)); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (***no contract existed*** between agricultural employees allowing access by union organizers to the premises on an agricultural employer); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (***no contract existed*** between the cable company and landlord who contested the New York statute permitted cable companies to place wires on premises).

In this case, the Court of Appeals properly found the Condominium Act was specifically incorporated into the Declaration when the parties agreed under § 6.1 of the Declaration that:

> The Association shall have such rights, powers, and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and Condominium Act.

[IR-51, Ex. 1 at 24 (APP086)]; *see Weatherguard Roofing Co. V. D.R. Ward Constr. Co.*, 214 Ariz. 344, 346 (App. 2007) ("It is a basic rule of contract construction that to incorporate by reference: '[T]he reference must be clear and unequivocal and must be called to the attention of the other party, he must consent thereto, and the terms of the incorporated documents must be known or be easily available to the contracting parties. . . .'"); *see also United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 268 (App. 1983) ("While it is not necessary that a contract state

specifically that another writing is 'incorporated by this reference herein,' the context in which the reference is made must make clear that the writing is part of the contract.").

Plaintiffs erroneously argue that a fundamental right is being taken and thus, waiver of a fundamental constitutional right requires "clear, unambiguous, unmistakable, and conspicuous language," citing to *Missouri v. Muslet*, 213 S.W.3d 96, 99 (Mo. Ct. App. 2006). Petition pp. 12-13. First, *Missouri v. Muslet* is not an Arizona case with precedential value; and further, the right of property has not been found to be a fundamental constitutional right by Arizona. *See Inspiration Consol. Copper Co.*, 16 Ariz. at 266 ("The right of property is a legal right and not a natural right. . . ."). Plaintiffs' reliance on *Wilson v. Playa De Serrano*, 211 Ariz. 511 (App. 2005), is also misplaced as *Wilson* does not require enhanced notification or agreement to restrict an owner's property rights, but rather only requires "sufficient specificity that purchasers are on notice that the occupancy of their property could be severely restricted." *Id.* at 515.

In this case, it is clear and unequivocal that the Condominium Act became terms of the Declaration. *See Weatherguard Roofing Co. v. D. R. Ward Constr. Co.*, 214 Ariz. at 346; *see also Inst. of London Underwriters v. Sea-Land Serv., Inc.*, 881 F.2d 761, 765 (9th Cir. 1989) (holding that where a statute is incorporated by reference, its provisions are merely terms of the contract like any other contractual

term). There is no ambiguity in the language of the Declaration that the Condominium Act is incorporated into the contract and that the Association has the rights, powers, and duties prescribed by the Condominium Act. "It is the general rule that the grantee, with notice of restrictive covenants, who accepts a deed referring to those restrictions is deemed to assent to be contractually bound by the restrictions as if he had individually executed an instrument containing them." *Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198 (App. 1983) (citing *Murphey v. Gray*, 84 Ariz. 299 (1958) and *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330 (App. 1977)). Furthermore, there is no ambiguity in the Condominium Act that a termination agreement may provide for the sale of the condominium. A.R.S. §33-1228(D). Thus, the Court of Appeals properly found the Condominium Act was incorporated into the Declaration and that Plaintiffs were on notice that a termination and sale of the condominium could occur.

Furthermore, Plaintiffs cannot negate the effect of this incorporation by relying on the Opinion's *dicta* that the statute is unconstitutional on its face, or arguing the Condominium Act "prescribes nothing *because it is unconstitutional*." Petition p. 15. "[C]ontractual language must be interpreted in light of existing law" at the time of the contract. *Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 485 (App. 2009). At the time the Declaration was entered into, A.R.S. §33-1228 was (and still is) a valid statute. Furthermore, as Plaintiffs admit, contracting parties are

not prevented from agreeing to terms that may otherwise be unconstitutional. Petition p. 19. Having properly found that the Condominium Act is incorporated into the Declaration and the parties consented to the termination and sale of the condominium, there is no basis for this Court to grant review of Plaintiffs' issues.

III. Plaintiffs' Argument regarding Whether the Unit Owners or Association Have Authority to Sell Creates a False Distinction and Does Not Support Accepting Review.

Plaintiffs seek review based upon an incorrect reading of the Declaration and application of the Condominium Act when they argue the Declaration only gives the Association rights, powers, and duties prescribed by the Condominium Act, and not the individual unit owners. Petition pp. 21-22. However, as clearly provided in § 6.1 of the Declaration, "[t]he Association shall be the entity *through which the Unit Owners shall act*." [IR-51, Ex. 1 at 24 (APP086)] (emphasis added). It further states, "[u]nless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approval or actions to be given or taken by the Association shall be valid if given or taken by the Board of Directors." *Id.* The Association is the vehicle upon which the unit owners act and thus, it is a distinction without a difference. PFP, as a unit owner, just like Plaintiffs themselves, has the same rights and powers that are afforded under the Declaration and the Condominium Act and has the right to vote upon whether to terminate and sell the

condominium. Nothing needs to be clarified as Plaintiffs suggest and review should be denied.

IV. The Court of Appeals Properly Analyzed the Language of A.R.S. §33-1228 In Finding the Sale of Any Portion of the Condominium Is Permissible.

As their final issue, Plaintiffs assert that this Court should grant review to correct the Opinion's conclusion that A.R.S. §33-1228(C) authorizes the sale of "less than all the units and common elements." Petition pp. 22-24. Review of this issue can be swiftly denied. Plaintiffs cannot read the one sentence of A.R.S. §33-1228(C) in a vacuum to support their position that the statute only permits the sale of all of the condominium. The Court of Appeals properly analyzed the entire section, taking into consideration the second sentence of subsection (C) in which the legislature contemplated an agreement under which "*any* real estate in the condominium is to be sold." A.R.S. §33-1228(C) (emphasis added). Plaintiffs' self-serving reading is simply contrary to statutory interpretation. *See Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017) ("Words in statutes should be read in context in determining their meaning. In construing a specific provision, we look to the statute as a whole . . . ."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167-169 (2012) ("Context is a primary determinant of meaning," and all of a statute "provides the context for each of its parts.").

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Petition for Review.

CROSS-PETITION FOR REVIEW

INTRODUCTION

Every day, Arizona residents lose their homes because they fall behind on their mortgage; although unfortunate, this is a consensual process, founded in contracts allowing mortgage holders to foreclose on property owners' interests under specified terms and conditions in accordance with the then-existing statutory framework. Every day, homeowners in multi-family dwellings (such as condominiums) find it impossible to remain because communal ownership dictates that decisions may be made by the majority to incur expenses, impacting assessments, thereby rendering it fiscally impossible for certain owners to remain. And, at times, a majority of condominium owners find it advantageous to terminate the communal ownership arrangement so property can be sold and utilized for development as apartments, hospitals, or office buildings, *a process expressly prescribed by the Arizona Legislature since 1986, after a careful weighing and balancing of public policy, competing interests and appropriate safeguards*. Even those in single family dwellings may find it impossible to remain in their

neighborhood as property taxes rise due to gentrification. These are normal, understood, and contractually-accepted risks of home ownership, particularly in a communal setting. One homeowner's right to sell her property for the best price and allow for the highest and best use of land will invariably be affected by the decisions of other homeowners – which interest is more worthy of protection? Robert Kennedy said, "Progress is a nice word. But change is its motivator. And change has its enemies." It is to be anticipated that in order for 90% of owners to have their way, the remaining 10% may be disgruntled. The delicate task of weighing and balancing these respective rights is best left to the Legislature; the Legislature has addressed these interests in the evolving statutory framework set forth within the Condominium Act, much of which is designed to afford greater protection to minority owners[2] and some of which protects the 99% of homeowners from missing a lucrative sales opportunity due to one lone dissent. One person's sword is the other's safeguard, but the clear intent of the Act is to balance those interests. It would be anomalous to suggest that such enhanced safeguards would not apply to homeowners simply because they purchased their unit under an earlier version of the statute, particularly where the Declaration specifically states that it is subject to the

[2] Some of these protections can be found in the Legislature's amendments to A.R.S. §33-1228(G)(1) by allowing for competing appraisals and ultimately requiring arbitration if the appraisal amounts defer more than five percent, a process of which Plaintiffs did not avail themselves.

"Condominium Act" and defines that to mean "the Arizona Condominium Act, A.R.S. §33-1201, et. seq., as amended from time to time." And yet, such is the result if the Court of Appeals' application of *Kalway* is permitted to stand.

ISSUES PRESENTED FOR REVIEW ON CROSS-PETITION

PFP requests review of the following issues:

1. Should the Court of Appeals' dicta stating, "A.R.S. §33-1228 is unconstitutional on its face" be stricken or depublished since a constitutional challenge of the statute on its face was never raised and the sale was not a taking, but rather a private contractual issue between private parties? If misinterpreted or portrayed to suggest a broader ruling, as Plaintiffs have done here, this could have a chilling effect on development of properties in Arizona that would serve an essential function for the state.
2. Did the Court of Appeals improperly apply *Kalway* in restricting application of subsequent statutory amendments to a parties' condominium declaration?
3. Did the Court of Appeals err in finding a substantive amendment existed between the 1986 and 2018 versions of A.R.S. §33-1228(G)(1)?
4. Did the Court of Appeals err in finding Plaintiffs were the prevailing party in awarding attorneys' fees when the only issue the Court of Appeals reversed and remanded was an issue never originally raised by Plaintiffs before the Superior Court or Court of Appeals?

ISSUES NOT REACHED BY THE PANEL

1. In applying the 2018 version of A.R.S. §33-1228, whether Defendants complied with the Declaration, Condominium Act, and Termination Agreement when Dorsey Place Condominium was terminated and sold.

REASONS TO GRANT REVIEW OF CROSS-PETITION

I. A Condominium Termination Is Not a "Taking" Under the Law, But Rather an Enforceable Right of Private Contract Between Private Parties.

The power of eminent domain belongs solely to the governmental entities of this State: "Zoning finds its authority in the police powers, while eminent domain is the right and power in a sovereign state to appropriate private property to uses for the public good. The right is 'a necessary, constant and unextinguishable attribute,' of sovereignty." *City of Scottsdale v. Mun. Court of City of Tempe*, 90 Ariz. 393, 396 (1962) (citations omitted). "Constitutional provisions in regard to eminent domain do not create or grant the power, but are limitations thereon; therefore, when by Article II, Section 17 of the Constitution of Arizona it was provided that private property may not be taken without just compensation, there was an implied recognition that private property may be taken with just compensation for public use." *Id.*

Here, PFP did not exercise any eminent domain power because PFP is not a sovereign and it has no such power. There is no constitutional implication because

this is not a taking. Instead, PFP exercised its private contractual rights under the Declaration (*see Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. at 198), and the Termination Agreement (*see* A.R.S. §33-1228(D)) to effectuate the termination. The Declaration at Article 13, Section 13.4 confirm the distinction between condominium termination and eminent domain: "Except in the case of a taking of all the Units by eminent domain, the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated." [IR-51, Ex. 1 at 49 (APP111)]. The Termination Agreement recitals confirm the same. [IR-45, Ex. 3 (PFP.APP040). Thus, this is a private dispute between private parties, pursuant to private contracts, which should be enforced. This is not a "taking" any more than a partition sale, the placement of a receiver, or a corporate takeover, all of which require a far less showing than 90% approval to transfer private property away from private owners.

II. This Court Should Qualify that its' Opinion in *Kalway* Does Not Restrict Application of Subsequent Statutory Amendments to a Condominium Declaration.

While this case was pending before the Court of Appeals, this Court issued its decision in *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022). The Court of Appeals misapplied *Kalway* in holding that the Declaration did not incorporate the 2018 amendments to A.R.S. §33-1228, and thus, the 1986 version of A.R.S. §33-1228 applied to the termination and sale of the condominium as to Plaintiffs. This

Court should grant review to not only limit the application of *Kalway* when analyzing incorporation of statutory amendments, but also because the Court of Appeals incorrectly found the amendments at issue did not fall within Plaintiffs' reasonable expectations based upon the Declaration in place at the time of purchase.[3] *See* Opinion ¶20.

In *Kalway*, this Court analyzed the extent to which homeowners may rely on a general-amendment-power provision in their CC&Rs to place restrictions on the use of their own and their neighbors' land. 252 Ariz. at 532. Four out of five homeowners in *Kalway* amended the CC&Rs by majority vote without Kalway's consent or knowledge—such amendments ranging from changing definitions to creating new restrictions and enacting new enforcement measures. *Id.* The issues in *Kalway* are inapplicable here as the issue focused on the homeowners amending the Declaration with new restrictions, not the State Legislature amending the law. Our case is distinguishable as the issue involves whether such amendments by the Legislature apply to the termination and sale at issue. In applying the *Kalway* reasoning to statutory amendments and requiring that there be sufficient notice of a substantive amendment of the law, the Court of Appeals has exceeded its judicial

[3] Pursuant to Arizona Rules of Appellate Procedure, Rule 13(h), PFP adopts and incorporates by reference the Association's arguments regarding the Court of Appeals' Misapplication of *Kalway*, Association's Cross-Petition §IV.A.1., and the Court of Appeals' unsound basis for determining the 2018 statute gives less rights to Plaintiffs, Association's Cross-Petition §IV.A.3.

boundaries in violation of Article III by engaging in interstitial judicial lawmaking in an area in which the Legislature has already enacted statutes. Condominiums are creatures of statute. The Legislature has the right to define their creation as well as their termination, including any amendments the Legislature deems necessary. Setting up the process by which a condominium may be terminated is critical given the fact that without a termination process, every piece of real property dedicated as a condominium in this State will remain as such forever, and the risk of tragic consequences such as blight, decay, crime, and indeed the danger and destruction seen in the Champlain Towers in Florida, is all quite real.

Even if the underlying premise of *Kalway* applies, the Court of Appeals incorrectly found that the Declaration did not provide sufficient notice of the statutory amendments. The Declaration provided fair notice that amendments to the Condominium Act would apply to Plaintiffs' condominium. The Declaration explicitly references and incorporates the Condominium Act in multiple places, putting the unit owners on notice that they agree to be bound by the Condominium Act, ***as it may be amended from time to time***. Article 1.1 of the Declaration states:

> General Definitions. Capitalized terms not otherwise defined in this Declaration shall have the meanings specified for such terms in the Arizona Condominium Act, A.R.S. §33-1201, et. seq., as amended from time to time. [IR-51, Ex. 1 at 1 (APP063)].

At Article 1.2.15, the Declaration states:

> "Condominium Act" means the Arizona Condominium Act, A.R.S. §33-1201, et. seq., as amended from time to time. [*Id.* at 2 (APP064)].

Finally, at Article 6.1, the Declaration states:

> The Association shall have such rights, powers and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. [*Id.* at 24 (APP086)].

Plaintiffs had specific notice that the Condominium Act would likely be "amended from time to time" and such provisions would automatically be incorporated into the Declaration. This is distinguishable from the general-amendment-power provision in *Kalway* that this Court found was insufficient. Just as the Court of Appeals found that the Condominium Act itself was incorporated into the Declaration, so should the statutory amendments based upon the proper notice to Plaintiffs.

Indeed, the latest version of the Condominium Act applies to all condominium declarations in this State, unless a statutory amendment contradicts an express pre-existing term of the Declaration. More broadly, however, even if the Declaration was not express on this point, the Legislature can always change statutory rights before they vest in any particular person. "The rule is that **any right conferred by statute may be taken away by statute before it has become vested**. The rule is the same for the common law." *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 138

(1986) (emphasis added). Rights under previous versions of the termination statute did not vest if no termination previously occurred, and therefore, do not apply to Plaintiffs or anyone else. [4]

III. The Issues Are of Statewide Importance Affecting Arizona's Economy and Investors Seeking to Improve Upon the Community.

Contrary to the "as applied" issue raised by Plaintiffs, which is unique to this set of facts and controlling documents, the general application of Arizona's Condominium Act, and in particular the termination statute, is critically important to provide certainty to investors and businesses interested in investing in Arizona's economy. Investors like PFP must be assured that they can have confidence in the efficacy of the Association's termination process. The Opinion has the effect of creating an untenable framework for termination of condominiums likely to deter businesses and investors seeking to invest in Arizona's economy. If the rules and application of the statute apply differently for each unit owner depending upon when the unit owner purchased their condominium unit, there is an increased risk that the differing rights and obligations will be misapplied. Condominiums are creatures of

[4] Contractual rights on the other hand, like the 90% termination threshold in this case, are vested rights, which are not subject to a Legislative enactment for example by subsequent raising or lowering. Ariz. Const. art. II, § 25; *see also Scholten v. Blackhawk Partners*, 184 Ariz. 326, 330 (App. 1995).

statute, and the Legislature has frequently amended the Condominium Act.[5] The grievance of which Plaintiffs complain is not unknown to or unaddressed by the Legislature—Plaintiffs simply do not like how the Legislature addressed it. It is clear, however, that the Legislature established our public policy, which balances the rights of the parties in this situation and weighs the interests of 93.75% of the owners to make better use of the property rather than allowing one unit owner, the Plaintiffs, to stand in the way.

It is a statewide concern that Arizona continues to attract businesses and investors to grow our state and economy, and renovate and re-purpose buildings to their highest and best use, whether that might be for affordable apartments, hospitals, entertainments districts and the like. What once was developed as a condominium may no longer be the best use of the building or land, and a uniform application of the statutes to terminate and sell the condominium is needed to ensure the land and/or building is put to its best use. There are numerous reasons why condominiums are terminated, including bankruptcy following a judgment against the condominium association;[6] structural defects too large for its members to correct through special

[5] Indeed, since 2018, the statute at issue, A.R.S. §33-1228, has been amended three times. *See* Laws 2018, Ch. 235 §1, effective August 3, 2018; Laws 2019, Ch. 233 §2, effective August 27, 2019; Laws 2022 Ch. 373 §2, effective September 24, 2022.
[6] Judgments against the association can be secured through a judgment lien that attaches to "all of the units in the condominium at the time the judgment was entered." A.R.S. §33-1257.

assessments;[7] deterioration of the condominium through crime and/or blight; and the condominium is "broken" based upon a large single entity block of ownership from the developer's inability to sell all of the units.[8] With the Court of Appeals' decision creating an unsustainable framework to terminate condominiums, the likelihood of investors and businesses wanting to reinvest in these buildings and land will be stifled. Moreover, there are hundreds of millions of dollars committed to these "broken" condo projects across this State. Those purchases and investment decisions were made with the understanding that A.R.S. §33-1228 is the law and the provisions of the condominium declarations are the enforceable contract terms between the parties. To change course in midstream will result in stopping the flow of capital to fix these broken condos.

[7] This was a contributing factor to the July 2021 Champlain Towers South collapse in Florida, which identified the structural repairs needed and began the special assessment process two years before the collapse, i.e., "Owners would have to pay assessments ranging from $80,190 for one-bedroom units to $336,135 for the owner of the building's four-bedroom penthouse." *See* https://www.cnn.com/2021/06/28/us/surfside-condo-owners-assessments-invs/index.html.

[8] "Broken" condos typically have unaligned owner interest because there is a mix of individual unit owners with one block owner, creating issues among the owners on the best use of the property with the block owner seeking overall improvements to increase their investment while individual unit owners wanting to limit costs and improve only things at the property that affect their daily life. Further, "broken" condos face more difficulties in financing, which limits the pool of owners who need to buy the block in a condo.

IV. This Court Should Grant Review to Clarify the Issue of Whether Plaintiffs Can Be Deemed the Prevailing Party Entitled to Attorney's Fees and When Such a Determination Should Be Made.

Pursuant to Arizona Rules of Appellate Procedure, Rule 13(h), PFP adopts and incorporates by reference the Association's arguments regarding this issue in their Cross-Petition under Section IV.B. Plaintiffs should not receive the benefit of an award of attorney's fees against either Defendant, however, when the decision on appeal rests on an issue the parties never litigated at the trial court level. ***PFP prevailed on every issue*** before the Trial Court; won on every issue raised and initially briefed by Plaintiffs; and has not even had a chance to address the belatedly raised issue of whether the termination process would have also complied with the 1986 statute. The effect of the procedural posture of this case in terms of how issues were raised and decided should not be used to create serious injustice in punishing a party who did not have an opportunity to properly litigate the issue before the Superior Court, particularly given that the Court may ultimately find that material compliance was had under either version.

NOTICE UNDER RULE 21(a)

Appellee PFP respectfully requests that it be awarded its attorneys' fees and costs incurred on appeal pursuant to Arizona Rules of Civil Appellate Procedure, Rule 21, Article 13.15 of the Declaration [IR-51, Ex. 1 at 52 (APP114)], and A.R.S. §§12-1103, 33-420, and/or 12-341.01 as this action is based in contract.

CONCLUSION

Appellee requests this Court grant review of its Cross-Petition, reverse the Court of Appeal's decision, and uphold the Trial Court's ruling dismissing Plaintiffs' causes of action against PFP in their entirety for failure to state a claim upon which relief can be granted based upon the Trial Court's finding that Defendants complied with the 2018 version of A.R.S. §33-1228.

RESPECTFULLY submitted this 28th day of October, 2022.

WONER HOFFMASTER PESHEK & GINTERT, PC

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APPENDIX
TABLE OF CONTENTS[1]

[1] Cross-Petitioner has numbered its Appendix with the following prefix PFP.APP to distinguish it from Petitioner's prior appendix at APP027-APP160. The appendix page numbers are sequential to the last page of the brief. This Appendix complies with the requirements of ARCAP 13.1(d)(3).

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DIVISION ONE
FILED: 03/17/2022
AMY M. WOOD, CLERK
BY: AJA

JIE CAO, et al.,	)	Court of Appeals
	)	Division One
Plaintiffs/Appellants,	)	No. 1 CA-CV 21-0275
	)	
v.	)	Maricopa County
	)	Superior Court
PFP DORSEY INVESTMENTS, LLC, et al.,	)	No. CV2019-055353
	)	
	)	
Defendants/Appellees.	)	
	)	

ORDER FOR ADDITIONAL BRIEFING

The court, Presiding Judge Paul J. McMurdie, Vice Chief Judge David B, Gass, and Chief Judge Kent E. Cattani, has reviewed the briefing and considered the arguments. On the court's motion, the court has determined that added briefing may help the court.

The court has considered appellants' argument that A.R.S. § 33-1228 authorized an unconstitutional taking of appellants' property and appellees' argument that the authority to sell instead arose out of contract—through the CC&R. A forced sale under A.R.S. § 33-1228 is likely unconstitutional, but only if the owners did not agree to it through a private agreement—purchase of a property subject to CC&R. In January 2018, appellants bought their condominium subject to the Declaration, which gives the Association the "rights, powers and duties as are prescribed by the Condominium Act."

Both parties apply the version of the Condominium Act enacted by Laws 2018, ch. 235, § 1, effective from August 3, 2018, to August 26, 2019 (2018 version). When appellees took ownership of their unit in January 2018, the effective version of the statute was enacted by Laws 1985, ch. 192, § 3, effective from January 1, 1986, to August 2, 2018 (1986 version).

Subsection (G)(1) of the 1986 version states:

> [T]he respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by an independent appraiser selected by the

> Association. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which fifty percent of the votes in the Association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.
>
> Subsection (G)(1) of the 2018 version states:
>
> [T]he respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the Association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the Association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the Association's appraiser, the unit owner shall submit to arbitration at the Association's expense and the arbitration amount is the final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

The court has the following questions:

(a) If a private agreement—the purchase agreement of a condominium—incorporates a statute by reference, are subsequent statutory amendments incorporated into the agreement?

(a) In this case, were the CC&R ever amended to incorporate the 2018 amendments?

(a) If the private agreement did not include the 2018 statutory amendment, would its application violate the private takings prohibition?

(a) Appellees argue that they did not breach their fiduciary duty to appellants because they strictly complied with the 2018 version of A.R.S. § 33-1228(G). Assuming that the 1986 version applies, have appellees breached their fiduciary duty?

(a) Have Appellants waived any assertion that the 1986 version of the statute applies?

IT IS ORDERED that the parties file simultaneous supplemental briefs on the questions raised no later than April 15, 2022. The briefs will be limited to 5000 words. Requests for extensions of time or word count will not be entertained. The parties may raise subsidiary issues only related to the court's questions.

IT IS FURTHER ORDERED that the parties may file a supplemental reply brief no later than May 2, 2022. Any reply brief will be limited to 3000 words. Requests for extensions of time or word count will not be entertained.

/s/_____
PAUL J. McMURDIE, Presiding Judge

A copy of the foregoing
was sent to:

Eric M Fraser
John S. Bullock
Shawna M Woner
Stephanie Kwan Gintert
Edith I Rudder
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James Martin Manley

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DIVISION ONE
FILED: 03/23/2022
AMY M. WOOD,
CLERK
BY: KLE

JIE CAO, et al.,	)	Court of Appeals
	)	Division One
Plaintiffs/Appellants,	)	No. 1 CA-CV 21-0275
	)	
v.	)	Maricopa County
	)	Superior Court
PFP DORSEY INVESTMENTS, LLC, et al.,	)	No. CV2019-055353
	)	
	)	DEPARTMENT B
Defendants/Appellees.	)	
	)	

ORDER RE: SUPPLEMENTAL AUTHORITY

The court, Presiding Judge Paul J. McMurdie, Vice Chief Judge David B. Gass, and Chief Judge Kent E. Cattani, has determined that a new case may require the parties' attention.

The Supreme Court of Arizona recently issued a decision in *Kalway v. Calabria Ranch HOA, LLC, et al.*, CV-20-1052-PR, (Mar. 22, 2022), in which it held that an HOA may rely on a general-amendment-power provision in its CC&Rs to amend only those restrictions for which the HOA's original declaration provided sufficient notice. Thus, the parties should address the effect of the *Kalway* opinion on the issues raised in our supplemental-briefing order.

On the court's motion,

IT IS ORDERED giving notice to the above.

/s/
PAUL J. McMURDIE, Presiding Judge

A copy of the foregoing
was sent to:

Eric M Fraser
John S. Bullock
Shawna M Woner
Stephanie Kwan Gintert
Edith I Rudder
Nicholas Nogami
James Martin Manley

DO
he

When recorded, return to:

Michael A. Schern
1640 S. Stapley Dr., Suite 132
Mesa, AZ 85204
Tel: (480) 632-1929

CONDOMINIUM TERMINATION AGREEMENT

This Condominium Termination Agreement (the "**Agreement**") is entered into on April 9th, 2019, by and between DORSEY PLACE CONDOMINIUM ASSOCIATION, an Arizona nonprofit corporation ("**Association**"), and PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company ("**PFP**"), and all the Owners (defined below).

RECITALS

WHEREAS, Association is a condominium association organized to manage the condominium known as DORSEY PLACE CONDOMINIUMS (the "**Condominium**"), including the management of common elements and enforcement of that certain Declaration of Condominium for Dorsey Place Condominiums recorded on August 15, 2007 as Document No. 2007-0921387, in the Official Records, and as amended by that First Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on September 3, 2009 as Document No. 2009-0825688, in the Official Records, and as amended by that Second Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on February 29, 2012 as Document No. 2012-0168217, in the Official Records, and as amended by that Third Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on March 2, 2018 as Document No. 2018-0161234, in the Official Records of Maricopa County, Arizona (the "**Declaration**").

WHEREAS, the Condominium is depicted and described in that certain plat recorded in Book 938 of Maps, Page 7 and as Document No. 2007-0856826 in the Official Records of Maricopa County, Arizona and further depicted and described in that certain replat of commercial space and a portion of common element of the Condominium recorded in Book 1246 of Maps, Page 16 and as Document No. 2015-0740949 in the Official Records of Maricopa County, Arizona (the "**Plat**"). All property described in the Plat and subject to the Declaration is referred to herein as the "**Project**."

WHEREAS, pursuant to the Arizona Condominium Act, at A.R.S. § 33-1228(A), a condominium may be terminated by agreement of Unit owners (the Unit owners of Units within the Condominium are referred to herein collectively as "**Owners**," and individually as "**Owner**") of Units to which at least eighty percent (**80%**) of the votes in the Association are allocated, or any larger percentage the Declaration specifies.

WHEREAS, the Declaration specifies that the agreement of at least ninety percent (**90%**) of the Owners is required to terminate the Condominium.

WHEREAS, the Owners of Units to which at least ninety percent of the votes in the Association are allocated have agreed to terminate the Condominium as evidenced by the written ratification of this Agreement by such Unit owners attached hereto as **Exhibit A** and incorporated herein by this reference.

WHEREAS, Association is agreeing on behalf of the Owners to a sale of all portions of and interest in the Project not already owned by PFP, to PFP, upon termination of the Condominium (such property to be sold is referred to herein as "**Purchased Property**" and is described on **Exhibit B** attached hereto and incorporated herein by this reference.

WHEREAS, all capitalized terms not otherwise defined herein shall have the same meaning as provided in the Declaration.

AGREEMENT TERMS AND CONDITIONS

In light of the foregoing, and for valuable consideration, the receipt of which is hereby acknowledged, the Association, PFP, and Owners agree as follows:

1. Recitals. The foregoing recitals, which the parties to this Agreement represent and warrant are true and correct, are incorporated by this reference into these Agreement Terms and Conditions.

2. Effective upon Recording. This Agreement is effective immediately upon being recorded in the official records of the county recorder of Maricopa County, Arizona.

3. Effect of Termination of Condominium. Upon termination of the Condominium, the Declaration and Plat are of no further force and effect upon recording of this Agreement and at such time the Project will not be subject to any plat.

4. Title to the Project; Power of Association. Upon termination of the Condominium, title to the Purchased Property vests in the Association as trustee for the holders of all interest in the Units. Thereafter, the Association has all powers necessary and appropriate to effect the sale described in this Agreement.

5. Sale of the Purchased Property. All interest in the Purchased Property shall be sold by the Association to PFP promptly following termination of the Condominium, as described herein and for the consideration set forth below.

a. Determination of the Respective Interests of Unit Owners.

i. *Fair Market Value Determination.* An independent appraiser, K&T Appraisals, Inc., chosen by the Association has valued the Project. The appraiser's determination of fair market value ("**Association's Appraisal**") report will be distributed to the Owners for review and shall become final as to each respective Unit if not disapproved as set forth herein below.

ii. *Owner Disapproval.* In the event an Owner disapproves of the Association's Appraisal of such Owner's Unit, such Owner shall obtain a second independent appraisal of the fair market value of such Owner's Unit ("Owner's Appraisal") at such Owner's expense and provide the Association with a copy of the Owner's Appraisal report within sixty (60) days from the date the Association's Appraisal was originally distributed to the Owners for review. If the Owner's Appraisal amount differs from the Association's Appraisal amount by:

1. five percent (5%) or less, the higher determination of fair market value shall be final and binding as to such Unit.

2. more than five percent (5%), the Association's Appraisal of the Unit shall be final and binding as to such Unit; provided, however, that if Owner submits the issue (referred to herein as an "**Arbitrable Issue**") to arbitration in accordance with the terms set forth herein below, then the fair market value determined by the arbitrator shall be final and binding as to such Unit.

iii. *Arbitration.* Arbitrable Issues shall be resolved by final and binding arbitration as set forth herein.

1. No later than the seventieth (70^{th}) day after the Association's Appraisal was originally distributed to the Owners for review (the "**Submission** [Unofficial Document] "), the Owner shall submit the Arbitrable Issue to arbitration by delivering a notice of arbitration to the Association setting out the nature of the Arbitrable Issue and the relief requested.

2. Within ten (10) days of the receipt of the notice of arbitration, the Association shall deliver to the Owner its answer, which shall indicate whether the Association will contest the Owner's Appraisal.

3. The tribunal shall consist of one arbitrator, appointed as follows: the appraiser who authored the Owner's Appraisal and the appraiser who authored the Association's Appraisal shall, within seven (7) days of delivery of the answer, act together to appoint a third independent appraiser who shall act as the arbitrator.

4. The arbitrator shall decide the procedures to be followed in the arbitration after consultation with the Owner and the Association.

5. All fees and costs of the arbitrator shall be paid by the Association.

6. The fair market value determined by the arbitrator shall be final and binding as to such Unit. Failure of the Owner to submit the Arbitrable Issue to arbitration by the Submission Deadline shall result in the Association's Appraisal of the Unit being final and binding as to such Unit.

b. Purchase Price. PFP agrees to buy and the Association and Owners agree to sell to PFP the Purchased Property for the aggregate fair market value of the Purchased Property pursuant to Section 5(a) above Price in cash or cash equivalent to be paid on or before the later of the following to occur: (i) thirty days after the appraiser's determination of fair market value becomes final; or (ii) within thirty days after the recording of this Agreement.

c. Proceeds. All proceeds of the sale of the Project, together with the assets of the Association, will be held by the Association as trustee for the Owners and holders of liens on the Units as their interests may appear.

6. Escrow. The parties to this Agreement authorize Commonwealth Land Title Insurance Company, located at 2390 E. Camelback Rd., Suite 230, Phoenix, Arizona 85016, to act as "**Escrow Agent**" to receive funds and other items and, subject to clearance, disburse them in accordance with the terms of this Agreement. Escrow Agent will deposit all funds received in a non-interest bearing escrow account. If Escrow Agent receives conflicting demands or has a good faith doubt as to Escrow Agent's duties or liabilities under this Agreement, he/she may (a) hold the subject matter of the escrow until the Association and PFP mutually agree to its disbursement or until issuance of a court order or decision of arbitrator determining the Association's and PFP's rights regarding the escrow or (b) deposit the subject matter of the escrow with the clerk of the superior court having jurisdiction over the dispute. Upon notifying the parties of such action, Escrow Agent will be released from all liability except for the duty to account for items previously delivered out of escrow. The parties agree that Escrow Agent will not be liable to any person for misdelivery to the Association or PFP of escrowed items, unless the misdelivery is due to Escrow Agent's willful breach of this Agreement or gross negligence.

7. Distribution of Sale Proceeds and Satisfaction of Liens. The Association shall distribute the proceeds of sale of the Purchased Property pursuant to the following terms and in the following order of priority:

a. The Owner of each Unit that is a portion of the Purchased Property will be paid the net sum of the following amounts: (i) the Fair Market Value of his respective Unit as set forth in the Schedule of Values incorporated into the Agreement as **Exhibit C** hereto, as fair market value for such Owner's respective Unit and that Owner's proportional share on the Common Elements and assets of the Association; plus (ii) any additional amount as may be required to be paid pursuant to A.R.S. § 33-1228(G)(1); less (iii) any amount required to satisfy liens encumbering such Owner's Unit.

b. Any liens that encumber a Unit shall be paid by the Association to the extent, and nothing more, that the Owner of that particular Unit was entitled to sale proceeds described above in subsection a of this Section 7. The Association shall not be responsible for any deficiency that may exist due to a lack of proceeds available to an Owner. PFP shall pay any such deficiency then existing after the Association has distributed sale proceeds and that is required to satisfy all liens encumbering any portion of the Project. Each Owner for which PFP paid a deficiency to satisfy

lien(s) encumbering that Owner's Unit shall be personally obligated to reimburse PFP for such deficiency paid.

c. To the extent that after reasonable efforts to locate an Owner, that Owner cannot be located in order to distribute to him or her proceeds, the Escrow Agent is directed to comply with the Revised Arizona Unclaimed Property Act (A.R.S. § 44-301, *et seq.*) for deposit of those proceeds according to Arizona law.

8. Power of Attorney. Upon termination of the Condominium, Matthew Quinn shall be the attorney-in-fact for each Owner with the power to execute any and all documents necessary or appropriate to effectuate the terms of this Agreement.

9. Dissolution of Association. After termination of the Condominium and upon final distribution of sale proceeds, the Association's board of directors shall dissolve the Association by delivering to the Arizona Corporation Commission for filing articles of dissolution pursuant to A.R.S. § 10-11401 and 10-11403.

10. Deadline for Recording. This Agreement is void after August 1, 2019 unless it is recorded before that date.

11. Governing Law. This Agreement shall be governed by the laws of the State of Arizona. The parties irrevocably agree that the courts of the State of Arizona in Maricopa County, Arizona shall have exclusive venue and jurisdiction over the parties with respect to any dispute between the parties related to this Agreement.

12. Attorneys' Fees. If any action is brought by any party with respect to its rights under this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, consultant fees and all other court costs from the non-prevailing party, whether or not taxable by statute.

13. Captions. Any paragraph titles or captions contained in this Agreement are for convenience of reference only and shall not be deemed a part of this Agreement.

14. Terms. Common nouns and pronouns shall be deemed to refer to the masculine, feminine, neuter, singular and plural, as the identity of the person or entity may in the context require.

15. Severability. If any provision of this Agreement shall be held invalid or unenforceable, it shall not affect in any respect whatsoever the validity or enforceability of the remainder of this Agreement.

16. Complete Agreement. This Agreement, together with the exhibits attached hereto, constitutes the complete and exclusive statement of the agreement between the parties concerning this matter. This Agreement supersedes all prior written and oral statements and no representation, statement, condition or warranty not contained in this Agreement shall be binding on the parties or have any force or effect whatsoever. No amendment to this Agreement shall be binding unless in writing and executed by each of the parties.

17. Counterparts. This Agreement may be executed simultaneously or in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

----------SIGNATURES FOLLOW----------

IN WITNESS WHEREOF, the undersigned execute this Agreement this 9th day of April 2019.

DORSEY PLACE CONDOMINIUM ASSOCIATION,
an Arizona nonprofit corporation

By: _____
Matthew Quinn, President

State of Arizona)
) *ss.*
County of Maricopa)

See Attached

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this ____ day of April 2019, by Matthew Quinn, the President of Dorsey Place Condominium Association, an Arizona nonprofit corporation, for and on behalf of the corporation.

My Commission Expires: _____ Notary Public

Client: PFP Dorsey Investments, LLC
By: Pathfinder Partners Realty Ventures VII, LLC, Co-Manager
By: Pathfinder Partners, LP, Manager
By: Pathfinder Management and Operations Company, LLC, General Partner

By: _____
Name: Manager
Title: Lorne Polger

State of Arizona)
) *ss.*
County of Maricopa)

See Attached

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this ___ day of April 2019, by _____, _____ of PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company.

My Commission Expires: _____ Notary Public

CALIFORNIA JURAT WITH AFFIANT STATEMENT **GOVERNMENT CODE § 8202**

☑ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–6 to be completed only by document signer[s], *not* Notary)

Signature of Document Signer No. 1 *Signature of Document Signer No. 2 (if any)*

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of San Diego

Subscribed and sworn to ~~(or affirmed)~~ before me on this 9th day of April, 2019.
Date *Month* *Year*
by
(1) Matthew Quinn
(and (2) _____),
Name(s) of Signer(s)

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

AMANDA KAY SNYDER
Notary Public California
San Diego County
Commission # 2216831
My Comm. Expires Oct 31, 2021

Signature Amanda Kay Snyder
Signature of Notary Public

Seal
Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____ Document Date: _____

Number of Pages: _____ Signer(s) Other Than Named Above: _____

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State of California
County of San Diego

Subscribed and sworn to ~~(or affirmed)~~ before me on this 9th day of April, 2019,
Date *Month* *Year*
by
(1) Lorne Polger
(and (2) _____),
Name(s) of Signer(s)

proved to me on the basis of satisfactory evidence to be the person~~(s)~~ who appeared before me.

AMANDA KAY SNYDER
Notary Public - California
San Diego County
Commission # 2216831
My Comm. Expires Oct 31, 2021

Signature Amanda Kay Snyder
Signature of Notary Public

Seal
Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

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Number of Pages: Signer(s) Other Than Named Above: _____

Exhibit A

RATIFICATION OF CONDOMINIUM TERMINATION AGREEMENT

PFP DORSEY INVESTMENTS, LLC, a Delaware limited company, and Owner of the following real property that is part of the Condominium:

Unit: 102, Unit: 103, Unit: 104, Unit: 105, Unit: 107, Unit: 108,
Unit: 109, Unit: 110, Unit: 111, Unit: 112, Unit: 113, Unit: 114,
Unit: 115, Unit: 116, Unit: 117, Unit: 118, Unit: 119, Unit: 120,
Unit: 121, Unit: 201, Unit: 202, Unit: 203, Unit: 204, Unit: 205,
Unit: 206, Unit: 207, Unit: 208, Unit: 209, Unit: 210, Unit: 211,
Unit: 212, Unit: 213, Unit: 214, Unit: 215, Unit: 216, Unit: 217,
Unit: 218, Unit: 219, Unit: 220, Unit: 221, Unit: 222, Unit: 223,
Unit: 224, Unit: 225, Unit: 301, Unit: 302, Unit: 303, Unit: 304,
Unit: 305, Unit: 306, Unit: 308, Unit: 309, Unit: 311, Unit: 312,
Unit: 313, Unit: 314, Unit: 315, Unit: 316, Unit: 317, Unit: 318,
Unit: 319, Unit: 320, Unit: 321, Unit: 322, Unit: 323, Unit: 324,
Unit: 325, Unit: 402, Unit: 403, Unit: 404, Unit: 405, Unit: 406,
Unit: 407, Unit: 408, Unit: 409, Unit: 411, Unit: 412, Unit: 413,
Unit: 414, Unit: 415, Unit: 416, Unit: 417, Unit: 418, Unit: 419,
Unit: 420, Unit: 421, Unit: 422, Unit: 423, Unit: 424, Unit: 425,

of DORSEY PLACE CONDOMINIUMS, a Condominium as created by that certain Declaration of Condominium for Dorsey Place Condominiums recorded on August 15, 2007 as Document No. 2007-0921387, in the Official Records, and as amended by that First Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on September 3, 2009 as Document No. 2009-0825688, in the Official Records, and as amended by that Second Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on February 29, 2012 as Document No. 2012-0168217, in the Official Records, and as amended by that Third Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on March 2, 2018 as Document No. 2018-0161234, and as depicted and described in that certain plat recorded in Book 938 of Maps, Page 7 and as Document No. 2007-0856826 in the Official Records, and further depicted and described in that certain replat of commercial space and a portion of common element of the Condominium recorded in Book 1246 of Maps, Page 16 and as Document No. 2015-0740949 in the Official Records of Maricopa County, Arizona;

Together with each an undivided Interest in and to the General Common Elements as set forth in said Declaration and Plat,

does hereby agree to, and does ratify, that certain Condominium Termination Agreement entered into on April 9th, 2019 by and between Dorsey Place Condominium Association, an Arizona nonprofit corporation, and PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company, and all the Owners of Units within the Condominium.

IN WITNESS WHEREOF, the undersigned Owner has executed and acknowledged this instrument.

Client: PFP Dorsey Investments, LLC
By: Pathfinder Partners Realty Ventures VII, LLC, Co-Manager
By: Pathfinder Partners, LP, Manager
By: Pathfinder Management and Operations Company, LLC, General Partner

By: _____
Name: Manager
Title: Lorne Polger

State of Arizona)
) ss.
County of Maricopa)

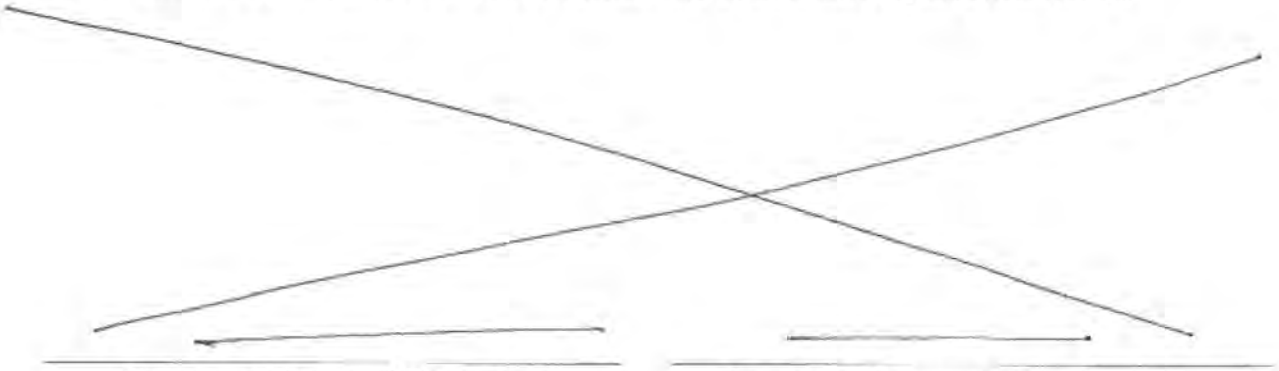
See Attached

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this ___ day of April 2019, by _____, _____ of PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company.

My Commission Expires: _____ Notary Public

CALIFORNIA JURAT WITH AFFIANT STATEMENT **GOVERNMENT CODE § 8202**

☑ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–6 to be completed only by document signer[s], *not* Notary)



Signature of Document Signer No. 1 *Signature of Document Signer No. 2 (if any)*

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of San Diego

Subscribed and sworn to ~~(or affirmed)~~ before me on this 9th day of April, 2019,
Date *Month* *Year*
by
(1) Lorne Polger
(and ~~(2)~~ _____),
Name(s) of Signer(s)

proved to me on the basis of satisfactory evidence to be the person~~(s)~~ who appeared before me.

AMANDA KAY SNYDER
Notary Public – California
San Diego County
Commission # 2216831
My Comm. Expires Oct 31, 2021

Signature Amanda Kay Snyder
Signature of Notary Public

Seal
Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

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Number of Pages: _____ Signer(s) Other Than Named Above: _____

Exhibit B

(The "Purchased Property" - property not owned
by PFP and to be purchased upon condominium termination)

Unit: 106, Unit: 307, Unit: 310, Unit: 410, Unit: 401, Unit: 101

of DORSEY PLACE CONDOMINIUMS, a Condominium as created by that certain Declaration of Condominium for Dorsey Place Condominiums recorded on August 15, 2007 as Document No. 2007-0921387, in the Official Records, and as amended by that First Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on September 3, 2009 as Document No. 2009-0825688, in the Official Records, and as amended by that Second Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on February 29, 2012 as Document No. 2012-0168217, in the Official Records, and as amended by that Third Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on March 2, 2018 as Document No. 2018-0161234, and as depicted and described in that certain plat recorded in Book 938 of Maps, Page 7 and as Document No. 2007-0856826 in the Official Records, and further depicted and described in that certain replat of commercial space and a portion of common element of the Condominium recorded in Book 124 of Maps, Page 16 and as Document No. 2015-0740949 in the Official Records of Maricopa County, Arizona;

Together with each an undivided Interest in and to the General Common Elements as set forth in said Declaration and Plat,

Exhibit C

Schedule of Values

Unit No.	Appraisal	HOA Assets	Total Fair Market Value
106	$ 234,000	$ 145	$ 234,145
307	$ 244,000	$ 145	$ 244,145
310	$ 244,000	$ 145	$ 244,145
410	$ 244,000	$ 145	$ 244,145
401	$ 244,000	$ 145	$ 244,145
101	$ 244,000	$ 145	$ 244,145

IN THE SUPREME COURT OF ARIZONA

JIE CAO. et al., Petitioners/Appellants/ Cross-Respondents vs. **PFP DORSEY INVESTMENTS, LLC.; DORSEY PLACE CONDOMINIUM ASSOCIATION** Respondents/Appellee/ Cross-Petitioners	**Arizona Supreme Court Case No.: CV-22-0228-PR** **Court of Appeals Division One Case No.: 1 CA-CV 21-0275** **Maricopa County Superior Court Case No. CV2019-055353**

RESPONDENT/APPELLEE/CROSS-PETITIONER DORSEY PLACE CONDOMINIUM ASSOCIATION'S CROSS-PETITION FOR REVIEW

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I. INTRODUCTION

This Court should grant review to correct the arbitrary encumbrances which the Court of Appeals' opinion ("Opinion") has placed on Arizona's community associations and the private contracts which govern them. Relying upon this Court's recent decision in *Kalway v. Calabria Ranch*, 252 Ariz. 532 (2022), the Court of Appeals determined that even a statutory amendment by the Legislature cannot be applied to an owner in a condominium association unless the association's governing documents specifically contemplate that legislative action or the owner "opts-in" to such changes. This is a bridge too far. *Kalway* addressed homeowners' limited power to amend their CC&Rs, not the State Legislature's power to amend the law. Moreover, *Kalway* ensured that majority and minority owners alike were subject to a uniform set of rules which were consistent with the parties' collective expectations at the time of contract. 252 Ariz. at ¶ 17. Here, the Court of Appeals misapplied *Kalway* to achieve exactly the opposite result, usurping the Legislature's clear intent in setting forth (and periodically amending) a procedure for the termination of condominium associations in A.R.S. §33-1228 and leaving associations to comb their governing documents and applicable statutes to discern which versions apply to which owners.

If left unchecked, the Opinion will very quickly leave Arizona community associations struggling to discern which versions of the state's robust statutory

schemes apply to which owners in their communities. Community associations and the individuals who own property within them need clarity and uniformity with respect to their rights and obligations under the private contractual agreements set forth in the governing documents and the statutes which overlay them. The Opinion only invites more confusion. In a state with many thousands of community associations, clarity regarding the interplay between an association's governing documents and the statutes that they incorporate is an issue (in fact, the only substantive issue) of paramount importance that warrants this Court's careful review.

This Court should grant review and hold that Dorsey Place Condominium Association properly utilized and applied the 2018 version of A.R.S. §33-1228 in effecting its 2019 termination and sale of the property in which Petitioners owned what was previously one condominium unit.

II. ISSUES PRESENTED FOR REVIEW

A. Does Arizona law require a condominium association to first determine whether an owner who agreed to be bound by the terms of the association's declaration, including incorporation of the Condominium Act, reasonably expected to be bound by potential future amendments to A.R.S. §33-1228 before pursuing a termination and sale of the condominium in accordance with the express provisions of the then-applicable statute?

B. If this Court does not vacate the Court of Appeals' Opinion, did the Court of Appeals err in its determination that Petitioners were the prevailing party when (1) Petitioners ultimately "prevailed" upon an issue raised *sua sponte* by the Court of Appeals and (2) the case has been remanded to the trial court for further proceedings?

III. MATERIAL FACTS

Petitioners Haining Xia and Jie Cao owned Unit 106 at Dorsey Place Condominiums, a condominium complex governed by the Dorsey Place Condominium Association. Op. ¶ 4. PFP Dorsey Investments, LLC owned 90 of the 96 units at Dorsey Place Condominiums prior to the termination of the condominium. Op. ¶ 5. Under the Association's Declaration, each Unit Owner is a Member of the Association. *Id*. Thus, Petitioner and PFP Dorsey were both members of the Association. *Id*.

On April 4, 2019, the Association held a meeting for the members of the Association. Op. ¶ 7. Petitioners were present at the meeting and termination of the condominium was discussed among the Members. *Id*. Pursuant to the Condominium Association's Declaration, under Section 13.4, "the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated. An agreement to terminate the Condominium must be evidenced by the execution or ratification of a

termination agreement, in the same manner as a deed by the requisite number of Unit Owners." Op. ¶ 8; APP112.

On April 9, 2019, the Condominium Termination Agreement was ratified by 93.75% of the Unit Owners (90 out of the 96 Unit Owners). Op. ¶ 8. Pursuant to the Agreement, the Association on behalf of the Unit Owners agreed to sell to PFP Dorsey all portions of and interests in Dorsey Place Condominium that were not already owned by PFP Dorsey. Op. ¶¶ 7-8.

Petitioners sued, seeking a declaratory judgment and other relief on the grounds that the Agreement and resulting sale of what was formerly their unit violated the Arizona Condominium Act, specifically A.R.S. §33-1228. Op. ¶ 9. In the alternative, Petitioners claimed the statute was unconstitutional as applied. *Id*. The Association and PFP Dorsey moved to dismiss under Ariz. R. Civ. P. 12(b)(6). Op. ¶ 10. The trial court granted the motions. *Id*. Petitioners' appeal followed.

On appeal, the Court of Appeals determined that "the statute is constitutional when applied to condominium owners who bought a condominium unit subject to terms that incorporate the statute" but held that the superior court incorrectly applied the August 2018 version of A.R.S. §33-1228 rather than the 1986 version which was in effect when Petitioners bought their unit in January 2018. Op. ¶¶ 2, 35.

IV. REASONS TO GRANT REVIEW

A. The Court of Appeals' Misapplication of *Kalway* Places an Untenable and Legally Unsupported Burden on Arizona's Community Associations.

The Opinion misapprehends the relationship between the declaration (a private contract) and the statutory scheme it references. By focusing on the amorphous concept of an owners' reasonable expectations at the time they took title subject to an association's declaration, the Court of Appeals has ignored an important reality: the statutes which apply to owners and associations must be applied uniformly, unless they contradict a pre-existing express term of the contractual covenants. The Court of Appeals further erred in relying upon *Kalway* to craft a rule under which only the version of the Condominium Act applicable at the time a unit owner becomes a member of the association can govern the owner's rights and obligations thereunder.

The rights appurtenant to ownership within an association include both "rights to" and "rights to be free from." In focusing on the right to be free from a "forced sale," the Court of Appeals was lured into issuing an opinion which impairs an important aspect of all condominium owners' bundle of rights: the right to free themselves from the auspices of a condominium entirely. By creating an untenable and unworkable rule which deeply burdens associations and the owners who comprise them, the Court of Appeals' Opinion will make it nearly impossible for any future association to effectively terminate their condominium (or community

association), trapping countless owners and real property in a contractual relationship and horizontal property regime for which both the Arizona Legislature and the governing contract provided a way out.

1. *Kalway* must be limited to situations in which a majority of owners affirmatively amend their governing documents without adequate notice.

In *Kalway*, four of the five owners in the Calabria Ranch association passed a number of amendments to the association's declaration that impacted the fifth owner's lot. 252 Ariz. at ¶ 4. The association justified these amendments under the governing declaration's statement that the community's covenants, conditions and restrictions could be amended any time by a majority vote of the members. *Id*. at ¶ 3. This Court rejected that argument, holding instead that "an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations." *Id*. at ¶ 14. Specifically, this Court explained that "the law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." *Kalway*, 252 Ariz. ¶ 15. What remained after this Court's blue penciling was a version of the Calabria Ranch declaration which sets forth a uniform set of restrictions for the association. Viewed in this light, it becomes clear that *Kalway* has no bearing on the discrete issue at hand, namely whether the Association

correctly applied the 2018 version of A.R.S. §33-1228 when it terminated the Association and sold Petitioners' unit.

Most notably, the restrictions at issue in *Kalway* concerned the owners' rights to utilize their land within the Association, such as new limitations on the size and location of dwelling and non-dwelling structures and changes to the types and quantity of permissible livestock. These rights arose solely from the parties' contractual relationship (not from statute) and, because this Court determined that the amended covenants were "entirely new and different in character" than the original covenant to which the fifth lot owner expressly agreed, this Court struck the majority of the challenged amendments. *Id.* at pp. 539-542. By contrast, the change in the termination and sale procedure at issue in this case arose not from majority amendment, but from the Arizona Legislature's amendment to the statute which dictates that procedure.

Unlike *Kalway*, nothing about the "original declaration" or the restrictions therein changed. Rather, it was the statute itself that changed— a statute to which Petitioners agreed to be bound. All condominium associations are subject to the statute, so it is not reasonable to impose *Kalway*'s "reasonable expectations" analysis on a provision of the declaration which merely incorporates the statute by reference. Said differently, there is no need to protect the minority from the majority's whims because the perceived changes to the declaration arose not from the imposition of a

new restriction on the few, nor even from a new restriction at all, but from the Legislature's modification of law. Moreover, such changes are always foreseeable as each legislative session amendments to existing law are adopted. Here, there is an express agreement to be bound by the Condominium Act, and an acknowledgement that it can be amended at any time. Petitioners cannot reasonably argue that they lacked sufficient notice that aspects of the termination procedure may change over time. Nonetheless, the Court of Appeals applied *Kalway* to hold that (1) "the declaration did not provide sufficient notice of such a substantive amendment" and (2) the amendments "substantively altered owners' property rights beyond the owners' expectations of the scope of the covenants." Op. ¶ 22. The Court of Appeals' ruling to that effect was in error.

Even if this Court were to determine that *Kalway* is instructive here, the Court of Appeals' determination that the amendments to the termination statute "substantively altered" owners' property rights was plain error and entirely distinguishable from the significant, substantive contractual amendments at issue in *Kalway*. The condominium termination and sale procedures have existed in statute for decades; the Petitioners knowingly took title subject to this statutory right. The legislature's subsequent tweaks to that procedure (rather than, for example, creating an entirely new right to terminate or eliminating an existing right to terminate entirely) cannot reasonably be said to be without notice. Thus, should this Court

determine that *Kalway's* analysis of contract amendments applies equally to statutory amendments, it should find that the Court of Appeals erred in holding that the legislative amendments were beyond Petitioners' expectations on the date of purchase.

2. Were this Court to allow the misapplication of *Kalway* to stand, associations would face an insurmountable patchwork of governing provisions.

The Court of Appeals held "although the Declaration incorporates amendments to the Condominium Act, an amendment will be included only if it falls within the [owners'] 'reasonable expectations based on the declaration in effect at the time of the purchase.'" Op. ¶ 20. When placed in the larger context of Arizona's vast network of community associations, this very broad ruling should give this Court great pause.

First, this ruling would require any Arizona homeowners' association to determine before taking any action authorized by Arizona law and based solely upon an owner's date of purchase: (1) whether any changes were made to any provisions of the Condominium Act (or Planned Community Act or NonProfit Corporation Act) since the date of purchase, (2) whether those statutory changes were within the "reasonable expectations" of the owner at the time of purchase and (3) if not, apply a different version of the statute to that owner. Not only does this impose an extraordinary burden on the (volunteer) governing board of an association, it

perversely leads to the exact opposite result that this Court sought to achieve in *Kalway*, namely, a uniform set of restrictions each of which is consistent with the owners' reasonable expectations under the Declaration. By requiring associations to determine which of an ever-growing number of statutory amendments applies to a particular owner, the Court of Appeals has all but assured that, despite having agreed to the same declaration, owners within the same association may be subject to different standards. Here, where there are multiple owners who purchased at various times, it is easy to imagine a scenario in which it is impossible to administer the termination and sale process in such a way that comports with each owners' "reasonable expectations" under the statute. Even with 90% agreement, termination and sale under A.R.S. §33-1228 would be unavailable to that association, thus negating the Arizona Legislature's clear intent in enacting, modifying, and preserving the right of a certain super-majority of homeowners to terminate.

Second, taking the Court of Appeals' analysis beyond the termination context (which is inevitable, giving the very broad language of the Court of Appeals' ruling at paragraph 20), the true burden on associations becomes clear. Common association issues which would need to be addressed on an owner-by-owner basis under the Opinion include:

- Flag Display. A.R.S. § 33-1261 concerns an owner's right to display certain flag on the owner's property and has been amended many times

since it was enacted in 2002. Under the original 2002 version, associations could prohibit the display of any flag except the American flag. After several amendments, if an owner purchase subject to the 2002 amendment and never opted-in to subsequent amendments, would the association be required to take action against an adjacent owner who flies a Gadsden Flag (now authorized under A.R.S. §33-1261(A)(5)) on the grounds that viewing a Gadsden Flag was not in the first owner's "reasonable expectations" at the time of purchase.

- Voting by Proxy. Prior to 2005, A.R.S. §33-1250 permitted owners in a condominium association to vote by proxy. Proxies are no longer permitted after declarant control ends. But if an owner who purchased prior to 2005 reasonably expected their right to vote by proxy to persist, under the Court of Appeals opinion, the association may well be required to permit that owner to continue voting by proxy, despite the fact that Arizona law now prohibits it.

As demonstrated by these few examples, the notion that an association must first make individual determinations of an owner's "reasonable expectations" before taking action authorized by statute is entirely inconsistent with the very basic principle of uniformity and predictability that must underpin community association law and which drove this Court's considered opinion in *Kalway*.

3. There is no sound basis for the Court of Appeals' determination that the 2018 statute gives less rights to Petitioners.

The Court of Appeals justified its holding, in part, by explaining that the trial

court erred in applying the 2018 version of the statute "because the previous version of the statute potentially provided greater protections" to Petitioners. Op. ¶ 2. To the extent that the Court's determination that the trial court erred in applying the 2018 statute was based upon its assessment that the 1986 version may be "more advantageous" to Petitioners, review is also warranted because there is no legal or factual basis for that conclusion. Whether a particular version of a statute is more advantageous to a particular party is a subjective and nuanced consideration. Here, the Court of Appeals' apparent conclusion that Petitioners were better off under the 1986 statute is, at best, debatable and, more likely, incorrect.

One of the major tenets of the 2018 version is that owners have the right to obtain their own appraisal and if the independent appraisal differs from the association's appraisal by less than 5%, "the higher appraisal is final" if by more, the parties submit to arbitration over the final value. *See* A.R.S. §33-1228(G)(1)(2018). The 2018 version also provides a 5% relocation cost premium to holdouts and a 60-day appeal period. *Id*. The 1986 version authorizes only the association to obtain an appraisal, which becomes final unless a majority of the owners disapproves it within 30 days, which was always mathematically impossible. The 2018 version provides substantially more advantages to holdout owners like Petitioners, but, under the Opinion, Petitioners could not have reasonably expected and cannot avail themselves of any of these, because only the 1986 version of §33-

1228 applies to them.

Even if the advantages of the 2018 and 1986 statutes were, in fact, debatable, the Court of Appeals' "more advantageous" criteria alone adds yet another problematic element to the determination of which version of a statute to apply to a particular owner. Before taking action otherwise authorized by statute (and, by extension, the declaration) an association must now (1) identify any statutory amendments which have occurred since the to-be-affected owners' purchased into the community, (2) assess whether any prior version of the relevant statute "provided greater protections" to minority owners, and (3), if so, determine whether any subsequent amendments are within what such owners "reasonably expected at that time." With the introduction of this potential third criteria, this Court's careful review is all the more necessary to avoid further confusion (and legal guesswork) among Arizona's many community associations.

B. Should the Court decline to review the Court of Appeals' application of §33-1228, the Court should still grant review to determine whether the Court of Appeals erred in its determination that Petitioners were the prevailing party on appeal.

The Court should also grant review to correct the Court of Appeals' determination that Petitioners were the prevailing party on appeal and corresponding fee award of $230,000 in Petitioners' favor. Though attorneys' fees awards are typically subject to the awarding court's discretion, on occasion, a lower court's

incorrect determination of the "prevailing party" warrants this Court's review. *See, e.g., Am. Power Prod., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, 366, 396 P.3d 600, 602 (2017) (accepting review of attorney fee award to address the interplay between §12–341.01 and contractual fee provisions as regards "prevailing party" determination).

Petitioners raised two issues on appeal: "(1) A.R.S. §33-1228 is an unconstitutional taking of private property and (2) A.R.S. §33-1228 prohibits PFP Dorsey and the Association from forcing a sale of less than the entire condominium for only the appraised value." Op. ¶ 13. The Court of Appeals rejected both of these arguments and, instead, reverse and remanded the case to the trial court because it found that the trial court applied the incorrect version of A.R.S. §33-1228, an issue Petitioners did not raise before the trial court or on appeal. Only when the Court of Appeals raised the issue *sua sponte* in its request for supplemental briefing did Petitioners make this argument. Here, the declaration allows a prevailing party to recover "reasonable attorney's fees." Op. ¶ 36. It is not reasonable to award prevailing party fees for briefing issues that were entirely unsuccessful on appeal. *See Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 394 (1985) (factors to consider in §12-341.01 analysis include merits of the unsuccessful party's defenses and whether the successful party prevailed with respect to all of the relief sought).

Even if Petitioners could be said to have been the "successful" or "prevailing

party" on appeal by virtue of the fact that Court of Appeals' own analysis resulted in a remand, under this Court's own precedent, where a case has been remanded to a lower court for further proceedings, no determination regarding the prevailing party on appeal can be made, and any award of fees based upon a premature determination of the prevailing party was in error.

Admittedly, in *Wagenseller*, this Court clarified that a successful appellant can be a prevailing party even if the case is remanded for a trial. 147 Ariz. at 394. Yet in *Johnson v. Earnhardt's Gilbert Dodge, Inc*., 212 Ariz. 381, 389, 132 P.3d 825, 833 (2006), this Court held that "[b]ecause we remand this case, Earnhardt has not prevailed, making an award of fees premature" and declined to award any attorneys' fees under A.R.S. §12-341.01). This Court should grant review to resolve this inconsistency and determine whether the Court of Appeals erred in awarding fees before the trial court has issued its final ruling on remand.

V. ARCAP 21 NOTICE

The Association requests its reasonable attorneys' fees on appeal pursuant to § 13.15 of the Declaration (APP114) and A.R.S. §12-341.01.

VI. CONCLUSION

The Court should grant review, vacate the Court of Appeals' opinion, and affirm the trial court's dismissal of Petitioner's claims.

RESPECTFULLY SUBMITTED this 28th day of October 2022.

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IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA

JIE CAO; et al., Petitioners / Appellants / Cross-Respondents, vs. PFP DORSEY INVESTMENTS, LLC; et al., Respondents / Appellees / Cross-Petitioners.	Arizona Supreme Court CV-22-0228-PR Court of Appeals Div. 1 No: 1 CA-CV 21-0275 Maricopa County Superior Court Case No. CV2019-055353

BRIEF OF AMICUS CURIAE
FOR ARIZONA HOMEOWNERS COALITION
IN SUPPORT OF APPELLANTS

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IDENTITY AND INTERESTS OF AMICI CURIAE

This brief is being filed on behalf of, and sponsored by, Arizona Homeowners Coalition ("AHC").[1] AHC is an unincorporated coalition of homeowners from across the state living in common-interest communities. AHC aims to help in the reformation of existing laws and adoption of new laws affecting individuals living in common-interest communities. AHC has an interest in this case because it raises serious issues affecting the rights and obligations of members of the coalition and all individuals living, residing, or owning properties in condominium communities. To that end, AHC has an interest in the interpretation and application of the Arizona Condominium Act, and specifically A.R.S. § 33-1228.

This case is important for all condominium owners across the State of Arizona. AHC believes Appellants' interests are well represented by their counsel, and simply seeks to present a broader perspective as to why the general incorporation of the Arizona Condominium Act, A.R.S. § 33-1201, *et seq.* into a condominium's declaration should not render A.R.S. § 33-1228, an otherwise unconstitutional statute, enforceable.

[1] The AZ HOA Homeowner Advocate and Dennis Legere provided financial resources for the preparation of this brief.

ARGUMENT

Arizonans should not be forced to waive constitutional protections simply because a contract of adhesion recorded against their property incorporates an unconstitutional statute as part of a larger statutory scheme.

I. A.R.S. § 33-1228 IS VOID AND UNENFORCEABLE.

As the Court of Appeals recognized in its underlying opinion, and as further explained below, A.R.S. § 33-1228 is unconstitutional on its face. *See* Court of Appeals Opinion (filed July 7, 2022) (APP028-APP039) ("Opinion"), ¶ 15.

A. A.R.S. § 33-1228 Violates Article 2, Section 17 of the Constitution.

In the Arizona Bill of Rights, Article 2, Section 17 of the Constitution provides:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made…. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

In other words, private property can only be taken for public use, never for private use. *See also*, A.R.S. § 12-1112 (the taking of private property must be necessary for public use); *Bailey v. City of Mesa*, 206 Ariz. 224, 230 (App. 2003) (the "anticipated public benefit must substantially outweigh" any character or private use of the land

taken). Indeed, as this Court recognized in 1914, "[t]he Legislature of a state may not take, ***or authorize*** the taking of private property, except for public use… private property may be taken for public uses only." *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 144 Ariz. 257, 262-67 (1914) (emphasis added);[2] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (finding a statute that authorizes a private party to take another party's property constitutes a taking).

Because it allows condominium associations to force the sale of a nonconsenting owner's property for someone else's private use, A.R.S. § 33-1228's enactment plainly conflicts with Article 2, Section 17 of the Arizona Constitution. *See Fann v. State*, 251 Ariz. 425, ¶ 24 (2021)

("a statute cannot circumvent or modify constitutional requirements"); *Dobson v. State ex rel., Com'n on App. Ct. Appointments*, 233 Ariz. 119, ¶ 17 (2013) ("When a state statute conflicts with Arizona's Constitution, the constitution must prevail"); *Harris v. Maehling*, 112 Ariz. 590, 591 (1976) ("The legislature may not enact a statute which is in conflict with a provision of the Arizona Constitution"); *Dorgan v. Pima Cnty.*, 131 Ariz. 491, 492 (App. 1982)

[2] Appellee PFP Dorsey Investments, LLC cites to *Inspiration Consol. Copper* (at p. 15) for the proposition that Arizona's constitution provides that "private property shall not be taken for private use ***unless by consent of the owner***," with that emphasis having been added by Appellee. However, Appellee failed to attribute that quote as being from *Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co*., 21 Wyo. 204, 131 P. 43, 56 (1913), in which the Wyoming Supreme Court interpreted its own state's takings clause, which expressly provides that "[p]rive property shall not be taken for private use ***unless by consent of the owner***." *See*, Wyo. Const. art. I, § 32 (emphasis added).

("It is elementary that the Arizona Constitution, second only to the United States Constitution, is the supreme law of Arizona, and any act of the legislature passed before or after adoption of the Arizona Constitution which contravenes the Arizona Constitution must fall"). In other words, the Arizona Legislature lacked the authority to enact A.R.S. § 33-1228.

Having reached the same conclusion in the underlying opinion, the Court of Appeals' analysis should have stopped there.

B. A.R.S. § 33-1228 Violates the Arizona Private Property Rights Protection Act, A.R.S. § 12-1131, *et seq.*

A.R.S. § 12-1131 provides that "eminent domain may be exercised only if the use of eminent domain is authorized by this state, whether by statute or otherwise, and for a public use as defined in this article." The public uses defined in the article, at A.R.S. § 12-1136(5), do not include forcing the sale of a holdout owner's property to be used by the investor who owners a majority of the other units within the condominium. Appellee PFP Dorsey nevertheless argues that its condemnation was not an act of eminent domain because it "is not a sovereign, and it has no such power." In doing so, it ignores that eminent domain can be exercised by a person, just as it may be exercised by a governmental entity. *See* A.R.S. § 12-1111 ("the right of eminent domain may be exercised by the state, a county, city, town, village, or political subdivision, or by a person"). Moreover, the contract rights otherwise providing alleged condemnation power are themselves derived from the power of

the sovereign, through the incorporation of the Condominium Act, not from separate language expressly adopting the right to force a sale of a nonconsenting owner's property as authorized in A.R.S. § 33-1228.

Because A.R.S. § 33-1228 grants a sovereign right to appropriate private land for private use, it authorizes eminent domain in violation of A.R.S. § 12-1131; *see Calmat of Ariz. v. State ex rel. Miller*, 176 Ariz. 190, 193 (1993) (recognizing eminent domain as the "sovereign right of the state to appropriate private land for the public good"). Because A.R.S. § 33-1228 is trumped by A.R.S. § 12-1131, it must necessarily fall. *See* A.R.S. § 12-1137 ("If a conflict between this article and any other law arises, this article controls"). Accordingly, A.R.S. § 33-1228 cannot be invoked to justify a private taking.[3]

C. A.R.S. § 33-1228 Violates Article 2, Section 4 of the Arizona Constitution.

Arizona's Due Process Clause, set forth in Article 2, Section 4 of its Constitution provides:

> No person shall be deprived of life, liberty, or property without due process of law.

[3] Because A.R.S. § 12-1131's effective date of December 7, 2006 predates Appellants' ownership of their unit and predates the 2007 recording of the applicable condominium declaration in this case, A.R.S. § 33-1228 could not have been incorporated into the declaration because it was invalid by operation of A.R.S. § 12-1131 at all relevant times. *See* Declaration of Condominium for Dorsey Place Condominiums (APP058-APP122).

"The term 'property' in the context of a due process inquiry does not refer to concessions or privileges that a state controls and may bestow or withhold at will." *Shelby Sch. v. Arizona State Bd. of Educ*., 192 Ariz. 156, 168, ¶ 55 (App. 1998). Rather, "due process protection vests when a person has a property interest that is protectible." *Id.* A.R.S. § 33-1228 allows a nonconsenting owner's home to be taken from them for somebody else's private use, without due process. Even borrowers subjected to foreclosure actions and tenants subjected to eviction actions are afforded due process rights. A.R.S. § 33-1228 is clearly meant to undermine the property rights of holdout owners in violation of constitutional protections against the same.

D. This Court Should Strike A.R.S. § 33-1228.

Given that A.R.S. § 33-1228 is unconstitutional, it is likewise void. *See State v. Patel*, 251 Ariz. 131, ¶ 26 (2021) (recognizing an unconstitutional statute as "thus void"); *Tucson Elec. Power Co. v. Apache Cnty.*, 185 Ariz. 5, 23 (App. 1995) (recognizing a law found to be unconstitutional is therefore void). To protect the integrity of individual property rights afforded to Arizonans through their constitution, A.R.S. § 33-1228 must be rendered invalid as a matter of law. *See Windes v. Frohmiller*, 38 Ariz. 557, 561 (1931) ("This court will not violate the people's trust by attempting to subvert their constitution to any legislative enactment"). If A.R.S. § 33-1228 is not rendered invalid and unenforceable in the

absence of an express incorporation of its unconstitutional terms, private takings will be authorized in perpetuity by almost every condominium whose declaration has been recorded since 1985.[4]

Indeed, declarations operate as the constitutions of the most local forms of government that exist. By moving into a particular property, owners are bound to comply with the applicable rules and laws of that jurisdiction, as adopted by relevant federal, state, county, city, and homeowner association authorities. *See Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198 (App. 1983) ("a grantee of land is bound by the restrictive covenants affecting the land purchased"). Acting as a democratically elected governing body, homeowner associations, whether in planned communities or condominiums, are then charged with carrying out the duties prescribed in declarations pursuant to which they were created. Just as the U.S. Constitution limits the Arizona Constitution, the Arizona Constitution must likewise limit these condominium constitutions. *See* U.S. Const. art. VI, cl. 2; Ariz. Const. art. II, § 3; Declaration, § 6.1, APP086; *see also Shelly v. Kraemer*, 334 U.S. 1 (1948) (finding that the enforcement of restrictive covenants by state courts may involve sufficient state action that the restrictive covenant will be treated as if it was imposed by the state).

[4] A.R.S. § 33-1228 has been part of the Arizona Condominium Act's adoption in 1985 under A.R.S. § 33-551 through A.R.S. § 33-561. It was renumbered as A.R.S. § 33-1228 in 1996.

While there is no doubt that a declaration is a contract, it is telling that disputes arising out of recorded declarations are guided by the Restatement (Third) of Property (Servitudes) in favor of the Restatement of Contracts.

Just like the condominium declaration at issue in this case, Restatement (Third) of Property (Servitudes) § 7.1 (2000) addresses the termination of a servitude, by agreement of the parties pursuant to its terms. However, unlike A.R.S. § 33-1228, neither the declaration nor the Restatement contemplates the forced sale of a nonconsenting owner's property.

The invalidation of A.R.S. § 33-1228 must further extend into all condominium declarations that have already incorporated the Condominium Act. The alternative would validate the legislature's attempt to restrict constitutionally protected property rights by including it in a larger statutory scheme incorporated into nearly every condominium's difficult-to-amend contract of adhesion. *See Kalway v. Calabria Ranch LLC*, 532 Ariz. 252 (2022) (requiring all declaration amendments to be foreseeable).

II. CONTRACT PROVISIONS INCORPORATING A.R.S. § 33-1228 SHOULD GENERALLY BE RENDERED VOID AND UNENFORCEABLE.

Like most condominium association declarations, the sixty-five (65) page Declaration of Condominium for Dorsey Place Condominiums (the "Declaration") at issue in this case is a contract of adhesion that generally acknowledges the

applicability of the Arizona Condominium Act. According to the Court of Appeals, the mere recognition that a condominium association has "rights, powers and duties as prescribed by the Condominium Act," allows for the enforcement of a facially unconstitutional statute enacted therein. In other words, under the current law, by owning a condominium, encumbered by a declaration incorporating the Condominium Act, Arizonans necessarily waive their constitutional protections against a taking for private use.

A. Recorded Declarations of Covenants and Restrictions are Contracts of Adhesion.

Condominium declarations and other CC&Rs are deed restrictions that run with land to form a contract between the association and individual lot owners. *See Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448 (App. 1993). "It is the general rule, that the grantee, with notice of restrictive covenants, who accepts a deed referring to those restrictions is deemed to assent to be contractually bound by the restrictions as if he had individually executed an instrument containing them." *Pinetop Lakes Ass'n*, 135 Ariz. at 198. Like other contracts of adhesion, a declaration is generally a "standardized form offered to consumers on essentially a take it or leave it basis." *Burkons v. Ticor Title Ins. Co. of Cal.*, 165 Ariz. 299, 311 (App. 1989), *rev'd on other grounds*, 168 Ariz. 345 (1991); *see also Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984 (9th Cir. 2017) (recognizing homeowners as consumers in relation to their homeowner associations). A "distinctive feature of a

contract of adhesion is that the weaker party has no realistic choice as to its terms… the essence of an adhesion contract is that bargaining position and leverage enable one party to select and control risks assumed under the contract." *Broemmer v. Abortion Servs. Of Phoenix, Ltd.*, 173 Ariz. 148, 151 (1992) (citations omitted).

Condominium declarations are quintessential contracts of adhesion. The contract is imposed on all purchasers on a "take it or leave it" basis, drafted unilaterally by the Declarant, long before any homes were sold. Without the contract even being presented to the purchaser for their signature, owners became subject to a declaration's terms automatically upon purchase without any realistic chance of negotiating its terms.

While contracts of adhesion are generally enforceable, that is so only within certain limits. "Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties." *Broemmer*, 173 Ariz. at 153; *see also Maxwell v. Fidelity Financial Services, Inc.*, 184 Ariz. 82, 88 (1995) ("reasonable expectations and unconscionability are two distinct grounds for invalidating or limiting the enforcement of a contract"). The argument that unconstitutional provisions in A.R.S. § 33-1228 are necessarily incorporated into any declaration that incorporates the Condominium Act should be rejected because its enforcement does not fall within the reasonable expectations of the parties, and it is substantively unconscionable.

B. A Waiver of a Constitutional Right Is Not Within the Reasonable Expectations of the Parties.

Contractual provisions that do not fall "within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him." *Broemmer*, 173 Ariz. at 151. "Clearly, the issues of knowing consent and reasonable expectations are closely related and intertwined." *Id.*, at 152. Like in *Broemmer*, the relevant contract of adhesion in this case did not contain a "conspicuous or explicit waiver" of the constitutional right, nor did it contain "any evidence that such rights were knowingly, voluntarily, or intelligently waived." *See id.*

Like the Planned Communities Act, the Condominium Act generally operates as a body of remedial statutes that limit the powers of homeowners' associations. *See* A.R.S. §§ 33-1242 (limiting an association's right to impose late fees and fines); 33-1243 (providing a mechanism to remove board members); 33-1248 (requiring that association business be conducted in open meetings with advance notice to members); 33-1250 (imposing procedural requirements for all elections); 33-1258 (requiring transparency of association records); 33-1260 (requiring certain disclosures about the association to be made to potential purchasers); 33-1260.01 (restricting associations from discriminating against renter-occupied properties). Of the 51 statutes contained within the Condominium Act, A.R.S. § 33-1228 is one of the only statutes that grants a power to the Association that was not first established

within its declaration. It is certainly unique in that it is the only statute that contemplates the loss of a property interest by someone who plays by all the rules.

Without expressly identifying the unconstitutional provisions contained in the Condominium Act as being incorporated into the declaration, it is unreasonable as a matter of law to expect owners to meaningfully appreciate that a reference to remedial statutes could result in a forced sale of their property without their consent when, unlike with foreclosures, they have done nothing wrong.

This is particularly true here, where the declaration contains a "Termination of Condominium" provision in Section 13.4, which recognizes the right of 90% of owners to terminate the condominium. It is not unreasonable for an owner to read a provision in their declaration that acknowledges a right to terminate a condominium as describing the conditions upon which the owners can decide to collectively throw out their restrictive covenants and start over.

Moreover, while Section 13.4 recognizes the right to terminate the condominium, it does not recognize the right for the Association to then sell a non-consenting owner's property for someone else's private use. Moreover, A.R.S. § 33-1228(F) provides that any real estate in the condominium being sold after termination "vests in the association as trustee for the holders of all interest in the units." By virtue of being a condominium, all property within the condominium must necessarily vest in the owners, not the Association. *See* A.R.S. § 33-1202(10) ("Real

estate is not a condominium unless the undivided interests in the common elements are vested in the unit owner"). Like most other condominium declarations, the one at issue in this case does not establish a vested right in property to the association following a vote to terminate under Section 13.4 of the same.

An owner who reads every word of their declaration should know what their rights are under that declaration. To interpret the declaration as incorporating A.R.S. § 33-1228, despite its inconsistency with the express terms of that declaration, ignores the importance of informed consent by the weaker party.

C. A Waiver of Constitutional Right in a Contract of Adhesion is Substantively Unconscionable.

Contracts that are unjust, one-sided, or contain overly harsh terms are substantively unconscionable. *Maxwell*, 184 Ariz. at 88-89 ("Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed"); *see also Darner Motor Sales, Inc. v. Universal Underwriters Ins.*, 140 Ariz. 383, 390–91 (1984) (stating courts will not enforce a standardized insurance contract term when the insurer has reason to believe that the insured would not have agreed to the contract if he had known about the term). "Relevant factors include whether the contract terms are so one-sided as to oppress or unfairly surprise an innocent party, whether there is an overall imbalance in the obligations and rights imposed, and whether there is a significant cost-price

disparity." *Duenas v. Life Care Centers of Am., Inc.*, 236 Ariz. 130, 136, ¶ 14 (App. 2014).

The relevant contractual provision in this case, which is commonplace in condominium declarations generally, incorporates the Condominium Act as follows:

> 6.1 **Rights, Powers and Duties of the Association**. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital

See Declaration, § 6.1, APP086.

As an initial matter, it is overly harsh to interpret a generic incorporation of relevant laws as a waiver of a constitutional protection. A "limit on the waiver of a constitutional right is that it must be made voluntarily, knowingly, and intelligently." *State v. Bocharski*, 200 Ariz. 50, ¶ 56 (2001). Moreover, "[r]estrictive covenants are to be strictly construed against persons seeking to enforce them and any ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of the property and against restrictions." *Duffy v. Sunburst Farms East Mutual Water & Agricultural Co., Inc.*, 124 Ariz. 413, 417, (1980) (citations omitted); *see also Kalway*, 252 Ariz. 532 (recognizing that restrictive covenants must be construed narrowly, and doubts about the intent of the parties must be resolved against the restriction's validity).

No reasonable owner would interpret Section 6.1 above as waiving a constitutional right or as giving someone else the right to sell their home. To suggest a contractual provision that does not expressly reference the Association's right to sell a nonconsenting owner's property for another's private use and does not even reference the particular statute for the purpose of providing notice that it authorizes the same, should not be allowed to validate an unconstitutional statute.

D. Contractual Provisions Interpreted as Incorporating A.R.S. § 33-1228 As Part of a Larger Statutory Scheme Are Void for Violation of Public Policy.

Contract provisions are unenforceable to the extent they violate statutes, constitutions, ordinances, applicable regulations, or other identifiable public policy. *1800 Ocotillo, LLC v. WLB Group, Inc.*, 219 Ariz. 200 (2008); *see also Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 286-287 (1953) ("Generally the right to contract as one wishes is entitled to constitutional protection, but this is a qualified right, and where the public interest is involved it may be restricted if there is a reasonable basis for such restriction").

To declare a term unenforceable on public policy grounds, "courts balance the interests in enforcing the terms against the public policy interest opposing it… The weight of the public policy interest generally focuses on the extent to which enforcement of the term would be injurious to the public welfare." *Zambrano v. M & RC II LLC*, 517 P.3d 1168, ¶ 11 (2022) (invalidating express waiver of implied

warranty in a preprinted purchase agreement). *See also 1800 Ocotillo*, 219 Ariz. at 202 ¶ 8 ("[C]ourts should rely on public policy to displace the private ordering of relationships only when the term is contrary to an otherwise identifiable public policy that clearly outweighs any interests in the term's enforcement.").

Further, agreements to waive declarations of public policy are necessarily void. *Elson Development Co. v. Ariz. Sav. & Loan Ass'n*, 99 Ariz. 217, 224 (1965) (invalidating a waiver of period for redemption as against public policy); *Ross v. Ross*, 96 Ariz. 249, 252 (1964) (invalidating a 'diligence in bringing suit clause' as a private attempt to repeal statute of limitations, which are declarations of public policy as well as a private right to the individual); *see also Zambrano*, 517 P.3d at 1173, ¶ 11 ("We identify public policy by examining our constitution, legislation, and judicial decisions"); Restatement (Third) of Property (Servitudes), § 3.1 (the restrictive covenants in recorded original declarations are "valid unless it is illegal or unconstitutional or violates public policy. Servitudes that are invalid because they violate public policy include but are not limited to… a servitude that unreasonably burdens a fundamental constitutional right."); *Burns v. Davis*, 196 Ariz. 155, 159, ¶ 5 (App. 1999) (explaining that Arizona courts look to the Restatement for guidance in the absence of case law to the contrary).

It is the public policy of this state that private property cannot be taken for someone else's private use. *See* Const. Art 2, Section 17. By incorporating the

Condominium Act in its entirety into the declaration, including an unconstitutional statute authorizing private takings, owners were forced to waive declarations of public policy. This is not a situation where a party contracted to waive their right to a taking at the point in time it became relevant. Indeed, that would be a consensual sale of the property. To the contrary, by incorporating the Condominium Act, the declaration – like many condominium declarations throughout the state – required a prospective waiver of a constitutional right the owners were not reasonably informed would ever be in jeopardy.

III. *KALWAY* SHOULD NOT EXTEND TO REVISIONS TO THE CONDOMINIUM ACT AND PLANNED COMMUNITY ACT.

Kalway serves an important purpose of preventing nonconsenting owners from having their property rights infringed upon by their neighbors, and neither its holding nor reasoning should be disturbed. However, as Appellee Dorsey Place Condominium Association argued, its purpose is undermined when applied to statutory revisions, which are otherwise generally enforceable as an operation of law. Because of the remedial nature of the Planned Community Act and Condominium Act, statutory amendments to those statutory schemes should theoretically benefit homeowners, either by correcting errors or filling in gaps in the law, as recognized to be necessary over time. To that end, Arizona Homeowners Coalition supports Appellee Dorsey Place Condominium Association's argument regarding the application of *Kalway* to applicable statutes.

CONCLUSION

This Court should reject the circular logic that allows A.R.S. § 33-1228 to be enforced despite being invalid and unconstitutional under Article 2, Sections 4 and 17 of the Arizona Constitution, in addition to A.R.S. § 12-1131, which likewise prohibits private takings and controls against any other law that arises, as set forth in A.R.S. § 12-1137. Specifically, because it would be beyond the reasonable expectation of condominium owners to have their property taken for private use without their consent, and because it is substantively unconscionable for a contract of adhesion to impose a waiver of a constitutional right by indirect reference to an unconstitutional statute, and because the alternative would allow the contractual provision to be interpreted to enforce an unconstitutional statute in perpetuity, this Court should strike A.R.S. § 33-1228 as unconstitutional and unenforceable, notwithstanding any indirect incorporation of the same into recorded covenants. We pray that the court will declare A.R.S. § 33-1228 unconstitutional as written and reverse the appellate court's ruling on the application of the *Kalway* decision to state statutes.

RESPECTFULLY SUBMITTED this 18th day of November 2022.

By: /s/ Ashley C. Hill

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CASE NAME: **CAO et al. v PFP DORSEY et al.**

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IN THE SUPREME COURT

STATE OF ARIZONA

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Supreme Court No. CV-22-0228-PR Court of Appeals Division One Case No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITION FOR REVIEW FILED WITH CONSENT OF ALL PARTIES

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute is a public policy foundation dedicated to advancing the principles of individual liberty and limited government. Through its Scharf-Norton Center for Constitutional Litigation, the Institute often represents parties in cases challenging unconstitutional government actions—including situations where, as in this case, the unconstitutional action is embedded in a contract. *See, e.g.,* *Schires v. Carlat*, 250 Ariz. 371 (2021); *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016); *Savas v. Cal. State Law Enf't Agency*, No. 22-212, (U.S. filed Sept. 8, 2022). The Institute has often been involved in lawsuits in which government entities seek to insulate unconstitutional actions from review by characterizing them as consensual agreements. *See, e.g., id.*; *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 2795 (2021); *Janus v. AFSCME*, 141 S. Ct. 1282 (2021). The Institute believes its policy expertise and experience will aid this Court in considering this petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals held that the underlying statute is "unconstitutional on its face," APP032 ¶ 15, but went on to say it could still bind the Petitioners because they signed a contract that incorporated the "rights, powers and duties as are prescribed by the [statute]." *Id.* ¶ 17. In other words, notwithstanding the fact that the law the contract purported to incorporate was unconstitutional, void, and

unenforceable, it could still be enforced because the Petitioners agreed to be bound by it.

This theory is untenable and dangerous. It is *untenable* because a facially unconstitutional statute is no statute at all, and thus by definition cannot be incorporated into a contract by operation of law. *Seaborn v. Wingfield*, 48 P.2d 881, 887 (Nev. 1935). Nor—except in equitable circumstances discussed in Section I.C below—can it be implemented by any branch of government. While private parties can, of course, form contracts to do things government itself cannot do, and can waive their constitutional rights, they cannot be *presumed* to do this; instead, such a waiver must be voluntary, knowing, and intelligent. *State v. Garcia-Contreras*, 191 Ariz. 144, 148 ¶ 14 (1998). Thus no waiver can be inferred or imposed by the boilerplate incorporation of law into a contract.

The contrary conclusion by the court below is *dangerous* because it would allow unconstitutional government actions to be insulated from judicial review—and enforced despite contradicting public policy—on the theory that private parties "agreed" to the terms of such statutes, even where that purported agreement is an inference based on ambiguous contractual recitations, as in this case. Allowing that would mean contracts that recite a requirement that citizens use their property or conduct their business consistently with then-existing statutes would be required—apparently forever—to (for example) allow their properties to be

searched or seized without lawful authority, or their speech or religion to be abridged, in ways that courts only later recognize as unconstitutional. That would amount not only to an *implied* waiver of constitutional rights, but a *mandatory* one. And it would make any legal determination of unconstitutionality into nothing more than a kind of time capsule: an unconstitutional law would still be enforced, perhaps decades later, because someone purportedly "agreed" to comply with it before a court declared it invalid. The principle of *lex loci contractus*, whereby "the municipal law of the State where the contract is so made, form[s] a part of it," *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 260 (1827), was never intended to become such an excuse for circumventing the Constitution.

ARGUMENT

I. An unconstitutional law is no law at all, and cannot be incorporated by contractual boilerplate.

A. A facially unconstitutional statute cannot be incorporated into a contract by operation of law.

As a general proposition, a contract implicitly incorporates the law in effect at the time and place of the contract's formation. *Foltz v. Noon*, 16 Ariz. 410, 414 (1915). But as Chief Justice Marshall recognized as long ago as *Ogden*, there must be limits to this *lex loci contractus* principle, because otherwise it would permit the legislature to entirely obliterate or unilaterally rewrite contractual obligations. 25 U.S. (12 Wheat.) at 337–38. Worse: if every statute, regardless of its

constitutionality, conscionability, or contrariness to public policy, is incorporated into a contract, then a subsequent judicial declaration that such statute is unenforceable would be essentially ineffective, because the ghost of that statute would remain in operation as a function of contract law—having been implicitly "agreed to" by all contracting parties.

That is not the law. On the contrary, an unconstitutional statute is a legal nullity, and cannot be incorporated by operation of law into a contract (although estoppel may sometimes require enforcement of such agreements as described in Section I.C below). That was the conclusion the Nevada Supreme Court reached in *Seaborn*, which involved an unconstitutional banking statute. That statute, adopted in 1911, made stockholders in banks individually liable to creditors in the event of a bank's insolvency. 48 P.2d at 882. The state Constitution, however, barred such liability. *Id.* Nevertheless, when the bank was declared insolvent in 1932, creditors sought to enforce the statutory liability, arguing that the stockholders had *contractually* waived the constitutional protection. *Id.* at 884. The court acknowledged that the laws in force at the time of a contract are typically incorporated into the contract—but held that statutes "in conflict with the Constitution, can in no wise form a part of such contract," and therefore that the stockholders could not be held to have implicitly waived constitutional safeguards by signing a contract. *Id.*

The *lex loci contractus* principle, said the court, only applies "'to the *valid* laws of the state. Only the provisions of the contract which are *legally enforceable* will control the parties thereto.'" *Id.* at 886 (emphases added; citation omitted). In fact, an unconstitutional law is "a dead limb on the legislative tree. An unconstitutional law is tantamount to no law at all. … '[I]t is, in legal contemplation, as inoperative as though it had never been passed.'" *Id.* at 887 (quoting *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)).

One reason *Seaborn* emphasized this point is that holding otherwise would not only insulate unconstitutional laws from judicial review if "agreed to" by individual private parties, but would also govern cases in which *corporate charters*, which are a kind of contract, purport to incorporate statutes *in esse*.[1] The *Seaborn* court cited, for example, *Morse v. Metropolitan S.S. Co.*, 102 A. 524 (N.J. 1917), which involved an unconstitutional statute relating to receivership. There, the defendant corporation argued that the statute was unenforceable, to which the plaintiff replied that the corporation had "allowed itself to come into existence under a charter from the state, which was expressly subject to the liability that under conditions which come within the purview of the statute," and so "by

[1] Which corporate charters virtually always do. A sample Arizona corporate charter on the website eforms.com, for example, declares in Section 2, "The Corporation is organized under the relevant laws of the State of Formation ('Statutes'), and except as otherwise provided herein, the Statutes shall apply to the governance of the Corporation."

incorporating under the act," the company had "waived its rights." *Id.* at 526. The court rejected that proposition, holding that only *constitutional* laws are incorporated into a contract by operation of law. "The fact that the defendant incorporated under an act which contained an unconstitutional provision cannot render the provision enforceable, nor confer any power on the court to enforce it." *Id.*

This is not an exception to the *lex loci contractus* principle, but is inherent *in* that principle. That principle rests on the assumption that "the parties to the contract would have expressed that which the law implies 'had they not supposed that it was unnecessary to speak of it because the law provided for it.'" *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 215 (Ill. 1972) (citation omitted). But the highest law is the Constitution, not the statutes—and courts must therefore presume all the more that the parties would have expressed what the *Constitution* implies, had they not considered *that* unnecessary. After all, courts presume *against* the idea that parties intend to waive their constitutional rights, and require proof that such a waiver was voluntary, knowing, and intelligent. *Garcia-Contreras*, 191 Ariz. at 148 ¶ 14; *Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 558 ¶ 10 (App. 2002). That means courts cannot presume that contracting parties meant to incorporate into their agreement statutes that

contradict the state's highest law, at least not without proof that such an intention was intelligent, knowing, and voluntary.[2]

Another reason an unconstitutional statute cannot form a part of a contract by mere operation of law is that this would render such contracts unenforceable on public policy grounds. "[A] court will not lend itself to the enforcement of an illegal contract … not because it endorses the conduct of either party but as a matter of public policy." *Brand v. Elledge*, 89 Ariz. 200, 204 (1961). A contract which purports to implement a facially unconstitutional law amounts to a contract to do an illegal thing. *See also Waggener v. Holt Chew Motor Co.*, 274 P.2d 968, 971 (Colo. 1954) ("Valid contracts may not arise out of transactions forbidden by law. The illegality inhering at the inception of such contracts taints them throughout and effectually bars enforcement.").

Of course, contracts alleged to violate public policy are not *per se* unenforceable in Arizona. *Zambrano v. M & RC II LLC*, 517 P.3d 1168, 1171 ¶ 1

[2] It might be argued that a statute is not unconstitutional until a court declares it so. But this is a positivist fallacy. (For one thing, it would mean that courts could never determine unconstitutionality, since every court would have to await a prior judicial determination of unconstitutionality before it could do so! *See* Green, *Legal Realism as Theory of Law*, 46 Wm. & Mary L. Rev. 1915, 1929 (2005) ("Since whatever a judge decides is law, there is simply no preexisting law to discover.")) As a logical matter, any facially unconstitutional statute has *always* been unconstitutional, even if courts only say so long after its enactment. To say otherwise is, among other things, to confuse the judicial and legislative roles, because it confuses a finding of unconstitutionality with repeal.

(Ariz. Sept. 28, 2022). Instead, courts balance the parties' interests with the public policy considerations at issue. *Id.* at 1173–74 ¶¶ 11–13. The court below, however, failed to consider such balancing, because it simply held that the contract's boilerplate purported to incorporate the laws then in effect, including unconstitutional ones. That was legal error which warrants reversal.

B. Private parties can contract to do things the Constitution does not authorize—but contractual boilerplate cannot keep an unconstitutional statute alive.

Private parties can, of course, agree to things that could not be legitimately imposed on them by statute. For example, a private club can discriminate based on classifications that the government may not consider, and members of a homeowners association can sign an agreement waiving their rights to display signs or symbols in their front yards, whereas imposing such a restriction on people by law would violate their freedom of speech. Likewise, if the members of a condominium association were to form a valid contract whereby each owner agreed that a bare majority's vote to sell would bind the dissenting minority, that contract would be valid, *cf. Stone v. Auslander*, 212 N.Y.S.2d 777, 780 (1961) (minority of corporate shareholders bound by majority); *Hodge v. U.S. Steel Corp.*, 54 A. 1 (N.J. App. 1903) (same), whereas for the legislature to impose such a rule would be—as the court below correctly held—an unconstitutional taking of private property for the benefit of private parties. APP032 ¶ 15.

But that is a different issue from the one presented here, which is whether the *lex loci contractus* rule can, via contractual boilerplate, enable a contracting party to exercise powers that originate not in agreement, but in an invalid statute. The answer is no, both because of the presumption against waiver of constitutional rights mentioned above, and because the source of the authority in question is different in the two situations. Where parties *agree* to empower an entity to do certain things—such as allowing a corporate majority to bind a minority—they are vesting it with their own *innate* authority over their own liberty and property. The source of that power is *consent*: the minority is choosing to exercise their own rights in a certain way (i.e., to surrender to the majority). But here, the power in question derives (or would, if the statute were constitutional) *not* from consent, but from the (unconstitutional) statute. If the statute were constitutional, the power being exercised would obviously be a delegated police power, *not* a power rooted in consent. But because the statute is *un*constitutional, the Condominium Association cannot lay claim to that delegated police power. It can therefore only require the minority property owners to acquiesce if it can trace that power to some consensual agreement. It cannot do that here, because its sole source of purported power is the contractual recitation that it can exercise "rights, powers and duties as are prescribed by the [statute]," *id.* ¶ 17, and that language cannot transform the

nature of the power from one (purporting to be) derived from the police power into one derived from consent.

C. Equitable considerations can sometimes require enforcement of invalid contracts, but no such considerations have been shown here.

Reliance interests and other equitable considerations can sometimes require parties to comply with agreements that have subsequently been found to be contrary to law. Just as contracts against public policy can sometimes still be enforced, *Zambrano*, 517 P.3d at 1173–74 ¶¶ 11–13, so parties who enter into contracts as a consequence of statutes later held unconstitutional can still be bound by those contracts. *See, e.g., Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 271–77 (3d Cir. 2002); *Brady v. United States*, 397 U.S. 742, 757 (1970). That is why, e.g., someone who settles a lawsuit is not entitled to later be relieved of the settlement on the grounds of a subsequent change in controlling law. *See, e.g., Ehrheart v. Verizon Wireless*, 609 F.3d 590 (3d Cir. 2010).[3] Likewise, a party that

[3] *Ehrheart* explained that "a litigant's decision to settle …, when voluntarily made, [are] *calculated and deliberate* choices … . [T]he decision to settle a case is a *considered* one … [which] implicitly acknowledges calculated risks and, in the end, reflects the *deliberate decision* of both parties to opt for certainty in terminating their litigation." *Id.* at 595–96 (emphases added). But in a case like this, there was no calculated and deliberate decision to opt out of the constitutional protections at issue. On the contrary, the parties agreed to be bound by the law—and the statute was not the law, because it was facially unconstitutional. Thus the equitable considerations which have led courts in cases like *Ehrheart* to continue enforcement of a contract that has become contrary to law are not present here.

receives benefits from an agreement may sometimes be estopped from denying the validity of that agreement, even if it turns out to be legally invalid. *See, e.g.,* *Bldg. & Loan Ass'n of Dakota v. Chamberlain*, 56 N.W. 897, 900 (S.D. 1893); *Perkinson v. Hoolan*, 81 S.W. 407, 407–08 (Mo. 1904).

But such estoppel is grounded on factors such as reliance. *See* *Cumberland Cap. Corp. v. Patty*, 556 S.W.2d 516, 540–41 (Tenn. 1977) (explaining in detail why contracts premised on unconstitutional laws are voidable, but not necessarily void). *Cf.* *Jones v. Preuit & Mauldin*, 851 F.2d 1321, 1323–28 (11th Cir. 1988) (private parties entitled to qualified immunity for acting in good faith in reliance on statute later declared unconstitutional); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 724–25 (10th Cir. 1988) (same). Because these are *equitable* considerations, they do not disturb the *legal* point made above, that an unconstitutional statute cannot be given life by being incorporated into a contract by operation of law.

But equitable considerations require inquiry into reliance, hardships, and clean hands—and the court below never discussed or weighed these or any other equitable considerations, because it never addressed the question of estoppel. If circumstances exist that would entitle the Respondents to estop the Petitioners from denying the validity of the power to compel them to sell their property, both sides should be given a chance to brief those equitable questions on remand.

II. The theory adopted below is dangerous to constitutional rights.

Not only is the decision below illogical and contrary to law, but it establishes a dangerous precedent that effectively insulates unconstitutional statutes from judicial control. Under that decision, the ghosts of laws declared unenforceable would continue to haunt contracting parties into the indefinite future—perhaps forever. A contract or corporate charter which purports to incorporate all laws *in esse* might remain in effect for decades, long after the underlying laws are declared invalid.

Consider: if this case involved a statute that, for example, prohibited the sale of real property to members of a racial minority—such as California's Alien Land Law[4]—no court would imagine that such an unconstitutional statute could be implicitly incorporated into a contract—and that contracting parties could continue to effectuate its mandates—due to boilerplate language saying that all laws *in esse* at the time of contract formation are incorporated therein. *Cf.* *Kaneda v. Kaneda*, 45 Cal. Rptr. 437, 444 (Cal. App. 1965) ("If the Alien Land Act is as inoperative as though it had never been passed, plaintiff cannot now rely upon it.").

Yet recent years have seen federal courts increasingly indulging the theory that contracts can keep unconstitutional government actions alive. This is most

[4] Adopted in 1913, the Law forbade the sale of land to Asians. It was not declared unconstitutional until 1952. *See Sei Fujii v. State*, 38 Cal.2d 718 (1952).

noticeable in the realm of public employee constitutional rights in the wake of *Janus*, 138 S. Ct. 2448. That case held it unconstitutional for public sector unions to force non-members to pay agency fees to the unions. Since then, plaintiffs have sought to enforce these rights, only to find lower courts declaring that because they joined a union prior to the *Janus* decision, they waived their constitutional rights.

Thus, for example, in *Savas v. Cal. State L. Enf't Agency*, 485 F. Supp. 3d 1233 (S.D. Cal. 2020), *aff'd*, 2022 WL 1262014 (9th Cir. Apr. 28, 2022), a group of lifeguards who joined the union before *Janus* was decided sought afterwards to resign from the union—only to be told they could not, because the union formed a collective bargaining agreement forbidding members from resigning for four years. The court ruled against them because the membership agreement said "there are limitations on the time period for [resigning]," *id.* at 1235, which the Court of Appeals said bound them as a contractual matter even though the four year non-resignation rule was adopted only *after* they signed the agreement.[5]

Likewise, in *Fisk v. Inslee*, 759 Fed. Appx. 632 (9th Cir. 2019), people who joined unions prior to *Janus*—and whose membership cards said the union would deduct dues for a minimum of one year, and that members could only opt out of paying dues during one annual two-week window, resigned within the first year. *Id.* at 664. When they sued to recoup the money the union had taken from them,

[5] A petition for certiorari is now pending in this case.

the Ninth Circuit held—despite the *Janus* decision's clear statement that it is unconstitutional for public sector unions to take money from workers without their prior, clear, and affirmative consent—that they could not sue because they had signed the membership agreements and had therefore consented to the taking of their money. *Id.*

Such illogical outcomes illustrate the problem with a rule whereby unconstitutional laws can be shielded from judicial action on a *lex loci contractus* theory. That cannot be the right outcome—and that warrants reversal.

CONCLUSION

The petition should be *granted*.

Respectfully submitted this 18th day of November 2022 by:

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE

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Date: Friday, November 18, 2022 3:45:37 PM

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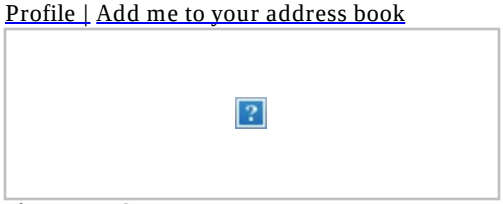
> 
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From:	Stephanie Gintert
To:	Timothy Sandefur; shawna@whpglaw.com
Cc:	Kris Schlott; Marissa
Subject:	RE: Cao v. Dorsey CV-22-0228-PR amicus consent request
Date:	Friday, November 18, 2022 12:30:28 PM
Attachments:	image001.png

Hi Timothy,

You have our consent on behalf of PFP Dorsey.

Thanks,
Stephanie

Stephanie Kwan Gintert, Esq.
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Please be advised that to save forests and help abate the spread of infection, we will be sending all documents electronically; if you require a hard copy, please let me know. Thank you for your understanding and cooperation, and please remain safe and well.

From: Timothy Sandefur <tsandefur@goldwaterinstitute.org>
Sent: Friday, November 18, 2022 12:07 PM
To: 'shawna@whpglaw.com' <shawna@whpglaw.com>; 'stephanie@whpglaw.com' <stephanie@whpglaw.com>
Cc: Kris Schlott <kschlott@goldwaterinstitute.org>
Subject: Cao v. Dorsey CV-22-0228-PR amicus consent request

The Goldwater Institute intends to file an amicus curiae brief in support of the petition for review in *Cao v. Dorsey*, CV-22-0228-PR, and I'm writing to request your consent for that filing. I apologize for this last-minute request. Please let me know as soon as you can if you have any objection.

Timothy Sandefur

Timothy Sandefur
Vice President for Legal Affairs and

Clarence J. & Katherine P. Duncan Chair in Constitutional Government
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"The Goldwater Institute is simply in the liberty business, and there's no institution in the country that performs that business better." – George Will

From:	Timothy Sandefur
To:	Kris Schlott
Subject:	FW: Cao v. Dorsey CV-22-0228-PR amicus consent request
Date:	Friday, November 18, 2022 3:25:09 PM

From: Eadie Rudder <eadie.rudder@carpenterhazlewood.com>
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Cc: Marisa J. Maya <Marisa.Maya@carpenterhazlewood.com>
Subject: RE: Cao v. Dorsey CV-22-0228-PR amicus consent request

Thank you for reaching out, Mr. Sandefur, Dorsey Place Condominiums does not object to your request for more time.

Eadie Rudder, Esq.
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Subject: FW: Cao v. Dorsey CV-22-0228-PR amicus consent request

The Goldwater Institute intends to file an amicus curiae brief in support of the petition for review in *Cao v. Dorsey*, CV-22-0228-PR, and I'm writing to request your consent for that filing. I apologize for this last-minute request. Please let me know as soon as you can if you have any objection.

Timothy Sandefur

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"The Goldwater Institute is simply in the liberty business, and there's no institution in the country that performs that business better." – George Will

IN THE
SUPREME COURT OF ARIZONA

No. CV-21-0129-PR

Ct. App. No. 1 CA-CV 21-0275

Maricopa County Superior Court
No. CV2019-055353

JIE CAO ET AL.,

Plaintiffs-Appellants,

v.

PFP DORSEY INVESTMENTS, LLC ET AL.,

Defendants-Appellees.

AMICUS CURIAE BRIEF OF PAPAGO SPRINGS, LLC, MAHDERE GEBREYESUS DESTA, AND GARY AND ALLIEN STOLOFF

(FILED WITH PARTIES' CONSENT)

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

Condominium units are a significant part of our residential housing mix. They provide homes for people in all walks of life, from retirees to college students. But many Arizonans would be surprised to learn that, buried in the condominium regime declarations of many such communities and in the bowels of Arizona's statutory law, lurks a little-known mechanism whereby a single person (or entity) who gains control of a percentage of units within a community may force the other owners out. Although there is no place like home, if that home is a condo, a deep-pocket real estate investor can pry it away. Our Constitution—indeed, common sense notions of fair play—does not permit such an oppressive and brazen deprivation of property rights.

The facts of this case are all too familiar in today's booming multi-family market: (1) an investor identifies a target condominium community and determines that it is ripe for conversion to apartments; (2) the investor then begins acquiring units, often using a straw agent to negotiate with the unit owners to conceal his identity and ultimate objective; (3) after he acquires a majority interest in the condominium community, he takes control of the board of directors by installing his partners or relatives as board members; (4) often, he then uses his control over the board to adopt changes to the rules and regulations in the community, *e.g.* increases to the monthly association dues or new fees or assessments that are onerous and detrimental to the remaining unit owners; (5) when he acquires enough units

to reach the termination threshold (typically 80%), his self-selected board of directors then begins a compelled sale process to force remaining unit owners to sell their units to the terminating entity.

The last step in the process warrants elucidation, because it is so foreign to the Anglo-American conception of private property. The compelled sale process includes the negotiation, drafting and approval by the board of directors of a "Termination Agreement" whereby the condominium's Association agrees to acquire the remaining units from their owners, then sell those units to the "terminator." The "negotiation" takes place between the members of the board—who, by this time, are wholly controlled by the terminator—and the terminator. Even though the remaining unit owners have no opportunity to influence its terms, the termination agreement becomes binding on the remaining unit owners upon the board's approval.

Adding injury to insult, the purchase prices for the remaining units are determined by an appraiser selected by the association. As revealed by examination of the recorded termination agreements[1] for the condominium communities that have been terminated in Maricopa County, terminators have identified a couple of "favorite" appraisers who they typically retain to

[1] Exemplar termination agreements are included in the Appendix filed contemporaneously herewith. The Court can consider those documents as publicly recorded public records pursuant to Rule 201 of the Arizona Rules of Evidence.

appraise the targeted units. Those appraisers often base their opinions of value on appraisals of "typical" units in the condominium community—not the actual units owned by the unit owners. As one would expect, their opinions of value are consistently at the low end of the possible range.

As reflected in the Appendix, that process has been used more than a dozen times in the recent past, resulting in the forced sale of hundreds, if not thousands of condominium units to real estate investors. Although the Legislature has attempted to mitigate the harm, its efforts have failed to address the fundamental inequity in the system. More important for present purposes, the Legislature has not addressed the constitutional infirmity. Determining the constitutionality of this process is the provenance of this Court, and Amici join the Petitioner in urging the Court to accept review in order to decide whether our Constitution permits a private person to exercise what is, in form and substance, a private power of condemnation.

Amici curiae are the owners of condominium units in a project called Papago Springs, which is in the midst of a condominium termination.[2] They submit this brief to urge the Court to accept review to clarify an issue of statewide import and constitutional significance. As property owners that are currently subject to the whims of a "terminator" who has invoked two different versions of A.R.S. § 33-1228 in an effort to take their units, Amici have a significant interest in the outcome of this case. The terminating entity

[2] The termination agreement for Papago Springs, and purported amendment thereto, are located at APP002–17.

in the Papago Springs termination proceedings has asserted that, based on the court of appeals' ruling in this case, the pre-2018 version of A.R.S. § 33-1228 applies and Amici have no right to dispute the amount to be paid for their units. In other words, absent intervention by this Court, Amici may lose their units without being afforded even the right to arbitrate the propriety of the "low ball" appraisals the terminator has obtained from his chosen appraiser.

ARGUMENT

In terms of a case appropriate for review, this case is a paradigm because (1) no case squarely controls the interpretation of the statute at issue, and (2) the termination of condominium regimes and attendant disposition of private property are matters of statewide concern. *See* ARCAP 23(d); *Bridges v. Nationstar Mortgage, LLC*, 253 Ariz. 532, 534 ¶ 6 (2022).

Amici urge the Court to accept review of this matter, both to provide the constitutional protection afforded private property in this State as well as to preclude continued abuse of the termination statute. To that end, Amici urge three points demonstrating why review is appropriate. First, this case is far from an isolated incident. Dozens of condominium terminations have occurred, and are occurring, in this State. Second, the termination of condominium regimes has been rife with abuse. Third, the court of appeals'

opinion in this case has created a constitutionally untenable situation which requires this Court's intervention.[3]

I. Condominium terminations are ubiquitous in Arizona.

It is important for the Court to know that this case is far from a one-off or rare occurrence. Under the power (improperly) bestowed upon controlling interests under A.R.S. § 33-1228, a number of entities have engaged in termination proceedings to destroy condominium regimes and compel the sale of private property.

Under the statutory scheme, the acquiring entity and the condominium association enter into a termination agreement, which is (nominally) a two-party document between the condominium association—which by that point is wholly controlled by the terminator—and the terminator. The primary purposes of a termination agreement are threefold: (a) to terminate the condominium regime so that the individual condominium units no longer exist as separate parcels of real property; (b) to compel the remaining unit owners to sell their units to the association, which then conveys title to those units to the terminator; and (c) establish the purchase price the terminator is prepared to pay for each remaining unit.

The remaining unit owners are not parties to the agreement and have no opportunity to negotiate its terms. Indeed, the sole recourse an owner has

[3] Pursuant to ARCAP 16, no party other than Amici has sponsored or participated in the drafting of this Brief.

in the entire process is the possible opportunity to dispute the purchase price— an opportunity that did not exist in A.R.S. § 33-1228 prior to 2018.

There are no fewer than 15 condominium terminations throughout the State that are either ongoing or have been completed since 2014:

- Solstice (Phoenix)
- Jamestown (Phoenix)
- Citi on Camelback (Phoenix)
- San Riva (Phoenix)
- Rose Garden (Phoenix)
- Papago Springs (Phoenix)
- Turney Brownstones (Phoenix)
- Quatros (Phoenix)
- Quatros II (Phoenix)
- Garden Lane Square One (Phoenix)
- Crystal Cove (Chandler)
- Santana Ridge (Chandler)
- Dorsey Place (Tempe)
- Four Peaks (Fountain Hills)
- Timberline Place (Flagstaff)

Each of these represents a circumstance in which a private person or entity compelled (or is preparing to compel) the sale of private property from its current owner to a private investor for purely private use. In light of Arizona's express constitutional prohibition on the use of the power of

eminent domain for private purposes, this process cries out for the Court's consideration. *See, e.g.*, *Bailey v. Myers*, 206 Ariz. 224, 227 ¶ 12 (App. 2003) ("Taking one person's property for another person's private use is plainly prohibited . . . ."); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.").

II. Section 33-1228 has been abused by developers.

Although terminators like PFP Dorsey paint the termination process as entirely contractual and above-board, experience does not bear that out. First, it is misleading to describe the condominium Declaration (often called "CC&Rs") as an arm's-length "contract" sufficient to comprise the waiver of a constitutionally protected right. As the Court has recently explained, "waiver" is the "voluntary and intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right." *Cavallo v. Phoenix Health Plans, Inc.*, 518 P.3d 759, 765 (2022) (quoting *City of Tucson v. Koerber*, 82 Ariz. 347, 356 (1957)). Although condominium unit owners are generally given a copy of the CC&Rs when they purchase their units, they have no opportunity to negotiate their terms, and would certainly not understand their units can be seized from them involuntarily under those agreements. To the extent they are even aware of its terms, if they want to purchase a unit in the community, they are compelled to consent. In other words, the CC&Rs are the paradigm of an "adhesion

contract," that arises only by virtue of taking title to property, not negotiation and bargaining.

Next, with regard to real-world impacts, by the time unit owners in a community find out that a terminator is sniffing about, it is often too late. In many cases, terminators use straw buyers who will acquire units on their behalf without disclosing their true purpose. Thus, unit owners often do not know that there is any termination in process until they open their mail and see a copy of the termination agreement and an appraisal upon which the acquisition price of their unit is based. Often, that appraisal is not of the individual unit the terminator is seeking to acquire, but a pre-selected "typical" unit of a similar floor-plan and design.[4] Those generalized and inaccurate appraisals are obtained by an appraiser selected and paid for nominally by the condominium association.[5] Further, the association sometimes begins levying huge association fees and assessments to either

[4] Yet another example of abuse is that, almost invariably, the association/terminator's appraiser relies on recent sales of units within the same condominium community—most often, units which were sold to the terminator under threat of termination—as the basis for determining the value of the remaining units. Such a process naturally depresses the "value" of the remaining units. This would flaunt the project influence rule that applies in eminent domain cases as embodied in RAJI (Eminent Domain) 8. No court, however, has spoken on whether such a rule applies in termination proceedings.

[5] It should come as no surprise that, in the undersigned's experience, the same handful of appraisers are repeatedly selected for such work. In fact, one appraiser, Michael Huscroft, was chosen by the terminator in *six* of the examples referenced above.

line the pockets of the terminator or to prevent a sale of the remaining units to a third party buyer.

Two additional points warrant brief mention. First, members of the board of directors who vote to approve termination agreements and force the sale of the remaining condominium units are not dealing with their own property. Rather, they are voting to compel the sale of units owned by others. Second, the "sale" process does not allow the remaining units to be exposed to the market. Thus, there is no opportunity to allow the market to establish a true "market value" for the subject units.

Papago Springs presents a clear case of these abuses. Over the past two years, the terminator of that project has wholly failed to maintain the property while at the same time inducing the board of directors to pay him a monthly "management" fee. As the source of funds for his salary, the terminator persuaded the Board (and voted himself) to increase the monthly association dues by 125%. Notwithstanding that increase, the terminator then closed the swimming pool in what appears to be an attempt to induce renters in the units owned by the Amici to move out. Early this year, the terminator and his self-selected board imposed a $20,000 "working capital fee" due upon sale of a unit.[6] Stated simply, by the time of the termination,

[6] In other words, while working to terminate the condominium regime, the terminator imposed a "due on sale" fee that he claimed was needed to pay for the ongoing expenses of an association he was in the process of terminating.

the unit owners that remain are locked out of control of the association, frozen into their units (because no one wants to buy into a termination), and at the mercy of a hostile association run by the person who is seeking to compel the sale of their units at "fire sale prices."

Another example of abuse is what occurred in the termination of Citi on Camelback. In that instance, the terminator—without prior notice to the remaining unit owners or their attorneys with whom it was in regular communication—recorded a "Master Deed" whereby it purported to transfer title to the remaining units to itself before it had paid a penny of compensation to the unit owners. It then demanded rent from the unit owners, or threatened eviction.

The consequences of condominium terminations often fall on the most vulnerable members of our communities. For example, in the termination of the Citi on Camelback condominium regime, news media at the time reported the story of an elderly owner—*91 years old*—being forced from her home in which she intended to spend the rest of her life. *See, e.g.*, ABC 15, *91 year old woman amongst dozens slated to lose condos to investors due to Arizona law*, https://www.abc15.com/news/state/91-year-old-woman-amongst-dozens-slated-to-lose-condos-in-forced-sale-to-investors-due-to-arizona-law (May 17, 2021). Similar results occurred at Solstice. ABC 15, *Hostile Takeover: State law allows investors to take homes*, https://www.abc15.com/news/let-joe-know/hostile-takeover-state-law-allows-investors-to-take-homes (Aug. 2, 2017).

Even though the remedies are limited, the costs associated with fighting a termination are substantial. Under the current version of A.R.S. § 33-1228, an individual unit owner has no legal basis to stop the compelled sale, but only to challenge the appraisal obtained by the association and the terminator. To pursue such a challenge, the owners, generally people of modest means, must hire a real property appraiser and head to arbitration. These costs often deter unit owners from contesting the purchase price.

III. Review is necessary to fix the law and create certainty.

The Petitioners in this matter have provided an excellent summary of the legal deficiencies in the court of appeals' ruling, and there is no need to recapitulate those points. Instead, the remainder of this brief points out the fundamental fallacy of Cross-Petitioners' insistence that this is a contract case, and explains the uncertain state of the law created by the court of appeals' decision.

A. CC&Rs cannot, and do not, trump the Arizona Constitution.

"The constitution of this state, second only to the constitution of the United States, is the supreme law of Arizona. Any act of the legislature . . . which contravenes its provisions must fall." *State v. Patel*, 251 Ariz. 131, 137 ¶ 26 (2021) (quoting *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 430–31 (1991)).

The supreme law of the land tightly circumscribes when individuals make take private property for private purposes. Article 2, § 17 of the Arizona Constitution is categorical that "[p]rivate property **shall not be**

taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes." (Emphasis added.) Clearly, redevelopment of a condominium community as apartments is not a "private way[] of necessity." Nor is it a "drain[], flume[], or ditch[]" for any purpose, much less a constitutionally authorized purpose. Indisputably, the legislature cannot create a statutory scheme to take private property for purposes that are not identified by the Constitution.

In response to the manifest constitutional infirmities in their position, PFP Dorsey, like the court of appeals, insists that this is a question of contract because the CC&Rs contemplate termination of the condominium regime. Not so.

First, there is a clear distinction between "termination" in the sense of ending the joint property regime that comprises a condominium, and forcing private parties to sell to a majority owner. It does not necessarily follow that termination *requires* a compelled sale transaction—that is generally not addressed in CC&Rs, but is a pure creation of statute. Most CC&Rs have nothing to say regarding a forced sale, and PFP Dorsey points to nothing to suggest otherwise. The provision in the typical CC&Rs dealing with termination is often no more than one or two sentences—a couple of lines hidden in a dense legal document. And, in any event, A.R.S. 33-1228 would still provide a mechanism for termination even where the CC&Rs are silent.

Second, and more importantly, it is black-letter law that an illegal contract, one whose terms violate the laws of this State, are void and unenforceable. *Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 242 Ariz. 108, 115 ¶ 39 (2017). To be sure, contractual terms that violate the constitution are unenforceable. For example, in *Phelps*, this Court found unenforceable an express contractual waiver releasing a racetrack from damages under Article 18, Section 5 of the Arizona Constitution, which makes any assumption of risk defense a jury question. *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403 (2005). As explained in holding that express contract unenforceable, this Court explained that:

> Although in today's world Article 18, Section 5 may seem impractical or a questionable policy choice, the framers of our constitution thought otherwise. It is not our role to determine public policy. The framers of our constitution and the Arizona voters who ratified it mandated that the defense of assumption of risk shall, at all times, be left to the jury. **We are bound to follow that mandate.**

Id. at 413 ¶ 40 (emphasis added).

The same rationale compels the same result here. Regardless of the language of the CC&Rs, parties cannot agree to permit private property to be taken by operation of law for purposes that are not authorized by Article 2, § 17. *Patel*, 251 Ariz. at 137 ¶ 26. As a result, any provision to the contrary cannot stand, nor can the court of appeals' decision stand. *Phelps*, 210 Ariz. at 413 ¶ 40.

B. The court of appeals' opinion creates a separate constitutional infirmity for owners like Amici.

Even if the termination process could somehow be reconciled with the public use standard in Article 2, § 17 of the Arizona Constitution (and it cannot), the Constitution also requires the payment of "just compensation." The current version of A.R.S. § 33-1228 purports to satisfy this standard by requiring a condominium association to submit to arbitration in any case where there is a disagreement of value for a particular unit of more than 5%. A.R.S. § 33-1228(I)(1). Under the court of appeals' reasoning, however, the applicable version of A.R.S. § 33-1228 depends on the date a unit owner obtained their condominium unit. (Op. ¶ 35.) Although such an interpretation appears to have been designed to protect the unit owners' expectations, it is extraordinarily problematic.

The pre-2018 version of A.R.S. § 33-1228 did not include any provision for competing appraisals, nor did it provide a clear right to challenge the association's determination of value. Instead, it arguably purports to permit the association to determine the value of each unit as the judge, jury, and executioner. Such a paradigm is not only incredibly unfair, it violates the constitutional requirement that unit owners receive just compensation for their property. Indeed, if unit owners are unable to challenge the valuation of their property undertaken by a (largely antagonistic) association and terminator, such a process does not comport even with the minimum standards of due process.

At a minimum, therefore, the Court should accept review to remedy the court of appeals' untenable holding and ensure that unit owners remain protected from significant overreach.

CONCLUSION

The Court should accept review of this matter and reverse the court of appeals' opinion.

DATED this 28th day of November, 2022.

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SUPREME COURT OF ARIZONA

JIE CAO, et al., Plaintiffs/Appellants/Petitioners, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees/Cross-Petitioners.	Arizona Supreme Court No. CV-22-0228-PR Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

DEFENDANTS/APPELLEES/CROSS-PETITIONERS PFP DORSEY INVESTMENTS, LLC AND DORSEY PLACE CONDOMINIUM ASSOCIATION'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Petitioners attempt to present the underlying issue as a taking of private property for a private, rather than public, purpose. But this case is not about that. Instead, it is about holding parties to the agreements they have made. Given the press coverage surrounding condominium terminations and this case, it is obvious the general public does not understand terminations. Those soundbites alleging that "California" investors are kicking people out of their homes are distasteful. They are also untrue.

The concept that "a deal is a deal" is "firmly entrenched in American culture and law, and is widely viewed as an essential cornerstone of economic development and stability."[1] "Society also broadly benefits from the prospect that bargains struck between competent parties will be enforced." *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, 202, ¶8 (2008). As with other enforceable contractual arrangements, there are many good practical and policy reasons why condominium terminations occur. These reasons include a bankruptcy following a judgment against a condominium association;[2] structural defects too large for the members to correct through special assessments;[3]

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[1] Richard P. Bress, Michael J. Gergen, Stephanie S. Lim, *A Deal Is Still A Deal: Morgan Stanley Capital Group v. Public Utility District No. 1*, Cato Sup. Ct. Rev., 2007-2008, at 285.

[2] This is not uncommon as judgments, which result from the acts of the association, are secured through a judgment lien that attaches to "all of the units in the condominium at the time the judgment was entered." A.R.S. §33-1257.

[3] This was a contributing factor to the July 2021 Champlain Towers South collapse in Florida, which identified the structural repairs needed and began the special assessment process two years before the collapse, i.e., "Owners would have to pay assessments ranging from $80,190 for one-bedroom units to $336,135 for the owner of the

deterioration of the project through poor maintenance, mismanagement, or crime and blight; and when the majority of the units are no longer owner-occupied, i.e., causing the project to be "broken" and operated like an apartment complex, rather than a residential community, resulting in significantly depressed values.[4] These types of transactions are beneficial to the economy and may help solve the housing crisis.

All this Court must resolve is whether A.R.S. §33-1228 is constitutional and whether parties should be held to the contract terms to which they agreed. Condominiums are creatures of statute and only come into existence via a developer's compliance with the Arizona Condominium Act. What the law calls into existence, it also must have a mechanism to dissolve or terminate. Other than by government action through eminent domain, the only way a condominium can be ended is through the private votes of at least 80% of the members of the condominium under the applicable statute or with a higher threshold vote set by the contract.[5]

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building's four-bedroom penthouse…." *See* https://www.cnn.com/2021/06/28/us/surfside-condo-owners-assessments-invs/index .html.

[4] The concentration of rental units, rather than owner-occupied units, depresses condominium values because they are ineligible for conventional loans and, typically, require all cash to purchase, which drives the investor ownership percentage even higher. FHA loans prohibit more than 65% rentals (HUD Handbook 4000.1, p. 505 accessible at hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh-080923.pdf); FannieMae will not allow more than 50% (Selling Guide, p. 650 accessible at https://singlefamily.fanniemae.com/media/36526/display), FreddieMac does not use the same threshold, but prohibits above 25% single entity ownership (Guide Section 5701.3(j) accessible at https://guide.freddiemac.com/app/guide/section/5701.3).

[5] The threshold is now 95% for any condominium created after September 24, 2022.

The problem associated with common ownership of real property when a small minority of owners want to hold out against the wishes and needs of the vast majority is exactly what the Uniform Law Commission considered when it settled on an 80% vote of the owners to terminate the condominium. "Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter on a project of any size, subsection (a) states a general rule that 80% consent of the unit owners would be required for termination of a project." §2-118 Termination of Condominium at Cmt. 2 [APP 023]. Indeed, the Prefatory Note of the Uniform Act provides that termination was one of the express purposes of the proposed act:

> "Finally, many actual or potential problems involving such matters as ***termination of condominiums***, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, have not been satisfactorily addressed by any existing statute. It is primarily to resolve these various problems that the Uniform Condominium Act was drafted."

See id. at Prefatory Note, p. 1 (emphasis added).

Eighty percent is a super super majority; the contract here required 90% to terminate the condominium. The threshold recognizes that there must be something systemically wrong with a project where such a vote can be reached. It will only happen when the vast majority of owners conclude that the condominium is no longer viable because it is effectively operating as an apartment building with numerous and disjointed landlords, or there is such significant internal damage that the membership cannot cure it themselves, e.g., Champlain Towers in Florida.

Whatever the reason for termination, while the natural focus of these disputes tends to be on the dissenting minority owners, the Court must also consider the common law, statutory, and express contractual rights of the majority—in this case, the 93%. Petitioners' theory leaves the super majority at the mercy of a single holdout, when that person agreed to be subject, as here, to a 90% vote. Consider a 10-unit condominium on what has now become a busy street surrounded by commercial space negatively driving down residential values. If a commercial developer offers to buy all the units and redevelop it, and nine of the owners agree, should one owner be able to prevent that transaction from occurring when the parties agreed that a 90% vote is the only requirement for this precise circumstance? The answer is no. The transaction presents no constitutional question, but rather one of the private rights of private parties, through their private contracts, i.e., the "CC&Rs". *See* [APP 190].[6]

Petitioners assert a creative constitutional argument that would transform this private real estate transaction into an unconstitutional taking. This position is legally untenable and potentially destructive to nearly every private contractual property right in Arizona. Indeed, when the Petitioners purchased the unit at issue, they knew one

[6] Nineteen states have adopted the Uniform Condominium Act's termination language, and no Court has ruled it to be unconstitutional. All states have laws governing condominiums: two states do not have termination thresholds, while 25 states and the District of Colombia have an 80% or 4/5ths requirement, two have 90%, two have 75%, and three have 67% or 2/3rds. Fifteen states appear to require 100% to terminate, but some of those states, at least Louisiana, Texas, and Ohio, provide that the CC&Rs may state a lower threshold.

entity owned more than 90% of the units, and that this entity had the right to terminate the project at any moment.[7] The law requires the Association to disclose the CC&Rs ten days after a buyer signs a purchase contract. A buyer must acknowledge in writing within fourteen days thereafter that the CC&Rs are an "enforceable contract," which the buyer has "read and understands."[8] When PFP purchased more than a 90% block of units, it did so with the understanding it had the contractual right to terminate the project and intended to do so. Yet Petitioners argue the Constitution protects them from their knowing contractual agreement that the Condominium could be and (given the 90% block) likely would be terminated.

The Arizona Condominium Act is constitutional and resolves the issue of disputes over jointly held property. The express contractual rights between these private parties are enforceable. PFP and Petitioners are sophisticated parties[9] and the Court

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[7] *Compare* Maricopa County Record No. 20130901745, recorded October 10, 2013, and showing over 93% of the units owned by Dorsey DIP-Alliance, LLC (PFP's predecessor in title) *with* Petitioner's Deed Maricopa County Record No. 20180103716, recorded February 9, 2018, of which this Court may take judicial notice.

[8] ARS §33-1260(a)&(h) "I hereby acknowledge that the declaration, bylaws and rules of the association constitute a contract between the association and me (the purchaser). By signing this statement, I acknowledge that I have read and understand the association's contract with me (the purchaser). I also understand that as a matter of Arizona law, if I fail to pay my association assessments, the association may foreclose on my property." The statement shall also include a signature line for the purchaser and shall be returned to the association within fourteen calendar days.

[9] This Court should take judicial notice that Petitioners have purchased and sold several properties in Maricopa County, including multiple condominium units. *See, e.g.*, Maricopa County Recording Numbers 20150093985; 20170047555; 20170549101; 20170775485; 20190233904; 20190312728; 20190323122; 20220371349; and 20230337154. Furthermore, Petitioner Jie Cao currently is a licensed attorney in New

ought to leave them to the terms of their contract, rather than restricting their contractual freedom.

LEGAL ARGUMENT

The Court has posed four questions. We will answer each.

1. Either on its face or as applied in this case, does A.R.S. §33-1228 authorize the taking of private property for private use in violation of Article 2, §17 of the Arizona Constitution?

In short, the answer is No. Here, no political subdivision of the state with jurisdiction over Dorsey Place Condominiums condemned the condominium project and no private party used any right of eminent domain to take Petitioners' property. Indeed, there is no "taking" here. Rather, the owners terminated the condominium and sold it as provided by the CC&Rs, i.e., by enforcement of a contract between the parties.

If Petitioners argue that individuals can affect a taking by terminating a condominium pursuant to A.R.S. §33-1228, that argument is contrary to the plain language of the Statute, which provides that only the owners of units in a condominium may terminate it, i.e., a private contractual right, and expressly provides "eminent domain" as an exception to termination. *See* A.R.S. §33-1228(A)(1) ("Except as provided in subsection B of this section, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentages the declaration specifies, except: 1.

York under Registration No. 2688141 (Cao previously was licensed in Washington State under License No. 29086, but voluntarily resigned).

In the case of a taking of all the units by eminent domain."). In other words, the Statute provides that termination and eminent domain are governed by two separate statutory frameworks because they are two separate things. Condemnation only occurs by the filing of a lawsuit in Superior Court and following specific procedures (A.R.S. §12-1116(A)), whereas a termination does not require court action, but simply a vote of the owners and typically, is not litigated. Indeed, if there is a dispute among the owners concerning the termination, the dispute is required to be privately arbitrated by following an entirely different set of specific procedures (A.R.S. §33-1228(G)). By distinguishing between eminent domain and termination, the Legislature provided that terminations are not "takings;" neither are they regulatory takings because they occur pursuant to the parties' written agreement, not by operation of law.

The purpose of A.R.S. §33-1228 is to provide a framework the owners must follow when terminating the condominium, and to provide for the sale of same if they choose.[10] A.R.S. §33-1228(F) and (G). The Statute sets forth provisions designed to protect the minority owners in the event of a sale—and in particular, it provides a procedure to protect the minority owners and ensure they receive a "just compensation." Except for the cost of an appraisal to verify whether the compensation

[10] Unlike Petitioners' argument in their Response [Doc. 31 at Page 9], this is not an instance of *strangers* taking anyone's property. These parties are in privity of contract; i.e., the CC&Rs is a contract not only between the Association and the owners, but also between the owners themselves. *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513, ¶7 (App. 2005).

to the minority owners is just, the association bears the cost of arbitration to determine the amount of that compensation. A.R.S. §33-1228(I)(1). While PFP and the Association followed the existing statute to terminate the Condominium, Petitioners never availed themselves of the protections or procedures of A.R.S. §33-1228(I)(1).

A.R.S. §33-1228 serves a purpose; i.e., it allows owners who no longer wish to be encumbered by the condominium form to rid themselves of it, through a super majority vote, while still protecting the interests of the minority owners. In any scenario discussed by Petitioners or their supporting Amicus Curiæ, termination will only occur when a super majority of owners want to terminate or sell to an entity that does. While Petitioners wish to focus on investors rather than the rights of the majority of owners, without owners who want to sell or terminate, an investor would never be able to gain an inroad to any condominium. Those private purchase and sale agreements and the CC&Rs must govern the ordering of these private parties' business dealings.

And any ruling that broadly reads the Statute to encompass a taking would have devastating results and practical consequences in numerous other areas of law. For example, under this reading, a lease option to purchase a rented space at the end of the lease term, if executed, would be an unconstitutional taking. Indeed, enforcement of any option for the purchase of property would be a taking since it would be a forced sale. In addition, the foreclosure and deed of trust statutes set forth a mechanism to forcibly acquire or sell the owner's real property to repay the lender, where both the owner and the lender have an interest in the property. These examples are no different

than a termination and if these statutes were held to amount to unconstitutional takings—no lender would lend in Arizona and the security interests of lenders large and small would be imperiled. Further, the law of corporations, partnerships, and limited liability companies all provide for the agreement by a simple majority (51%) to sell all assets and the business, itself, over the objection of the 49% interest holders. All such sales would be unconstitutional takings and massive litigation would ensue—no business would incorporate or form in Arizona. Moreover, the doctrines of specific performance and adverse possession result in a transfer of private property from a previous owner to a new owner for private purposes. Indeed, like the Statute here, adverse possession results in an owner losing its interest in property without any default or breach by the owner.

Similarly, partition statutes resolve disputes between tenants in common by forcing a sale of the whole real property at fair market value to either co-tenant or a third party. Partition (discussed more fully below), which has been every cotenants' right under the common law for over 500 years and under state statutes in all 50 jurisdictions, would not be possible if a forced sale would amount to an unconstitutional taking. Those laws are all premised upon private decisions between private parties, i.e., contracts. There is no constitutional infirmity to any of them, and this Court should not find one.

Moreover, if this Court determines that A.R.S. §33-1228 impermissibly authorizes the taking of private property for private use in violation of Article 2, §17,

terminations will still occur because condominium CC&Rs, such as the one at issue here, contain termination language, most of which do not provide the minority owner protections of the Statute. Following the termination, the owners become cotenants, all of whom have partition rights—Petitioners ignore this fact.

Petitioners admit that if the CC&Rs provided for the sale of the property, there would be no constitutional issue because both the termination and sale would be by private agreement. OB, p. 19. Faced with the reality of the termination provision in the CC&Rs, Petitioners argue that the CC&Rs do not expressly provide for the sale of the property, only the termination of the condominium upon a 90% vote, and that the parties should just remain **tenants in common** under the law. OB, p. 24.

This admission should decide the case because there is no dispute that if the parties become tenants in common following a 90% vote, PFP would still have the legal right to commence a partition action and force the sale.

Petitioners ignore that tenants-in-common have common law and statutory rights of partition to force the sale of the property. A.R.S. §12-1211 *et seq.*; *see also Lawson v. Ridgeway*, 72 Ariz. 253, 233 (1951) ("The right of partition is incident of common ownership and specifically authorized by statute."). Such a sale would reach the exact same result as was achieved under the Statute.[11]

[11] Here, it would not be possible to partition the condominium "in kind," i.e., divide it up like raw land, because the plumbing, electrical, roofs, etc., are all jointly owned; hence, a partition "by sale" would necessarily occur resulting in PFP buying out Petitioners or selling to a third party, which is how all partitions "by sale" conclude.

The termination statute facilitates a partition by sale of the condominium and provides an extra 5% in value to the minority owners. It efficiently resolves the only issue, i.e., how much money is due to the former unit owners, which is handled in private arbitration at the association's expense. If the Court accepts the Petitioners' argument that termination and sale under the Statute amounts to an unconstitutional taking, then partition of tenancies in common is necessarily unconstitutional, as they both accomplish the same thing—the forced sale of private property to another private user. Further, if the Court strikes down the partition statutes (which exist in all jurisdictions), will it also overturn the common law right of partition that has persisted for over 500 years? Neither termination and sale under the Statute, nor partition and sale under Arizona statutes and common law, is a taking.

2. If any common elements or units in a condominium are to be sold pursuant to a condominium termination agreement, does A.R.S. §33-1228 require all the common elements and units to be part of that sale?

There is no requirement to sell the entire condominium upon termination.

> There is no magic in statutory construction and no legal legerdemain should be used to change the meaning of simple English words so that the resulting interpretation conforms the statute to the sociological and economic views of judges or lawyers. Words are to be given their usual and commonly understood meaning unless it is plain or clear that a different meaning was intended…. Courts are not at liberty to impose their views of the way things ought to be simply because that's what must have been intended, otherwise **no statute, contract or recorded word, no matter how explicit, could be saved from judicial tinkering**. Moreover, if the sense of a word is not to be taken in its usual and commonly understood meaning except under circumstances where a different meaning is clearly intended, **it becomes impossible for men to**

> **mean what is said or say what they mean and purposeful communication is unattainable**.

Kilpatrick v. Superior Court In & For Maricopa County, 105 Ariz. 413, 421 (1970) (emphasis added). There is no statutory mandate that all of what formerly constituted the common elements and units of the condominium be sold upon termination. The Court of Appeals correctly interpreted the plain language of the Statute as a permissive, not mandatory, sale of the whole. *Premier Phys. Grp., PLLC v. Navarro*, 240 Ariz. 193, 195, ¶9 (2016) (absent ambiguity, courts interpret statutes by their plain language). "A termination agreement ***may*** provide that all the common elements and units of the condominium shall be sold." A.R.S. §33-1228(E) (emphasis added). As the Opinion states, "may" is a permissive word and such words grant discretion, they do not command compliance. The Statute further references a termination agreement in which "***any*** real estate in the condominium is to be sold." *Id.* (emphasis added). Moreover, in that same Paragraph E, as in other places within the Statute, the Legislature specifically used the word "shall," which is mandatory, not permissive, i.e., the Legislature knew how to require certain things in the law, and knew how to make other things permissive, which is what occurred here. The law does not require a sale of everything.

This permissive nature of the sale process is not merely a matter of statutory interpretation, it is also a practical reality. The super majority of owners have the legal and contractual power to decide what to do with the property following termination. The majority can purchase the minority ownership block, thereby owning the whole, or

sell a portion to a third party, or scrape the land and build a shopping mall. The Statute does not require one path forward for the project; indeed, the entire point of termination is the creation of options (the land can now be developed into anything) where previously only a condominium would persist.

Regardless, this is largely a semantic argument by Petitioners. If the Statute did require a sale of the whole, then PFP could merely have created a new entity, pledged its 93% interest to it as a capital contribution, deeded that portion of the project to it, and purchased the minority block through that entity to comply with a "sale of the whole" interpretation. In other words, the argument is without force. Although the Statute does not require the terminating party to sell or repurchase its own property, even if it did, PFP could have easily complied with no change in result to Petitioners.

3. If a contract incorporates an unconstitutional statute by reference, are the terms of that statute enforceable as to the contracting parties?

First, the answer to the question above is not determinative here because it ignores the separate express term of the CC&Rs, which provides for termination of the condominium apart from any reference to A.R.S. §33-1228. [*See* Petitioners' Appendix APP146 ("Except in the case of a taking of all the Units by eminent domain, the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated.")]. Therefore, it does not matter whether the CC&Rs can incorporate the Statute when there is a separate contractual term providing for termination.

However, assuming for sake of argument only that a termination pursuant to the Statute is a taking repugnant to the constitution and its incorporation into the CC&Rs matters, the agreement of the parties incorporating this process is a voluntary waiver of the minority owner's rights. *See* *Verma v. Stuhr*, 223 Ariz. 144, 157, ¶69 (App. 2009) ("Express waiver of a statutory right, however, need not recite exactly the right being waived; it is sufficient if the language of waiver clearly conflicts with the right and thereby demonstrates the beneficiary's intent to waive."); *see also* *Estate of Henry*, 6 Ariz. App. 183 (1967) ("It is well settled that most rights may be waived."); *Holmes v. Graves*, 83 Ariz. 174, 178 (1957) ("Statutory provisions enacted for the benefit of individuals may be so far waived by those for whose benefit they were enacted that they are estopped to insist upon their protection."). Indeed, arbitration clauses waive the constitutional right to a trial by jury and are enforceable. *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 251 (App. 2005).

The answer to the question as framed by the Court is "yes." Even if this Court finds the termination statute to be unconstitutional, the incorporation of its terms as the terms of the contract between these parties is still binding on them. As a general rule, contracts are read to incorporate applicable statutes. *American Power Products, Inc. v. CSK Auto, Inc.*, 242 Ariz. 364 (2017). "By deciding to incorporate a statute into the contract, the parties make its words their own" (Robert Whitman, *Incorporation by Reference in Commercial Contracts*, 21 Md. L. Rev. 1, 12 (1961)) "just as though the words

of that enactment were set out in full in the contract." §30:19. Incorporation of rules of law into contracts, 11 Williston on Contracts §30:19 (4th ed.).

Moreover, Petitioners are incorrect that the CC&Rs rely on power prescribed by statute to permit termination, and therefore, any limitation on the statute is a limitation on the parties' contractual rights. OB, p. 19. Here, the voting power comes from the 90% owners as agreed by contract. That express contractual right is independent of the Statute and can be enforced even if the Statute is invalid.

Regardless, "[c]hanges in decisional law, even constitutional law, do not relieve parties from their pre-existing contractual obligations." *Fischer v. Governor of New Jersey*, 842 F. App'x 741, 752 (3d Cir.), *cert. denied sub nom. Fischer v. Murphy*, 142 S. Ct. 426 (2021) (citing cases and authorities). The *Fischer* case is instructive as the plaintiffs, New Jersey public school teachers (on behalf of a putative class) attempted to leverage the decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), to argue that they should be able to terminate their payments made under a state statute to the teacher's union at any time, "notwithstanding the membership agreements that they signed, which obligated them to continue paying dues until a specific date…." *Fischer*, 842 F. App'x at 742. Even though the *Janus* Court had determined that the Illinois statute forcing teachers to pay union dues violated their First Amendment free speech rights (*Janus*, 138 S.Ct. at 2460), the *Fischer* Court joined "a 'swelling chorus of courts' [that have] recognized that '*Janus* does not extend a First Amendment right to avoid paying union dues' when those dues arise out of a

contractual commitment that was signed before *Janus* was decided." *Fischer*, 842 F.App'x at 753 (quoting *Belgau v. Inslee*, 975 F.3d 940, 944–45 (9th Cir. 2020) (collecting cases at n. 5)). Here, the rule is the same: even if the Court were to determine that the Statute authorizes an unconstitutional taking of private property for private use, contracts previously entered into are enforceable as written. All existing condominium declarations would remain subject to the termination procedures that the parties agreed to in the CC&Rs.

In any event, Petitioners knew they were buying into a condominium that was already more than 90% owned by a single entity and that the entire condominium could be terminated at any time. *See supra*, n. 6. PFP expressly purchased the more than 90% block of units to reassemble the project into apartments through the termination process. Petitioners (who are sophisticated real estate investors and an attorney) took title with notice of these termination facts. The rule is that "private parties are best able to determine if particular contractual terms serve their interests." *1800 Ocotillo*, 219 Ariz. at 202. State statute and common law provide that CC&Rs create "'a contract between the subdivision's property owners as a whole and the individual lot owners.'" *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 44, ¶4 (App. 2003), *quoting* *Horton v. Mitchell*, 200 Ariz. 523, 525, ¶8 (App. 2001), *quoting* *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448 (1993). Petitioners' agreement to the 90% termination threshold prior to taking title to the unit cannot be set aside because Petitioners do not like the fact that PFP exercised its contractual rights. That is exactly what Petitioners agreed to

when they purchased the condo. Petitioners' legal title and right of possession to the unit was always subject to the 90% vote holder's decision—a deal is a deal.

4. If a condominium declaration incorporates a statute by reference, are subsequent statutory amendments incorporated into the agreement?

Yes, to the extent such statutory amendments do not impair express vested rights under the condominium declaration. As applied to this case, the subsequent statutory amendments to A.R.S. §33-1228 were properly incorporated into the CC&Rs because: (1) the 2018 amendments to A.R.S. §33-1228 were within the parties' reasonable expectations and (2) the Legislature's amendment of subsection G, paragraph 1 in A.R.S. §33-1228 did not impair any rights under the CC&Rs.

Application of *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022) should be limited to cases in which the homeowners seek to amend the CC&Rs under a general amendment power provision (as opposed to Legislative amendments). Even if the underlying premise of *Kalway* applies to this case, Petitioners had sufficient notice that future amendments to the Act would occur and apply to the CC&Rs. The parties agreed to incorporate the Arizona Condominium Act into the CC&Rs and to be bound by the terms of the Act, "**as amended from time to time**." This was sufficient notice that "a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way." *Kalway*, 252 Ariz. at 539, ¶17.

The 2018 amendments to A.R.S. §33-1228 did not create the right to terminate and sell the condominium—that already existed when Petitioners purchased their unit in February of 2018 by virtue of the CC&Rs and the previous version of the Statute. Petitioners were on notice, and are required by law to agree to abide by such terms, should a termination occur. Thus, the amendments at issue, specifically subsection G, paragraph 1 of A.R.S. §33-1228, are not "entirely new and different in character." *Id.* Rather, the amendments refine the rights and obligations of the parties when a termination and sale of the condominium occurs, and fills in the gap to provide public policy protections to the unit owners. It is reasonably foreseeable that amendments to the Act would occur, and the parties expressly incorporated these amendments.

Further, the Legislature's 2018 amendment to A.R.S. §33-1228 did not impair the parties' contractual rights for two reasons: (1) the amendment did not contradict any express term of the CC&Rs;[12] and (2) the parties' contract expressly incorporates the Statute "as amended from time to time." First, prior to the amendment, the CC&Rs stated that termination upon a 90% vote was proper. The 2018 amendment did not alter that voting threshold, and therefore, did not impair the parties' contract. Indeed, even under the incorporation by reference analysis, the amendment to the Statute did not impair pre-existing rights, but rather supplemented those rights by providing a

[12] Of course, any vested rights are not subject to subsequent changes by later statutory amendment or judicial decisions. In Arizona, CC&R terms are vested rights upon which members are entitled to rely on, and the right to terminate or "abolish" the CC&Rs is expressly a vested right. *Scholten v. Blackhawk Ptrs.*, 184 Ariz. 326, 330 (App. 1995).

competing appraisal process. Second, the United States Supreme Court, when ruling on the federal "contracts clause," found no contractual impairment by later law or regulation when the contract "expressly recognize[d] the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983). Due to the CC&Rs "as amended from time to time" language, the Court should apply the analysis in *Energy Reserves* here. The parties anticipated changes in statute and provided for same in the CC&Rs. So long as those changes do not abrogate, amend, or impair an express term of the CC&Rs, then there is no impairment of contract issue, and the subsequent statutory amendment should be incorporated into the CC&Rs. As incorporated into the CC&Rs, the 2018 version of A.R.S. §33-1228 controlled at termination.

CONCLUSION

There will always be forced sales of property when that property is jointly owned. The only way to prevent such sales is to never jointly own property, don't get a loan for a home purchase, pay all cash, don't sell membership interests in your business that owns real property, fund it all yourself, don't have cotenants to real property, own it yourself, and here: don't buy a condominium, buy a single-family home, that you own "free and clear." But anytime parties jointly own anything or have a joint interest in it, there is a legal mechanism to force the sale by one party over the other subject to due process and contractual rights. Each of the foregoing is the transfer of private property

for private use, but none of the above are unconstitutional takings just because they are authorized by law. Indeed, the notion that any law authorizing the taking of private property for private use violates the takings clause is misguided.

This Court should vacate the Court of Appeals Opinion and the attorneys' fee award to Petitioners, affirm the judgment entered by the Superior Court, and award to PFP and the Association their attorneys' fees and costs on appeal.

RESPECTFULLY submitted this 12th day of September 2023.

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APPENDIX
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UNIFORM CONDOMINIUM ACT (1980)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-NINTH YEAR
IN KAUAI, HAWAII
JULY 26 – AUGUST 1, 1980

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
New Orleans, Louisiana, February 14, 1978

UNIFORM CONDOMINIUM ACT

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
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UNIFORM CONDOMINIUM ACT

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UNIFORM CONDOMINIUM ACT

PREFATORY NOTE

This Act contains comprehensive provisions designed to unify and modernize the law of condominiums, which has undergone great change in the last 16 years. As a result of the increasing usefulness and flexibility of the condominium concept, condominiums have become one of the most common forms of community ownership of property in the United States.

All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and most of the present state statues are patterned after that 1958 statute, or after the 1962 Federal Housing Administration model condominium statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have recently enacted more detailed and comprehensive "second generation" statutes.

The statutes governing condominiums in the various states use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of condominium documents and of condominium financing arrangements in those states. Moreover, the varying statutes, creating different "bundles of rights" for purchasers of condominiums in the various states, also make it difficult for the increasingly mobile consumer to become educated in this very complex area. Finally, many actual or potential problems involving such matters as termination of condominiums, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, have not been satisfactorily addressed by any existing statute. It is primarily to resolve these various problems that the Uniform Condominium Act was drafted.

Article 1 of the Act contains definitions and general provisions applicable throughout the Act. The article deals with such matters as applicability, separate titles and taxation, eminent domain, applicability of other statutes, and other general matters.

Article 2 provides for the creation, alteration, and termination of the condominium. The article provides great flexibility to a developer in crating a condominium project designed to meet the needs of a modern real estate market,

while imposing reasonable restrictions on developers' practices which have a potential for harm to unit purchasers.

Article 3 concerns the administration of the unit owners' association, a matter which has received very limited attention in the statutes of the various states. This article provides broad-ranging powers to the association, and covers such matters as insurance, tort and contract liability of the association, and other matters often not dealt with in current statutes.

Article 4 deals with consumer protection for condominium unit purchasers. In addition to treating specific abuses which have developed in the condominium industry in the past, the article requires very substantial disclosure by developers, which must be made available to consumers before conveyance of a unit. To further promote disclosure, the article also requires that all owners of units in residential condominiums provide resale certificates to subsequent purchasers, regardless of when the condominium was created.

Article 5 is an optional article which establishes an administrative agency to supervise a developer's activities. The article is so drafted that it may be included in the Act in those states where an agency is thought desirable, and deleted from the Act in those states which desire to have the Act enforced by private action. In the event that a state determines to delete Article 5 from the Act, other provisions of the Act, indicated in the text by brackets, should also be deleted. A list of these sections appears in the Prefatory Note to Article 5.

The Uniform Condominium Act was originally a part of the Uniform Land Transactions Act, but was separated from that Act for further consideration at the 1975 annual meeting of the National Conference of Commissioners on Uniform State Laws. This Act was approved at the annual meeting of the Conference in Vail, Colorado in August 1977.

Since promulgation of the Act in 1977, and approval by the American Bar Association in 1978, the Act has received widespread legislation attention. The Act was enacted in its uniform version in Minnesota, Pennsylvania, and West Virginia during the 1979-80 legislative year, and was enacted with substantial amendments in Louisiana in 1978-79. By 1980, it had also been introduced in the legislatures of Arizona, Colorado, Connecticut, Idaho, Illinois, Massachusetts, Missouri, Tennessee, Vermont, and Wyoming.

During this same period, the National Conference appointed a Drafting Committee to draft a Uniform Planned Community Act (UPCA), and that Act was promulgated by the Conference at its 1980 annual meeting. UPCA applies to a wide variety of other forms of multiple ownership real estate regimes which are

similar in legal structure to condominiums, but do not meet the definition of "condominium" either, under present state law or the Uniform Condominium Act.

As a result of the legislative process in the various states considering the Act, and review of the Act by the Drafting Committee on UPCA, a large number of amendments to the 1977 Act were proposed to the Conference.

Many of the amendments were adopted at the 1980 annual meeting of the Conference, and have been included in this edition of the Act. Most of them are of a minor non-substantial nature; they are intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which result in more significant changes, either on particular matters of substance, or in the use of terms throughout the Act which simplify the structure and readability of the Act. A summary of the more significant amendments can be obtained from the Headquarters Office of NCCUSL, Suite 510, 645 North Michigan Avenue, Chicago, Illinois 60611.

A second category of changes results from a decision of the Conference at its 1978 annual meeting that the Condominium and Planned Community Acts should contain identical provisions wherever possible, in order to facilitate the consolidation of the two Acts in those states desiring a single Uniform Act covering both forms of multiple ownership developments. This required a large number of textual changes with no substantive effect. As a result, however, there are very few differences between the two Acts, and consolidation would be a simple and desirable approach in states desiring uniform coverage of both forms of ownership. An analysis of the differences between the Acts, and a general description of how the Acts might be consolidated, appear in the Prefatory Note to UPCA. However, at this time, the Conference has not prepared a consolidated text, because of its continuing consideration of the co-operative form of ownership, and the possibility that a consolidated Act might be applicable to co-operatives as well.

UNIFORM CONDOMINIUM ACT

ARTICLE 1
GENERAL PROVISIONS

§ 1-101. [Short Title] This Act shall be known and may be cited as the Uniform Condominium Act.

§ 1-102. [Applicability]

(a) This Act applies to all condominiums created within this State after the effective date of this Act. Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 1-107 (Eminent Domain), 2-103 (Construction and Validity of Declaration and Bylaws), 2-104 (Description of Units), 3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 3-111 (Tort and Contract Liability), 3-116 (Lien for Assessments), 3-118 (Association Records), 4-109 (Resales of Units), and 4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and Section 1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State before the effective date of this Act; but those sections apply only with respect to events and circumstances occurring after the effective date of this Act and do not invalidate existing provisions of the (declaration, bylaws, or plats or plans) of those condominiums.

(b) The provisions of (insert reference to all present statutes expressly applicable to condominiums or horizontal property regimes) do not apply to condominiums created after the effective date of this Act and do not invalidate any amendment to the (declaration, bylaws, and plats and plans) of any condominium created before the effective date of this Act if the amendment would be permitted by this Act. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by (insert reference to all present statutes expressly applicable to condominiums or horizontal property regimes). If the amendment grants to any person any rights, powers, or privileges permitted by this Act, all correlative obligations, liabilities, and restrictions in this Act also apply to that person.

(c) This Act does not apply to condominiums or units located outside this State, but the public offering statement provisions (Sections 4-102 through 4-108) apply to all contracts for the disposition thereof signed in this State by any party

unless exempt under Section 4-101(b) [and the agency regulation provisions under Article 5 apply to any offering thereof in this State.]

Comment

1. The question of the extent to which a state statute should apply to particular condominiums involves two problems: first, the extent to which the statute should require or permit different results for condominiums created before and after the statute becomes effective; and second, whether the statute should impose any or all of its substantive requirements on condominiums located outside the state.

Two conflicting policies are proposed when considering the applicability of this Act to "old" and "new" condominiums located in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of condominiums created under old law, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically apply to "old" condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this section reflects a desire to maximize the uniform applicability of the Act to all condominiums in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to pre-existing condominiums.

2. In carrying out this philosophy with respect to "new" condominiums, the Act applies to all condominiums "created" within the state after the Act's effective date. This is the effect of the first sentence of subsection (a). The first sentence of subsection (b) makes clear that the provisions of old statutes expressly applicable to condominiums do **not** apply to condominiums created after the effective date of this Act.

"Creation" of a condominium pursuant to this Act occurs upon recordation of a declaration pursuant to Section 2-101; however, the definition of "condominium" in Section 1-103(7) contemplates that *de facto* condominiums may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a condominium. Any real estate project which includes individually owned units and common elements owned by the unit owners as tenants in common is therefore subject to the Act if created within the state after the Act's effective date. No intent to subject the condominium to the Act is required, and an express intention to the contrary would be invalid and ineffective.

3. The section adopts a novel three-step approach to condominiums created before the effective date of the Act. First, certain provisions of the Act automatically apply to "old" condominiums, but only prospectively, and only in a manner which does not invalidate provisions of condominium declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created condominiums where not automatically displaced by the Act. Third, owners of "old" condominiums may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by "old" law, so long as (a) the amendment is adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act.

4. Elaboration of the principles described in Comment 3 may be helpful.

First, the second sentence of subsection (a) provides that the enumerated provisions automatically apply to condominiums created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of condominiums created under early condominium statutes. To avoid possible constitutional challenges, these provisions, as applied to "old" condominiums, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to the provisions of the instruments creating the condominium, and this Act does not invalidate those instruments.

EXAMPLE 1:

Under subsection (a), Section 4-109 (Resale Certificates) automatically applies to "old" condominiums. Accordingly, unit owners in condominiums established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units in "old" condominiums. However, the failure of a unit owner to provide such a certificate to

a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

EXAMPLE 2:

Under subsection (a), Section 3-118 (Association Records) automatically applies to "old" condominiums. As a result, a unit owners' association of an "old" condominium must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

Second, the prior laws of the state relating to condominiums are not repealed by this Act because those laws will still apply to previously-created condominiums, except when displaced. Some states, such as Connecticut and Florida, have made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.

Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision. More specifically, subsection (b) permits the owners of a pre-existing condominium to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the condominium instruments as specified in those instruments and in the pre-existing statute.

EXAMPLE 3:

Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-112 does not automatically apply to "old" condominiums, if the unit owners of a pre-existing condominium amend their condominium instruments in the manner permitted by the old statute and their existing instruments to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

5. In considering the permissible amendments under subsection (b), it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of the condominium created under "old" law, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original condominium instruments, and in compliance with the old law.

EXAMPLE:

Suppose an "old" condominium declaration and "old" state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners' approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67% would be required for subsequent amendments.

6. The last sentence of subsection (b) addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.

EXAMPLE:

Assume that, pursuant to the provisions of the "old" law, the declarant may exercise control over the association for only 3 years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to subsection (b) to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for 2 additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control period.

Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails

for 2 years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

7. The reference in subsection (b) to "all present statutes expressly applicable to condominiums or horizontal property regimes" is intended to distinguish between a state's condominium enabling statutes and those statutes which apply not only to condominiums but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the state's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.

8. In place of the words "declaration, bylaws, and plats and plans", each state should insert the appropriate terminology for those documents under the present state law, *e.g.*, "master deed, rules and regulations", etc.

9. This section does not permit a pre-existing condominium to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing condominium may elect to terminate the condominium under pre-existing law and create a new condominium which would be subject to all the provisions of this Act.

10. Subsection (c) reflects the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out-of-state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information relating to condominiums located in other states but sold in that state. However, where sales contracts are executed wholly outside the enacting state and relate to condominiums located outside the state, it seems more appropriate for the courts of the jurisdiction(s) in which the condominium is located and where the transaction occurs to have jurisdiction over the transaction.

§ 1-103. [Definitions] In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this Act:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through

one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than 20 percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than 20 percent of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated Interests" means the undivided interest in the common elements, the common expense liability, and votes in the association allocated to each unit.

(3) "Association" or "unit owners' association" means the unit owners' association organized under Section 3-101.

(4) "Common elements" means all portions of a condominium other than the units.

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

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to Section 2-107.

(7) "Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(8) "Conversion building" means a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

(9) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of, [or] (ii) reserves or succeeds to any special declarant right [, or (iii) applies for registration of a condominium under Article 5.]

(10) “Declaration” means any instruments, however denominated, that create a condominium, and any amendments to those instruments.

(11) “Development rights” means any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a condominium; (ii) to create units, common elements, or limited common elements within a condominium; (iii) to subdivide units or convert units into common elements; or (iv) to withdraw real estate from a condominium.

(12) “Dispose” or “disposition” means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.

(13) “Executive board” means the body, regardless of name, designated in the declaration to act on behalf of the association.

(14) “Identifying number” means a symbol or address that identifies only one unit in a condominium.

(15) “Leasehold condominium” means a condominium in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the condominium or reduce its size.

(16) “Limited common element” means a portion of the common elements allocated by the declaration or by operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.

(17) “Master association” means an organization described in Section 2-120, whether or not it is also an association described in Section 3-101.

(18) “Offering” means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a condominium not located in this State, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the condominium is located.

(19) “Person” means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity. [In the case of a land trust, however, “person” means the beneficiary of the trust rather than the trust or the trustee.]

(20) “Purchaser” means any person, other than a declarant or a person in the business of selling real estate for his own account, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than 20 years, or (ii) as security for an obligation.

(21) “Real estate” means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. “Real estate” includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(22) “Residential purposes” means use for dwelling or recreational purposes, or both.

(23) “Special declarant rights” means rights reserved for the benefit of a declarant to (i) complete improvements indicated on plats and plans filed with the declaration (Section 2-109); (ii) to exercise any development right (Section 2-110); (iii) to maintain sales offices, management offices, signs advertising the condominium, and models (Section 2-115); (iv) to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (Section 2-116); (v) to make the condominium part of a larger condominium or a planned community (Section 2-121); (vi) to make the condominium subject to a master association (Section 2-120); (vii) or to appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (Section 3-103(c)).

(24) “Time share” means a right to occupy a unit or any of several units during [5] or more separated time periods over a period of at least [5] years, including renewal options, whether or not coupled with an estate or interest in a condominium or a specified portion thereof.

(25) “Unit” means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 2-105(a)(5).

(26) “Unit owner” means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation.

Comment

1. The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "affiliate of a declarant" (Section 1-103(1)) is similar to the definitions in 12 U.S.C. § 1730(a), which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. § 78(c)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. § 1730(a)(2)B, no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

3. Definition (2), "allocated interests," refers to all of the interests which this Act requires the declaration to allocate. *See* Section 2-107.

4. Definitions (4) and (25), treating "common elements" and "units," should be examined in light of Section 2-102, which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real estate in the condominium not designated as part of the units.

5. Definition (7), "condominium," makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is

not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.

6. Definition (8), "conversion building," is important because of the protection which the Act provides in Section 1-112 for tenants of buildings which are being converted into a condominium. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the condominium form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

7. Definition (9), "declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. (Of course, such a person could become a declarant by subsequently succeeding to a special declarant right.) Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because their units were "previously disposed of" when originally conveyed.

The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the Act.

8. Definition (11), "development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974.

Some of these techniques relate to the phased (or incremental) development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than he is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the condominium by adding an additional building on Parcel B, containing additional

units, as part of the same condominium. If he reserves the right to do so, *i.e.*, to "add real estate to a condominium," he has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the condominium from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will extend into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the condominium from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the condominium and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from a condominium." The portion of the garage which extends into Parcel B may be left in the condominium (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" is frequently useful in commercial or mixed-use condominiums where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the condominium has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchaser will want to buy the whole floor as a single units or whether several purchasers will want the floor divided into several units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential condominiums, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial condominiums, but can occasionally be useful in certain kinds of residential condominiums as well.

9. Definition (12), "dispose" or "disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "purchaser," *infra*. However, the term includes more than conveyances and would, for example, cover contracts of sale.

10. Definition (15), "leasehold condominium," should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, real estate which has been subjected to the condominium form of ownership. In such a case, units located on

the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real estate underlying the unit would be removed from the condominium if the lease were not extended or renewed. On the other hand, real estate may not be subjected to condominium ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

This distinction is very significant. Under Section 3-105, the unit owners' association is empowered, following expiration of the period of declarant control, to cancel any lease of recreational or parking areas or facilities to which it is a party, regardless of who the lessor is. The association also has the power to cancel any lease for any land if the declarant or an affiliate of the declarant is a party to that lease. If the leased real estate, however, is subjected by the declarant to condominium form of ownership, that lease may not be cancelled unless it is unconscionable or unless the real estate was submitted to the condominium regime for the purpose of avoiding the right to terminate the lease. *See* Section 3-105.

While the subjective test of declarant's "purpose" may not always be clear, the rights of the association to cancel a lease depend upon the test. Thus, for example, a declarant who wishes to lease a swimming pool to the unit owners would have a choice of subjecting the pool for, say, a term of 20 years to the condominium form of ownership as a common element. At the end of the term, the lease would terminate and the real estate containing the pool would be automatically removed from the condominium unless there were a right to renew the lease. During the 20-year term, the lease would not be cancellable, regardless of the terms, unless it were found to be unconscionable under Section 1-112, or cancellable because submitted for the purpose of avoiding the right to cancel. On the other hand, if the pool were not submitted to the condominium form of ownership and was leased directly to the association for a 20-year term, the association could cancel that lease 90 days after the period of declarant control expired, even if, for example, 18 years remained of the term.

In either case, the terms of the lease would have to be disclosed in the public offering statement.

11. Definition (20), "purchaser," includes a person who acquires any interest in a unit, even as a tenant, if his tenancy entitles him to occupy the premises for more than 20 years. This would include a tenant who holds a lease of a unit in a fee simple condominium for one year, if the lease entitles the tenant to renew the lease for more than 4 additional years. Excluded from the definition, however, are mortgagees, declarants, and people in the business of selling real estate for their account. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4-102(c)) and the right to rescind (Section 4-108).

12. Definition (21), "real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(16) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend *ab solo usque ad coelum*, because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

13. Definition (23), "special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.

Any person who possesses a special declarant right would be a "declarant", including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.

14. Definition (24), "time share," is based on Section 1-102(14) and (18) of the Uniform Law Commissioners' Model Real Estate Time-Share Act.

15. Definition (25), "unit," describes a tangible, physical part of the project, rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons each of whom has the right to occupy the unit for one month does not create 12 new units-there are, rather, 12 owners of the unit. (Under the section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the votes assigned to that unit.)

While a separately described part of the project is not a unit unless it is designed for, and is subject to, separate ownership by persons other than the association, the association developer can hold or acquire units unless otherwise provided in the declaration. *See*, also, Comment 4.

16. Definition (26), "unit owners," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities might be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

The definition makes it clear that declarants, so long as they own units in the condominium, are unit owners and are therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments against those units. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

§ 1-104. [Variation by Agreement] Except as expressly provided in this Act, provisions of this Act may not be varied by agreement, and rights conferred by this Act may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this Act or the declaration.

Comment

1. The Act is generally designed to provide great flexibility in the creation of condominiums and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants. Accordingly, this section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the Act or of the declaration.

3. The following sections permit variation:

Section 1-102. [Applicability.] Preexisting condominiums may elect to conform to the Act.

Section 1-103. [Definitions.] All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.

Section 1-107. [Eminent Domain.] The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Section 2-102. [Unit Boundaries.] The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105. [Contents of Declaration.] A declarant may add any information he desires to the required content of the declaration.

Section 2-107. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities.] A declarant may allocate the interests in any way desired, subject to certain limitations.

Section 2-108. [Limited Common Elements.] The Act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-109. [Plats and Plans.] There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111. [Alterations Within Units.] Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-112. [Relocation of Boundaries Between Adjoining Units.] Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-113. [Subdivision of Units.] If the declaration expressly so permits, a unit may be subdivided into two or more units.

Section 2-115. [Use for Sales Purposes.] The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-116. [Easement to Facilitate Exercise of Special Declarant Rights.] Subject to the provisions of the declaration, the declarant has an easement for these purposes.

Section 2-117. [Amendment of Declaration.] The declaration of a non-residential condominium may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-118. [Termination of Condominium.] The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential condominium, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

Section 2-120. [Master Associations.] The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.

Section 3-102. [Powers of the Association.] The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.

Section 3-103. [Executive Board Members and Officers.] Except as limited by the declaration or bylaws, the Executive Board may act for the association.

Section 3-106. [Bylaws.] Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

Section 3-107. [Upkeep of the Condominium.] Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.

Section 3-108. [Meetings.] The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.

Section 3-109. [Quorums.] This section permits statutory quorum requirements to be varied by the bylaws.

Section 3-110. [Voting; Proxies.] A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.

Section 3-113. [Insurance.] The declaration may vary the provisions of this section in non-residential condominiums, and may require additional insurance in any condominium.

Section 3-114. [Surplus Funds.] Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to common expense liability.

Section 3-115. [Assessments for Common Expenses.] To the extent otherwise provided in the declaration, common expenses for limited common elements must be assessed against the the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

Section 4-101. [Applicability; Waiver.] All of Article 4 is modifiable or waivable by agreement in a condominium restricted to non-residential use.

Section 4-115. [Warranties.] Implied warranties of quality may be excluded or modified by agreement.

Section 4-116. [Statute of Limitations on Warranties.] The 6-year limitation may be modified by agreement of the parties.

4. The second sentence of the section is an important limitation upon the rights of a declarant. It is the practice in many jurisdiction today, particularly jurisdictions which do not permit expansion of a condominium by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters.

Section 2-117 requires unanimous consent to make certain amendments to the declaration and bylaws. If a declarant were permitted to use powers of attorney to accomplish such changes, the substantial protection which Section 2-117(d) provides to unit owners would be illusory. Section 1-104 prohibits the declarant from using powers of attorney for such purposes.

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, *see* Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. *See* Section 1-112. This section derives from Section 1-102(3) of the Uniform Commercial Code.

§ 1-105. [Separate Titles and Taxation]

(a) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

(b) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights.

(c) Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

(d) If there is no unit owner other than a declarant, the real estate comprising the condominium may be taxed and assessed in any manner provided by law.

Comment

1. A condominium may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently with existing rental apartment projects which are converted into condominiums. Subsection (d) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the condominium is created may be permitted under other law. *See* subsection (d). When separate tax assessments become mandatory under this section, the assessment for each unit must include the value of that unit's common element interest, and no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively. Any common elements subject to development rights, however, are separately taxed to the declarant.

2. Even if real estate subject to development rights is a part of the condominium and lawfully "owned" by the unit owners in common, it is in fact an asset of the declarant, and must not be taxed and assessed against unit owners. Under subsection (c), the declarant is exclusively liable for those taxes.

3. If there is any question in a particular state that a unit occupied as a residential dwelling is not entitled to treatment as any other residential single-family detached dwelling under the homestead statutes, this section should be modified to insure that units are similarly treated.

4. Unlike the law of New York and perhaps other states, this section imposes no limitation on the power of a jurisdiction to tax the condominium unit based on its fair market value. In most jurisdictions, experience has shown that the conversion of an apartment building to the condominium form of ownership greatly increases the fair market value of that building. Accordingly, a jurisdiction under this Act may impose real estate taxes on condominium units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.

§ 1-106. [Applicability of Local Ordinances, Regulations, and Building Codes] A zoning, subdivision, building code, or other real estate use law, ordinance, or regulation may not prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership. Otherwise, no provision of this Act invalidates or modifies any provision of any zoning, subdivision, building code, or other real estate use law, ordinance, or regulation.

Comment

1. The first sentence of this section prohibits discrimination against condominiums by local law-making authorities. Thus, if a local law, ordinance, or regulation imposes a requirement which cannot be met if property is subdivided as a condominium but which would not be violated if all of the property constituting the condominium were owned by a single owner, this section makes it unlawful to apply that requirement or restriction to the condominium. For example, in the case of a high-rise apartment building, if a local requirement imposing a minimum number of parking spaces per apartment would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher number of spaces per apartment merely by virtue of the same building being owned as a condominium.

2. The second sentence makes clear that, except for the prohibition on discrimination against condominiums, the Act has no effect on real estate use laws. For example, a particular piece of real estate submitted to the condominium form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the condominium but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to

violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

§ 1-107. [Eminent Domain]

(a) If a unit is acquired by eminent domain, or if part of a unit is acquired by eminent domain leaving the unit owner with a remnant which may not practically or lawfully be used for any purpose permitted by the declaration, the award must compensate the unit owner for his unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking, and the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (1) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration, and (2) the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(c) If part of the common elements is acquired by eminent domain the portion of the award attributable to the common elements taken must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.

(d) The court decree shall be recorded in every (county) in which any portion of the condominium is located.

Comment

1. The provisions of this statute are not intended to supplant the usual rules of eminent domain but merely to supplement the rules to address the unique problems which eminent domain raises in the context of a **condominium**. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this section are properly integrated.

2. When a unit is taken or partially taken by eminent domain, this section provides for a recalculation of the allocated interests of all units.

EXAMPLE 1:

Suppose that all allocated interests in a 9-unit condominium were originally allocated to the units on the basis of size. If eight of the units are equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is taken out of the condominium by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22 2/9% while each of the small units would have 11 1/9%.

EXAMPLE 2:

Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) provides that the allocated interests would automatically shift to 5 5/19% for the partially taken unit, 21 1/19% for the largest unit, and 10 10/19% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does **not** mean that its allocated interests are only half as large as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken unit's reallocated interests are 5 5/19% rather than 5%.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a

condominium unit as a part of the condominium or must take the unit and have the unit excluded from the condominium.

Subsection (a) merely requires that the taking body compensate the unit owner for all of his unit and its interest in the common element, whether or not the common element interest is acquired. The Act also requires that the allocated interests are automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the common element interest, votes, and common expense liability to the government) is an unanswered question.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interest to be reallocated. Subsection (b) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. This right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

EXAMPLE 1:

Suppose, in a commercial condominium consisting of four units, each unit consists of a factory and parking lot, and that the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit #1 are equal, and that 1/2 the parking lot is taken by eminent domain, leaving the factory and 1/2 the lot intact. Under the formula set out in the statute, unit #1's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

EXAMPLE 2:

Suppose that a condominium contains ten units, each of which is allocated at 1/10 undivided interest in the common elements. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the common element interest of all the units will be reallocated so that the partially-taken unit has a 1/19 undivided interest in the common elements and the remaining 9 units each a 2/19 undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to 1/2 of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining 9 units each having a 10% undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and reallocation of interests, votes, and liabilities.

6. Subsection (c) provides that, if part of the common elements is acquired, the award is paid to the association. This would not normally be the rule in the absence of such a provision.

§ 1-108. [Supplemental General Principles of Law Applicable] The principles of law and equity, including the law of corporations (and unincorporated associations), the law of real property and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this Act, except to the extent inconsistent with this Act.

Comment

1. This Act displaces existing law relating to condominiums and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely an illustration: no listing could be exhaustive.

2. The bracketed language concerning unincorporated associations should be deleted in the event the enacting state requires incorporation of a unit owners' association. *See* the parallel language contained in Section 3-101.

§ 1-109. [Construction Against Implicit Repeal] This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

Comment

This section derives from Section 1-104 of the Uniform Commercial Code.

§ 1-110. [Uniformity of Application and Construction] This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Comment

This Act should be construed in accordance with its underlying purpose of making uniform the law with respect to condominiums, as well as the purposes stated in the Prefatory Note of simplifying, clarifying, and modernizing the law of condominiums, promoting the interstate flow of funds to condominiums, and protecting consumers, purchasers and borrowers against condominium practices which may cause unreasonable risk of loss to them. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

§ 1-111. [Severability] If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are severable.

§ 1-112. [Unconscionable Agreement or Term of Contract]

(a) The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, shall be afforded a reasonable opportunity to present evidence as to:

(1) the commercial setting of the negotiations;

(2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, or inability to understand the language of the agreement or similar factors;

(3) the effect and purpose of the contract or clause; and

(4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the real estate and the value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions, but a disparity between the contract price and the value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

Comment

This section is similar to Section 2-302 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act. The rationale and comments provided in those sections are equally applicable to this section.

§ 1-113. [Obligation of Good Faith] Every contract or duty governed by this Act imposes an obligation of good faith in its performance or enforcement.

Comment

This section sets forth a basic principle running throughout this Act: in condominium transactions, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards, "honesty in fact" and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.

§ 1-114. [Remedies To Be Liberally Administered]

(a) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this Act or by other rule of law.

(b) Any right or obligation declared by this Act is enforceable by judicial proceeding.

ARTICLE 2
CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

§ 2-101. [Creation of Condominium]

(a) A condominium may be created pursuant to this Act only by recording a declaration executed in the same manner as a deed. The declaration must be recorded in every [county] in which any portion of the condominium is located, and must be indexed [in the Grantee's index] in the name of the condominium and the association and [in the Grantor's index] in the name of each person executing the declaration.

(b) A declaration or an amendment to a declaration adding units to a condominium, may not be recorded unless all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent (registered) engineer, surveyor, or architect [, or unless the agency has approved the declaration or amendment in the manner prescribed in Section 5-103(b).]

Comment

1. A condominium is created pursuant to this Act only by recording a declaration. As with any instrument affecting real estate, the declaration must be recorded in every recording district in which any portion of the condominium is located and must be indexed in the manner described in subsection (a). Specific indexing rules are suggested in brackets and should be used in those states where this result would not otherwise occur. For example, the declaration commonly has not been indexed in the grantee's index in the name of the condominium. Moreover, when multiple persons execute the declaration, the declaration has often been indexed solely in the name of the declarant and not in the name, for example, of lenders and other persons who might have executed the declaration. Because it is important that the names of the association and all persons executing the declaration appear in the index in order to locate all instruments in the land records, that language is not included in brackets.

2. In Section 1-103, the Act defines the term "Declaration" as any instruments, however denominated, which create a condominium, and any amendments to those instruments. "Condominium," in turn, is defined as "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those

portions." It is important to emphasize that other covenants, conditions or restrictions applicable to the real estate in the condominium might be recorded before or after the instruments are recorded which divide the real estate into units and common elements, thereby creating the condominium.

Until the actual recordation of the document which accomplished that result, however, the condominium has not been created.

3. A condominium has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of "condominium" in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with.

4. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate the condominium. However, if that lien is prior to the declaration itself, the lienholder may exclude that real estate from the condominium. *See* Sections 2-118(i) and (j). Moreover, the declarant may wish to obtain agreements from mortgagees or other lienholders that they will give partial releases permitting lien-free conveyance of the condominium units. *See* Section 4-111(a).

5. Except when development proceeds pursuant to Section 5-103, this Act contemplates that two different stages of construction must be reached before (1) a condominium may be created or (2) a unit in the condominium may be conveyed. These stages are described, respectively, in subsection (b) and Section 4-120. The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose.

If a condominium were said to consist from the beginning of a certain number of units, even though some of those units had not yet been completed or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete the construction could be enforced against any solvent person. If the insolvent owner of the unbuilt units failed to pay his common expense assessments for example, the unit owners' association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace. Moreover, votes in the unit owners' association could be assigned to units, and those votes could be cast, even though the units were never built. The Act therefore requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial completion [or the alternative bonding procedure and other assurances required by Section 5-103] reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests

in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

6. Section 2-101(b) requires that "all structural components and mechanical systems of all buildings containing or comprising any units" which will be created by recording a declaration, must be substantially completed in accordance with the plans. The intent of subsection (b) is that if any buildings are depicted on the plats and plans which are required by Section 2-109, and these buildings contain or comprise spaces which become units by virtue of recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the plats and plans recorded pursuant to Section 2-109 depict only the boundaries of the buildings and the units created in those buildings, and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected. *See* Comment 8, below.

The concept of "structural components and mechanical systems" is one commonly understood in the construction field and this comment is not intended as a comprehensive list of those components. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weathertight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would clearly not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting, and the like. Similarly, typical examples of "mechanical systems" include the plumbing, heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

7. Section 4-120, requires that, before an individual unit is conveyed, the unit must be "substantially completed." "Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A201, General Conditions of the Contract for Construction (1976 Ed.) at para. 8.1.3, states:

> The Date of Substantial Completion of the Work . . . is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work . . . for the use for which it is intended.

This standard is also one often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, leaking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

8. Section 2-101(b) and 4-120 require that completion certificates be recorded, or local certificates of occupancy be issued, as evidence of the fact that the required levels of construction have been met. In the case of "substantial completion," issuance of "a certificate of occupancy authorized by law," as is commonly required by local ordinance or state building codes, will suffice. Once the certificates have been recorded, or issued, as the case may be, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the declarant may have failed to complete the required levels of construction; the architect, surveyor or engineer (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under Section 4-115, but would not affect the validity of the purchasers' title to the condominium.

9. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units which may ultimately be located have been "structurally" completed, the declarant may create a condominium in which he reserves particular development rights (Section 2-105(a)(8)). In such a project, only the completed units might be treated as units from the outset, and the development rights would be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements, or by subdividing units previously created. The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more phased condominiums under Section 2-105 in projects which once were in fact built in phases, but under a single nonexpandable declaration. Experience in the several states where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or the lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this Act. Finally, many lenders and developers are increasingly sensitive to the secondary mortgage market requirements particularly those of the

Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC). Experience indicates that the pre-sale requirements imposed by FNMA and FHLMC frequently dictate that multi-building condominium projects be structured on a phased or expandable condominium basis.

11. The requirement of completion would be irrelevant in some types of condominiums, such as campsite condominiums or some subdivision condominiums where the units might consist of unimproved lots, and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this Act would require any residence to be built before the lots could be treated as units.

12. The term "independent" architect, surveyor or engineer in subsection (b) and elsewhere in the Act distinguishes any such professional person who acts as an independent contractor in his relationship to the declarant or lender.

§ 2-102. [Unit Boundaries] Except as provided by the declaration:

(1) If walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

(3) Subject to the provisions of paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

Comment

1. It is important for title purposes and other reasons to have a clear guide as to precisely which parts of a condominium constitute the units and which parts constitute the common elements. This section fills the gap left when the declaration merely defines unit boundaries in terms of floor, ceilings, and perimetric walls.

The provisions of this section may be varied, of course, to the extent that the declarant wishes to modify the details for a particular condominium.

For example, in a townhouse project structured as a condominium, it may be desirable that the boundaries of the unit constitute the exterior surfaces of the roof and exterior walls, with the center line of the party walls constituting the perimetric boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternatively, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In those cases it would not be appropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner. The differentiations made clear here, in conjunction with the provisions of Section 3-107, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of components – such as stoops and pipes – are resolved by Section 3-107, which imposes liability on the unit owner who causes damage to common elements, or under the broader provisions of Section 3-115(e), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that owner. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of common elements.

2. The differentiation between components constituting common elements and components which are part of the units is particularly important in light of Section 3-107(a), which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of common elements and each unit owner individually responsible for upkeep of his unit.

3. The differentiation between unit components and common element components may or may not be important for insurance purposes under this Act. While the common elements in a project must always be insured, the units themselves need not be insured by the association unless the project contains units

divided by horizontal boundaries; *see* Section 3-113(b). In a "high rise" configuration, however, Section 3-113(a) contemplates that both will normally be insured by the association (exclusive of improvements and betterments in individual units) and that the cost of such insurance will be a common expense. That common expense may be allocated, however, on the basis of risk if the declaration so requires. *See* Section 3-115(c)(3).

§ 2-103. [Construction and Validity of Declaration and By-Laws]

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

(b) The rule against perpetuities may not be applied to defeat any provision of the declaration, bylaws, rules, or regulations adopted pursuant to Section 3-102(a)(1).

(c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this Act.

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

Comment

1. Subsection (b) does not totally invalidate the rule against perpetuities as applied to condominiums. The language does provide that the rule against perpetuities is ineffective as to documents which would govern the condominium during the entire life of the project, regardless of how long that should be. With respect to deeds or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

2. In considering the effect of failures to comply with this Act on title matters, subsection (d) refers only to defects in the declaration – which includes the plats and plans – because the declaration is the instrument which creates and defines the units and common elements. No reference is made to other instruments, such as bylaws, because these instruments have no impact on title, whether or not recorded. However, in all cases of violations of the Act, a failure of the bylaws – or any other instrument – to comply with the Act, would entitle any affected persons to appropriate relief under Section 4-117.

3. No special prohibition against racial or other forms of discrimination is included in this Act because the provisions of generally applicable federal and state law apply as much to condominiums as to other forms of real estate.

4. Some examples may help to clarify what sorts of defects in the declaration are to be regarded as "insubstantial" within the meaning of the first sentence of subsection (d).

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by Section 2-107. This would be a substantial defect if the assigned interests were unequal, but if all units were assigned identical interests it would be possible to infer that the basis of allocation was equality – and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a condominium where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common element interests unless a different formula were specified pursuant to Section 2-107(b).

Other examples of insubstantial defects that might occur include failure of the declaration to include the word "condominium" in the name of the project, as required by Section 2-105(1), or failure of the plats and plans to comply satisfactorily with the requirement of Section 2-109(a) that they be "clear and legible," so long as they can at least be deciphered by persons with proper expertise. Failure to organize the unit owners' association at the time specified in Section 3-101 would not be a defect in the declaration at all, and would not affect the validity or marketability of titles in the condominium. It would, however, be a violation of this Act, and create a claim for relief under Section 4-117.

5. Each state has case or statutory law dealing with marketability of titles, and the question of whether substantial failures of the declaration to comply with the Act affect marketability of title should be determined by that law and not by this Act.

§ 2-104. [Description of Units] A description of a unit which sets forth the name of the condominium, the [recording data] for the declaration, the [county] in which the condominium is located, and the identifying number of the unit, is a sufficient legal description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws.

Comment

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements so long as the requirements of this section are satisfied, and so long as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

2. The last sentence makes clear that an instrument which does meet those requirements includes all interest appurtenant to the unit. As a result, it will not be necessary under this Act to continue the practice, common in some jurisdictions, of describing the common element interests, or limited common elements, that are appurtenant to a unit in the instrument conveying title to that unit.

§ 2-105. [Contents of Declaration]

(a) The declaration for a condominium must contain:

(1) the names of the condominium, which must include the word "condominium" or be followed by the words "a condominium", and the association;

(2) the name of every [county] in which any part of the condominium is situated;

(3) a legally sufficient description of the real estate included in the condominium;

(4) a statement of the maximum number of units which the declarant reserves the right to create;

(5) a description of the boundaries of each unit created by the declaration, including the unit's identifying number;

(6) a description of any limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-109(b)(10);

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

(8) a description of any development rights and other special declarant rights (Section 1-103(23)) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(9) if any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

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

(11) an allocation to each unit of the allocated interests in the manner described in Section 2-107;

(12) any restrictions on use, occupancy, and alienation of the units;

(13) the [recording data] for recorded easements and licenses appurtenant to or included in the condominium or to which any portion of the condominium is or may become subject by virtue of a reservation in the declaration; and

(14) all matters required by Sections 2-106, 2-107, 2-108, 2-109, 2-115, 2-116, and 3-103(d).

(b) The declaration may contain any other matters the declarant deems appropriate.

Comment

1. Many statutes and other regulatory schemes in the multi-owner project field do not separate the functions of a recorded declaration and unrecorded public offering statements or disclosure documents. As a result, many of the developer's representations and assurances concerning his future plans must appear in the declaration as well as the public offering statement, even though they may have nothing to do with the legal structure or title of the project. *See* e.g., Section 47-70, Conn.Gen.Stat. (1980). This results in duplicative requirements and unnecessarily complex declarations.

This Act seeks functionally to distinguish between the declaration and the public offering statement. It requires the declaration to contain only those matters which affect the legal structure or title of the condominium. This includes the reserved powers of the declarant to exercise development rights within the condominium. A narrative description of those rights, however, and the possible consequences flowing from their exercise, are required to be disclosed only in the public offering statement and not in the declaration.

2. This section requires a statement of the name of the association for the condominium as well as the name of the condominium itself, in order that the declaration may be indexed in the name of the association. *See* Section 2-101.

3. The Act requires that the declaration for a condominium situated in two or more recording districts be recorded in each of those districts. While the bracketed language refers to the "county" as the recording district in which the declaration is to be recorded, it would be appropriate in states where recording is done at the city, town, or parish level to amend the bracketed language accordingly.

4. Paragraph (a)(5) requires the declarant to state the largest number of units he reserves the right to build. Unlike many current condominium statutes, this Act imposes no time limit, measured by an absolute number of years, at the expiration of which the declarant must relinquish control of the association. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a 2-year period during which development is not proceeding. *See* Section 3-103(d). The flexibility afforded by this section may be important to a declarant as he responds to unanticipated future changes in his market.

In theory, a declarant might overstate the maximum number of units in an attempt to artificially extend the period of declarant control, since the time might never come when a declarant had sold 75% of that number of units. As a practical matter, however, such a practice would not likely achieve long-term control.

EXAMPLE:

A declarant reserves the right to build 100 units, even though zoning would permit only 75 units on the site, and the declarant actually plans on building only 50 units. As a result of the reservation, the declarant would not lose control of the association under the 75% rule stated in Section 3-103(d)(i) even when all 50 units had been built and sold, because that percentage applies to all potential units, not units actually built. *See* Section 3-103(d)(i).

However, there are practical constraints on the declarant's decision in this matter. Substantial exaggeration of the future density of the development might tend to impede sales of units in that project. Moreover, such a statement might also produce negative governmental reaction to proposals which might require local approval.

Even if the declarant did overstate the number of units to retain control, however, other limitations imposed by Section 3-103(d) will require turnover at an appropriate time. In the example, once the declarant had exercised the right to add the last of the 50 units which he intends to build, the 2-year period imposed by Section 3-103(d)(ii) and (iii) would begin to run, and the declarant would lose the right to control the association 2 years from the time the last units were added, even though he had reserved the right to add more units.

5. Paragraph (a)(5) requires that the boundaries of each unit created by the declaration be identified. The words "created by the declaration" emphasize that in an expandable project, new units may be created in the future by amendments to the declaration. Until those new units are actually added to the project by amending the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

6. Section 2-102 makes it possible in many projects to satisfy paragraph (a)(5) of this section by merely providing the identifying number of the units and stating that each unit is bounded by its ceiling, floor, and walls. The plats and plans will show where those ceilings, floors, and perimetric walls are located, and Section 2-102 provides all other details, except to the extent the declaration may make additional or contradictory specifications because of the unique nature of the project.

7. Paragraph (a)(6) makes clear that the limited common elements described in Section 2-102(2) and (4) need not be described in the declaration. These limited common elements are typically porches, balconies, patios, or other amenities which may be included in a project. Such improvements are treated by the Act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specially referred to in the declaration. Porches, balconies and patios must be shown on the plats and plans (*see* Section 2-109(b)(10)), but other limited common elements described in Section 2-102(2) and (4) need not be shown.

8. Paragraph (a)(7) contemplates that the common elements in the project may be allocated as limited common elements at some future time, either by the declarant or the association. For example, a swimming pool might serve an entire project during early phases of development. At the outset, that pool might be a common element which all the unit owners may use. At a later time, with more units and additional pools built in subsequent phases, either the declarant or the association might determine that the first pool should become a limited common element reserved for the use only of units in the first phase, while the other pools should be reserved exclusively for units in the subsequent phases. Such a potential allocation should be described in the declaration pursuant to this section.

9. Paragraph (a)(8) requires the declaration to describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be exercised. The Act imposes no maximum time limit for the exercise of those rights, and the particular language of a declaration will vary from project to project depending on the requirements of each project. This Act contemplates that those rights may be exercised after the period of declarant control terminates.

10. Plats and plans are made a part of the declaration for legal purposes by Section 2-110, and their content may in part provide some of the information required by this section.

11. Paragraph (a)(14) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as 2-107 on the allocations of allocated interests or 2-109 on plats and plans, will affect all projects. Others, such as 2-106 on leasehold condominiums, will apply only to particular kinds of projects.

12. Subsection (b) contemplates that, in addition to the content required by subsection (a), other matters may also be included in the declaration if the declarant or lender feel they are appropriate to the particular project. In particular, the draftsman should carefully consider any desired provisions which would vary any of the many sections of the Act where variation is permitted, including such matters as expanding or restricting the association's powers. A list of sections which may be varied appears in the comment to Section 1-104.

§ 2-106. [Leasehold Condominiums]

(a) Any lease the expiration or termination of which may terminate the condominium or reduce its size [, or a memorandum thereof,] shall be recorded.

Every lessor of those leases must sign the declaration, and the declaration shall state:

(1) the [recording data] for the lease [or a statement of where the complete lease may be inspected];

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

(3) a legally sufficient description of the real estate subject to the lease;

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

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

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

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

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

(d) If the expiration or termination of a lease decreases the number of units in a condominium, the allocated interests shall be reallocated in accordance with Section 1-107(a) as though those units had been taken by eminent domain. Reallocations shall be confirmed by an amendment to the declaration prepared, executed, and recorded by the association.

Comment

1. Subsection (a) requires that the lessor of any lease, which upon termination will terminate the condominium or reduce its size, must sign the

declaration. This requirement insures that the lessor has consented to use of his land as a condominium.

2. Subsection (a)(1) provides alternative bracketed language which should be considered by each state based on its practice. In any state where the recording acts do not specify the essential terms which must be included in a memorandum of lease, either this section should be supplemented to specify the essential terms or else the bracketed language relating to such memoranda should be deleted.

3. This section sets out requirements concerning leasehold condominiums which are not typically contained in the statutes of most states. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. The section also contains a number of other consumer protection provisions. However, in contrast to the result under some states' laws, unit owners have no statutory right to renewal of a lease upon termination.

4. The most significant matter of consumer protection in this section is subsection (b), which provides that unit owners who pay their share of the rent of the underlying lease may not be deprived of their enjoyment of the leasehold premises.

Subsection (b) is intended to protect the "unit owner" regardless of whether he is a lessee, sublessee, or even further down in a chain of transfer of leasehold interests. Thus, for example, if the "unit owner" is a sublessee, the term "lessor (or) his successor in interest" includes not only the lessor, but also the lessee.

Subsection (b) further protects the unit owner by assuring that he will not share with his fellow unit owners any collective obligations toward their common lessor. All obligations are instead fractionalized so that no unit owner can be made liable or otherwise penalized for a default by any of his fellows. Thus, a default by the association in payment of the rent due the lessor, in a case where the lease of common elements ran to the association, would not permit the lessor to terminate continued use of those common elements by those unit owners who then pay their share of the rent.

5. Subsection (d) considers the problems created when termination of a lease reduces the size of a condominium. In the event that some units are thereby withdrawn from the condominium, reallocation of the allocated interests would be required; the section describes how that reallocation would occur.

§ 2-107. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities]

(a) The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant.

(b) If units may be added to or withdrawn from the condominium, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.

(c) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class. A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this Act, nor may units constitute a class because they are owned by a declarant.

(d) Except for minor variations due to rounding, the sum of the undivided interests in the common elements and common expense liabilities allocated at any time to all the units must each equal one if stated as fractions or 100 percent if stated as percentages. In the event of discrepancy between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

(e) The common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated, is void.

Comment

1. Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests, while equality is used in allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant. Otherwise, each of the separate allocations may be made on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

2. While the flexibility permitted in allocations is broader than that permitted by any present statutes, it is likely that the traditional bases for allocation will continue to be used, and that the allocations for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality, or value of units. Each of these is discussed below.

3. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formulas he has chosen.

4. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in Comment 2, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

5. The purpose of subsection (b) is to afford some advance disclosure to purchasers of units in the first phase of a flexible condominium of how common element interests, votes and common expense liabilities will be reallocated if additional units are added.

6. Subsection (e) means what it says when it states that a lien or encumbrance on a common element interest without the unit to which that common element interest is allocated is void. Thus, consider the case of a flexible condominium in which there are 50 units in the first phase, each of which initially has a 2 percent undivided interest in the common elements. The declarant borrows money by mortgaging additional real estate. When the declarant expands the condominium by adding phase 2 containing an additional 50 units, he reallocates the common element interests in the manner described in his original declaration, to give each of the 100 units a 1 percent undivided interest in the common elements in both phases of the condominium. At this point, the construction lender cannot have a lien on the undivided interest of phase 1 owners in the common elements of phase 2 because of the wording of the statute. Thus, the most that the construction lender can have is a lien on the phase 2 units together with their common element interests. The mortgage documents may be written to reflect the fact that upon the addition of phase 2 of the condominium, the lien on the additional real estate will be converted into a lien on the phase 2 units and on the common element interest as they pertain to those units in both phase 1 and phase 2; however, *see* Comment to Section 2-110.

Unless the lender also requires phase 2 to be designated as withdrawable real estate, the phase 2 portion may not be foreclosed upon other than as condominium units and the construction lender may not dispose of phase 2 other than as units which are a part of the condominium. In the event that phase 2 is designated as withdrawable land, then the construction lender may force withdrawal of phase 2 and dispose of it as he wishes, subject to the provisions of the declaration. If one unit in phase 2, however, has been sold to anyone other than the declarant, then phase 2 ceases to be withdrawable land by operation of Section 2-110(d)(2).

7. If a unit owned only by the declarant – as opposed to the same unit if owned by another person – may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into 2 or more units or common elements, within the meaning of the definition of development rights, and is not governed by Section 2-113 (Subdivision of Units).

8. Subsection (c) represents a significant departure from practice in most states concerning the allocation of votes. The usual rule is that a single allocation of votes is made to each unit, and that allocation applies to all matters on which those votes may be cast. This section recognizes that the increasingly complex nature of some projects requires different allocation on particular questions. It may be appropriate, for example, in a project where common expense liabilities, or questions concerning rules and regulations, affect different units differently.

EXAMPLE:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners paid a much larger share than their proportion of the total units, the vote of commercial unit owners would be increased to 3 times the number of votes the residential owners held. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

9. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice, and the device described in Comment 9 was not desired. To prevent abuse of class voting by the declarant, subsection (c) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

EXAMPLE:

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting just the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103).

10. The last clause of subsection (c) prohibits a practice common in the planned community or other non-condominium multi-ownership projects, where units owned by declarant constitute a separate class of units for voting and other purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. In those circumstances which such classes were legitimately intended to address, principally control of the association, the Act provides other, more balanced devices for declarant control. *See* Section 3-103(d).

§ 2-108. [Limited Common Elements]

(a) Except for the limited common elements described in Section 2-102(2) and (4), the declaration shall specify to which unit or units each limited common element is allocated. That allocation may not be altered without the consent of the unit owners whose units are affected.

(b) Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by the unit owners between or among whose units the reallocation is made. The persons executing the amendment shall provide a copy thereof to the association, which shall record it. The amendment shall be recorded in the names of the parties and the condominium.

(c) A common element not previously allocated as a limited common element may not be so allocated except pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7). The allocations shall be made by amendments to the declaration.

Comment

1. Like all other common elements, limited common elements are owned in common by all unit owners. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed against all the units. *See* Sections 3-107(a) and 3-115(c)(1). This might include the costs of repainting all shutters, or balconies, for example, which are limited common elements pursuant to Section 2-102(4). Accordingly, there may be occasions where, to meet the expectations of owners and to have costs borne directly by those who benefit from those amenities, the declaration might provide that the costs will be borne, not by all unit owners as part of their common expense assessments, but only by the owners to which the limited common elements are assigned.

2. Even common elements which are not "limited" within the meaning of this Act may nevertheless be restricted by the unit owners' association pursuant to the powers set forth in Section 3-102(6) and (10), unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage or deed of trust may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

§ 2-109. [Plats and Plans]

(a) Plats and plans are a part of the declaration. Separate plats and plans are not required by this Act if all the information required by this section is contained in either a plat or plan. Each plat and plan must be clear and legible and contain a certification that the plat or plan contains all information required by this section.

(b) Each plat must show:

(1) the name and a survey or general schematic map of the entire condominium;

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

(3) a legally sufficient description of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) the extent of any encroachments by or upon any portion of the condominium;

(5) to the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the condominium;

(6) the location and dimensions of any vertical unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(7) the location with reference to an established datum of any horizontal unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

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

(9) the distance between non-contiguous parcels of real estate comprising the condominium;

(10) the location and dimensions of limited common elements, including porches, balconies and patios, other than parking spaces and the other limited common elements described in Sections 2-102(2) and (4);

(11) in the case of real estate not subject to development rights, all other matters customarily shown on land surveys.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown must be labeled either “MUST BE BUILT” or “NEED NOT BE BUILT”.

(d) To the extent not shown or projected on the plats, plans of the units must show or project:

(1) the location and dimensions of the vertical boundaries of each unit, and that unit’s identifying number;

(2) any horizontal unit boundaries, with reference to an established datum, and that unit’s identifying number; and

(3) any units in which the declarant has reserved the right to create additional units or common elements (Section 2-110(c)), identified appropriately.

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

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

(g) Any certification of a plat or plan required by this Section or Section 2-101(b) must be made by an independent (registered) surveyor, architect, or engineer.

Comment

1. The terms "plat" or "plan" have been given a variety of meanings by custom and usage in the various jurisdictions. Under this Act, it is important to recognize that a "plat" need not mean a "survey" of the entire real estate constituting a project at the time the initial plat is recorded, although, through amendments to the plat as development proceeds, it ultimately becomes a survey of the entire project.

As to "plan," the Act does not use that term to mean the actual building plans used for construction of the project. Instead, the required content of the plans in this Act is described in subsection (d). Essentially, the plans constitute a boundary survey of each unit. Typically, the walls will be the vertical ("up and down" or "perimetric") boundaries, and the floors and ceilings will be the horizontal boundaries. Importantly, these boundaries need not be physically measured, but may instead be projected from the plat or from actual building construction plans. Thus, the plans under this Act are not conceived to be "as built" plans.

2. Subsection (c) permits, but does not require, the plats to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may control) makes the improvement pursuant to Section 3-102(7). Should the association attempt that improvement, in the face of unit owner's objections, it may involve risk of challenge. Within land subject to development rights, of course, construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, *see* Section 4-118(a).

3. As noted in the Comments to Section 2-101, a condominium unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of Section 2-109 relating to plans (but not plats) would be inapplicable.

4. In detailing the required contents of the plats, two different types of legal description are contemplated. First, in subsection (b)(1), the plat must show at least a general schematic map of the entire project. While this may be by survey, the Act recognizes that a survey may be unduly expensive or impractical in a large project, and accordingly permits a general schematic map of the entire project at the commencement of development. With respect to those portions of the project,

however, where no future development may take place, the flexibility of a general schematic map is not necessary. At the same time, it becomes important for title purposes to be able to identify precisely that portion of the project which is essentially completed. Accordingly, as development ceases in particular phases, subsection (b)(2) contemplates that the locations and dimensions of that real estate will be identified. As this process continues, all of the real estate originally shown in a general schematic map will have been surveyed, and the location and dimensions of that real estate identified, at the expiration of development rights. In addition, subsection (2) contemplates that existing improvements must be shown within real estate where no further development will take place. This does not mean the units which may be within each building, but it does mean the external physical dimensions of the buildings themselves. As implied by subsection (11), the nature of "existing improvements" required to be surveyed under subsection (2) should be determined by local practices in the particular state.

5. Subsection (b)(3) requires that the real estate which is subject to development rights must be identified with a legally sufficient description, that is, either a metes and bounds description, or reference to the deeds of that real estate. Since different portions of the real estate may be subject to differing development rights – for example, only a portion of the total real estate may be added as well as withdrawn from the project – the plat must identify the rights applicable to each portion of that real estate. The same reasoning applies to the legally sufficient description of easements affecting the condominium and any leasehold real estate.

6. Subsection (f) describes the amendments to the plats and plans which must be made as development rights are exercised. This section requires that the plats and plans be amended at each stage of development to reflect actual progress to date. If an original schematic map was initially recorded as required by subsection (b)(1), the survey required by (b)(2) would also constitute the amendments required by subsection (f).

7. The terms "horizontal" and "vertical" are now commonly understood in condominium parlance to refer, respectively, to "upper and lower" and "lateral or perimetric." Thus, Section 2-102 contemplates that the perimetric walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this Act.

8. Sections 4-118 and 4-119 reveal the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT," as required by subsection (b)(3).

§ 2-110. [Exercise of Development Rights]

(a) To exercise any development right reserved under Section 2-105(a)(8), the declarant shall prepare, execute, and record an amendment to the declaration (Section 2-117) and comply with Section 2-109. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created, and, except in the case of subdivision or conversion of units described in subsection (b), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by Section 2-108 (Limited Common Elements).

(b) Development rights may be reserved within any real estate added to the condominium if the amendment adding that real estate includes all matters required by Section 2-105 or 2-106, as the case may be, and the plats and plans include all matters required by Section 2-109. This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to Section 2-105(a)(8).

(c) Whenever a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both:

(1) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain (Section 1-107).

(2) If the declarant subdivides the unit into 2 or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(d) If the declaration provides, pursuant to Section 2-105(a)(8), that all or a portion of the real estate is subject to the development right of withdrawal:

(1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(2) If a portion or portions are subject to withdrawal, no portion may be withdrawn after a unit in that portion has been conveyed to a purchaser.

Comment

1. This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the condominium, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only within the self-determined constraints originally described by the declarant.

2. The reservation and exercise of development rights is and must be closely co-ordinated with financing for the project. As a result, lender review and control of that process is common, and the financing documents should reflect the proposed development process.

A typical construction loan mortgage on a portion of a phased condominium might provide that as soon as new units are built on new land to be added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land converts into a mortgage on all of the units located within that portion, together with their respective common element interests. The common element interest of those units will, of course, extend to the common elements in other sections of the condominium. However, failure of a construction loan mortgage to so provide is inconsequential, because conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interests, as a result of the requirements of Sections 2-108(d) and 2-111(a).

3. A lender who holds a mortgage lien on one portion of a condominium may not cause that portion to be withdrawn from the condominium unless the portion constitutes withdrawable real estate in which there is no unit owner other than the declarant. Even then, the amendment effectuating the withdrawal must be executed by the declarant. Consequently, unless the lender wishes to become a declarant subsequent to foreclosure or a deed in lieu of foreclosure in order to execute the amendment, or forecloses in order to require an amendment from the association under Section 2-118(i), a lender might require that the signed amendment be deposited in escrow at the time the loan is made in order to protect against a recalcitrant borrower.

4. As indicated in the Comments to Sections 1-103(24) and 1-106, the withdrawal of real estate from a condominium may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider." In the event of a

withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the condominium.

5. Subsection (c) deals with special problems surrounding allocated interests when the declarant subdivides or converts units which were originally created in the declaration into additional units, common elements or both. This development right permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand. The concept is called "convertible space" in several existing state statutes.

For example, a declarant of a 5-story office building condominium may have purchasers committed at the time of the filing of the condominium declaration but a lack of purchasers for the upper 2 floors. In such a circumstance, the declarant could designate the upper 2 floors as a unit, reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide his 2-floor unit into 2 or more units. He may also wish to reserve a portion of the divided floor as a corridor which will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

Alternatively, the declarant may ultimately decide that the entire 2 floors should be turned over to the unit owners' association not as a unit but as common elements to be used perhaps as a cafeteria serving the balance of the building, or for retail space to be rented by the association. In that case, should he choose to make the entire 2 floors common elements, the provisions of paragraph (c)(1) would apply.

§ 2-111. [Alterations of Units] Subject to the provisions of the declaration and other provisions of law, a unit owner:

(1) may make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium;

(2) may not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without permission of the association;

(3) after acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries.

Comment

1. This section deals with permissible alterations of the interior of a unit, and impermissible alterations of the exterior of a unit and the common elements, in ways which reflect common practice. The stated rules, of course, may be varied by the declaration where desired.

2. Subsection (3) deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not impaired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2).

3. In considering permissible alteration of the interior of a unit, an example may be useful. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be impaired. Moreover, no trespass would be committed because each unit owner, as a part owner of the common elements, has a right to utilize them subject only to such restrictions as may be created by the Act, the declaration, bylaws, and the unit owners' association pursuant to Section 3-102.

4. Removal of a partition or the creation of an aperture between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate units within the meaning of Section 1-104 and would continue to be treated separately for the purposes of this Act.

5. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed

upon the primary residence of a unit owner, it may be appropriate in the case of time-share or other condominiums.

§ 2-112. [Relocation of Boundaries Between Adjoining Units]

(a) Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated by an amendment to the declaration upon application to the association by the owners of those units. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application must state the proposed reallocations. Unless the executive board determines, within 30 days, that the reallocations are unreasonable, the association shall prepare an amendment that identifies the units involved, states the reallocations, is executed by those unit owners, contains words of conveyance between them, and upon recordation, is indexed in the name of the grantor and the grantee.

(b) The association shall prepare and record plats or plans necessary to show the altered boundaries between adjoining units, and their dimensions and identifying numbers.

Comment

1. This section changes the effect of most current condominium statutes, under which the boundaries between units may not be altered without unanimous or nearly unanimous consent of the unit owners. As the section makes clear, this result may be varied by restrictions in the declaration.

2. This section contemplates that, upon relocation of the unit boundaries, no reallocation of allocated interests will occur if none is specified in the application. If a reallocation is specified but the executive board deems it unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's finding as unreasonable.

§ 2-113. [Subdivision of Units]

(a) If the declaration expressly so permits, a unit may be subdivided into 2 or more units. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit, the association shall prepare, execute, and record an amendment to the declaration, including the plats and plans, subdividing that unit.

(b) The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.

Comment

1. This section provides for subdivision of units by unit owners, thereby creating more and smaller units than were originally created. The underlying policy of this section is that the original development plan of the project must be followed, and the expectations of unit owners realized. Accordingly, unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided into 2 or more units unless the declaration is amended to permit it. A subdivision itself is accomplished by an amendment to the declaration.

2. At the same time, situations will often occur where future subdivision is appropriate, and this section permits the declaration to provide for it. Most state statutes do not presently provide for subdivision of units.

An analogous concept in the context of development rights is subdivision of units by a declarant. The development right is described in Section 2-110.

§ 2-114. [ALTERNATIVE A] [Easement for Encroachments] [To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans.]

§ 2-114. [ALTERNATIVE B] [Monuments as Boundaries] [The existing physical boundaries of a unit or the physical boundaries of a unit reconstructed in substantial accordance with the original plats and plans thereof become its boundaries rather than the metes and bounds expressed in the deed or plat or plan, regardless of settling or lateral movement of the building, or minor variance between boundaries shown on the plats or plans or in the deed and those of the building. This section does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans.]

Comment

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various states have adopted one approach or the other. Both theories recognize the fact that the actual physical boundaries may differ somewhat from what is shown on the plats and plans, and the practical effect of both is the same.

The easement approach of Alternative A creates easements for whatever discrepancies may arise, while the "monuments as boundaries" approach of Alternative B would make the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent settling or shifting.

§ 2-115. [Use for Sales Purposes] A declarant may maintain sales offices, management offices, and models in units or on common elements in the condominium only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. Any sales office, management office, or model not designated a unit by the declaration is a common element, and if a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the condominium in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the condominium. The provisions of this section are subject to the provisions of other state law, and to local ordinances.

Comment

1. This section prescribes the circumstances under which portions of the condominium – either units or common elements – may be used for sales offices, management offices, or models. The basic requirement is that the declarant must describe his rights to maintain such offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element uses might include a sales booth in the lobby of the building, or a trailer or temporary building located outside the buildings on the grounds of the property.

2. In addition, this section contains a permissive provision permitting advertising on the common elements. The declarant may choose to limit his rights in terms of the size, location, or other matters affecting the advertising. The Act, however, imposes no limitation. At the same time, the last sentence of the section recognizes that state or local zoning or other laws may limit advertising, both in

terms of size and content of the advertising, or the use of the units or common elements for such purposes. This section makes it clear that local law would apply in those cases.

§ 2-116. [Easement Rights] Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging a declarant's obligations or exercising special declarant rights, whether arising under this Act or reserved in the declaration.

Comment

1. This section grants to declarant an easement across the common elements, subject to any self-imposed restrictions on that easement contained in the declaration. At the same time, the easement is not an easement for all purposes and under all circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant's rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant's construction equipment to pass and repass over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the "reasonably necessary" test contained in this section to consider limitations on the declarant's easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.

2. The declarant is also required to repair and restore any portion of the condominium used for the easement granted under this section. *See* Section 4-119(b).

§ 2-117. [Amendment of Declaration]

(a) Except in cases of amendments that may be executed by a declarant under Section 2-109(f) or 2-110; the association under Section 1-107, 2-106(d), 2-108(c), 2-112(a), or 2-113; or certain unit owners under Section 2-108(b), 2-112(a), 2-113(b), or 2-118(b), and except as limited by subsection (d), the declaration, including the plats and plans, may be amended only by vote or agreement of unit owners of units to which at least [67] percent of the votes in the association are allocated, or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to non-residential use.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration must be recorded in every [county] in which any portion of the condominium is located, and is effective only upon recordation. An amendment shall be indexed [in the Grantee's index] in the name of the condominium and the association and [in the Grantor's index] in the name of the parties executing the amendment.

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

(e) Amendments to the declaration required by this Act to be recorded by the association shall be prepared, executed, recorded, and certified on behalf of the association by any office of the association designated for that purpose or, in the absence of designation, by the president of the association.

Comment

1. This section recognizes that the declaration, as the perpetual governing instrument for the condominium, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential condominium, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) lists those other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board of directors.

2. Section 1-104 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (e) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

§ 2-118. [Termination of Condominium]

(a) Except in the case of a taking of all the units by eminent domain (Section 1-107), a condominium may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to non-residential uses.

(b) An agreement to terminate must be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof must be recorded in every [county] in which a portion of the condominium is situated, and is effective only upon recordation.

(c) In the case of a condominium containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(d) In the case of a condominium containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or unless all the unit owners consent to the sale.

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate in the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination.

Proceeds of the sale must be distributed to unit owners and lien holders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection (h). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in interest remain liable for all assessments and other obligations imposed on unit owners by this Act or the declaration.

(f) If the real estate constituting the condominium is not to be sold following termination, title to the common elements and, in a condominium containing only units having horizontal boundaries described in the declaration, title to all the real estate in the condominium, vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (h), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

(g) Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units, which were [recorded] [docketed] [(insert other procedures required under state law to perfect a lien on real estate as a result of a judgment)] before termination, may enforce those liens in the same manner as any lien holder. All other creditors of the association are to be treated as if they had perfected liens on the units immediately before termination.

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

(1) Except as provided in paragraph (2), the respective interests of unit owners are the fair market values of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved within 30 days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated. The proportion of any unit owner’s interest to that of all unit owners is determined by dividing the fair market value of that unit owner’s unit and common element interest by the total fair market values of all the units and common elements.

(2) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

(i) Except as provided in subsection (j), foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable real estate, does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real estate from the condominium.

(j) If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may upon foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

Comment

1. While few condominiums have yet been terminated under present state law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real estate; the circumstances under which sale of units may be imposed on dissenting owners; the powers held by the Board of Directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire condominium with respect to the validity of the project; and other matters.

2. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter on a project of any size, subsection (a) states a general rule that 80% consent of the unit owners would be required for termination of a project. The declaration may require a larger percentage of the unit

owners and, in a non-residential project, it may also require a smaller percentage. Pursuant to Section 2-119 (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, will require the consent of a percentage of the lenders before the project may be terminated.

3. As a result of subsection (d), unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the condominium despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made.

4. Subsection (a) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real estate is being accomplished by the agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. Importantly, the agreement becomes effective only when it is recorded.

5. Subsections (c) and (d) deal with the question of when all the real estate in the condominium, or the common elements, may be sold without unanimous consent of the unit owners. The section reaches a different result based on the physical configuration of the project.

Subsection (c) states that if a condominium contains only units having horizontal boundaries – a typical high rise building – the unit owners may be required to sell their units upon termination despite objection. Under subsection (d), however, if the project contains any units which do not have horizontal boundaries – for example, a single family home project where some of the units include title to **land** and could theoretically continue apart from a condominium as a title matter – then the termination agreement may not force dissenting unit owners to sell their units unless the declaration as originally recorded provided otherwise. Obviously, of course, if all the unit owners consent to the sale of the units, sale of the entire development would be possible.

6. Subsection (e) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on unit owner

approval. This section also makes clear that, upon termination, title to the real estate shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this section makes clear that, until the association delivers title to the condominium property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real estate will not be impaired.

7. Subsection (f) contemplates the possibility that a condominium might be terminated but the real estate not sold. While this is not likely to be the usual case, it is important to provide for the possibility.

8. A complex series of creditors' rights questions may arise upon termination. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted, and unsecured creditors of the association. Subsection (g) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the Act, based on application of an assumed state lien priority rule of "first in time, first in right." In those instances, particularly involving mechanics' liens, where state law often establishes priorities at variance with that rule, that result is also indicated.

EXAMPLE 1:

HYPOTHETICAL FOR EXAMPLES 1A-1H: A condominium consists of 5 detached single family homes on 5 individually owned lots, together with a 6th lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned on an undivided interest basis by the unit owners.

The declaration provides that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) common element interest votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent of first mortgage holders before the unit owners may vote to terminate.

The 5 units were originally sold at equal prices of $50,000. Common expenses in the project are $100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the condominium which were senior to the declaration.

A shopping center developer has offered $380,000 for the purchase of the entire condominium. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The appraisal required by Section 2-118(h) shows that the units are still of equal value.

EXAMPLE 1A:

At the time of termination, the 5 units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of $50,000.
Unit 2: The owner's first mortgage had an unpaid balance of $40,000.
Unit 3: The owner's first mortgage had an unpaid balance of $25,000.
Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total $20,000.

Under the Act (Section 2-118(e)), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for the holders of all interests in the units." In these circumstances, the interests of each party in the total value of $400,000 would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Owners	30,000	40,000	55,000	80,000	80,000

EXAMPLE 1B:

The facts stated in Example 1A remain true. However, at termination, Unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due Owners	28,000	40,000	55,000	80,000	80,000

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that 6 months of the unpaid assessments prime the first mortgage pursuant to Section 3-116(b). Thus, if the sales proceeds had been only $50,000 per unit, rather than $80,000, the results with respect to Unit 1 would have been as follows:

Sales Proceeds	$50,000
6-Month Assessment Due Association	600
Balance	$49,400
Paid to 1st Mortgage Holder	$49,400
Loss to 1st Mortgage Lender	(600)
Loss to Association	(600)

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first 6 months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of 6 months' common expense assessments, as they often do for real property taxes.

EXAMPLE 1C:

The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on Lot 6. The association contracts with XYZ Pool Company to build the pool for $100,000. XYZ does not take a security interest in the common elements, as it might have done under Section 3-112, and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and properly perfects its judgment pursuant to Section 3-111 (Tort and Contract Liability). As provided in Section 3-111, liens resulting from judgments against the association are governed by Section 3-117. At the time of termination, XYZ has not been paid, and its claim amounts to $100,000.

Section 3-117(a) provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a $20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Due Owners	8,800	20,000	35,000	60,000	60,000

EXAMPLE 1D:

All facts stated in example 1C remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire condominium would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to $280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

EXAMPLE 1E:

The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a $50,000 uninsured judgment is entered against the owner of Unit 4, resulting from his personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-

Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Due Owners	8,800	20,000	35,000	10,000	60,000

EXAMPLE 1F:

The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against Unit 4 is perfected, the child secures a judgment against the association for $100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Tort Lien	8,800	20,000	20,000	10,000	20,000
Due Owners	-0-	-0-	15,000	-0-	40,000

Note that the child's lien realizes only $78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unmet claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which is the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for $20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at $20,000, even though he could have reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

EXAMPLE 1G:

The facts stated in Example 1F remain true. After the Unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P Paving Company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P $50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not, however, grant the mechanics' lien priority over any liens perfected before work began. P Paving sues on its lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-

XYZ Pool Lien	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	10,000
Tort Lien	-0-	10,000	20,000	-0-	20,000
Due Owners	-0-	-0-	5,000	-0-	30,000

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units were not liable for the balance.

In the example, the common expense lien arises before P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) 6 months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

EXAMPLE 1H:

The facts stated in example 1G remain true. Assume Unit 5, before termination, paid its pro rata share of both the P Paving lien and the tort lien. This reduces the P Paving lien to $40,000, and the tort lien to $80,000. Under Section 3-117, this entitles Unit 5 to a partial release of both claims, and neither P Paving nor the child has a further claim against Unit 5. The interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Liens	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	-0-

Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	-0-
Tort Lien	-0-	10,000	20,000	-0-	-0-
Due Owners	-0-	-0-	5,000	-0-	80,000

EXAMPLE 2:

The facts stated in example 1G remain true. Assume, however, that, at the outset, Unit 5 was twice as large as the others, sold for $100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In those circumstances, the results on sale are as follows:

UNIT #	1	2	3	4	5
Sale Proceeds	66,666	66,666	66,666	66,666	133,332
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	15,466	16,666	16,666	16,666	33,333
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	13,333	-0-	26,666
Tort Lien	-0-	1,667	16,666	-0-	33,333
Due Owners	-0-	-0-	-0-	-0-	50,000

Note that **all** the liens are allocated in accordance with each unit's common expense liability, since no special provision was made for allocating the costs of the pool, the paving or the tort claim. Unit 5 probably did not contemplate the size of

its exposure; nevertheless, fewer dollars were available to creditors upon termination than in Example 1G.

EXAMPLE 3:

The facts stated in Example 1G remain true, including the fact that Unit 5 was originally sold at the same price ($50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, Unit 5 is now worth $75,000. Three other units have remained at $50,000, while Unit 1 was neglected, and is now worth only $40,000. Common expense liabilities never changed. In this example, the total value of the units is now $265,000. Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1:	(15.09433%)	$ 60,377
Unit 2:	(18.86793%)	$ 75,472
Unit 3:	(18.86793%)	$ 75,472
Unit 4:	(18.86793%)	$ 75,472
Unit 5:	(28.30188%)	$113,207
	100.00000%	$400,000

UNIT #	1	2	3	4	5
Sales Proceeds	60,377	75,472	75,472	75,472	113,207
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	9,177	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	10,000	5,472	10,000
Tort Lien	-0-	5,472	20,000	-0-	20,000
Due Owners	-0-	-0-	472	-0-	63,207

In this example, the equal distribution of common expense liability coupled with the "fair value" distribution of sales proceeds create the greatest losses for the creditors of the association.

9. Subsection (h) departs significantly from the usual result under most condominium acts. Under those acts the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of the sales proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollars actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination agreement is approved, so that unit owners may understand the likely financial consequences of the termination.

10. Subsection (h)(2) is an exception to the "fair market value" rule. It provides that, if appraisal of any unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available, which is the common element interest allocated to each unit.

11. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium, but, if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium to be terminated pursuant to subsection (a) of this section.

12. A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to the first sentence of subsection (d).

13. With respect to the association's role as trustee under subsection (c), see Section 3-117.

14. If an initial appraisal made pursuant to subsection (h) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

15. “Foreclosure” in subsection (i) includes deeds in lieu of foreclosure, and “liens” includes tax and other liens on real estate which may be converted or withdrawn from the project.

16. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the condominium which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a condominium which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

17. Subsection (j) recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium declaration was recorded. In the absence of a provision such as subsection (j), recordation of the declaration would constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium documents. For that reason, this section permits the nonconsenting prior lienholder upon foreclosure to exclude the real estate subject to his lien from the condominium.

§ 2-119. [Rights of Secured Lenders] The declaration may require that all or a specified number or percentage of the mortgagees or beneficiaries of deeds of trust encumbering the units approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board, or (ii) prevent the association or the executive board from commencing, intervening in, or settling any litigation or proceeding, or receiving and distributing any insurance proceeds except pursuant to Section 3-113.

Comment

1. In a number of instances, particularly sale or encumbrance of common elements, or termination of a condominium, a lender’s security may be dramatically affected by acts of the association. For that reason, this section permits ratification of those acts of the association which are specified in that declaration as a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the

association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would order appointment of a receiver for an association. While this would be possible in a court proceeding, the Act prohibits private contractual granting of such a power.

4. Since it may well be that the association might find itself involved in litigation which would be adverse to the interests of the lender or the declarant, it is inappropriate for a secured party to be able to control the course of litigation in the absence of the consent of the other parties. In an appropriate case, of course, where the lenders' interests are affected, a lender might seek to intervene as a party in that proceeding.

5. Section 3-113 provides for the distribution of insurance proceeds in a particular manner. In particular, it prevents distribution of those proceeds to lenders until the intended purpose of the insurance has been met. For that reason, under this section the declaration may not provide the lender a right to receive insurance proceeds in any manner except the manner provided in Section 3-113.

6. In addition to the provision of the declaration, the provisions of individual deeds to units may require that unit owner to secure his lender's consent before taking particular actions.

§ 2-120. [Master Associations]

(a) If the declaration for a condominium provides that any of the powers described in Section 3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation (or unincorporated association) which exercises those or other powers on behalf of one or more condominiums or for the benefit of the unit owners of one or more condominiums, all provisions of this Act applicable to unit owners' associations apply to any such corporation (or unincorporated association), except as modified by this Section.

(b) Unless a master association is acting in the capacity of an association described in Section 3-101, it may exercise the powers set forth in Section 3-102(a)(2) only to the extent expressly permitted in the declarations of condominiums which are part of the master association or expressly described in the delegations of power from those condominiums to the master association.

(c) If the declaration of any condominium provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(d) The rights and responsibilities of unit owners with respect to the unit owners' association set forth in Sections 3-103, 3-108, 3-109, 3-110, and 3-112 apply in the conduct of the affairs of a master association only to those persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this Act.

(e) Notwithstanding the provisions of Section 3-103(f) with respect to the election of the executive board of an association, by all unit owners after the period of declarant control ends, and even if a master association is also an association described in Section 3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each condominium the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

(1) All unit owners of all condominiums subject to the master association may elect all members of that executive board.

(2) All members of the executive boards of all condominiums subject to the master association may elect all members of that executive board.

(3) All unit owners of each condominium subject to the master association may elect specified members of that executive board.

(4) All members of the executive board of each condominium subject to the master association may elect specified members of that executive board.

Comment

1. It is very common in large or multi-phased condominiums, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller condominiums. While it is expected that this phenomenon will be less necessary under this Act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue. Moreover, this section should be of significant benefit to the large number of condominiums created under prior law which have need for the benefits of a provision on master associations.

2. Subsection (a) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association by, the declaration for the condominium permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several condominiums may amend their declarations in similar fashion to provide for this power. Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, such provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

3. Subsection (b) changes the usual presumption with respect to the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more condominiums. In those cases where it is not so acting. However, the only powers of the unit owners' association which the master association may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of Section 3-102 that all of the powers described in that section may be exercised unless limited by the declaration.

4. Subsection (c) clarifies the liability of the members of the executive board of a unit owners' association when the condominium for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (c) makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (a), that liability lies with the members of the master association.

5. Subsection (d) addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (d) provide certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the condominiums subject to the master board. For that reason, the rights of notice, voting, and other rights enumerated in the Act are available only to the persons who actually elect the board.

6. Subsection (e) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at-large election is reasonable. For that reason, subsection (e) provides that, after the period of declarant control has terminated, there may be 4 ways of electing the master association board. Those four ways are: (1) at-large election of the master board among all the condominiums subject to the master association; (2) at-large election of the master board only among the members of the executive boards of all condominiums subject to the master association; (3) each condominium might have designated positions on the master board, and those spaces could be filled by an at-large election among all the members of each condominium; or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each condominium. It would only be in the case of an at-large election of the master board among all condominiums that subsection (d) would have no relevance.

§ 2-121. [Merger or Consolidation of Condominiums]

(a) Any 2 or more condominiums, by agreement of the unit owners as provided in subsection (b), may be merged or consolidated into a single condominium. in the event of a merger or consolidation, unless the agreement otherwise provides, the resultant condominium is, for all purposes, the legal successor of all of the preexisting condominiums and the operations and activities of all associations of the preexisting condominiums shall be merged or consolidated into a single association which shall hold all powers, rights, obligations, assets and liabilities of all preexisting associations.

(b) An agreement of two or more condominiums to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded and certified by the president of the association of each of the pre-existing condominiums following approval by owners of units to which are allocated the percentage of votes in each condominium required to terminate that condominium. Any such agreement must be recorded in every (county) in which a portion of the condominium is located and is not effective until recorded.

(c) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant condominium either (i) by stating the reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall allocated interests of the new condominium which are allocated to all of the units comprising each of the preexisting condominiums, and providing that the portion of the percentages allocated to each unit formerly comprising a part of the preexisting condominium

must be equal to the percentages of allocated interests allocated to that unit by the declaration of the preexisting condominium.

Comment

1. There may be circumstances where condominiums may wish to merge or consolidate their activities by the creation of a single condominium; this section provides for that possibility.

Subsection (a) makes it clear that a merger or consolidation may occur by the same vote of the unit owners necessary to terminate the condominium. If 2 or more condominiums are merged or consolidated, the resulting condominium is for all purposes the legal successor of the pre-existing condominiums, with a single association for all purposes. In the event condominiums did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to Section 2-120.

2. Under subsection (b), the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (c) does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (c) may be included. The important point that subsection (c) makes is that the reallocation of the common element interests, common expense liabilities and votes in the new association must be carefully stated.

Subsection (c) states 2 alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of common element interests, common expense liability, and votes in the association to each unit, or by stating the formulas by which those interests may be allocated to each unit in all of the pre-existing condominiums.

Alternatively, the merger or consolidation agreement may state the percentage of overall common element interests, common expense liabilities, and votes in the association allocated to "all of the units comprising each of the pre-existing condominiums." The agreement might then also provide that the portion of the percentage allocated to each unit from among the shares allocated to each condominium will be equal to the percentage of common expense liability and votes in the association allocated to that unit by the declaration of the pre-existing condominium. An example of how this alternative formulation would operate may be useful.

EXAMPLE:

Assume that 2 adjoining condominiums wish to merge their activities into one condominium. Assume that the first condominium consists of 10 one-bedroom units, with an annual budget of $10,000. Assume further that each of the units, being identical, has a common element interest of 10%, equal common expense liability of 10%, and one vote per unit.

The second condominium consists of 40 units, with 20 2-bedroom units and 20 3-bedroom units. The budget of the second condominium consists of $70,000 per year. Each of the 2-bedroom units has been allocated a 2% interest in the common elements and a 2% common expense liability, while each of the 3-bedroom units has been allocated a 3% interest in the common elements, and a 3% common expense liability. Finally, each of the units in the second condominium also has an equal vote.

There is no provision in the Act which mandates a particular allocation among condominiums 1 and 2 as to either common element interest, common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common element interests and common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii), to state "the percentage of overall allocated interests of the new condominium" as follows: as to common element interests and common expense liabilities, they might allocate 12.5% of those interests in the merged project to condominium 1, and 87.5% thereof to condominium 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing condominium must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing condominium" as required by subsection (c), each unit in condominium 1 would then have allocated to it 1.25% of both the common element interests and common expense liabilities in the new condominium. It happens that 1.25% of the common expenses of a merged condominium which has a budget of $80,000 equals $1,000.

Under the same rationale, if each of the 2-bedroom units in the second condominium to which were formerly allocated 2% of the common element interests and common expense liabilities, now has allocated 2% of the 87.5% allocated to the second condominium, each of those units would then have allocated to it 1.75% of the common element interest and common expense liabilities of the new condominium. 1.75% of $80,000 is $1,400. Similarly, each of the 3-bedroom units would then have allocated to it 2.625% of the common element interest and common expense liabilities in the merged condominium. That percentage of the

common expense liabilities of $80,000 would yield an annual cost of $2,100, the same cost as previously obtained in this condominium.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both condominiums, this would have the effect of giving 20% of the votes to condominium 1, even though condominium 1 had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the expectations of the unit owners in both condominiums. Alternatively, condominium 1 might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second condominium, then each of the unit owners in condominium 2 would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to paragraphs (c)(i) rather than (c)(ii).

ARTICLE 3
MANAGEMENT OF CONDOMINIUM

§ 3-101. [Organization of Unit Owners' Association] A unit owners' association must be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners or, following termination of the condominium, of all former unit owners entitled to distributions of proceeds under Section 2-118, or their heirs, successors, or assigns. The association shall be organized as a profit or nonprofit corporation [or as an unincorporated association.]

Comment

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium even during a period of declarant control reserved pursuant to Section 3-103(d).

2. The bracketed language preserves the flexibility existing under the vast majority of present condominium statutes to organize the association as a profit or non-profit corporation or as an unincorporated association. Although at least one

state (Georgia) requires the organization of the association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

§ 3-102. [Powers of Unit Owners' Association]

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association [, even if unincorporated,] may:

(1) adopt and amend bylaws and rules and regulations;

(2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;

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

(4) institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or 2 or more unit owners on matters affecting the condominium;

(5) make contracts and incur liabilities;

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

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

(8) acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to Section 3-112;

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

(10) impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements (other than limited common elements described in Sections 2-102(2) and (4)) and for services provided to unit owners;

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

(12) impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments;

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

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

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

(16) exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and

(17) exercise any other powers necessary and proper for the governance and operation of the association.

(b) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

Comment

1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-106.

3. Many state condominium statutes give the association the power to sue and be sued in its own name. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that the association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph (8) refers to the power granted by Section 3-112 to sell or encumber common elements without a termination of the condominium upon a vote of the requisite number of unit owners. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners.

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. These powers are intended to be in addition to any rights which the association may have under other law.

6. Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration – for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

7. If the association is incorporated, it may, pursuant to paragraph (16), exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (16), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-108.

§ 3-103. [Executive Board Members and Officers]

(a) Except as provided in the declaration, the bylaws, in subsection (b), or other provisions of this Act, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of

the executive board are required to exercise (i) if appointed by the declarant, the care required of fiduciaries of the unit owners and (ii) if elected by the unit owners, ordinary and reasonable care.

(b) The executive board may not act on behalf of the association to amend the declaration (Section 2-117), to terminate the condominium (Section 2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (Section 3-103(f)), but the executive board may fill vacancies in its membership for the unexpired portion of any term.

(c) Within [30] days after adoption of any proposed budget for the condominium, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. Unless at that meeting a majority of all the unit owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) [60] days after conveyance of [75] percent of the units which may be created to unit owners other than a declarant; (ii) [2] years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) [2] years after any development right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event he may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(e) Not later than [60] days after conveyance of [25] percent of the units which may be created to unit owners other than a declarant, at least one member and not less than [25] percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than [60] days after conveyance of [50] percent of the units which may be created to unit owners other than a declarant, not less than [331/3] percent of the members of the executive board must be elected by unit owners other than the declarant.

(f) Not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least 3 members, at least a majority of who must be unit owners. The executive board shall elect the officers. The executive board members and officers shall taken office upon election.

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

Comment

1. Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board.

2. The provisions of paragraph (c) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect.

3. Subsection (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a condominium project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

4. Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the

expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

5. Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

§ 3-104. [Transfer of Special Declarant Rights]

(a) No special declarant right (Section 1-103(23)) created or reserved under this Act may be transferred except by an instrument evidencing the transfer recorded in every (county) in which any portion of the condominium is located. The instrument is not effective unless executed by the transferee.

(b) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this Act. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.

(2) If a successor to any special declarant right is an affiliate of a declarant (Section 1-103(1)), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the condominium.

(3) If a transferor retains any special declarant right, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this Act or by the declaration relating to the retained special declarant rights and arising after the transfer.

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

(c) Unless otherwise provided in a mortgage instrument or deed of trust, in case of foreclosure of a mortgage, tax sale, judicial sale, sale by a trustee under a

deed of trust, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant or real estate in a condominium subject to development rights, a person acquiring title to all the real estate being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that real estate held by that declarant, or only to any rights reserved in the declaration pursuant to Section 2-115 and held by that declarant to maintain models, sales offices and signs. The judgment or instrument conveying title shall provide for transfer of only the special declarant rights requested.

(d) Upon foreclosure, tax sale, judicial sale, sale by a trustee under a deed of trust, or sale under Bankruptcy Code or receivership proceedings, of all units and other real estate in a condominium owned by a declarant:

(1) the declarant ceases to have any special declarant rights, and

(2) the period of declarant control (Section 3-103(d)) terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

(e) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:

(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by this Act or by the declaration.

(2) A successor to any special declarant right, other than a successor described in paragraphs (3) or (4), who is not an affiliate of a declarant, is subject to all obligations and liabilities imposed by this Act or the declaration:

(i) on a declarant which relate to his exercise or non-exercise of special declarant rights; or

(ii) on his transferor, other than;

(A) misrepresentations by any previous declarant;

(B) warranty obligations on improvements made by any previous declarant, or made before the condominium was created;

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

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

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (Section 2-115), if he is not an affiliate of a declarant, may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement[,] [and] any liability arising as a result thereof [, and obligations under Article 5.]

(4) A successor to all special declarant rights held by his transferor who is not an affiliate of that declarant and who succeeded to those rights pursuant to a deed in lieu of foreclosure or a judgment or instrument conveying title to units under subsection (c), may declare his intention in a recorded instrument to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit owned by the successor, or unit recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the executive board in accordance with the provisions of Section 3-103(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, he is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under Section 3-103(d).

(f) Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this Act or the declaration.

Comment

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a condominium. There are two parts to be problem. First, what obligations and liabilities to unit owners (both existing unit owners and persons who become unit owners in the future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest. No present condominium state adequately addresses these issues.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose

only interest in the condominium project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the condominium, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor over whom he has no control. Similarly, the section imposes obligations and liabilities arising after the transfer upon a non-affiliated successor to a declarant's interests, but absolves such a transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (*e.g.*, a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a condominium project to a successor, without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing unit owners and persons who subsequently become unit owners) for all obligations and liabilities, including warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in Section 1-103(1)), the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b) and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (e). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor whose interest in the project is solely for the protection of debt security) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which relate to the rights he holds. Such a transferee is liable for the

promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (e)(2)(ii). For example, a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however, to complete improvements labeled "MUST BE BUILT" on the original plans.

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (e) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (*i.e.*, persons whose sole interest in the condominium project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a mortgage, a sale by a trustee under a deed of trust, or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of **all** units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights, then, under subsection (d), such special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described or by deed in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (e), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who exercises such a right is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the

association. This provision is designed to deal with the typical problem of a foreclosing mortgage lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits such a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, paragraph (3) of subsection (e) provides that a successor who has only the right to maintain model units, sales offices, and signs does not thereby become subject to any obligations or liabilities as a declarant except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a condominium project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act.

Under Section 2-110, a declarant may reserve the right to create additional units in portions of the condominium which were originally designated as common elements. The declarant becomes the owner of any units created, but, prior to creation of units, the title to those portions of the condominium is in the unit owners. The right to create the units is an interest in land in which a security interest might be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d), the purchaser may limit his liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (e)(4) or may buy the rights under paragraph (c).

§ 3-105. [Termination of Contracts and Leases of Declarant] If entered into before the executive board elected by the unit owners pursuant to Section 3-103(f) takes offices, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office upon not less than (90) days' notice to the other party. This section does not apply to any lease the termination of

which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section.

Comment

1. This section deals with a common problem in the development of condominium projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem is two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the condominium and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a condominium project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (*i.e.*, any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party, or any contract or lease previously entered into by the declarant which is not *bona fide* or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses the usual leasehold condominium situation where the underlying real estate is subject to a long-term ground lease which is then submitted to the Act. Because termination of the ground lease would terminate the condominium, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) will be restructured to come within the exception,

a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the condominium was to prevent termination of the lease, the lease may nevertheless be terminated.

§ 3-106. [Bylaws]

(a) The bylaws of the association must provide for:

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

(2) election by the executive board of a president, treasurer, secretary, and any other officers of the association the bylaws specify;

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

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

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

(6) the method of amending the bylaws.

(b) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

Comment

1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the condominium. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The requirement, set forth in subsection (a)(5), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain),

Section 2-106 (expiration of certain leases), Section 2-112 (Relocation of Boundaries Between Adjoining Units), and Section 2-113 (subdivision or conversion of units). Section 2-117(e) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

§ 3-107. [Upkeep of Condominium]

(a) Except to the extent provided by the declaration, subsection (b), or Section 3-113(h), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

(b) In addition to the liability that a declarant as a unit owner has under this Act, the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the condominium is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.

Comment

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. *See* Section 1-103(16). As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units **benefited**. *See* Comment 1 to Section 2-108.

2. Under Section 2-110, a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit

owners. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate. As to real estate taxes, see Section 1-105(c).

§ 3-108. [Meetings] A meeting of the association must be held at least one each year. Special meetings of the association may be called by the president, a majority of the executive board or by unit owners having 20 percent, or any lower percentage specified in the bylaws, of the votes in the association. Not less than (10) nor more than [60] days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer.

§ 3-109. [Quorums]

(a) Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast [20] percent of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast [50] percent of the votes on that board are present at the beginning of the meeting.

Comment

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort condominiums where many owners may reside elsewhere, often at considerable distances, for most of the year.

§ 3-110. [Voting; Proxies]

(a) If only one of the multiple owners of a unit is present at a meeting of the association, he is entitled to cast all the votes allocated to that unit. If more than one of the multiple owners are present, the votes allocated to that unit may be cast

only in accordance with the agreement of a majority in interest of the multiple owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the multiple owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

(b) Votes allocated to a unit may be cast pursuant to proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may not revoke a proxy given pursuant to this section except by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.

(c) If the declaration requires that votes on specified matters affecting the condominium be cast by lessees rather than unit owners of leased units; (i) the provisions of subsection (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners. Unit owners must also be given notice, in the manner provided in Section 3-108, of all meetings at which lessees may be entitled to vote.

(d) No votes allocated to a unit owned by the association may be cast.

Comment

Subsection (c) addresses an increasingly important matter in the governance of condominiums: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the condominium community.

§ 3-111. [Tort and Contract Liability] Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain. Otherwise, an action alleging a wrong done by the association must be brought against the association and not against any unit owner. If the wrong occurred during any period of declarant control and the association gives the declarant

reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner: (i) for all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) for all costs which the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all litigation expenses, including reasonable attorneys fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from bringing an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by Section 3-117 (Other Liens Affecting the Condominium).

Comment

1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subsection (a) provides that the association or any unit owner shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. If a suit based on a claim which accrued during the period of developer control is brought against the association after control of the association has passed from the developer, reasonable notice to, and grant of an opportunity to the developer to defend, are conditions to developer liability. If, however, suit is brought against the association while the developer is still in control, obviously the developer cannot later resist a suit by the association for reimbursement on the grounds of failure to notify.

§ 3-112. [Conveyance or Encumbrance of Common Elements]

(a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but all the owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses. Proceeds of the sale are an asset of the association.

(b) An agreement to convey common elements or subject them to a security interest must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every [county] in which a portion of the condominium is situated, and is effective only upon recordation.

(c) The association, on behalf of the unit owners, may contract to convey common elements, or subject them to a security interest, but the contract is not enforceable against the association until approved pursuant to subsections (a) and (b). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(d) Any purported conveyance, encumbrance, judicial sale or other voluntary transfer of common elements, unless made pursuant to this section, is void.

(e) A conveyance or encumbrance of common elements pursuant to this section does not deprive any unit of its rights of access and support.

(f) [Unless the declaration otherwise provides,] a conveyance or encumbrance of common elements pursuant to this section does not affect the priority or validity of pre-existing encumbrances.

Comment

1. Subsection (a) provides that, on agreement of unit owners holding 80% of the votes in the association, parts of the common elements may be sold or

encumbered. (80% is the percentage required for termination of the condominium under Section 2-118.) This power may be exercised during the period of declarant control, but, in order to be effective, 80% of non-declarant unit owners must approve the action.

The ability to sell a portion of the common elements without termination of the condominium gives the condominium regime desirable flexibility. For example, the unit owners, some years after the initial creation of the condominium, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

2. Subsection (b) requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite majority of the unit owners. The agreement then must be recorded in the land records. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full power to execute a deed or mortgage. Under subsection (c), it is contemplated that the association will execute the actual instrument of conveyance. Under subsection (e), a conveyance or encumbrance of common elements may not deprive a unit owner of rights of access and support.

3. Under the condominium form of ownership, each unit owner owns a share of the common elements as an appurtenant interest to his unit and, when the unit owner mortgages his unit, he also mortgages his appurtenant interest. The unit owner himself cannot convey his unit separately from its interest in the common elements nor can he convey his common element interest separately from the unit. Therefore, if there is a mortgage or other lien against any unit, the problem arises as to whether the association under this section can convey a part of the common elements free from the mortgage interest of the unit mortgagee. Subsection (f) answers that question **no**. Therefore, a sale or encumbrance of common elements under this section would be subject to the superior priority of any prior mortgagee on the unit unless the mortgagee releases his interest therein.

The bracketed introductory language to subsection (f) is intended to permit an enacting state to choose whether or not the declaration could vary the rule of subsection (f). If the bracketed language is included, the declaration might provide,

for example, that any subsequent conveyance of specified portions of the common elements would be free of prior security interests. In that case, the security interest in the common elements held by unit mortgagees would be cut off. Since the loss of the security interest in the common elements could significantly affect mortgagees, states considering inclusion of the bracketed language probably should consult mortgagee groups. If limited to particular common element real estate such as portions of recreational area land, and if protections are provided for lender interests, the ability to convey free of prior security interests could contribute significantly to the continued economic viability of a project. Therefore, lenders may be favorable to inclusion of the bracketed language.

The declaration could protect lender interests in connection with a conveyance free of the security interests in a number of ways. For example, the declaration might provide for payment of a specified percentage of the sales price to unit mortgagees or it might provide that a specified percentage of the mortgage debt be paid to them. Also, the declaration might provide that no sale or encumbrance of common elements would be effective without the approval of a specified percentage of lenders. There are, no doubt, other devices which could afford substantial protection to lenders.

§ 3-113. [Insurance]

(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

(1) property insurance on the common elements insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion building, against fire and extended coverage perils. The total amount of insurance after application of any deductibles shall be not less than 80 percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations and other items normally excluded from property policies; and

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

(b) In the case of a building containing units having horizontal boundaries described in the declaration, the insurance maintained under subsection (a)(1), to

the extent reasonably available, shall include the units, but need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsections (a) and (b) is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it deems appropriate to protect the association or the unit owners.

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

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

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

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

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

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

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

(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner, mortgagee, or beneficiary under a deed of trust. The insurer issuing the policy may not cancel or refuse to renew it until [30] days after notice of the proposed cancellation or non-renewal has been mailed to the association, each unit owner and each mortgagee or beneficiary under a deed of trust to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

(h) Any portion of the condominium for which insurance is required under this section which is damaged or destroyed shall be repaired or replaced promptly by the association unless (i) the condominium is terminated, (ii) repair or replacement would be illegal under any state or local health or safety statute or ordinance, or (iii) [80] percent of the unit owners, including every owner of a unit or assigned limited common element which will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire condominium is not repaired or replaced, (i) the insurance proceeds attributable to the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the condominium, (ii) the insurance proceeds attributable to units and limited common elements which are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lienholders, as their interests may appear, and (iii) the remainder of the proceeds must be distributed to all the unit owners or lienholders, as their interests may appear, in proportion to the common element interests of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations. Notwithstanding the provisions of this subsection, Section 2-118 (Termination of Condominium) governs the distribution of insurance proceeds if the condominium is terminated.

(i) The provisions of this section may be varied or waived in the case of a condominium all of whose units are restricted to non-residential use.

Comment

1. Subsections (a) and (b) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

2. Subsection (b) represents a significant departure from the present law in virtually all states by requiring that the association obtain and maintain property insurance on **both** the common elements **and** the units within buildings with "stacked" units. *See* Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit condominium situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

The Act does not mandate association insurance on units in town house or other arrangements in which there are no stacked units. However, if the developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Section 1-103(4) and (25) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, the provisions of Section 2-102 apply.

In summary, Section 2-102 provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited common element (*see* definition in Section 1-103(16)), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements. This treats and defines ownership of all portions of the electrical, plumbing and mechanical systems serving the building not entirely within the boundaries of a unit.

All spaces, interior partitions, electrical, plumbing and mechanical systems, and all other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit.

Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of a stacked unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If installed by the unit owner, the item should be insured by the unit owner. Those items, installed by the unit owner and not covered by the association policy, are called "improvements and betterments".

4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many condominium documents require insurance in an amount equal to **100% of the replacement cost** of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (a)(2) covers only the liability of the association, and unit owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit.

7. Clause (i) of the third sentence of subsection (h) would operate as follows: (1) if the condominium consists of campsites, restoration after fire damage might consist of merely resodding the area damaged; (2) if the condominium consists of separate gardentype buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the condominium consists of a single highrise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the condominium" would be damaged and unrestored.

8. The scheme of this section, as set forth in subsection (h), is that any damage or destruction to any portion of the condominium must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a

decision to terminate the condominium or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (e) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the condominium that may be required.

9. In the case of commercial or industrial condominiums, unit owners may prefer to act as self-insurers or make other arrangements with respect to property insurance. Accordingly, subsection (i) provides that the insurance requirements of this section may be varied or waived in the case of a condominium all of the units of which are reserved exclusively for non-residential use. Such waiver or modification is not possible in the case of a mixed-use condominium, some of the units of which are used for residential purposes.

§ 3-114. [Surplus Funds] Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves must be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

Comment

Surplus funds of the association are generally used first for the pre-payment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (*e.g.*, the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

§ 3-115. [Assessments for Common Expenses]

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

(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to Section 2-107(a). Any past due common expense assessment or instalment thereof bears interest at the rate established by the association not exceeding [18] percent per year.

(c) To the extent required by the declaration:

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

(2) any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and

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

(d) Assessments to pay a judgment against the association (Section 3-117(a)) may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense liabilities.

(e) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.

(f) If common expense liabilities are reallocated, common expense assessments and any instalment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

Comment

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment

is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a condominium after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision or conversion of units).

§ 3-116. [Lien for Assessments]

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien may be foreclosed in like manner as a mortgage on real estate [or a power of sale under (insert appropriate state statute)] [but the association shall give reasonable notice of its action to all lienholders of the unit whose interest would be affected]. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11) and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. The lien is also prior to the mortgages and deeds of trust described in clause (ii) above to the extent of the common expense assessments based on the periodic

budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [The lien under this section is not subject to the provisions of (insert appropriate reference to state homestead, dower and curtesy, or other exemptions).]

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a recordable statement setting forth the amount of unpaid assessments against his unit. The statement must be furnished within (10) business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

Comment

1. Subsection (a) provides that the association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens. In addition, if the use of a power of sale pursuant to a mortgage is permitted in a particular state, the bracketed language (with an appropriate statutory citation inserted) may be used to ensure that the association's lien for unpaid assessments may also be enforced through the power of sale device. The bracketed language requiring notice of foreclosure should be adopted only in states in which the power of sale statute does not require notice to junior lienholders.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first mortgages recorded before the date the assessment became delinquent. However, as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

3. Subsection (e) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. In view of the association's powers to enforce its lien for unpaid assessments, subsection (f) provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (a), currently levied against his unit. The statement is binding on the association, the executive board, and every unit owner in any subsequent action to collect such unpaid assessments.

5. Units may be part of a condominium and of a larger real estate regime (*see* the Uniform Planned Community Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1980, which would govern most associations with assessment powers). For example, a large real estate development any consist of a larger planned community which contains detached single family dwellings and town houses which are not part of any condominium and a highrise building which is organized as a condominium within the planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c)

provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or become delinquent.

§ 3-117. [Other Liens Affecting the Condominium]

(a) Except as provided in subsection (b), a judgment for money against the association [if recorded] [if docketed] [if (insert other procedures required under state law to perfect a lien on real property as a result of a judgment)], is not a lien on the common elements, but is a lien in favor of the judgment lienholder against all of the units in the condominium at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(b) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(c) Whether perfected before or after the creation of the condominium, if a lien other than a deed of trust or mortgage, including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium, becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(d) A judgment against the association must be indexed in the name of the condominium and the association and, when so indexed, is notice of the lien against the units.

Comment

1. This section deals with the effect on unit owners of judgments against the association. The issue is not free from difficulty. Presently, in most states, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against the property of the association. On the other hand, if the association is organized as an unincorporated association,

under the law of most states each unit owner would have joint and several liability on the judgment. This Act strikes a balance between the two extremes, making the judgment lien a direct lien against each individual unit, but allowing the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment. The judgment would also be a lien against any property owned by the association.

2. It should be noted that, while the judgment lien runs directly against unit owners, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated association only is liable for a judgment, it will, of course, have no assets to satisfy the judgment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnished by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That additional assessment would be in precisely the amount for which this Act gives a direct lien against the individual unit owners. Further, if an association which is without sufficient assets to satisfy a judgment refuses to make assessments from which the creditor can have his claim satisfied, it is very likely that a court, in a supplemental proceeding on the judgment, would direct the association to make the necessary assessments against the unit owners. Unpaid assessment made by the association constitute liens against units just as do judgments.

Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay his proportionate share will end up with a lien against his unit.

The differences, therefore, between the lien system established by Section 3-117 and the system which would be applicable if ordinary corporation rules were applied are these:

(1) The unit owner can discharge his unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on his unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

(2) The judgment creditor through his ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment. Procuring an assessment through pressure on individual unit owners may be quicker and cheaper for the judgment creditor than using supplemental proceedings and having a judge order that the board of directors make the necessary assessment.

In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units in the unit owners as tenants-in-common or otherwise, the National Conference of Commissioners on Uniform State Laws believes that that result is inappropriate, and that the unit in the condominium itself should be viewed as equity property of the association capable of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy the condominium association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well-being of society. The condominium association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of his home or for torts caused by his failure to adequately maintain the premises should not be able to entirely avoid that liability through the device of organizing with other homeowners into a condominium association. On the other hand, it is perhaps not fair to a unit owner in a condominium regime to have all of his assets at risk based on the contracts of the association over which he has little control and as to which he has only a fractional interest or benefit.

It should be noted that, except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left to a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.

§ 3-118. [Association Records] The association shall keep financial records sufficiently detailed to enable the association to comply with Section 4-109. All financial and other records shall be made reasonable available for examination by any unit owner and his authorized agents.

§ 3-119. [Association as Trustee] With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquiry whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

Comment

Based on Section 7 of the Uniform Trustees' Powers Act, this section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under Section 3-113 for insurance proceeds, or Section 2-118 following termination.

ARTICLE 4
PROTECTION OF CONDOMINIUM PURCHASERS

§ 4-101. [Applicability; Waiver]

(a) This Article applies to all units subject to this Act, except as provided is subsection (b) or as modified or waived by agreement of purchasers of units in a condominium in which all units are restricted to non-residential use.

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

(1) a gratuitous disposition of a unit;

(2) a disposition pursuant to court order;

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

(4) a disposition by foreclosure or deed in lieu of foreclosure;

(5) a disposition to a person in the business of selling real estate who intends to offer those units to purchasers; or

(6) a disposition that may be canceled at any time and for any reason by the purchaser without penalty.

Comment

In the case of commercial and industrial condominiums, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection imposed by Article 4 may be substantial. Accordingly, subsection (a) permits waiver or modification of Article 4 protection in condominiums where all units are restricted to non-residential use, *e.g.*, in the case of most commercial and industrial condominiums. However, except for certain waivers of implied warranties of quality (*see* Section 4-115) and certain exemptions from public offering statement and resale certificate requirements (*see* subsection (b)), no express waiver of the protections of this Article with respect to the purchasers of residential units is permitted by this subsection. Accordingly, by operation of Section 1-104, the rights provided by this Article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use condominiums, waiver or modification of rights conferred by this Article is restricted to purchasers in wholly non-residential condominiums.

§ 4-102. [Liability for Public Offering Statement Requirements]

(a) Except as provided in subsection (b), a declarant, prior to the offering of any interest in a unit to the public, shall prepare a public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105 and 4-106.

(b) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant (Section 3-104) or to a person in the business of selling real estate who intends to offer units in the condominium for his own account. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).

(c) Any declarant or other person in the business of selling real estate who offers a unit for his own account to a purchaser shall deliver a public offering statement in the manner prescribed in subsection 4-108(a). The person who prepared all or a part of the public offering statement is liable under Sections 4-108

[and] [,] 4-117 [, 5-105, and 5-106] for any false or misleading statement set forth therein or for any omission of material fact therefrom with respect to that portion of the public offering statement which he prepared. If a declarant did not prepare any part of a public offering statement that he delivers, he is not liable for any false or misleading statement set forth therein or for any omission of material fact therefrom unless he had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission.

(d) If a unit is part of a condominium and is part of any other real estate regime in connection with the sale of which the delivery of a public offering statement is required under the laws of this State, a single public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105, and 4-106 as those requirements relate to all real estate regimes in which the unit is located, and to any other requirements imposed under the laws of this State, may be prepared and delivered in lieu of providing 2 or more public offering statements.

Comment

This section permits declarants to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering statement is liable for his own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

§ 4-103. [Public Offering Statement; General Provisions]

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

(1) the name and principal address of the declarant and of the condominium;

(2) a general description of the condominium, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings, and amenities that declarant anticipates including in the condominium;

(3) the number of units in the condominium;

(4) copies and a brief narrative description of the significant features of the declaration (other than the plats and plans) and any other recorded covenants, conditions, restrictions and reservations affecting the condominium; the bylaws, and any rules or regulations of the association; copies of any contracts and leases to be signed by purchasers at closing, and a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under Section 3-105;

(5) any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for [one] year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include, without limitation:

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

(ii) a statement of any other reserves;

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

(iv) the projected monthly common expense assessment for each type of unit;

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

(7) any initial or special fee due from the purchase at closing, together with a description of the purpose and method of calculating the fee;

(8) a description of any liens, defects, or encumbrances on or affecting the title to the condominium;

(9) a description of any financing offered or arranged by the declarant;

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

(11) a statement that:

(i) within 15 days after receipt of a public offering statement a purchaser, before conveyance, may cancel any contract for purchase of a unit from a declarant,

(ii) if a declarant fails to provide a public offering statement to a purchaser before conveying a unit, that purchaser may recover from the declarant (10) percent of the sales price of the unit, and

(iii) if a purchaser receives the public offering statement more than 15 days before signing a contract, he cannot cancel the contract;

(12) a statement of any unsatisfied judgments or pending suits against the association, and the status of any pending suits material to the condominium of which a declarant has actual knowledge;

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

(14) any restraints on alienation of any portion of the condominium;

(15) a description of the insurance coverage provided for the benefit of unit owners;

(16) any current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium;

(17) the extent to which financial arrangements have been provided for completion of all improvements labeled “MUST BE BUILT” pursuant to Section 4-119 (Declarant’s Obligation to Complete and Restore); and

(18) a brief narrative description of any zoning and other land use requirements affecting the condominium; and

(19) all unusual and material circumstances, features, and characteristics of the condominium and the units.

(b) If a condominium composed of not more than 12 units is not subject to any development rights, and no power is reserved to a declarant to make the condominium part of a larger condominium, group of condominiums, or other real

estate, a public offering statement may but need not include the information otherwise required by paragraphs (9), (10), (15), (16), (17), (18), and (19) of subsection (a) and the narrative descriptions of documents required by paragraph (a)(4).

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

Comment

1. The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement appears in Section 4-102(c), and Section 4-108 provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the Act.

2. Paragraph (a)(2) requires a general description of the condominium and, to the extent possible, the declarant's schedule for commencement and completion of construction for all building amenities that will comprise portions of the condominium. Under Section 2-109, the declarant is obligated to label all improvements which may be made in the condominium as either "MUST BE BUILT" or "NEED NOT BE BUILT." Under Section 4-119, the declarant is obligated to complete all improvements labeled "MUST BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with the requirements of Section 4-119.

3. Paragraph (4) requires the public offering statement to include copies of the declaration, bylaws, and any rules and regulations of the condominium, as well as copies of any contracts or leases to be executed by the purchaser. In addition, the paragraph requires the public offering statement to include a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities, and other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expires, as provided in Section 3-105. This latter requirement is intended to

encourage the preparation of brief summaries of all condominium documents in laymen's terms, *i.e.*, the "brief narrative description" should be more than a simple explanation of what a declaration (or other document) is, but less than an extended legal analysis duplicating the contents of the documents themselves. The summary requirement is intended to alleviate the common problem of public offering statements being drafted in lawyers' terms and being no more comprehensible to laymen than the documents themselves.

4. The disclosure requirement of paragraph (6) is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period. In such a circumstance, the declarant commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping, or other services) will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to each) in paragraph (6), the Act seeks to minimize "lowballing". In order to comply fully with the provisions of paragraph (5), the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the condominium during that budget year. This requirement as well operates to negate the effects of any attempted "lowballing."

5. Paragraph (9) requires disclosure of any financing "offered" by the declarant. The paragraph contemplates that a declarant disclose any arrangements for financing that may have been made, including arrangements with any unaffiliated lender to provide mortgages to qualified purchasers.

6. Under paragraph (10), the declarant is required to disclose the terms of all warranties provided by the declarant (including the statutory warranties set forth in Section 4-114) and to describe any significant limitations on such warranties, the enforcement thereof, or damages which may be collectible as a result of a breach thereof. This latter requirement would necessitate a description by the declarant of any exclusions or modifications of statutory warranties undertaken pursuant to Section 4-115. The statute of limitations for warranties set forth in Section 4-116, together with any separate written agreement (as required by Section 4-116) providing for reduction of the period of such statute of limitations, must also be disclosed.

7. Paragraph (14) requires that the declarant disclose the existence of any right of first refusal or other restrictions on the uses for which or classes of persons to whom units may be sold.

8. Paragraph (15) corrects a defect common to many condominium statutes by requiring the declarant to describe the insurance coverage provided for the benefit of unit owners. *See* Section 3-113.

9. Under paragraph (16), the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the condominium. Such fees or charges might include swimming pool fees, golf course fees, or required membership fees for recreation associations. Such fees are often not disclosed to condominium purchasers and can represent a substantial addition to their monthly assessments.

10. The "financial arrangements" required to be disclosed pursuant to paragraph (17) may vary substantially from one condominium development to another. It is the intent of the paragraph to give purchasers as much information as possible with which to assess the declarant's ability to carry out his obligations to complete the improvements. For example, if a declarant has a commitment from a bank to provide construction financing for a swimming pool when 50% of the units in the condominium are completed, that fact should be disclosed to potential purchasers.

11. In addition to the information required to be disclosed by paragraphs (1) through (18), paragraph (19) requires that the declarant disclose all other "unusual and material circumstances, features, and characteristics" of the condominium and all units therein. This requires only information which is both "unusual **and** material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the condominium, *e.g.*, the fact that a condominium has a roof, walls, doors, and windows. Similarly, the provision does not require the disclosure of "unusual" information about the condominium which is not also "material," *e.g.*, the fact that a condominium is the first condominium in a particular community. Information which would normally be required to be disclosed pursuant to paragraph (19) might include, to the extent that they are unusual and material, environmental conditions affecting the use or enjoyment of the condominium, features of the location of the condominium, *e.g.*, near the end of an airport runway or a planned rendering plant, and the like.

12. The cost of preparing a public offering statement can be substantial and may, particularly in the case of small condominiums, represent a significant portion of the cost of a unit. For that reason, subsection (b) permits a declarant to exclude from a public offering statement certain information in the case of a small condominium (*i.e.*, less than 12 units) which is not subject to development rights and which is not potentially part of a larger condominium or group of condominiums. Essentially, subsection (b) permits a declarant to exclude from a

public offering statement those materials which, as a practical matter, require extended preparation effort by an attorney or engineer in addition to the normal effort which must be exerted to provide the declaration, bylaws, plats and plans, or other documents required by the Act.

§ 4-104. [Same; Condominiums Subject To Development Rights] If the declaration provides that a condominium is subject to any development rights, the public offering statement must disclose, in addition to the information required by Section 4-103:

(1) the maximum number of units, and the maximum number of units per acre, that may be created;

(2) a statement of how many or what percentage of the units which may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

(3) if any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas, and the maximum percentage of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

(4) a brief narrative description of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;

(5) a statement of the maximum extent to which each unit's allocated interests may be changed by the exercise of any development right described in paragraph (3);

(6) a statement of the extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the condominium will be compatible with existing buildings and improvements in the condominium in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;

(7) general descriptions of all other improvements that may be made and limited common elements that may be created within any part of the condominium pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(8) a statement of any limitations as to the locations of any building or other improvement that may be made within any part of the condominium pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(9) a statement that any limited common elements created pursuant to any development right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the condominium, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

(10) a statement that the proportion of limited common elements to units created pursuant to any development right reserved by the declarant will be approximately equal to the proportion existing within other parts of the condominium, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

(11) a statement that all restrictions in the declaration affecting use, occupancy, and alienation of units will apply to any units created pursuant to any development right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

(12) a statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

Comment

This section requires disclosure in the public offering statement of the manner in which the declarant's exercise of development rights may affect purchasers who acquire units before those rights have been fully exercised. The purpose is to put the purchaser on notice of the extent to which the exercise of those rights may alter, sometimes quite dramatically, both the physical and the legal aspects of the project. For example, the prospective purchaser may be contemplating the acquisition of a particular unit because it enjoys a view of open, undeveloped land over which the declarant has, however, reserved development rights. It may be that the boundary of the parcel as to which development rights have been reserved actually coincides with, or runs quite close to, the outer wall of the unit in question. The disclosures or statements made pursuant to paragraphs (8) and (12) of this section will indicate to the prospective purchaser the extent (if any) to which he can rely on the declarant not to do anything which would radically alter the view from the unit which he now finds so appealing.

§ 4-105. [Same; Time Shares] If the declaration provides that ownership or occupancy of any units is or may be in time shares, the public offering statement shall disclose, in addition to the information required by Section 4-103:

(1) the number and identity of units in which time shares may be created;

(2) the total number of time shares that may be created;

(3) the minimum duration of any time shares that may be created; and

(4) the extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in Section 3-116.

Comment

1. Time sharing has become increasingly important in recent years, particularly with respect to resort condominiums. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing.

2. Virtually all existing state condominium statutes are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this Act, however, does not imply that other law regulating time sharing is affected in any way in a state merely because that state enacts this Act.

The Uniform Law Commissioners' Model Real Estate Time-Share Act specifies more extensive disclosures for time-share properties. A "time-share property" may include part or all of the condominium, and Section 1-109 of the Model Act governs conflicts between this Act and time-share legislation.

§ 4-106. [Same; Condominiums Containing Conversion Buildings]

(a) The public offering statement of a condominium containing any conversion building must contain, in addition to the information required by Section 4-103:

(1) a statement by the declarant, based on a report prepared by an independent (registered) architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;

(2) a statement by the declarant of the expected useful life of each item reported on in paragraph (1) or a statement that no representations are made in that regard; and

(3) a list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations.

(b) This section applies only to buildings containing units that may be occupied for residential use.

Comment

1. In the case of a condominium containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of condominium sales.

2. Paragraph (a)(1) requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the conversion building. Such information is as useful to declarant as to the purchaser since, under the implied warranty provisions of Section 4-114, a declarant impliedly warrants all improvements made by any person to the building "before creation of the condominium" unless such improvements are specifically excluded from the implied warranty of quality pursuant to Section 4-115(b).

3. *See* Comment 6 to Section 2-101 concerning the meaning of "structural components" as used in paragraph (a)(1). Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3), the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the condominium) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association

following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the same reasons set forth in the Comment to Section 4-101(a), this section does not apply to units which are restricted exclusively to non-residential use.

§ 4-107. [Same; Condominium Securities] If an interest in a condominium is currently registered with the Securities and Exchange Commission of the United States, a declarant satisfies all requirements relating to the preparation of a public offering statement of this Act if he delivers to the purchaser [and files with the Agency] a copy of the public offering statement filed with the Securities and Exchange Commission. [An interest in a condominium is not a security under the provisions of (insert appropriate state securities regulation statutes.)]

Comment

1. Some condominiums are regarded as "investment contracts" or other "securities" under federal law because they exhibit certain investment features such as mandatory rental pools. *See* SEC Securities Act Release No. 5347 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this Act, the prospectus filed with and distributed pursuant to the regulations of the United States Securities and Exchange Commission. Absent this provision, prospective purchasers of condominiums classified by the SEC as "securities" would have to be given two public offering statements, one prepared pursuant to this Act and the other prepared pursuant to the Securities Act of 1933. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of either public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to adopt the agency provisions of Article 5 of the Act. The second sentence should also be inserted by states opting to incorporate Article 5 of the Act to avoid duplicative regulation of condominiums by the agency administering the State's securities regulation statutes.

§ 4-108. [Purchaser's Right to Cancel]

(a) A person required to deliver a public offering statement pursuant to Section 4-102(c) shall provide a purchaser of a unit with a copy of the public

offering statement and all amendments thereto before conveyance of that unit, and not later than the date of any contract of sale. Unless a purchaser is given the public offering statement more than 15 days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, may cancel the contract within 15 days after first receiving the public offering statement.

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

(c) If a person required to deliver a public offering statement pursuant to Section 4-102(c) fails to provide a purchaser to whom a unit is conveyed with that public offering statement and all amendments thereto as required by subsection (a), the purchaser, in addition to any rights to damages or other relief, is entitled to receive from that person an amount equal to [10] percent of the sales price of the unit.

Comment

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) requires that each purchaser be provided with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as "non-binding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) that a purchaser be provided with subsequent amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments

is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the condominium which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be permitted to judge for himself the materiality of any change in the nature of the condominium.

5. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a), the purchaser would, as a matter of right, be able to extend the date of closing for 15 days from the time the public offering statement was provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a), the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance right following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible under the common law in some states that reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under Section 4-117 to collect punitive damages and attorney's fees in connection with his action against the declarant.

§ 4-109. [Resales of Units]

(a) Except in the case of a sale where delivery of a public offering statement is required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser before execution of any contract for sale of a unit, or otherwise before conveyance, a copy of the declaration (other than the plats and plans), the bylaws, the rules or regulations of the association, and a certificate containing:

(1) a statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit;

(2) a statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling unit owner;

(3) a statement of any other fees payable by unit owners;

(4) a statement of any capital expenditures anticipated by the association for the current and 2 next succeeding fiscal years;

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

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

(7) the current operating budget of the association;

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

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

(10) a statement as to whether the executive board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned thereto violate any provision of the declaration;

(11) a statement as to whether the executive board has knowledge of any violations of the health or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the condominium; and

(12) a statement of the remaining term of any leasehold estate affecting the condominium and the provisions governing any extension or renewal thereof.

(b) The association, within 10 days after a request by a unit owner, shall furnish a certificate containing the information necessary to enable the unit owner to comply with this section. A unit owner providing a certificate pursuant to subsection (a) is not liable to the purchaser for any erroneous information provided by the association and included in the certificate.

(c) A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the purchaser contract is voidable by the purchaser until the certificate has been provided and for (5) days thereafter or until conveyance, whichever first occurs.

Comment

1. In the case of the resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate for his own account, a public offering statement need not be provided. *See* Section 4-102(c). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular condominium unit. Accordingly, each unit owner not required to furnish a public offering statement under Section 4-102(c) and not exempt under Section 4-101(b) is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the condominium and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within 10 days after a request for such information. Under Section 3-102(a)(12), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to Section 4-117.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for

information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

§ 4-110. [Escrow of Deposits] Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to Section 4-102(c) shall be placed in escrow and held either in this State or in the state where the unit is located in an account designated solely for that purpose by [a licensed title insurance company] [an attorney] [a licensed real estate broker] [an independent bonded escrow company or] an institution whose accounts are insured by a governmental agency or instrumentality until (i) delivered to the declarant at closing; (ii) delivered to the declarant because of purchaser's default under a contract to purchase the unit; or (iii) refunded to the purchaser.

Comment

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of Section 4-101. It does not apply, however, to resales of units between private parties. Escrow provisions are not part of the law in several jurisdictions.

2. This section provides declarant a number of choices as to the appropriate escrow agent. Whether the escrow agent must deposit the funds in an insured institutional depository, or in a particular type of account, depends on state law, or the agreement of the parties. To minimize record keeping, of course, the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted. The account may be held whether in the state where the unit is located, or in the enacting state, in recognition that buyers are often from outside the state where the unit is located.

3. The escrow requirements of this section apply in connection with **any** deposit made by a purchaser, whether such deposit is made pursuant to a binding contract or pursuant to a nonbinding reservation agreement (with respect to which no public offering statement is required under Section 4-101(b)(6)).

4. In some states current practice permits escrows to be held by certain title insurance or escrow companies, attorneys, or real estate brokers. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

5. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller, or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

6. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this Act does not include bonding as an alternative to the required escrow of deposits.

§ 4-111. [Release of Liens]

(a) In the case of a sale of a unit where delivery of a public offering statement is required pursuant to Section 4-102(c), a seller shall, before conveying a unit, record or furnish to the purchaser, releases of all liens affecting that unit and its common element interest which the purchaser does not expressly agree to take subject to or assume [, or shall provide a surety bond or substitute collateral for or insurance against the lien as provided for liens on real estate in (insert appropriate references to general state law or Sections 5-211 and 5-212 of the State Uniform Simplification of Land Transfers Act).] This subsection does not apply to any real estate which a declarant has the right to withdraw.

(b) Before conveying real estate to the association the declarant shall have that real estate released from: (1) all liens the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and (2) all other liens on that real estate unless the public offering statement describes certain real estate which may be conveyed subject to liens in specified amounts.

Comment

The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. Theoretically, a developer might partially avoid the lien release requirement of subsection (a) by placing part of the common element improvements such as a swimming pool or tennis court on withdrawable real estate. By doing so, it could separately mortgage that part of the common elements without being obligated to discharge the mortgage or secure partial releases when individual units are sold. (However, even if there were no withdrawable real estate exemption from the release of lien requirement, developers could still separately mortgage such improvements as pools and tennis courts without having to discharge the mortgage

on sale of units. All they would have to do is leave the particular real estate out of the condominium and then convey it directly to the association subject to the mortgage.)

If a mortgage or other lien created by or arising against the developer attaches to withdrawable real estate after the declaration has been recorded, a lapse of the developer's right to withdraw the real estate would also terminate the rights of the lienor, since the lien would attach only to the developer's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the condominium declaration was recorded, lapse of the right to withdraw would not affect the lienor's rights and it could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

If units are created in withdrawable real estate, the units, when sold, are subject to the release-of-lien rule of subsection (b)(1) and after a unit in a particular withdrawable parcel is sold, that parcel can no longer be withdrawn. In that case, any lien created by or arising against the developer which attached to the real estate and is subordinate to the condominium declaration would automatically expire.

§ 4-112. [Conversion Buildings]

(a) A declarant of a condominium containing conversion buildings, and any person in the business of selling real estate for his own account who intends to offer units in such a condominium shall give each of the residential tenants and any residential subtenant in possession of a portion of a conversion building notice of the conversion and provide those persons with the public offering statement no later than 120 days before the tenants and any subtenant in possession are required to vacate. The notice must set forth generally the rights of tenants and subtenants under this section and shall be hand-delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than 120 days' notice, except by reason of nonpayment of rent, waste, or conduct that disturbs other tenants' peaceful enjoyment of the premises, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession.

(b) For [60] days after delivery or mailing of the notice described in subsection (a), the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases that unit. If a tenant fails to purchase the unit during that [60]-day period, the offeror may not offer to dispose of an interest in that unit during the following [180] days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant. This subsection does not apply to any unit in a conversion building if that unit will be restricted exclusively to non-residential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

(c) If a seller, in violation of subsection (b), conveys a unit to a purchaser for value who has no knowledge of the violation, recordation of the deed conveying the unit extinguishes any right a tenant may have under subsection (b) to purchase that unit if the deed states that the seller has complied with subsection (b), but does not affect the right of a tenant to recover damages from the seller for a violation of subsection (b).

(d) If a notice of conversion specifies a date by which a unit or proposed unit must be vacated, and otherwise complies with the provisions of (insert appropriate state summary process statute), the notice also constitutes a notice to vacate specified by that statute.

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

Comment

1. One of the most controversial issues in the field of condominium development relates to conversion of rental buildings to condominiums. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to condominium ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curtailing the problem of declining urban tax bases. Proponents also point out that the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization. This section, which seeks to balance

these competing interests, is based principally on similar provisions set forth in the condominium statutes of Virginia and the District of Columbia.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (b) provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to tenants if the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single condominium unit, compliance with the requirements of subsection (b) would be impossible.

3. Jurisdictions with rent control statutes should consider whether amendments to this section are necessary to conform to the procedures or substantive requirements set out in the rent control laws or whether modifications to the rent control laws may be required as a result of the enactment of this section.

4. Except for the restrictions on permissible evictions stated in subsection (a), this Act does not change the law of summary process in a state. As a result, if a tenant refuses to vacate the premises following the 120-day notice, the usual provisions of the state's summary process statutes would apply, while any defenses available to a tenant would also be available.

§ 4-113. [Express Warranties of Quality]

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

(1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium, creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(2) any model or description of the physical characteristics of the condominium, including plans and specifications of or for improvements, creates an express warranty that the condominium will conform to the model or description;

(3) any description of the quantity or extent of the real estate comprising the condominium, including plats or surveys, creates an express warranty that the condominium will conform to the description, subject to customary tolerances; and

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

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

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

Comment

1. This section, together with Sections 4-114, 4-115, and 4-116, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, that is, with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

3. Subsection (b) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (a) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning condominium property during the bargaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representations need be shown in order to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Subsection (a)(1) provides that representations as to improvements and facilities not located in the condominium may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts, etc., will be constructed in the future and that unit owners

will have the right to utilize such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the condominium." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if they are not completed. Such liability is distinct from the declarant's obligations, under Section 4-119, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under subsection (a)(4), a contract provision permitting the purchaser to use a condominium unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under Section 4-115.

6. The precise time when representations set forth in subsection (a) are made is not material. The sole question is whether the language or other representations of the declarant are fairly to be regarded as part of the contract between the parties.

7. Subsection (b) makes clear that it is not necessary to the existence of a warranty that the declarant have intended to assume a warranty obligation. On the other hand, mere statements of opinion or commendations by the declarant do not necessarily create warranties. Whether a particular statement purports to be merely opinion or commendation is basically a question of whether the purchaser could reasonably rely upon the statement as a meaningful representation or promise with respect to the condominium. That determination depends, in turn, not merely upon the words used but also upon the relative characteristics and skills of the parties. Thus a representation by a declarant to a novice purchaser that a particular condominium unit is in "good condition" may be more than mere opinion or commendation, while the same statement by a novice seller to a professional buyer would likely be only opinion or commendation, and thus not a warranty.

8. The provision of subsection (c) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate his warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

§ 4-114. [Implied Warranties of Quality]

(a) A declarant and any person in the business of selling real estate for his own account warrants that a unit will be in at least as good condition at the earlier

of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear excepted.

(b) A declarant and any person in the business of selling real estate for his own account impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him, or made by any person before the creation of the condominium, will be:

(1) free from defective materials; and

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

(c) In addition, a declarant and any person in the business of selling real estate for his own account warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

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

(e) For purposes of this section, improvements made or contracted for by an affiliate of a declarant (Section 1-103(1)) are made or contracted for by the declarant.

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

Comment

1. This section, which is based upon Section 2-309 of ULTA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of "*caveat emptor*"). In recent years, that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930's, more and more courts have completely or partially abolished the *caveat emptor* rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under

subsection (b), are imposed only against declarants and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability. However, under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential condominiums. If, for example, a commercial unit is sold for commercial use although it is not suitable for the ordinary uses of condominium units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the condominium.

4. The warranty of suitability and of quality of construction arises only against a declarant and persons in the business of selling real estate for their own account. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties made by him. However, if a non-professional seller fails to disclose defects of which he is aware, he may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-professional seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the condominium is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (e) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (c), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for any violation of housing codes or other laws which renders any existing use of the condominium unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arm's length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (f) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and Section 3-104(b)(1) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by him, even after he transfers all

declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor declarant is an affiliate of the original declarant, it is clear, under both Sections 3-104(b)(2) and 4-114(f), that the original declarant remains liable for warranties of quality or improvements made by his successor even after the declarant himself ceases to have any special declarant rights.

8. As to the liabilities of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to Section 3-104(e)(1), for warranties or improvements made by his predecessor. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improvements made or contracted for by him, and is not liable for warranties which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. *See* Section 3-104(e)(2). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of ULTA. The same result is also reached under ULTA in the case of a successor who, under ULTA Section 3-309(b), would be a seller in the business of selling real estate since under that subsection the seller is liable only for warranties or improvements made or contracted for by him.

§ 4-115. [Exclusion or Modification of Implied Warranties of Quality]

(a) Except as limited by subsection (b) with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

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

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

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any person in the business of selling real estate for his own account may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

Comment

1. This section parallels Section 2-311(b) and (c) of ULTA.

2. Under this section, implied warranties of quality may be disclaimed. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability. Although the section imposes no requirement that a disclaimer be in writing, except in the case of residential units, an oral disclaimer might be ineffective under the law of parole and extrinsic evidence.

3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to effectively notify the purchaser of the nature of the disclaimer.

4. Under subsection (b), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion condominium might, consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials comprising or supporting the roof, and all components of the air conditioning system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. However, under the Act, the implied warranty that a new condominium unit will be suitable for ordinary uses (*i.e.*, habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

§ 4-116. [Statute of Limitations for Warranties]

(a) A judicial proceeding for breach of any obligation arising under Section 4-113 or 4-114 must be commenced within 6 years after the [claim for relief] [cause of action] accrues, but the parties may agree to reduce the period of limitation to not less than 2 years. With respect to a unit that may be occupied for residential use, an agreement to reduce the period of limitation must be evidenced by a separate instrument executed by the purchaser.

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

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

(2) as to each common element, at the time the common element is completed or: if later, (i) as to a common element that may be added to the condominium or portion thereof, at the time the first unit therein is conveyed to a bona fide purchaser, or (ii) as to a common element within any other portion of the condominium, at the time the first unit in the condominium is conveyed to a bona fide purchaser.

(c) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the [claim for relief] [cause of action] accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

Comment

1. Under subsection (a), the parties may agree that the statute of limitations be reduced to as little as 2 years. However, such a contract provision (which, in the case of residential units, must be reflected in a separate written instrument executed by the purchaser) could, like other contract provisions, be subject to attack on grounds of unconscionability in particular cases.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of a warranty of quality would normally arise when the purchaser to whom it is first made enters into possession. Suit on such a warranty would thus have to be brought within 6 years thereafter. Even an inability to discover the breach would not delay the running of the statute of limitations in this regard.

3. Real estate sales frequently include warranties that certain components (*e.g.*, furnaces, hot water heaters, air conditioning systems, and roofs) will last for a particular period of time. In the case of such warranties, the statute of limitations would not start running until the breach is discovered, or, if not discovered before the end of the warranty term, until the end of the term.

§ 4-117. [Effect of Violations on Rights of Action; Attorney's Fees] If a declarant or any other person subject to this Act fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. Punitive damages may be awarded for a willful failure to comply with this Act. The court, in an appropriate case, may award reasonable attorney's fees.

Comment

This section provides a general clause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3-103(d), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section specifically permits punitive damages to be awarded in the case of willful failure to comply with the Act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

§ 4-118. [Labeling of Promotional Material] If any improvement contemplated in a condominium is labeled "NEED NOT BE BUILT" on a plat or plan, or is to be located within a portion of the condominium with respect to which the declarant has reserved a development right, no promotional material may be displayed or delivered to prospective purchasers which describes or portrays that improvement unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified as "NEED NOT BE BUILT."

Comment

1. Section 2-109(c) requires that the plats and plans for every condominium indicate whether or not any improvement that might be built in the condominium must be built. However, Section 4-103 does not require that copies of the plats and plans be provided to purchasers as part of the public offering statement. Consequently, this section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with respect to which improvements the declarant is obligated to make in a particular condominium project.

2. Since no contemplated improvements on real estate subject to development rights need be shown on plats and plans, additional labeling is required by this section to insure that, if the declarant shows any contemplated improvements in his promotional material which are not shown on the plats and plans, those improvements must also be appropriately labeled.

§ 4-119. [Declarant's Obligation to Complete and Restore]

(a) The declarant shall complete all improvements labeled "MUST BE BUILT" on plats or plans prepared pursuant to Section 2-109.

(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the condominium, of any portion of the condominium affected by the exercise of rights reserved pursuant to or created by Sections 2-110, 2-111, 2-112, 2-113, 2-115, and 2-116.

Comment

1. Subsection (a) requires the declarant to complete any improvement which the plats or plans indicate, pursuant to the requirements of Section 2-109(c), "MUST BE BUILT." This is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under Section 3-104.

2. Under subsection (b), in the event that a declarant exercises the right to use an easement which is created by Section 2-116, or in the event the declarant maintains model units or signs on the condominium, the declarant is obligated to restore the portions of the condominiums used to a condition compatible with the remainder of the condominium.

§ 4-120. [Substantial Completion of Units] In the case of a sale of a unit where delivery of a public offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed, [except pursuant to Section 5-103(b)], until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an independent [registered] architect, surveyor or engineer, or by issuance of a certificate of occupancy authorized by law.

Comment

The purpose of this section, complemented by Section 4-110, is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

[OPTIONAL]

ARTICLE 5
ADMINISTRATION AND REGISTRATION OF CONDOMINIUMS

Prefatory Comment to Article 5

Administrative agencies have become an essential and accepted part of state government. Accordingly, the procedures by which those agencies adopt their rules and reach their decisions, as well as the powers of those agencies, have assumed great importance.

The existence of government regulation reflects the common belief that adequate enforcement of a particular field of law requires both public oversight of private compliance with law, and an ability in government to promulgate new regulations to meet new circumstances. Often, regulation also reflects the regulated industry's desires for certainty and for an administrative agency knowledgeable of, and perhaps sympathetic to, the needs of the industry.

At the same time, in some states the public's response to administrative regulation has become increasingly negative. The adoption of so-called "sunshine" and "sunset" laws, consolidation or merger of many agencies, and abolition of some outmoded boards and commissions, reflect a growing public perception that administrative enforcement may at times be neither efficient nor effective.

The debate on the general desirability of state agency regulation is reflected in the question of regulation of condominium development. While many states with widespread condominium activity, such as California, Florida, Virginia, and New York, have created agencies to regulate condominiums or have placed the regulation of condominiums in an existing governmental body, other states with substantial condominium activity, such as Illinois and Maryland, have chosen not to regulate condominiums, relying instead on the private market and lenders for consumer protection.

State administrative law does not demand uniformity between the States. For example, the Revised Model State Administrative Procedure Act (1961), noted that there was a demand for an act covering that subject, but that administrative procedure was a subject upon which uniformity between the states was neither necessary nor desirable. "Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state." Comment, *Content of the Model State Administrative Procedure Act*, Uniform Laws Annotated, Master Edition (see U.L.A. Directory of Acts for location).

The same reasoning applies to the law of condominiums. While uniform substantive law regarding condominiums and the protection to be provided to consumers is important, the means by which the substantive law is enforced does not require uniformity. Nevertheless, it appears desirable to provide the states the option of choosing agency regulation of condominiums, as many states have already chosen to do, by providing an optional article on agency administration which is closely integrated with the Uniform Condominium Act.

Accordingly, Article 5 may or may not be adopted, depending on whether or not a state chooses to have agency regulation. The article has been drafted in such a way as to minimize the number of changes necessary in the body of the first four articles of the Act. However, in order to provide for close integration of Article 5 with the remainder of the Act, there are a number of sections in the Act where bracketed references to the agency or to Article 5 now exist. These sections are Sections 1-102(c), 1-103(10)(b), 2-101(b), 2-101(c), 3-103(f), 3-104(e)(3), and 4-105. In the event that a state determines not to adopt Article 5, the bracketed clauses or provisions in each of the above sections which refer to Article 5 should be deleted. In the event a state adopts Article 5, the brackets should be removed and the clauses or provisions retained.

§ 5-101. [Administrative Agency] As used in this Act, "agency" means (insert appropriate administrative agency), which is an agency within the meaning of (insert appropriate reference to state administrative procedure act). (Insert any related provisions on creation, selection, and remuneration of personnel, budget, annual reports, fees, and other administrative provisions appropriate to the particular state).

Comment

1. Each state should insert in lieu of the bracketed language in the first sentence that agency, whether it be the Real Estate Commission, the Attorney

General's Office, or any other existing or new agency, which the state deems appropriate for regulation of condominiums.

2. The Revised Model State Administrative Procedure Act (the "Model Act") had been adopted in 26 states and the District of Columbia by 1976. The appropriate reference in those states to the definition of "Agency" would be the statute adopting Section 1(1) of the Model Act. In those states which have not adopted the Model Act, reference to a similar statute should be made to insure that the procedures of the agency regulating condominiums are undertaken in accordance with the principles of procedural due process which underlie the Model Act. In those states which do not have an administrative procedure act, appropriate administrative procedures should be included, either in this section or elsewhere in this article, to provide for hearings, appellate review, regulations, and other administrative matters.

3. As indicated, Article 5 was not designed to solve all procedural matters which are appropriate for an agency. Rather, the Act relies on the cross reference to a state administrative procedure act. Even in such states, however, it may be appropriate to include other provisions, either in Section 5-101 or elsewhere in this article, which are necessary under state practice to insure the proper functioning of a state agency. This might include budget authority, salary levels, civil service requirements, and the like. This may be particularly important when a new state agency is created.

§ 5-102. [Registration Required] A declarant may not offer or dispose of a unit intended for residential use unless the condominium and the unit are registered with the agency, but a condominium consisting of no more than 12 units and which is not subject to development rights is exempt from the requirements of this section and Section 5-103(a).

Comment

1. Registration of a condominium is only required in the case of a condominium or unit intended for residential use. Commercial and industrial condominiums, accordingly, are exempt from registration under this Act. Also exempt from the requirement of registration is a small condominium containing 12 or fewer units, so long as the condominium is not subject to development rights. However, the small condominium and the industrial or commercial condominium are still subject to scrutiny by the agency under its general powers, despite the fact that registration is not required.

2. If Article 5 were adopted in a particular state, a declarant could not offer or dispose of a residential unit unless that unit were registered with the agency. However, he could offer and dispose of the unit after registration was approved but before the condominium was created, subject to the requirements of Sections 2-101 and 5-103.

§ 5-103. [Application for Registration; Approval of Uncompleted Units]

(a) An application for registration must contain the information and be accompanied by any reasonable fees required by the agency's [rules] [regulations.] A declarant promptly shall file amendments to report any factual or expected material change in any document or information contained in his application.

(b) If a declarant files with the agency a declaration or proposed declaration, or an amendment or proposed amendment to a declaration, creating units which he proposes to convey before they are substantially completed in the manner required by Sections 2-101(b) and 4-120, the declarant shall also file with the agency:

(1) a verified statement showing all costs involved in completing the buildings containing those units;

(2) a verified estimate of the time of completion of construction of the buildings containing those units;

(3) satisfactory evidence of sufficient funds to cover all costs to complete the buildings containing those units;

(4) a copy of the executed construction contract and any other contracts for the completion of the buildings containing those units;

(5) a 100 percent payment and performance bond covering the entire cost of construction of the buildings containing those units;

(6) plans for the units conforming to the requirements of Section 2-109(c);

(7) if purchasers' funds are to be utilized for the construction of the condominium, an executed copy of the escrow agreement with an escrow company or financial institution authorized to do business within the state which provides that:

(i) disbursements of purchasers' funds may be made from time to time to pay for construction of the condominium, architectural, engineering finance, and legal fees, and other costs for the completion of the condominium in proportion to the value of the work completed by the contractor as certified by an independent (registered) architect or engineer, or bills submitted and approved by the lender of construction funds or the escrow agent;

(ii) disbursement of the balance of purchasers' funds remaining after completion of the condominium shall be made only when the escrow agent or lender receives satisfactory evidence that the period for filing mechanic's and materialman's liens has expired, or that the right to claim those liens has expired, or that the right to claim those liens has been waived, or that adequate provision has been made for satisfaction of any claimed mechanic's or materialman's lien; and

(iii) any other restriction relative to the retention and disbursement of purchasers' funds required by the agency; and

(8) any other materials or information the agency may require by its [rules] [regulations.]

The agency may not register the units described in the declaration or the amendment unless the agency determines, on the basis of the material submitted by declarant and any other information available to the agency, that there is a reasonable basis to expect that the units to be conveyed will be completed by the declarant following conveyance.

Comment

1. Subsection (a) is a general provision empowering the agency by regulation to develop requirements for information to be submitted to the agency, and for the imposition of reasonable fees by the agency. Such rules or regulations, under the Model Act, could be adopted only after providing notice to interested persons and an opportunity to be heard. *See* Section 3 of the Model Act. The article encourages, but does not require, development of uniform regulations between states adopting Article 5. *See* Section 5-107(e).

2. Subsection (b) departs from the provisions contained in Section 2-101 and Section 4-120 regarding conveyance of units. Under Section 2-101(b), neither a declaration nor an amendment to a declaration adding units to a condominium, may be recorded (and thus no condominium may be created) unless the structural components of the buildings in which those units are located are substantially completed. Under Section 4-120, no unit in a condominium may be conveyed unless the unit itself is substantially completed. In addition, under Section 4-110,

any deposit made in connection with the purchase or reservation of a unit must be held in escrow until closing. The combined effect of Sections 2-101, 4-120 and 4-110 is to insure that any funds of a purchaser are held in escrow until his unit is substantially completed, and the purchaser has title.

The need for consumer protection suggests that substantial completion of a residential unit should be a prerequisite for adding that unit to the condominium or conveying the unit to a purchaser, in the absence of an agency to control and review condominium projects. Under subsection (b), however, a declarant may file a declaration or proposed declaration, or an amendment to a declaration, for the purpose of creating a condominium in which the buildings are not structurally completed. Subsection (b) contemplates that the agency might nevertheless register the units described in the declaration or amendment, if the agency were satisfied that the units would be completed. Registration would then permit the declarant to offer to sell and convey units which had not yet been built and to record the declaration.

In addition, paragraph (7) of Section 5-103(b) contemplates that purchaser's funds might be used, despite the language of Section 4-110 for construction of the condominium. Controls are imposed, however, to insure that disbursements are made in accordance with the value of work completed and approved by an escrow agent.

Note that the common elements in the condominium under the Act need not be completed at the time of the sale, even in the absence of an agency. Completion of common elements, however, is governed by Section 4-119 (Obligation to Complete and Restore).

3. The agency, by regulation, should determine the parties whom the payment and performance bond required under paragraph (b)(5) indemnifies.

§ 5-104. [Receipt of Application; Order or Registration]

(a) The agency shall acknowledge receipt of an application for registration within [5] business days after receiving it. Within [60] days after receiving the application, the agency shall determine whether:

(1) the application and the proposed public offering statement satisfy the requirements of this Act and the agency's rules;

(2) the declaration and bylaws comply with this Act; and

(3) it is likely that the improvements the declarant has undertaken to make can be completed as represented.

(b) If the agency makes a favorable determination, it shall issue promptly an order registering the condominium. Otherwise, unless the declarant has consented in writing to a delay, the agency shall issue promptly an order rejecting registration.

Comment

1. This section provides reasonable deadlines for agency review of an application for registration, and describes the standards by which the application should be measured. The agency is directed to review the documents provided to the purchaser, and is given a great deal of discretion in mandating the form and content of the public offering statement; *see* Section 5-110.

2. The agency is also charged with reviewing those common element improvements which a declarant has promised to make, and which would be labeled under Section 4-118 as "MUST BE BUILT," to determine whether the declarant has the financial capacity to build them.

3. In the event the agency were to issue an order rejecting registration under subsection (b), an important issue concerning judicial review of that order may arise in some states.

The order would appear to be a rejection of an application for a license, as defined in Section 1(3) of the Model Act; it would be a "contested case", however, within the meaning of Section 1(2) of the Model Act, only if "an opportunity for hearing" is provided. No right to a hearing, or right of appeal, is provided in the Act.

The order rejecting registration thus might not be appealable under Section 15 of the Model Act, because judicial review is provided under Section 15 only for "contested cases". While that section does not limit utilization of, or the scope of judicial review available under, other means of review, some courts have held that, in the absence of specific statutory authority to hear an appeal from an administrative decision, courts have no jurisdiction to entertain such an appeal. *See, e.g.*, *Rybinski v. State Employees' Retirement Comm.*, 173 Conn. 462 (1977).

Accordingly, the law of each state should be carefully reviewed. In cases where the state administrative procedure act provides for appeals from decision on licensing matters made by state agencies regardless of the availability of a hearing, no amendment would be required.

§ 5-105. [Cease and Desist Orders] If the agency determines, after notice and hearing, that any person has disseminated or caused to be disseminated orally or in writing any false or misleading promotional materials in connection with a condominium, or that any person has otherwise violated any provision of this Act or the agency's [rules] [regulations] or orders, the agency may issue an order to cease and desist from that conduct, to comply with the provisions of this Act and the agency's [rules] [regulations] and orders, or to take affirmative action to correct conditions resulting from that conduct or failure to comply.

§ 5-106. [Revocation of Registration]

(a) The agency, after notice and hearing, may issue an order revoking the registration of a condominium upon determination that a declarant or any officer or principal of a declarant has:

(1) failed to comply with a cease and desist order issued by the agency affecting that condominium;

(2) concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of units in that condominium;

(3) failed to perform any stipulation or agreement made to induce the agency to issue an order relating to that condominium;

(4) misrepresented or failed to disclose a material fact in the application for registration; or

(5) failed to meet any of the conditions described in Sections 5-103 and 5-104 necessary to qualify for registration.

(b) A declarant shall not convey, cause to be conveyed, or contract for the conveyance of any interest in a unit while an order revoking the registration of the condominium is in effect, without the consent of the agency.

(c) In appropriate cases the agency, in its discretion, may issue a cease and desist order in lieu of an order of revocation.

Comment

1. This section permits the agency, after notice and hearing, to revoke a prior registration of a condominium. Under Section 15 of the Model Act, the revocation would not be effective until the last day for seeking review of the agency

order. While the filing of the appeal would not stay the agency's decision, the agency or reviewing court could grant a stay of the revocation. Naturally, this result may vary in a particular state.

2. A declarant is prohibited from disposing of any interest in a unit when registration has been revoked, without consent of the agency.

§ 5-107. [General Powers and Duties of Agency]

(a) The agency may adopt, amend, and repeal [rules] [regulations] and issue orders consistent with and in furtherance of the objectives of this Act, but the agency may not intervene in the internal activities of an association except to the extent necessary to prevent or cure violations of this Act. The agency may prescribe forms and procedures for submitting information to the agency.

(b) If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of this Act or any of the agency's rules or orders, the agency without prior administrative proceedings may bring suit in the [appropriate court] to enjoin that act or practice or for other appropriate relief. The agency is not required to post a bond or prove that no adequate remedy at law exists.

(c) The agency may intervene in any action or suit involving the powers or responsibilities of a declarant in connection with any condominium for which an application for registration is on file.

(d) The agency may accept grants in aid from any governmental source and may contract with agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this Act.

(e) The agency may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the agency's duties.

(f) In issuing any cease and desist order or order rejecting or revoking registration of a condominium, the agency shall state the basis for the adverse determination and the underlying facts.

(g) The agency, in its sound discretion, may require bonding, escrow of portions of sales proceeds, or other safeguards it may prescribe by its [rules] [regulations] to guarantee completion of all improvements labeled "MUST BE

BUILT" pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore).

Comment

1. Under subsection (a), the agency is empowered to adopt regulations and issue orders in furtherance of the objectives of this Act. Those objectives are the same as the underlying purposes of the Act. The agency, however, is prohibited from intervening in the internal activities of the association except to the extent necessary to prevent or cure violations of this Act. The principal purpose of the agency is to regulate the behavior of the declarant, not the behavior of individual unit owners. If, however, the declarant is misusing the association by virtue of his power to control its activities, and thereby violating the Act, the agency may act to prevent the violation.

2. Subsection (g) empowers the agency to require bonding, escrow, or other safeguards to guarantee completion of improvements labeled "MUST BE BUILT" (Sections 2-109, 4-118).

A substantive requirement for bonding is not included under Article 4 for all condominiums, in all circumstances. While some states have adopted bonding and escrow requirements for completion of the common elements (*see, e.g.*, Section 47-74d, Conn.Gen.Stat.), the available economic evidence indicates that a universal bonding requirement would increase the cost of condominiums, and that the cost of such provisions may not always be justified. The principal concern for consumer protection in this regard has been resolved in the Act by requiring substantial completion of all units prior to conveyance (Section 4-120) and by requiring labeling of common elements as either "MUST BE BUILT" or "NEED NOT BE BUILT."

At the same time, particularly in the case of condominiums registered under Section 5-103(b), there may be individual cases where the agency, in its discretion, may find escrowing or bonding to be in the public interest. For that reason, this power is included only as a permissible power for the agency under Article 5.

§ 5-108. [Investigative Powers of Agency]

(a) The agency may initiate public or private investigations within or outside this State to determine whether any representation in any document or information filed with the agency is false or misleading or whether any person has engaged, is engaging, or is about to engage in any unlawful act or practice.

(b) In the course of any investigation or hearing, the agency may subpoena witnesses and documents, administer oaths and affirmations, and adduce evidence. If a person fails to comply with a subpoena or to answer questions propounded during the investigation or hearing, the agency may apply to the [appropriate court] for a contempt order or injunctive or other appropriate relief to secure compliance.

Comment

The powers enumerated in Sections 5-107 and 5-108 are specifically granted to the agency because of judicial determinations in various states that, in the absence of such statutory powers, agencies have no authority to act.

§ 5-109. [Annual Report and Amendments]

(a) A declarant, within 30 days after the anniversary date of the order of registration, annually shall file a report to bring up-to-date the material contained in the application for registration and the public offering statement. This provision does not relieve the declarant of the obligation to file amendments pursuant to subsection (b).

(b) A declarant promptly shall file amendments to the public offering statement with the agency.

(c) If an annual report reveals that a declarant owns or controls units representing less than (25) percent of the voting power in the association and that a declarant has no power to increase the number of units in the condominium, or to cause a merger or confederation of the condominium with other condominiums, the agency shall issue an order relieving the declarant of any further obligation to file annual reports. Thereafter, so long as the declarant is offering any units for sale, the agency has jurisdiction over the declarant's activities, but has no other authority to regulate the condominium.

Comment

1. This section requires annual reports from a declarant to the agency in order to keep the information filed with the agency current. This requirement parallels the declarant's obligation to provide a current public offering statement to unit owners. *See* Section 4-103(c).

2. Under subsection (c), if the period of declaration control has passed, the declarant is relieved of the obligation to continue to file an annual report. However, the obligation to continue to provide public offering statements is imposed on a

declarant under Section 4-103 so long as he is offering any unit for sale. The agency would thus continue to have jurisdiction over the declarant's activities, but would have no other authority to regulate the condominium.

§ 5-110. [Agency Regulation of Public Offering Statement]

(a) The agency at any time may require a declarant to alter or supplement the form or substance of a public offering statement to assure adequate and accurate disclosure to prospective purchasers.

(b) The public offering statement may not be used for any promotional purpose before registration and afterwards only if it is used in its entirety. No person may advertise or represent that the agency has approved or recommended the condominium, the disclosure statement, or any of the documents contained in the application for registration.

(c) In the case of a condominium situated wholly outside of this State, no application for registration or proposed public offering statement filed with the agency which has been approved by an agency in the State where the condominium is located and substantially complies with the requirements of this Act may be rejected by the agency on the grounds of non-compliance with any different or additional requirements imposed by this Act or by the agency's [rules] [regulations.] However, the agency may require additional documents or information in particular cases to assure adequate and accurate disclosure to prospective purchasers.

Comment

1. Subsection (c) attempts to facilitate interstate sales of units by requiring the agency in the enacting state to accept an agency-approved public offering statement from the state where the condominium is located. This avoids the need for a different public offering statement in several states for the same project. If no agency exists in the state where the condominium is located, however, a public offering statement must be prepared and approved before offering an out-of-state unit in an enacting state.

2. Because of the bracketed language contained in Section 1-102(c), which should be inserted in the Act if Article 5 is enacted, a foreign condominium must only be registered under this Article in an enacting state if a declarant is "offering" the condominium in the enacting state. Thus, general advertising which did not meet the definition of "offering" could be circulated in the enacting state without registration. If an "offering" is once made, however, then all of Article 5 applies to

the foreign condominium. Any "disposition" of a foreign residential condominium in an enacting state, of course, would require delivery of a public offering statement even in the absence of an agency; *see* Section 1-102(c). If an agency exists in the enacting state, any disposition in that state would be illegal if the condominium were not registered in the enacting state; *see* Section 5-102.

Survey of State Condominium Termination Laws

Alabama – Uniform Act Language (Ala. Code § 35-8A-218 establishes **80% termination** threshold).

Alaska – Alaska Stat. Ann. § 34.08.260 establishes **80% termination** threshold.

Arizona – Uniform Act Language (A.R.S. § 33-1228 establishes **80% termination** threshold and creates the competing valuation and private arbitration process.

Arkansas – Appears not to have a termination statute. Ark. Code Ann. § 18-13-107 establishes a 100% threshold for merger of the horizontal property regime.

California—Appears not to have a termination statute. Cal. Corp. Code § 8724 establishes 100% threshold to dissolve an owners association.

Colorado – Uniform Act Language (Colo. Rev. Stat. Ann. § 38-33.3-218 establishes a **67% termination** threshold, but subject to a 25% veto).

Connecticut – Uniform Act Language (Conn. Gen. Stat. Ann. § 47-237 establishes a **80% termination** threshold).

Delaware – Uniform Act Language (Del. Code Ann. tit. 25, § 81-218 establishes a **80% termination** threshold).

D.C. – D.C. Code Ann. § 42-1902.28 requires a **4/5ths vote** to terminate.

Florida – Has the most complicated statutory regime for termination (Fla. Stat. Ann. § 718.117 establishes an **80% termination** threshold with a 5% veto power). The statute contains the Florida Legislature's policy findings with respect to termination of condominiums:

> The Legislature finds that:
>
> (a) Condominiums are created as authorized by statute and are subject to covenants that encumber the land and restrict the use of real property.
>
> (b) In some circumstances, the continued enforcement of those covenants may create economic waste and areas of disrepair which threaten the safety and welfare of the public or cause obsolescence of the property for its intended use and thereby lower property tax values, and it is the public policy of this state to provide by statute a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination.
>
> (c) It is contrary to the public policy of this state to require the continued operation of a condominium when to do so constitutes economic waste or when the ability to do so is made impossible by law or regulation.

(d) It is in the best interest of the state to provide for termination of the covenants of a declaration of condominium in certain circumstances in order to:

1. Ensure the continued maintenance, management, and repair of stormwater management systems, conservation areas, and conservation easements.

2. Avoid transferring the expense of maintaining infrastructure serving the condominium property, including, but not limited to, stormwater systems and conservation areas, to the general tax bases of the state and local governments.

3. Prevent covenants from impairing the continued productive use of the property.

4. Protect state residents from health and safety hazards created by derelict, damaged, obsolete, or abandoned condominium properties.

5. Provide fair treatment and just compensation for individuals and preserve property values and the local property tax base.

6. Preserve the state's long history of protecting homestead property and homestead property rights by ensuring that such protection is extended to homestead property owners in the context of a termination of the covenants of a declaration of condominium.

Georgia – Ga. Code Ann. § 44-3-98 requires a **4/5ths vote** to terminate followed by a partition action (Ga. Code Ann. § 44-6-160).

Hawaii – Haw. Rev. Stat. Ann. § 514B-47(a)(1) establishes an **80% termination** threshold and an action for partition to force the sale.

Idaho – Idaho Code Ann. § 55-1510 requires a **2/3rds vote** to terminate.

Illinois – 765 Ill. Comp. Stat. Ann. 605/15 requires a **75% vote** to sell the project, which is then followed by termination.

Indiana – Ind. Code Ann. § 32-25-8-16 requires 100% of owners to terminate.

Iowa – Iowa Code Ann. § 499B.13 requires 100% of owners to terminate.

Kansas – Kan. Stat. Ann. § 58-3116 (a) requires 100% of owners to terminate.

Kentucky – Uniform Act Language (Ky. Rev. Stat. Ann. § 381.9157 establishes **80% termination** threshold).

Louisiana – La. Stat. Ann. § 9:1122.112 requires 100% to terminate or any other percentage as specified in the Declaration.

Maine – Uniform Act Language (Me. Rev. Stat. tit. 33, § 1602-118(a) establishes **80% termination** threshold).

Maryland – Uniform Act Language (Md. Code Ann., Real Prop. § 11-123(a) establishes **80% termination** threshold).

Massachusetts – Mass. Gen. Laws Ann. ch. 183A, § 19 establish a **75% termination** threshold followed by a partition action (Mass. Gen. Laws Ann. ch. 241, § 1).

Michigan – Mich. Comp. Laws Ann. § 559.151 § 51(1) requires a **4/5ths vote** to terminate, then provides for the right of partition (Mich. Comp. Laws Ann. § 559.137 § 37(6)).

Minnesota – Uniform Act Language (Minn. Stat. Ann. § 515A.2-120(a) establishes an **80% termination** threshold).

Mississippi – Miss. Code. Ann. § 89-9-9 appears to require 100% to terminate.

Missouri – Uniform Act Language (Mo. Ann. Stat. § 448.2-118(1) establishes an **80% termination** threshold).

Montana –Mont. Code Ann. § 70-23-1101 appears to require 100% to terminate.

Nebraska – Uniform Act Language (Neb. Rev. Stat. Ann. § 76-855(a) establishes an **80% termination** threshold).

Nevada – Uniform Act Language (Nev. Rev. Stat. Ann. § 116.2118 establishes an **80% termination** threshold).

New Hampshire – N.H. Rev. Stat. Ann. § 356-B:34 requires a **4/5ths vote** to terminate.

New Jersey – N.J. Stat. Ann. § 46:8B-26 requires **80% revocation vote**, which can be followed by a partition action (N.J. Stat. Ann. § 2A:56-2).

New Mexico – Uniform Act Language (N.M. Stat. Ann. § 47-7B-18 establishes an **80% termination** threshold).

New York – N.Y. Real Prop. Law § 339-t provides for **80% to terminate** and expressly states "then the property shall be subject to an action for partition by any unit owner…."

North Carolina – Uniform Statute Language (N.C. Gen. Stat. Ann. § 47C-2-118 establishes an **80% termination** threshold).

North Dakota – N.D. Cent. Code Ann. § 47-04.1-10 appears to require 100% to terminate.

Ohio – Ohio Rev. Code Ann. § 5311.17 requires 100% to terminate, unless the Declaration provides a lesser threshold.

Oklahoma – Okla. Stat. Ann. tit. 60, § 528 provides for **90% vote** to terminate the condominium, "then the property shall be subject to partition at the suit of any unit owner…."

Oregon – Or. Rev. Stat. Ann. § 100.605 establishes a **90% vote** to terminate.

Pennsylvania – Uniform Act Language (68 Pa. Stat. and Cons. Stat. Ann. § 3220 (a) establishes an **80% termination** threshold).

Rhode Island – Uniform Act Language (34 R.I. Gen. Laws Ann. § 34-36.1-2.18(a) establishes an **80% termination** threshold).

South Carolina – S.C. Code Ann. § 27-31-130 requires 100% to terminate.

South Dakota – No provision of SD law appears to provide a dissolution mechanism.

Tennessee – Uniform Act Language (Tenn. Code Ann. § 66-27-318 (a) establishes an **80% termination** threshold).

Texas – Tex. Prop. Code Ann. § 82.068 (a) provides a 100% default voting threshold, but may be reduced **as low as 80% pursuant** to the specific Declaration.

Utah – Utah Code Ann. § 57-8-32 provides that **67% of the owners may sell the entire project** and the minority owners are bound by that decision; thereafter, the new owner of the whole may terminate the condominium, which requires 100%. Utah Code Ann. § 57-8-22 (1).

Vermont – Vt. Stat. Ann. tit. 27, § 1316 (a) requires 100% to terminate.

Virginia – Modified Uniform Act Language (Va. Code Ann. § 55.1-1937 establishes a **4/5ths vote** to terminate).

Washington – Uniform Act Language (Wash. Rev. Code Ann. § 64.34.268(A) establishes an **80% termination** threshold).

West Virginia – W. Va. Code Ann. § 36A-6-1 requires 100% to terminate.

Wisconsin – Wis. Stat. Ann. § 703.28 requires 100% to terminate.

Wyoming - No provision of WY law appears to provide a dissolution mechanism.

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SUPREME COURT OF ARIZONA

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Arizona Supreme Court No. CV-22-0228-PR Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

PLAINTIFFS/APPELLANTS JIE CAO AND HAINING "FRAZER" XIA'S SUPPLEMENTAL BRIEF

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* For the Court's convenience, the accompanying statutory addendum includes the versions of A.R.S. § 33-1228 effective in 2018 (in effect when the forced sale occurred) and 1986 (in effect when the Xias purchased Unit 106).

TABLE OF AUTHORITIES

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Cases

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I. A.R.S. § 33-1228 violates article 2, § 17 because it authorizes the taking of private property for private use.

This case rests on a simple premise. The legislature cannot enact a law that allows one person to take another's home by appraising the home, presenting a check for that amount to the owner, and recording title to that person's property.

The Arizona Constitution prohibits taking private property for private use, except for inapplicable enumerated exceptions: "Private property shall not be taken for private use …." Ariz. Const. art. 2, § 17.

No one questions that this case involves "private property." Each condominium unit, including the Xias' Unit 106, is an individually owned "separate parcel of real estate." A.R.S. § 33-1204(A). No one questions that what occurred here resulted in "private use." Unit 106 ended up in the hands of a private company, and was not used to build a road or a school, or put to any other public use.

Nor does anyone question that the government cannot delegate to private actors the power to take private property for private use. Otherwise, Mesa could have avoided article 2, § 17 in *Bailey v. Myers*, 206 Ariz. 224 (App. 2003), by authorizing the developers to acquire land directly for the government-favored redevelopment project. The legislature lacks the constitutional power to enact a law that gives a private entity the power to take private property.

This point should not be controversial. As the Xias explained (Petition at 11; Cross-PFR Resp. at 7-11; COA Op. Br. at 45-52), this has been the law for a century.

Arizona's first takings case, *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 262 (1914), involved not direct eminent domain, but a law that authorized one party to take the private property of another. This Court held that under article 2, § 17, the legislature cannot "*authorize* the taking of private property …." *Id.* (emphasis added).

Even though article 2, § 17 protects property rights more than the federal takings clause, the U.S. Supreme Court agrees with this fundamental principle. *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982), reached the same result as *Inspiration*: a law violates the takings clause when it authorizes a private party to interfere with someone else's private property. Most recently, the U.S. Supreme Court again confirmed that "government-authorized invasions of property" violate the takings clause, even when a private actor exercises the authority. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2074 (2021).

Such an intrusion does not require a court to balance any interests. A government-authorized intrusion "constitutes a *per se* physical taking." *Id.* at 2080. Full compensation does not remedy the constitutional violation, either. Article 2, § 17 requires "just compensation" for *public* uses, but it categorically *prohibits* all non-enumerated takings for private use. Full payment doesn't fix it.

In determining whether a law effects a taking, courts must look to "longstanding background restrictions on property rights." *Cedar Point*, 141 S.Ct. at

2079. The U.S. Supreme Court recently confirmed that although state law is one source for understanding property rights, "state law cannot be the only source. Otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 638 (2023) (quotation marks omitted).

Here, the fact that condominium purchasers might know about A.R.S. § 33-1228 before purchasing does not mean that the eradication of the property right is anything less than a taking. In *Tyler*, for example, the condo owner could have known about Minn. Stat. § 282.08, which authorized the state to sell someone's property to satisfy delinquent taxes, and allowed the state to keep the surplus after satisfying the back taxes. Yet that statute still violates the takings clause. 598 U.S. at 647. The takings clause is about takings, not notice.

Nor is condominium ownership barred by "background restrictions" in such a way as to entitle the state to obliterate such rights by fiat. This analysis begins by "look[ing] to traditional property law principles, plus historical practice and [judicial] precedents." *Id. at* 638 (quotation marks omitted). The rights at issue here fall squarely within the traditional property law principles that existed long before Arizona enacted A.R.S. § 33-1228 in 1985.

For hundreds of years property has meant "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total

exclusion of the right of any other individual in the universe." 2 Wm. Blackstone, *Commentaries* *2. Property entails a "bundle of real property rights." *Eardley v. Greenberg*, 164 Ariz. 261, 265 (1990). "One of the principal elements of property is the right of alienation or disposition." *Buehman v. Bechtel*, 57 Ariz. 363, 375 (1941) (citation omitted).

Forced sales under A.R.S. § 33-1228(C) deprive condominium owners of *all* property rights. On April 8th, 2019, the Xias had the right to exclude others, the right to use and enjoy the unit, and the right to alienate or dispose of the unit. The next day, they had none of those rights. Their property rights went from full to zero.

In addition, condominium-style ownership is not new. It existed at least as early as a millennium ago:

> *From the 1100s* onward we already find extremely wide-spread in German towns so-called "story" or "roomage" ownership—ownership of the individual stories of a building. Houses were horizontally divided, and the specific parts so created—the stories, floors, and cellars—were *held by different persons in separate ownership*; this being associated, as a rule, with *community ownership* of the building site and the portions of the building (walls, stairs, roof, etc.) that were used in common.

Rudolf Huebner, *History of the Germanic Private Law* 174 (1918) (translations omitted; emphases added). This ancient tradition matches Arizona's condominium structure, in which individual units are separately owned, with shared ownership of the common elements. *See* A.R.S. § 33-1204(A).

British and early American law likewise recognized this type of ownership.

See, e.g., 1 E. Coke, *Institutes*, *48b (1628) ("A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and seeing it is an inheritance corporeal it shall pass by livery."); *Madison v. Madison*, 69 N.E. 625, 627 (Ill. 1903) ("A house, or even the upper chamber of a house, may be held separately from the soil on which it stands ….").

The right to separate ownership of individual units, with both horizontal and vertical divisions, long predated Arizona's adoption of article 2, § 17, let alone A.R.S. § 33-1228. It therefore falls within the "traditional property interests" protected by the takings clause. *Tyler*, 598 U.S. at 638. The legislature cannot give authority to anyone to take someone else's condominium unit.

Dorsey Investments offers four main responses to the constitutional argument. First, it argues that this case arose under contract, not statute. But no contract authorized this forced sale. Dorsey Investments points to the condominium's Declaration, but the Declaration does not authorize forced sales. (*See* § III.C, below; *see also* Xias' Petition at 12-22.) It also points to the termination agreement. [IR-51, Ex. 2.] But the Xias never agreed to the termination agreement so that cannot provide the necessary contractual consent.

Second, Dorsey Investments argues that it is not a government entity and this case does not involve eminent domain. The Xias explained that the takings clause is not so limited. (Cross-PFR Resp. at 9-10.)

Third, it presents other examples such as partition actions or receivership. The Xias explained that these examples either arise from the "longstanding background restrictions on property rights" that do not offend the takings clause, *Cedar Point*, 141 S.Ct. at 2079, or do not involve forced sales.

Fourth, it points to policy arguments such as holdout problems or safety risks. But the Xias explained that the framers of Arizona's Constitution resolved the holdout issue in favor of property rights, and other laws (e.g., blight and safety inspections) resolve the other concerns. (Cross-PFR Resp. at 15-16.)

In sum, A.R.S. § 33-1228(C) authorizes one person to sell someone else's property. It therefore authorizes the taking of private property for private use, which violates article 2, § 17.

II. A sale under § 33-1228 requires selling everything.

The background rule for private property is that you can't sell what you don't own. *See, e.g.*, 2 Blackstone, *Commentaries*, *2 ("sole and despotic dominion"); *Buehman*, 57 Ariz. at 375 ("One of the principal elements of property is the right of alienation or disposition.").

In those rare instances where the law departs from this background rule by allowing someone to sell someone else's property, then the sale must strictly comply with the law's requirements. A party cannot sell someone else's property in a manner not authorized by the law; otherwise it is theft or conversion. Consequently, if a

forced sale under A.R.S. § 33-1228 is permissible, then that sale must strictly comply with § 33-1228's requirements.

Here, the only provision authorizing any sale requires selling everything: "A termination agreement may provide that *all the common elements and units* of the condominium shall be sold following termination." A.R.S. § 33-1228(C) (emphasis added). This provision does not authorize selling anything less than "all the common elements and units." "In short, 'all' means all." *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998). This is the only section authorizing selling anything.

A party looking to sell only *some* units must rely on some other source of authority (e.g., express consent). In this context, the law does not need to expressly *prohibit* selling less than everything. The background rule—no selling other people's stuff—takes care of that. Selling someone else's property requires express authorization (by law, contract, or otherwise), not just the absence of a prohibition.

The permissive "may" in § 33-1228(C) does not change the analysis because that merely confirms that the parties may terminate without selling property. Similarly, the phrase "any real estate" in that section does not authorize any sales, but merely recognizes that not every termination will involve selling any property.

The legislature's decision to require selling all property makes sense because it aligns everyone's incentives. Under § 33-1228's text, the money from the sale after expenses is pooled ("Proceeds of the sale") and distributed *proportionally* ("in

proportion to the respective interests of unit owners"), using appraisals ("fair market values") to set the percentage interest ("respective interests") of each unit owner. In other words, each unit owner doesn't get a fixed sum (the appraisal value), but instead gets a percentage of the total net proceeds. (*See* COA Op. Br. at 24-45.)

If everyone's property is at stake, then everyone has the same incentive to seek the highest total price, which will maximize how much each owner gets paid. Here, by contrast, Dorsey Investments was the only unit owner voting for a sale, yet it had no property at stake and in fact was voting to *sell to itself*. This means Dorsey Investments had a strong incentive to *minimize* the sale price. Selling everything, as the statute requires, would give everyone the same incentive to maximize the price and therefore reduces the incentives for the kind of self-dealing that occurred here.

A subsequent change by the Uniform Law Commission confirms that § 33-1228 requires selling *all* units. "When, as here, a statute is based on a uniform act, we assume that the legislature intended to adopt the construction placed on the act by its drafters and commentary to such a uniform act is highly persuasive." *May v. Ellis*, 208 Ariz. 229, 232 (2004) (cleaned up). Until 2021, the Uniform Common Interest Ownership Act required sales to include "all of the common elements and units," as Arizona's law requires. A 2021 "revision allows for the sale of some but not all common elements and units." Uniform Common Interest Ownership Act (2021) at 106, cmt. 6. The Uniform Act now states that a termination "may provide

for the sale of some or all of the common elements and units." *Id.* at 100, § 2-118(c). This amendment confirms that the prior version of the Uniform Act requires selling everything. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012) ("If the legislature amends or reenacts a provision … a significant change in language is presumed to entail a change in meaning."). Arizona has not adopted the amendment, meaning the original requirement of selling everything still applies (and unquestionably applied in 2019 when this forced sale occurred).

III. The Declaration references the Condominium Act as a statutory scheme, so the reference includes the constitutional limits on statutes.

Parties may intend a contract to refer to a statute *as a statute*, or they may instead intend text from a statute to be treated as a contractual term. Which they have done depends on their intent as expressed by the chosen text and context. Here, the Declaration expressly distinguishes between rights the Association has under existing law and rights created in the condominium documents. The right at issue here—to take the Xias' property against their will—comes *only* from existing law (a statute in the Condominium Act). That means that if the statute is unconstitutional, then the Association had no right at all to take the Xias' property.

A. A contract's intent determines whether a referenced statute functions as a statute.

1. Every contract is governed by a body of law, including relevant statutes, whether it expressly says so or not. *See Sch. Dist. No. One of Pima Cnty. v. Hastings*,

106 Ariz. 175, 177 (1970) ("[T]he Constitution and laws of the State are a part of every contract."). A contract may also expressly identify a governing body of law that would not otherwise apply, as when an Arizona contract selects Delaware law. There, the obligation to abide by Delaware law *arises from contract* but the nature and status of Delaware law remains independent of the contract. In other words, the contract inherits the meaning and context of the relevant Delaware statutes *qua* statutes even though the obligation to comply with those statues arises from contract.

This remains true if a contract similarly references a specific act or code. For example, a Nevada contract could say that "the parties' rights and obligations shall be determined as set forth in the Arizona Uniform Commercial Code and other applicable law." Again, the obligation to comply with the Arizona U.C.C. would arise from contract. But because the contract references the statutory scheme *in its capacity as a statutory scheme*, the nature of the obligations that arise from contract would be determined as a matter of statutory law.

2. Alternatively, a contract could intend to treat text from a statute as a purely contractual term without regard to the independent legal status and nature of the referenced statute. In other words, a contract could incorporate a statute and intend that the text from the referenced statute no longer function as statutory. For example, a contract might say that "A.R.S. § 47-2308(1) from the 2023 version of the Arizona Uniform Commercial Code is hereby incorporated by reference as

though the text of that statute were set forth in full as a term of this contract and shall be interpreted as a contract term rather than as a statute."[1] In such a case, the parties would be expressing their intent that the text from this statute function as independent, direct contractual text without regard to its status as a statute.

B. Unless a contract intends a referenced statute to not be a statute, the contract remains subject to judicial interpretation and the constitutional limitations applicable to the statute.

Parties have the freedom to refer to a statute in a contract with the intent that the referenced statute retain its status as statutory—and function as such—or not. They may intentionally choose one over the other because they are conceptually distinct, function differently, and have different legal consequences.

1. When a contract references a statute in its capacity *as a statute* (i.e., statute *qua* statute), the parties intend the statute to function as a statute. To return to basics, a statute is a law enacted by the legislature. The judicial branch interprets the meaning of statutes, including determining any constitutional limitations. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). "To conclude otherwise would deprive the judiciary of its authority, and indeed its obligation, to interpret and apply constitutional law." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229

[1] A.R.S. § 47-2308(1) provides that unless otherwise agreed, "[t]he place for delivery of goods is the seller's place of business or if he has none his residence."

Ariz. 347, 354–55, ¶ 33 (2012). So when a contract references a statute in its capacity as a statute, the implied term "as interpreted by the courts" accompanies that concept. In such cases, what courts have said about the statute (e.g., the U.C.C.'s duty of good faith found in A.R.S. § 47-1304 in the prior example) may matter.

2. When a contract intends text that originated in a statute to function purely as a direct, independent contractual term without regard to its statutory nature, then the legal status of the source material may no longer matter (other than perhaps tangentially). In other words, if the contract did not intend judicial interpretation of a statute to matter, then it may not affect the obligations of the parties.

For contracts in the first category, if the source of a power comes from a referenced statute, then that statute determines the limits of the power. That is a key lesson from the 11/18/2022 Goldwater brief (at 3-8) and its discussion of *Seaborn v. Wingfield*, 48 P.2d 881 (Nev. 1935). Moreover, any other conclusion would make no sense for a variety of reasons, as discussed in the Xias' Petition at 15-18.

Again returning to basics, a power that comes from a statute referenced in a contract necessarily derives from the statute, and therefore the power cannot be broader than the principal source of that power. If the principal source (the statute) has constitutional limitations, then those same limits necessarily apply to the derivative reference in the contract. After all, it cannot be that a statute has constitutional limitations, but a power derived from that statute, and placed in a

contract, is *free* of those constitutional limitations. *See Seaborn*, 48 P.2d at 886 ("incorporat[ing] under an act which contained an unconstitutional provision cannot render the provision enforceable, nor confer any power on the court to enforce it.").

Indeed, the Constitution limits every statute the legislature enacts, so those limits necessarily accompany every reference to the statute:

> There is no position which depends on clearer principles, than that every act of a *delegated authority*, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the *deputy is greater than his principal*; that the *servant is above his master* ….

The Federalist No. 78 (emphases added). This rule does not go away when one references a statute in a contract. To the contrary, "the Constitution … [is] a part of every contract." *Hastings*, 106 Ariz. at 177. When a contract references a statute in its capacity as a statute, the implied term "as limited by the Constitution" accompanies the statute because the Constitution is *already a part of the contract*.

In sum, whether a statute referenced in a contract should be interpreted as a statute or not depends on the contract's intent. Because judicial interpretation and constitutional limitations are implicit in every statute, then absent some expressed intent to strip a referenced statute of its statutory function, a referenced statute remains subject to judicial interpretation and any constitutional limitations.

C. The Declaration's text reflects an intent to refer to the Act as a statutory scheme, not to incorporate the text from that Act as additional contractual terms.

"A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Powell v. Washburn*, 211 Ariz. 553, 557 (2006). Any ambiguity is resolved "against the restriction and in favor of the free use and enjoyment of the property." *Wilson v. Playa de Serrano*, 211 Ariz. 511, 514, ¶ 10 (App. 2005) (quotation marks and citation omitted).

Although in some cases it may be difficult to discern whether a declaration intends to refer to a statutory scheme as a statutory scheme or as direct, independent contractual text untethered from its statutory capacity, it's easy in this case. The key sentence from Declaration § 6.1 expressly distinguishes between the two primary sources (legal vs. contractual) for the rights, powers, and duties of the Association:

> The Association shall have such rights, powers and duties [1] as are prescribed by the Condominium Act, other applicable laws and regulations and [2] [such rights, powers and duties] as are set forth in the Condominium Documents together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act."

[IR-51, Ex. 1 at 24 (bracketed numbers and text added).]

The first phrase—"duties as are prescribed by the Condominium Act, other applicable laws and regulations"—can only be read as referencing existing

applicable law as the source for those "rights, powers and duties," not as creating any new or independent rights as a matter of contract. Nothing in this text suggests that it purports to create *new* rights, powers and duties not found in the referenced legal sources, let alone to erase existing constitutional rights. The phrase merely informs the reader that existing law gives the Association certain rights.

The second phrase—"and [such rights, powers and duties] as are set forth in the Condominium Documents"—confirms this construction because it expressly delineates between the rights, powers and duties afforded by existing law and those created in the contract documents, including the Declaration. ("'Condominium Documents' means this Declaration and the Articles, Bylaws and the Rules." [IR-51, Ex. 1 at 2.]) This plain text means that only the separate terms found in the Documents (not the referenced statutory scheme with its dozens of sections regulating nearly every aspect of condominiums) qualify as contractual terms that impose obligations separate and apart from those created by the referenced legal sources (which remain subject to judicial interpretation).

Simply put, no one would expect that a contractual provision giving the Association the "powers … prescribed by the Condominium Act" would in fact give the Association *broader* powers than the Association would have when acting under the Condominium Act directly. In fact, no one would view this boilerplate text as altering the legal landscape at all. All it does is repeat what was already true by

operation of law; the Condominium Act "applies to all condominiums created within this state." A.R.S. § 33-1201. The fact that Declaration § 6.1 also references "other applicable laws and regulations," which could include *any* statute, confirms that no one intended this provision to alter the legal landscape or strip constitutional rights.

Moreover, the Constitution surely falls within the "applicable laws" as expressly invoked by Declaration § 6.1, so the powers "prescribed by the Condominium Act" must also include Constitution's limitations on statutes.

Other considerations confirm this conclusion. Courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *State v. Rickman*, 148 Ariz. 499, 503 (1986). Arizona voters have confirmed that "all property rights are fundamental rights." Prop. 207 (2006). "[F]undamental restrictions" of property rights in a declaration must also be "clear and unambiguous," and must be designed to put purchasers "on notice." *Wilson*, 211 Ariz. at 514-15, ¶¶ 10, 16. Other courts recognize that waiving the constitutional protection against takings requires "clear, unambiguous, unmistakable, and conspicuous language." *Missouri v. Muslet*, 213 S.W.3d 96, 99 (Mo. Ct. App. 2006).

No reasonable person would view Declaration § 6.1 as consenting to allow anyone to forcibly take their property, waiving article 2, § 17 of the Constitution, or giving up their fundamental right to keep their home. A broad reference to *already-applicable* background law does not put reasonable people on notice that they are

waiving fundamental constitutional and property rights.

To top it off, condominium declarations and other CC&Rs require special care because they are "special types of contracts." *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 538, ¶ 14 (2022). In an ordinary contract—even an adhesion contract—a party has at least a *theoretical possibility* of negotiating over terms. But with CC&Rs, there is no counterparty at all. They are servitudes that run with the land and bind all future purchasers by virtue of *property* law, not contract law. Accordingly, courts "do not enforce 'unknown terms which are beyond the range of reasonable expectation.'" *Id.* (citation omitted). This is precisely why "a fundamental restriction of the individual owners' expected property rights must be set forth in the Declaration with sufficient specificity that purchasers are on notice that the occupancy of their property could be severely restricted." *Wilson*, 211 Ariz. at 515, ¶ 16. Declaration § 6.1's broad, generic statutory reference flunks this test.

Arizona voters have confirmed that property is a fundamental right in Arizona. People should not lose their homes because a servitude attached to their home referenced an unconstitutional statute. Accordingly, if the Court holds that A.R.S. § 33-1228 violates article 2, § 17, then the Declaration's statutory reference takes the statute subject to that judicial holding. The Declaration therefore gives the Association only the *lawful* powers of the Condominium Act, which do not include taking the Xias' property.

D. Dorsey Investments' efforts to avoid the import of the Declaration's plain text miss the point.

Incorporation. Dorsey Investments claims in its PFR Response (at 15) that "the Condominium Act was specifically incorporated into the Declaration." But under Arizona law, "[w]hile it is not necessary that a contract state specifically that another writing is 'incorporated by this reference herein,' *the context in which the reference is made must make clear that the writing is part of the contract*." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 260, 268 (App. 2007) (emphasis added). "[M]ere reference to a document for descriptive purposes does not operate as an incorporation of the document …." *Id.*

Here, the pertinent text purports to describe the Association's powers under existing law ("powers … prescribed by the Condominium Act"), but does not incorporate anything. *Cf. Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 826 (Fed. Cir. 2010) (a contract's "passing reference to the entire corpus of [an act]" does not "automatically result in 'wholesale incorporation' of that statute."); *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988) ("This is hardly the type of clause that should be read as incorporating fully into the contract all the [agency] regulations.").

More fundamentally, nothing in the Declaration or the context here suggests any intent to deprive the Act of its default statutory nature subject to the usual rules of judicial interpretation and constitutional limitation, let alone waive any

constitutional rights. (*See also* 11/18/2022 Goldwater brief at 6-7). To the contrary, if a contract says a party has "the rights prescribed by an Act and other applicable laws," it means *the law* is prescribing those rights, not the contract itself.

Existing law. Dorsey Investments notes that "contractual language must be interpreted in light of existing law" at the time of the contract. (PFR Response at 17 (citation omitted).) But "[i]n Arizona, an opinion in a civil case typically applies retroactively as well as prospectively." *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 228, ¶ 40 (2022); *see also* 11/18/2022 Goldwater brief at 7 n.1.

Fundamental right. Dorsey Investments claims (Petition Response at 16) this case involves no fundamental right. Prop. 207 says otherwise, and this misses the point. Dorsey Investments purportedly had the right to sell the Xias' condominium against their will only because of A.R.S. § 33-1228. If that statute is unconstitutional, Dorsey Investments had no authority to do what it did.

Separate authority from the Declaration. In their Response to Amici (at 9) Defendants suggest this is an example of private parties agreeing to do things the Constitution does not authorize. But again, the only authority for taking the Xias' property comes from A.R.S. § 33-1228, and that statute was not incorporated as a direct, independent contract term. Perhaps the Declaration *could* have said "90% of unit owners may vote to sell any person's unit," but it did not. It merely gave the Association the "powers … prescribed by the Condominium Act."

IV. A statutory reference does not always include subsequent amendments.

If the parties intended a statutory reference in a declaration to function as a statute, then subsequent statutory amendments apply by operation of law, subject to ordinary constitutional limits. If, however, the parties intended to treat a statute as a direct, independent contractual term, with no statutory context or limits, then subsequent amendments do not apply if they fall outside "a homeowner's reasonable expectations." *Kalway*, 252 Ariz. at 538, ¶ 15.

Consider a hypothetical Condominium Act amendment: "upon demand from the state or any political subdivision, the association must transfer title to any units and common elements to the state or political subdivision, for no compensation." Applying this unconstitutional amendment would "allow[] substantial, unforeseen, and unlimited amendments [to] alter the nature of the covenants to which the homeowners originally agreed." *Id.* An existing declaration's reference to powers "prescribed by the Condominium Act" would not include this amendment.

This issue raises complicated questions, which confirms why courts should be wary of applying unconstitutional statutes in the first place. If the Court rules that Declaration § 6.1 references the Condominium Act as a source of law, not as an independent contractual term, then the Court need not reach Issue 4.

CONCLUSION

The Court should reverse, remand, and award the Xias' their fees.

RESPECTFULLY SUBMITTED this 12th day of September, 2023.

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STATUTORY ADDENDUM*

A.R.S. § 33-1228 (2018)

§ 33-1228. Termination of condominium

Effective: August 3, 2018 to August 26, 2019

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B of this section. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as

* For the Court's convenience, this addendum includes the versions of A.R.S. § 33-1228 effective in 2018 (in effect when the forced sale occurred) and 1986 (in effect when the Xias purchased Unit 106).

provided in subsection G of this section. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit. During the period of that occupancy, each unit owner and the successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units that were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F of this section are as follows:

1. Except as provided in paragraph 2 of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the association's appraiser, the unit owner shall submit to arbitration at the association's expense and the arbitration amount is the

final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I of this section, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, on foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C, D, E, F, H and I of this section do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contains provisions inconsistent with these subsections.

K. Beginning on the effective date of this amendment to this section, any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy.

A.R.S. § 33-1228 (1986)

§ 33-1228. Termination of condominium

Effective: January 1, 1986 to August 3, 2018

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty per cent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection G. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in

interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units which were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F are as follows:

1. Except as provided in paragraph 2, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by an independent appraiser selected by the association. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which fifty per cent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a

portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may, on foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C through I do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contain provisions inconsistent with such subsections.

IN THE SUPREME COURT

STATE OF ARIZONA

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Supreme Court No. CV-22-0228-PR Court of Appeals Division One Case No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

SUPPLEMENTAL BRIEF OF AMICUS CURIAE GOLDWATER INSTITUTE IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of amicus Goldwater Institute is set forth in its amicus brief in support of the Petition for Review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Dorsey's[1] arguments that no taking is involved here are unpersuasive. Although the state itself is not acquiring a property right, eminent domain is still the power being used when the state authorizes a private party to extinguish another's property right for its own benefit. And the prohibition on private takings in Ariz. Const. art. II § 17 forbids the state from empowering the majority of property owners in a condominium to compel the dissenter to surrender her property rights for the majority's use. Nor can such a requirement to sell against her will be imposed by operation of law. The only way such a requirement may be imposed is by contract: that is, Dorsey must show that Cao knowingly and voluntarily agreed by a valid contract to surrender her property rights upon the majority's demand.

[1] Defendants/Appellees PFP Dorsey Investments, LLC, et al., are herein referred to as Dorsey. Plaintiffs/Appellants Jie Cao, et al., are herein referred to as Cao.

ARGUMENT

I. This case involves a private taking.

As the leading scholars of this subject observe, statutes that empower a majority of condominium owners to force the minority of owners to relinquish their ownership represent a "unique[] … form of private-to-private or delegated takings." Douglas C. Harris & Nicole Gilewicz, *Dissolving Condominium, Private Takings, and the Nature of Property, in* B. Hoops, et al., *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* 278 (2015). *See also* Marlene Brito, *Terminating a Condominium or Terminating Property Rights: A Distinction Without a Difference*, 45 Real Est. L.J. 200, 218-20 (2016) (showing that termination statute violated Florida Constitution's prohibition on private takings); Tyler Gaines, *Note: The Georgia Condominium Act's Authorization of Private Takings: Revisiting Kelo and "Bitter with the Sweet*," 55 Ga. L. Rev. 395 (2020) (statutes allowing extinguishment of condominium owners' rights are unconstitutional takings even under *Kelo v. City of New London*, 545 U.S. 469 (2005)).

A. Laws that let one private party acquire, extinguish, or use another's property *must* inflict a taking.

Dorsey claims this is not a taking because "[t]he government is not effectuating a transfer of property by operation of law."[2] But that's not true. Dorsey itself says that the source of the power to extinguish Cao's ownership rights is the statute, as incorporated into the Declaration: the latter says "The Association shall have such rights, powers, and duties as are prescribed by the Condominium Act…,"[3] and *that's* the source of Dorsey's purported authority to eliminate Cao's ownership rights.

A simple syllogism makes it obvious that this case involves a taking. A taking occurs when the state authorizes the "substantial[] depriv[ation]" of an owner's "use and enjoyment of [her] property or physically invades it." *Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 487 ¶ 45 (App. 2009). Condominium owners hold fee simple interests. *Makeever v. Lyle*, 125 Ariz. 384, 386 (App. 1980). Section 33-1228 empowers the majority of unit-owners to compel an individual condominium owner to surrender that fee interest to the majority. Therefore, it authorizes a taking. *See Gaines*, *supra* at 404–09.[4]

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[2] Combined Response to Amicus Briefs in Support of Petition for Review at 10.
[3] Dorsey's Response to Petition for Review at 15 (quoting APP.086).
[4] To be specific, it's a physical, not a regulatory, taking. That is, Section 33-1228 doesn't just limit use in a way that reduces the property owner's market value, but actually provides for the confiscation of tangible things. In *Horne v. USDA*, 576 U.S. 350 (2015), the U.S. Supreme Court made clear that a law that imposes

True, this kind of taking is unusual, in that it involves not the acquisition of an ownership interest by the state, but the extinguishment of one owner's interest for the benefit of another, who is empowered to compel this via the state's coercive authority. That may be out of the ordinary but, it's still a taking. *See* Laurence Tribe, *American Constitutional Law* 592 (2d ed. 1978) (observing that "[m]ost people know a taking when they see one" and setting forth three traditional tests for taking—all of which are satisfied here).

Throughout history, government has often effectuated takings by empowering private parties to convert the property of others to their own private use—and these are recognized as instances of eminent domain. The clearest example is statutes that let mining companies dig tunnels or shafts across the land of neighboring property owners. In *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 261 (1914), this Court said such tunnels would violate the Arizona Constitution's ban on private takings, if they weren't expressly authorized in the Constitution. Similarly, laws that let one property owner build waterworks whereby water spills onto the land of another, are private takings. *Clausen v. Salt River Valley Water Users' Ass'n*, 59 Ariz. 71, 82–83 (1942).

"direct appropriations" on someone's "property, real or personal"—so that it's "actually occupied or taken away"—qualifies as a physical taking for Fourteenth Amendment purposes. *Id.* at 361. Even if it were viewed as a regulatory taking, however, it would still be a taking because it inflicts a 100 percent wipeout of value. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020 (1992).

Or consider the extinguishment of joint co-ownership interests under bankruptcy laws. Under certain circumstances, bankruptcy trustees have statutory authority to sell a debtor's co-owned property, free of the co-ownership interests of that debtor's co-tenants—in other words, the trustee can simply sell the debtor's land, which obliterates the rights of innocent co-owners. In such a situation, the government isn't appropriating anything—nobody is; the right is just extinguished, as in this case. And in *In re Persky*, 134 B.R. 81, 95–99 (Bankr. E.D.N.Y. 1991), the court found that this was an unconstitutional private taking, because it eliminates one person's property right for the benefit of another private party.

B. Corporate ownership offers a helpful analogy.

The context in which state courts have most clearly addressed this issue is corporate ownership. *Cf.* Harris & Gilewicz, *supra* at 283 (referencing corporation analogy). For well over a century, corporations law has recognized that a statute whereby a minority of shareholders is forced to sell their shares to the majority would constitute an exercise of eminent domain. *See Black v. Delaware & Raritan Canal Co.*, 24 N.J. Eq. 455, 469–71 (1873). Some states have allowed this, on the grounds that under those states' constitutions, the "public use" requirement is satisfied by a general "public purpose." For example, in *Narragansett Elec. Lighting Co. v. Sabre*, 146 A. 777, 782 (R.I. 1929), Rhode Island's Supreme Court held that such a statute did not violate that state's Constitution, which only requires

that a use of eminent domain serve a general public good, and does not prohibit all private takings. *See also* Henry Campbell Black, *An Essay on the Constitutional Prohibitions against Legislation Impairing the Obligation of Contracts* § 77 at 93 (1887) ("the minority may be worked out of the transaction altogether, by invoking the State's power of eminent domain … [if] the object … [of] the consolidation is a 'public purpose.'").

But under Arizona's Constitution, this would *not* be permitted, because Arizona's Constitution emphatically forbids takings for private use. *Inspiration Consol. Copper*, 16 Ariz. at 260–64; *Bailey v. Myers*, 206 Ariz. 224, 226–30 ¶¶ 9–26 (App. 2003). *See also Taking Corporate Shares by Right of Eminent Domain*, 5 Yale L.J. 205, 211 (1896) ("it is perfectly evident that the right of eminent domain cannot be exercised with propriety to enable the corporation itself, or a majority of its stockholders, to eliminate the interest of one or more shareholders."). And, indeed, Arizona corporation law does not give the majority of shareholders power to force the minority to sell their shares against their will. True, a dissenting *minority* can compel the *majority* to *buy* their shares, *see* A.R.S. § 10-1302, as a means of protecting the minority against oppression. But the only way a corporate majority can compel the minority to sell their shares is through so-called "drag-along rights." *See* Suren Gomtsian, *Private Ordering of Exit in Limited Liability Companies: Theory and Evidence from Business Organization Contracts*, 53 Am.

Bus. L.J. 677, 705–06 (2016). And these rights must be acquired by a *contract* whereby all stock-purchasers knowingly and consciously agree to sell their shares upon the demand of the majority.

Thus, a condominium purchaser *can* agree by contract to be bound to surrender her unit upon demand of the majority. *See* Harris & Gilewicz, *supra* at 280 ("the extent to which acquisition should be understood to entail consent may depend, at least in part, on the notoriety of this aspect of condominium ownership"). But such an agreement would have to be knowing and intelligent, and the question of whether such a contract was validly formed in *this* case must be resolved under ordinary Arizona contract law, including the reasonableness and forseeability requirements of *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 537–39 ¶¶ 10–17 (2022).[5] That requires remand to the trial court. *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 246 ¶ 16 (App. 2005).

II. A facially unconstitutional statute cannot be incorporated into a contract as a matter of law.

Amicus Community Associations Institute claimed in its brief supporting the Cross-Petition (at 10) that the laws of the state are automatically incorporated into

[5] Parties to a contract can agree to be bound even by future changes in either a statute or an organization's own rules—but only if those future changes are reasonable. *See, e.g., Uhl v. Life & Annuity Ass'n,* 155 P. 926, 926 (Kan. 1916). A statute authorizing a private taking is *per se* unreasonable. *Cf. Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking … would serve no legitimate purpose of government.").

every contract. This is inaccurate.[6] As Amicus Goldwater Institute explained in its brief in support of the Petition for Review (at 3–10), that rule does not apply to facially unconstitutional statutes.

The leading case on this question is *Seaborn v. Wingfield*, 48 P.2d 881 (Nev. 1935), which involved a facially unconstitutional banking regulation. The state's Banking Examiner sought to enforce that regulation anyway, on the grounds that it was incorporated by operation of law into the contracts to which the bank's directors had agreed. The court rejected that argument, because "only a valid law… becomes incorporated in [a] contract." *Id.* at 884–85. *Accord, Morse v. Metropolitan S.S. Co.*, 102 A. 524, 526 (N.J. App. 1917).

The reason is simple: the Constitution's prohibition on private takings is *also* incorporated by operation of law into every contract, and it must take precedence over all legislation.[7]

In seeking to keep the unconstitutional statute in effect via contract, Dorsey (Supp. Br. at 15–16) cites to federal cases postdating *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), in which courts of appeal have refused to grant relief to people who signed contracts that let unions extract funds from their paychecks in a manner that

[6] Even under federal law, it is not true that the law *in esse* at the time of the contract's formation are automatically incorporated into the contract. That is only true of laws that "affect the validity, construction, and enforcement of contracts." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992).

[7] *See* Brief of Goldwater Institute in Support of Petition for Review at 6–7.

Janus later found to be unconstitutional. This argument is unpersuasive for two reasons. First, those cases (such as *Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 2795 (2021), and *Fischer v. Governor of New Jersey*, 842 F. App'x 741 (3d Cir.), *cert. denied sub nom. Fischer v. Murphy*, 142 S. Ct. 426 (2021)) are simply wrong. Such contracts are, indeed, unenforceable under *Janus*, and decisions to the contrary are depriving individuals of their First Amendment rights under the guise of contract law. The post-*Janus* refusal of lower courts to declare these "contracts" invalid represents a refusal to take *Janus* seriously, not an objective application of legal standards—as witness the fact that some lower courts have even used this "contract" rationale to deny relief to plaintiffs *whose signatures were forged*.[8] This Court should steer clear of precedent as poorly reasoned as these lower-court, post-*Janus* decisions; they accomplish precisely what the *Seaborn* principle forbids: allowing a facially unconstitutional law to remain in effect after the courts have declared it invalid, as a sort of legal zombie kept animated by the fiction that a contracting party agreed to an unconstitutional act.

[8] *See, e.g., Jarrett v. Marion County*, No. 6:20-cv-01049-MK, 2021 WL 65493, *1 (D. Or. Jan. 6, 2021), *aff'd,* 2023 WL 4399242 (9th Cir. 2023); *Zielinski v. Serv. Emps. Int'l Union Loc. 503*, 499 F. Supp.3d 804, 806 (D. Or. 2020), *aff'd*, 2022 WL 4298160 (9th Cir. Sept. 19, 2022); *Schiewe v. SEIU Local 503*, No. 3:20-cv-00519-JR, 2020 WL 5790389, *1-2 (D. Or. Sept. 28, 2020), *aff'd* 2023 WL 4417279 (9th Cir. 2023).

Even if these cases were not so unconvincing, however, they are easily distinguishable. They involved union *members* (where *Janus* involved non-members) who agreed for a one-year period to have a fee deducted from their paychecks for union purposes, and who, as *Belgau* put it, "were free to 'join' … or 'refrain' from participating in union activities." 975 F.3d at 950. The *Belgau* court found that they "repeatedly stated that they 'voluntarily authorize[d]' [the union] to deduct union dues from their wages, and that the commitment would be 'irrevocable for a period of one year.'" *Id.* That is quite different from a contract that purports to allow a person to be disseised of her real property at any time indefinitely into the future, upon a vote of her neighbors, based on an admittedly unconstitutional statute that was vaguely gestured to in the contractual boilerplate.

III. Also, the condition of being forced to sell cannot be imposed as a matter of law.

The right to form a condominium association is not a privilege granted by the state, on which the state can impose whatever conditions it wishes. Rather, that right—like the right to create a corporation—is an inherent contractual right, which statutes merely facilitate, but do not create. Its true source is the individual's basic freedom of economic choice. *Zambrano v. M & RC II LLC*, 517 P.3d 1168, 1171 ¶ 1(Ariz. 2022) ("parties are generally free to contract on whatever terms they choose."). And since the right to create a condominium association "cannot remotely be described as a 'governmental benefit,'" *Nollan v. Cal. Coastal*

Comm'n, 483 U.S. 825, 833 n.2 (1987), then the taking of property pursuant to Section 33-1228 cannot be viewed as some type of condition which the state may justly impose upon people who obtain such a "benefit."

Consider the difference between *Nollan* and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). *Nollan* involved conditions imposed upon the issuance of a building permit, which the owners said were so arbitrary and extreme that they amounted to an uncompensated taking of their land. In dissent, Justice Brennan said it was not a taking, but more like a fee or a toll that the government could charge the property owner in exchange for the permit. *See id.* at 856–58 (Brennan, J., dissenting). He relied for that theory on the *Monsanto* case, in which the Court had said it was not a taking when the government forced a chemical company to publish its secret formulae in exchange for the government registering its pesticides under federal environmental laws. *Id.* at 1013. The *Monsanto* Court said this requirement was not a taking, but just a sort of toll charged by the government "in exchange for the ability to market pesticides." *Id.* at 1007. Justice Brennan said the same was true in the *Nollan* case. But the majority in *Nollan* rejected that analogy. It said that, unlike the pesticide-sales license in *Monsanto*, "the right to build on one's own property" could not even "remotely" be characterized as the kind of government-created privilege for which the government could demand a "toll" in exchange. *Nollan*, 483 U.S. at 833 n.2.

A similar dilemma is implicit here. If the power to form a condominium association existed solely by the state's fiat, like the pesticide license in *Monsanto*, then the state could *arguably* impose conditions on that privilege,[9] such as decreeing that a property owner must surrender her property if the majority of owners in the unit wish her to. But if people have an inherent *right* to form condominium associations—as they have the right to use their land, as in *Nollan*—then the state cannot legitimately impose the risk of confiscation on them as the price of doing so.

The answer is that the right to form a condominium association is not a mere government privilege, but a function of the individuals' inherent property and contract rights. Condominiums are formed by an agreement between people using their own resources consistently with the *sic utere* principle. The law has recognized this right for thousands of years, *see* *Siller v. Hartz Mountain Assocs.*, 461 A.2d 568, 570 n.4 (N.J. 1983); Warren Freedman & Jonathan Alter, *The Law of Condominia and Property Owners' Associations* 1–2 (1992), and even Lord Coke mentions it. 1 E. Coke, *Institutes* *42. Certainly it's old enough to qualify as one of the "background principles" of Arizona law. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001). Simply put, the formation of this type of co-ownership is,

[9] Actually, the condition at issue here would probably still fail the "unconstitutional conditions" test, because it compels the relinquishment of a constitutional right. *See* *State v. Okken*, 238 Ariz. 566, 572 ¶ 22 (App. 2015).

like the state law regarding the formation of corporations, a function of the individual's right to contract, *not* a mere privilege for which the state can demand something in return.[10]

This is important because of what *Gaines*, *supra*, at 418, calls the "bitter with the sweet" theory—that is, the idea that the buyer of a condominium acquires her interest subject to the statutory possibility of extinguishment, and that because she knows this, the extinguishment cannot be a taking. That cannot be right. If the state could insert "so potent a Hobbesian stick into the Lockean bundle" of property rights, then it could effectively "put an expiration date on the Takings Clause." *Palazzolo*, 533 U.S. at 627. The state cannot rewrite property and contract rights by statute in such a way as to nullify constitutional protections for those rights.

CONCLUSION

The incorporation of Section 33-1228 by reference into the Declaration is insufficient to authorize the forced sale of Cao's property. No constitutionally legitimate state authority can vest in a private party the power to obliterate the

[10] It's sometimes said that corporations are "creatures of the state," but this is false. Corporations are not created by the state; they are contractual arrangements that owe their legitimacy—their "breath of life," so to speak—to contractual agreements between individuals. The state simply issues them licenses—as a ministerial act—and these licenses merely formalize the institution created by the contractual choices of the corporators. The state's role is that of "*protector,* not creator." Robert Hessen, *In Defense of the Corporation* 33 (1979).

property of another for his own benefit. Instead, the Court can only rule in Dorsey's favor if it finds that Cao knowingly agreed by a valid contract to surrender her property upon demand by the majority.

Respectfully submitted this 19th day of September 2023 by:

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ARIZONA SUPREME COURT

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	)	No. CV-22-0228-PR Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

BRIEF OF AMICI CURIAE ERIC BUCKEYE, PETER SCZUPAK, REKHA AND MUKESH TATARIA, AND AMY WAUTIER IN SUPPORT OF PLAINTIFFS/APPELLANTS

FILED WITH WRITTEN CONSENT OF THE PARTIES

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Identity and Interest of Amici Curiae[1]

Amici Curiae Eric Buckeye, Peter Sczupak, Rekha and Mukesh Tataria, and Amy Wautier (collectively, "Condo Owners") are former and current condominium unit owners who either had their property taken from them through condominium termination and forcible sale or are in the midst of that process. This case has ramifications for anyone who owns or might (re)purchase into a condominium, Condo Owners included.

Condo Owners submit this brief to explain how real estate investors exploit A.R.S. § 33-1228 to wrongfully take property from innocent Arizonans who own their property outright or have never missed a mortgage payment. If the Court does not find the statute facially unconstitutional (which it is), the Court should at least interpret the statute in a manner that prevents this misconduct. The correct interpretation of the statute—under which the condominium association: (i) sells "all the common elements and units of the condominium"; (ii) acts as "trustee" to sell the property in a manner designed to maximize the benefit to all unit owners; and (iii) divides the proceeds among the unit

[1] Under Arizona Rule of Civil Appellate Procedure 16(b)(3), the counsel below certifies that no persons or entities provided financial resources for preparing this brief.

holders in accordance with their proportional interests in the property—will eliminate incentives for self-dealing and stop this abusive practice.

Introduction

Supporters of condominium terminations justify the practice as a means to heal "broken" communities and prevent decay that renders properties dilapidated and potentially dangerous. Evoking the tragedy of Champlain Tower—the 12-story condominium that collapsed in Surfside, Florida—supporters claim that disaster awaits condominiums where residents fail to care for and reinvest in the property. To supposedly help prevent that sort of deterioration, supporters assert that real estate investors are uniquely positioned to buy and rehabilitate condominiums.

But the noble aspirations that supporters ascribe to real estate investors who terminate condominiums are untethered from what is actually happening in Arizona. Condominium terminations are not about preventing the next condominium calamity. They are not about healing "broken" communities. To the contrary, they are sadly often about real estate investors forcing innocent Arizonans to sell their property so that the investors can convert high quality, resort-style, gated condominium

complexes into high-rent, cashflow-generating apartments. They are about increasing investor profits and return-on-investment.

To illustrate, in the last decade, more than 10 condominiums in Arizona have been subject to termination and forced sale. (Papago Spr. App. at 002-137). Each instance follows a similar playbook:

- An investor identifies a target condominium community and determines that it's ripe for conversion to apartments;
- The investor begins acquiring units (and does so in bulk);
- After the investor acquires a majority interest, it takes control of the board of directors; and
- When the investor acquires enough units to reach the termination threshold (typically 80%), the self-selected condominium association initiates a compelled sale process to force the remaining unit owners to sell their units to the terminating entity at a price established by the terminating entity's own appraiser.

Dorsey Investments says, "a deal is a deal." But where's the deal? Neither Condo Owners nor the Xias agreed to anything. Declarations for their condominium communities are silent about the possibility of a

forced sale of their home. Dorsey Investments then pivots and claims that A.R.S. § 33-1228 green-lights this process. It couldn't be more wrong.[2]

Argument

Real estate investors, including Dorsey Investments, rely on the purported authority bestowed on controlling interests under A.R.S. § 33-1228 to terminate condominiums, force individual owners to sell their units to the investor, and purchase the property at a price determined by the investor's own appraiser and shielded from bids from the open market. This abusive practice is possible only because real estate investors misinterpret A.R.S. § 33-1228's provisions.

I. Any sale following termination must include "all the common elements and units of the condominium."

Investors who obtain enough votes to terminate a condominium improperly pluck off the minority individual units at a fixed price. But A.R.S. § 33-1228's plain language does not permit this practice.

[2] We refer to Plaintiffs/Appellants Jie Cao and Haining "Frazer" Xia as "the Xias" and Defendants/Appellees PFP Dorsey Investments, LLC and Dorsey Place Condominium Association as "Dorsey Investments."

Subsection (C)[3] provides the only authority permitting a condominium termination agreement to provide for a real estate sale:

> A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

A.R.S. § 33-1228(C).

The subsection's first sentence authorizes a sale. It also unambiguously requires that any such sale be for "all the common elements and units of the condominium." *Id.* "'[A]ll' is an all-encompassing term" that means exactly what it suggests. *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998). "In short, 'all' means all." *Id.* (interpreting "all" in a purchase and sale agreement).

Contrary to the Court of Appeals' decision below (¶¶ 30-31), "may" in A.R.S. § 33-1228(C)'s first sentence does not allow a supermajority of owners to sell less than all the units. Instead, it merely reflects that the termination agreement may—but does not need to—provide for the sale

[3] We cite A.R.S. § 33-1228's 2018 version because that was the version in effect when Dorsey Investments forced the Xias to sell their condominium unit. But all these arguments still apply with full force to the statute's current version.

of the condominium. A.R.S. § 33-1228(E) recognizes as much. That subsection contemplates that a termination agreement may not provide for a condominium sale and explains the consequences for that decision. *See* A.R.S. § 33-1228(E) ("*If* the real estate constituting the condominium is *not to be sold* following termination . . .") (emphasis added).

Upon termination, the condominium can either be sold or not sold. Termination and a subsequent sale can happen together. But they don't have to. That's why Dorsey Investments' reference to the declaration provision that authorizes terminations—but not sales—does not answer the question before the Court. *See* Supp. Br. at 13 (citing APP146). To sell property, real estate investors must rely on A.R.S. § 33-1228(C).

A supermajority of owners who vote to terminate a condominium have a choice. The supermajority can terminate a condominium *without* selling the property. If it does so, "title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests," and each unit owner has a "right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit." A.R.S. § 33-1228(E). If, however, the supermajority wishes to terminate *and* sell the property, it also may do

so—provided that "all the common elements and units of the condominium" are sold. A.R.S. § 33-1228(C). Thus, when a supermajority elects not to sell the property, it cannot sell any of the property. But when it elects to sell the property, it must sell *all* the property.

Subsection (C)'s second sentence also does not authorize investors to sell less than all the units. This sentence merely imposes a requirement on termination agreements that do involve the sale of property—the termination agreement must "set forth the minimum terms of the sale." *Id.* But the sentence does not itself authorize any sales, nor does it purport to define which property can be sold.

Even if subsection (C)'s second sentence were ambiguous (it's not), it still wouldn't matter. This Court must "strictly construe[]" A.R.S. § 33-1228(C), and any coin tosses "favor" property owners. *Kubby v. Hammond*, 68 Ariz. 17, 22 (1948); *accord, e.g.*, *Maricopa Cnty. v. Rana*, 248 Ariz. 419, 423 ¶ 11 (App. 2020). As we explain below, interpreting A.R.S. § 33-1228(C) to allow investors to sell less than all the property would create perverse incentives leading to investors pummeling property owners, not favoring them. Nothing in A.R.S. § 33-1228(C)'s plain language or this Court's interpretive principles stands for this.

II. Upon termination, the association as trustee must act in the interests of all the owners, sell on the best possible terms, and cannot treat the majority owner as the presumed buyer.

When a supermajority of owners votes to terminate and sell a condominium, A.R.S. § 33-1228(D) imposes a trustee obligation on the condominium association. This trustee obligation provides an important safeguard against investor abuse and self-dealing. But in practice, real estate investors ignore their fiduciary duties. They refuse to solicit bids or consider other buyers for the condominium. Rather, they force the remaining individual unit owners to sell their units *to the investors* at a price established by *the investors' own appraiser*. This misconduct violates the statute and harms innocent individual unit owners.

The statute could not be clearer. When a supermajority of owners decides to terminate and sell a condominium and approves the "minimum terms of the sale," A.R.S. § 33-1228(C), the condominium association must act "as trustee for the holders of all interest in the units." A.R.S. § 33-1228(D). The condominium association as trustee then has "all powers necessary and appropriate to effect the sale." *Id.*

As a trustee, the association "owes a fiduciary duty to [the] trust's beneficiaries," and must "act with the highest degrees of fidelity and

utmost good faith." 76 Am. Jur. 2d Trusts § 334 (2023) (trustees owe fiduciary duties). Here, unit owners are the trust's beneficiaries.

When "a trust has two or more beneficiaries, the trustee [must] act impartially" among the beneficiaries. A.R.S. § 14-10803. "[T]he trustee's duty to each beneficiary precludes it from favoring one party over another" and requires that the trustee do "his or her best for the entire trust." 76 Am. Jur. 2d Trusts § 360 (2023). The trustee cannot favor one beneficiary's interests just because that "particular beneficiary has more access to the trustee." Restatement (Third) of Trusts § 79, cmt. b (2023).

These well-established principles apply when the association, as trustee, sells the condominium. "A trustee who is empowered to sell trust property is under a duty to sell it for the best price and on the best terms possible." 76 Am. Jur. 2d Trusts § 525 (2023); *see also, e.g.*, *Forest Guardians v. Wells*, 201 Ariz. 255, 262 ¶ 23 (2001) ("[The trustee] could not reject the high bids without first examining the facts and exercising a fact-based discretion to determine whether those bids would advance the interests of the trust and its beneficiaries."). Thus, "the trustee should secure competitive bidding and surround the sale with such other factors

as will tend to cause the property to sell to the greatest advantage." 76 Am. Jur. 2d Trusts § 526 (2023).

When a supermajority of owners elects to terminate and sell a condominium and approves a minimum price, the association, as trustee, must try to sell the condominium on the best possible terms. Condo Owners do not dispute that A.R.S. § 33-1228 may allow for a sale to the supermajority owner. But to make such a sale, the association must generally seek and consider competitive bids. That's what it means for the association to "act with the highest degrees of fidelity and utmost good faith." 76 Am. Jur. 2d Trusts § 334 (2023). In other words, although A.R.S. § 33-1228 authorizes a supermajority to force a sale over the minority's objections, it does not guarantee that the supermajority owner is the preordained purchaser of the remaining units at a predetermined price. The association can't just assume that the supermajority owner will be the buyer. If it could, there would be no need to have the association serve as trustee and facilitate a sale to the highest bidder.[4]

[4] Along these same lines, Dorsey Investments argues that A.R.S. § 33-1228(C)'s requirement that "all" the property be sold is mere "semantics" because investors could evade the statute's requirements by creating a new entity, pledging 93% interest to it as a capital contribution, deeding that portion of the project to itself, and purchasing

Dorsey Investments contends that it's impossible to sell on the open market without violating A.R.S. § 33-1228(C). It asserts that if the association does not market the property until after the owners enter the termination agreement, there's no way for the termination agreement to "set forth the minimum terms of the sale." A.R.S. § 33-1228(C). Not so.

It's possible to know the minimum terms of the sale and state them in the termination agreement even if the association does not market the property until after the owners enter the termination agreement. As its name suggests, "the minimum terms of the sale" are the minimum terms that owners will accept in a sale. They're the worst deal that the owners will take. For example, the owners could set the minimum terms at $10 million. That sets the floor below which no offer may be accepted. But potential buyers may, of course, offer better terms (*i.e.*, more than $10 million). As a result, the *minimum* terms may differ from the *final* terms,

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the minority block through that entity. (*See* Supp. Br. at 13). But this hypothetical rests on the false assumption that an investor's new entity is the only possible buyer. A.R.S. § 33-1228(D) disproves this assumption. As we explain above, A.R.S. § 33-1228(D) requires the association to operate as a trustee that owes fiduciary duties to sell to the buyer offering the best terms. So, while an investor's new entity may submit an offer, there's no reason to assume that the association will solicit no other offers and just sell the property to the investor's new entity no questions asked.

and the owners can provide the minimum terms in the termination agreement before the association markets the property. Dorsey Investments' argument to the contrary is baseless.

III. Payments to owners must be in proportion to the owners' respective interests in the sale proceeds.

Real estate investors also disregard the statutorily-required mechanism for distributing the condominium sale proceeds to the detriment of individual unit owners.

After the condominium association sells the property to the highest bidder, the "[p]roceeds of the sale [must] be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners[.]" A.R.S. § 33-1228(D). The "respective interests of unit owners are the fair market values of their units, limited common elements and common element interests . . . ." A.R.S. § 33-1228(G)(1). The "fair market values" come from an appraiser, with the possibility of arbitration over the appraised amount. *Id.*

After an appraiser determines the "fair market value" of each unit, that number gets converted to a "respective interest," which is a *percentage value* equal to the appraised "fair market value" of the particular unit divided by the sum of all the appraised "fair market

values" of all the units. Put another way, the appraised values determine the *relative size* of each unit's piece of the pie. The condominium sale creates a pool of money—the "proceeds of the sale"—to be distributed to unit owners. The payment to each unit owner is the unit's "respective interest" percentage multiplied by the "proceeds of the sale." A.R.S. § 33-1228(D), (G)(1); *see also, e.g.*, *Green v. Villas on Town Lake Owners Ass'n, Inc.*, No. 03-20-00375-CV, 2021 WL 4927414, at *1 (Tex. Ct. App. Oct. 22, 2021) (recognizing that an owner's interest in the proceeds of a condominium sale was determined by dividing the appraisal value of the owner's unit by the sum of all the appraisals).

If a majority owner could simply force an individual unit owner to sell at the appraised value, the statute would have said as much. It doesn't. Instead, the statute requires the association to have a trustee, sell all the units, conduct a market transaction, and calculate and distribute proceeds in proportion to the unit owners' respective interests.

Investors ignore this statutory framework to the detriment of individual unit owners. Rather than follow the above steps, investors simply pay individual unit holders the appraisal value as consideration for their unit. Because the investors are also acting as the sole buyer,

there is a perverse incentive for the investors to deflate appraisal values. This harms the individual unit owners.

IV. This Court must interpret A.R.S. § 33-1228 in line with its plain language to properly align incentives.

These two features of the statute (fiduciary duties and the distribution of proceeds) only reinforce that the condominium association must sell all the property in a transaction following termination. That is, the association's obligation as a trustee to sell on the best possible terms and duty to distribute sales proceeds proportionally show why "all" in subsection (C) must mean *all*. If the association, as trustee, must sell on the best possible terms (it does) and distribute proceeds proportionally (it does), then selling everything is the only way to properly align incentives. If, however, Dorsey Investments is right that "all" somehow sometimes means "less than all," the statute encourages self-dealing and incentivizes associations to breach their fiduciary duties. That's what has been happening in Arizona. Only this Court can fix it.

To understand this incentives problem, consider Dorsey Investments' own example. (*See* Supp. Br. at 13). Dorsey Investments apparently believes that it may comply with the statute by creating a new entity, pledging 93% interest to it as a capital contribution, deeding that

portion of the project to itself, and purchasing the holdout units at a fixed price through that entity. Wrong. If an investor can pluck off units and sell them individually without putting its own units up for sale, then the investor has no reason to care about the price. That's especially true when the investor (or its newly created entity) just assumes that it'll be the purchaser. Under those circumstances, the investor's incentives are exactly backwards. It will search for the lowest possible price. It's only when all the units (including the investor's units) are put up for sale that the investor seeks the best possible terms because the investor will receive only a proportional share of the sale proceeds. If the new entity in Dorsey Investments' example offered the best possible price, it would be the purchaser of the investor's 90 units as well as the 6 holdout units, and each unit owner would receive a percentage of the total proceeds.

To prevent real estate investors from continuing to abuse innocent Arizonans under A.R.S. § 33-1228, it's essential that, in each sale, all units are sold—at the best possible price—resulting in a proceed pool that's divided proportionally. That's what the statute says, and that's what this Court should interpret the statute to mean.

V. Condo Owners' experience with A.R.S. § 33-1228 only confirms that investors are abusing the statute.

Condo Owners are former and current condominium unit owners that either had their property taken from them through condominium termination and forcible sale or are in the middle of that process. Their experiences with condominium termination illustrate how everything about the process is currently one-sided to favor real estate investors.

Consider these outrageous examples. With those Condo Owners who have lost their property to forced termination, the investor hand-picked a captive appraiser to value the units, the appraiser produced a lowball value for each of the holdout units, and the investor then told the holdout owners that they must sell to the investor for that deflated price. In the case of one of the Condo Owners, the appraisal came back between $50,000-$65,000 less than the investor was simultaneously agreeing to buy the units for. In the case of another, the appraised value was nearly $100,000 less than a similar sized unit in the same area. The investor did not put any of its own units up for sale. Nor did the investor solicit competing bids or put the units on the open market. Instead, as shown by the termination agreement, the investor just assumed that it was the only buyer, and that the sale price was the lowball appraisal value.

That's not all. Among the Condo Owners, there are also individuals living in condominiums currently subject to takeover efforts by an investor. These individuals are retirees, who own their units outright, and live on a fixed income. The decision to retire for these individuals, as it is for many Arizonans, was based on careful calculations for expected monthly and annual expenses. Given that they own their condominiums outright, these people did not factor in the purchase of a new residence in Arizona's booming real-estate market. Their condominiums are in complexes they have described as "special," "close knit," and a "desert oasis." They believed they would live in these communities for the rest of their lives. But these carefully laid retirement plans are now in jeopardy.

Investors have also targeted other communities for termination and forced sale. The investor in two Condo Owners' communities owns and rents out more than 50% of the condominium's units. Because of financing limitations placed on condominium complexes where rental units exceed 50%, these Condo Owners can sell only to cash buyers. The investor has sought to take advantage of this fact in its quest to reach the 80% threshold, making lowball offers to buy the remaining units. Unfortunately, for unit owners living on a fixed income, those deflated

offers fall well below the cost of a comparable replacement property (or the price they paid for the unit). Without sufficient financial resources to offset the potential increase in cost of living (*i.e.*, the mortgage associated with a more expensive property), Condo Owners are left with the real prospect of being priced out of Arizona or being forced to return to work. Nothing in A.R.S. § 33-1228 justifies any of this investor misconduct.

Conclusion

Real estate investors misinterpret and exploit A.R.S. § 33-1228 to wrongfully take property from innocent Arizonans. The Condo Owners are only a few of the many individual unit owners in Arizona who have fallen or may soon fall victim to these unlawful schemes. To properly align incentives—and to end this abusive practice—this Court should hold that A.R.S. § 33-1228 is facially unconstitutional or at least interpret it to mean what it says. Under the statute, a condominium association must (i) sell "all the common elements and units of the condominium"; (ii) act as "trustee" to sell the property in a manner designed to maximize the benefit to all unit owners; and (iii) divide the proceeds among the unit holders in accordance with their proportional interests in the property.

RESPECTFULLY SUBMITTED this 26th day of September, 2023.

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SUPREME COURT OF ARIZONA

JIE CAO, et al. Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Arizona Supreme Court No. CV-22-0228-PR Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353 *This brief has been filed with the written consent of the parties.*

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPORT OF PLAINTIFFS/APPELLANTS

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INTEREST OF THE *AMICUS CURAE*[1]

The Cato Institute's Robert A. Levy Center for Constitutional Studies is dedicated to restoring the principles of limited government that are the foundation of liberty. This case interests *amicus* because property rights are critical to freedom and prosperity and yet among the least respected constitutional rights.

INTRODUCTION

Life would be so much easier if we could force others to do what we want. Disgruntled sports fans wish they could force a stingy owner to sell their favorite team to a more generous benefactor. Passionate patrons of the arts wish they could force a private collector to sell a prized painting to a public gallery to be appreciated by the masses. Aggrieved social media users wish they could force a big tech company to sell the platform to an idealistic billionaire who promises to fix its moderation rules. And then many wish they could force the billionaire to sell it back.

We all wish we could force unwilling sellers to transfer property to owners we like better. But in a country that respects private property rights, we can't always get what we want. If one private citizen could force another to sell her own private property against her will, that would be an egregious violation of the owner's property rights. The Arizona Constitution recognizes this fact, but the Arizona law at issue in this case does not.

[1] Rule 16(b)(4) Statement: No person or entity other than amicus and its members made a monetary contribution to its preparation or submission.

Under an Arizona law called the Condominium Act, a supermajority of condo owners can force a minority of condo owners to sell their units against their will. That's exactly what happened when an LLC called PFP Dorsey Investments bought ninety out of ninety-six units in a condo building in Tempe. That was enough, under the Act, to allow PFP Dorsey to force a sale of the remaining six units to *itself*—never mind that the remaining owners, including Jie Cao, did not want to sell.

PFP Dorsey defends the Arizona law on both legal and policy grounds, but its arguments fall flat. PFP Dorsey claims that it would be unreasonable to allow a minority of condo owners in a building to potentially block the sale of the entire building and prevent its conversion to a so-called better use:

> Consider a 10-unit condominium on what has now become a busy street surrounded by commercial space negatively driving down residential values. If a commercial developer offers to buy all the units and redevelop it, and nine of the owners agree, should one owner be able to prevent that transaction from occurring when the parties agreed that a 90% vote is the only requirement for this precise circumstance? The answer is no.

Defendants' Supp. Br. At 4.

In fact, as a question of both law and policy, the answer is "yes." Arizonans made that determination in the Arizona Constitution and mandated that property rights should be protected. Furthermore, Arizonans explicitly commanded that this Court should not defer to the legislature on the question of whether a taking is for a

truly public use and reiterated this decision in the wake of *Kelo v. New London* with the Private Property Rights Protection Act, which trumps other Arizona statutes.

That determination is also correct as a policy matter. Property rights are critical to achieving a free and prosperous society; as Friedrich Hayek said: "The system of private property is the most important guaranty of freedom." FRIEDRICH HAYEK, ROAD TO SERFDOM 103 (1944). The protection of property rights is strongly correlated with economic prosperity. But fully protecting property rights means protecting those rights even when individual property owners wish to use their property in manners that may seem inefficient. The forced sale of property through eminent domain can be too easily abused when (mostly private) "economic benefits" are enough to justify takings. And the supposed problems caused by unwilling sellers are overblown, anyway—time and time again developers have managed to prosper despite holdouts.

If the government can negate property rights whenever it deems it to be in the public interest, people do not really have property rights at all. Property rights are too important to be so easily thrown away. This Court should hold the challenged provision incompatible with the Arizona Constitution.

ARGUMENT

I. THE CONDOMINIUM ACT EFFECTS A TAKING FOR PRIVATE USE IN VIOLATION OF THE ARIZONA CONSTITUTION.

A key principle going back to the Founding Era is that the government may not take a person's property for *private* use, even with just compensation. In *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), Justice Samuel Chase wrote of a "law that takes property from A. and gives it to B.," and remarked that the "genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them." *Id.* at 388. John Locke, whose works were very influential on the American founders, stated that "I have truly no property in that which another can by right take from me when he pleases against my consent." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 360–61 (Peter Laslett ed., Cambridge Univ. Press, Student ed. 1988) (1689). William Blackstone, a similarly influential figure to early American jurists, said that property rights cannot be violated "even for the general good of the whole community." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 135 (Oxford, Clarendon Press 1765). This principle led to the inclusion of the Takings Clause in the Fifth Amendment, which guarantees that private property will not be taken for private use, and even if taken for public use, can only be taken with "just compensation."

The Arizona Constitution similarly holds that "[p]rivate property shall not be taken for private use, except for [listed uses not relevant here]" ARIZ. CONST. art. 2,

§ 17. Whether the use for which the private property is taken is a public use is a question for the court, which must not give any deference to the legislature. *See id*.

A. Under Arizona takings law, the taking is clearly unconstitutional.

Under the Arizona Takings Clause, the taking in this case is not for public use. In *Bailey v. Myers*, the court of appeals invalidated a taking that was part of a city development project because it was not for public use. *See Bailey v. Myers*, 206 Ariz. 224, 225–26 (2003). It held that "[t]he constitutional requirement of 'public use' is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use." *Id.* at 230.

PFP Dorsey's taking of Jie Cao's condominium unit fails *Bailey*'s test. The private developer PFP Dorsey holds title to the entire building, including those units forcibly sold against the original owners' will. *See Cao v. PFP Dorsey*, 243 Ariz. 552, 555 (Ariz. Ct. App. 2022). The record does not appear to say for what purposes the property will be used, but PFP Dorsey is the sole driver of this forced sale. The sale involves a private developer selling the few condominium units it did not already own to *itself*, and the private developer will be the primary beneficiary of the new use. *See id.* at 554–55. Taken together, *Bailey*'s factors weigh against the use being public.

Arizona law goes even further to cabin the scope of "public use" than the text of the Arizona Constitution's Takings Clause alone. In the aftermath of *Kelo* in 2006,

Arizona passed by nearly a two-to-one margin the Private Property Rights Protection Act (PPRPA), A.R.S. §§ 12-1131–38 (LexisNexis 2023). Critically, the PPRPA explicitly excludes from the category of public use "the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health." A.R.S. § 12-1136(5)(b). But the only potential public purpose justifying takings under section 33-1228 of the Condominium Act is promoting economic development. "[I]f a conflict between [the PPRPA] and any other law arises, [the PPRPA] controls." A.R.S. § 12-1137.

Nor can the force of the PPRPA be avoided by recharacterizing the taking as a matter of contract rather than statute. PFP Dorsey argues, and the court below agreed, that Cao is bound to the terms of the Condominium Act by private contract because she voluntarily signed a condominium agreement "grant[ing] the Association the 'rights, powers and duties as are prescribed by the Condominium Act.'" *Cao*, 243 Ariz. at 556. For this reason, even though the court below agreed that "A.R.S. § 33-1228 is unconstitutional on its face," *id.* at 555, the court held that the forced termination and sale under section 33-1228 was constitutional as applied to Cao. *Id.* at 558.

Cao has explained why she did not, in fact, agree to these statutory terms by signing the contract. *See* Plaintiffs' Supplemental Brief at 14–24; Cao/Xia Petition at 12–19. But even if Cao did agree, that would not make § 33-1228 of the

Condominium Act constitutional—it would only mean that there is a separate private contract containing terms identical to those in the statute. For the reasons explained above, section 33-1228 of the Condominium Act is unconstitutional.

II. TAKINGS FOR ECONOMIC DEVELOPMENT DO MORE HARM THAN GOOD.

PFP Dorsey's policy arguments are no more successful than its legal ones. PFP Dorsey largely rests its appeal on the so-called "holdout problem," insisting that this is a problem requiring government intervention. The classic formulation of the holdout problem proceeds as follows: A developer seeks to purchase a property to move forward with a larger project, but the property owner refuses to sell the property to the developer at market price. Thus, the developer must either pay above market price or forgo purchasing the property altogether. If the developer purchases the property at above market price, the project produces less net economic gain. If the developer declines to purchase the property at the inflated price, the developer must change the project, reducing the value of the project to the developer. These losses, if large enough, could cause the developer to cancel the project.

Many development projects are economically beneficial in that the new use of the property produces more wealth than its original use. Since this increased wealth generation is taxable, some argue that the increased tax revenue to the government can benefit the surrounding community, which can have trickle-down effects on the surrounding economy as the extra wealth is spent. On this view, the

holdout problem can cause economic harm by interfering with economically beneficial projects. *See, e.g.*, Thomas J. Miceli & Kathleen Segerson, *Sequential Bargaining, Land Assembly, and the Holdout Problem* 2–4 (Univ. of Conn. Dept. of Econ., Working Paper No. 2011-13R, 2012).

But even accepting that these harms may occur, government interventions attempting to "solve" the holdout problem do not actually make things better. Strict protection of property rights produces much more prosperity than government control of the economy for the "public good." And as a practical matter, the harm holdouts may cause is outweighed by the harm caused by eminent domain abuses.

A. Property rights are critical for economic prosperity.

The profound value of property rights means that the holdout problem is less harmful than the abuse of eminent domain. Strong protection of property rights is critical to economic prosperity. One cannot live, let alone live well, without obtaining goods. And people generally will not spend time, effort, and resources producing goods unless they benefit from that expenditure. As Aristotle said: "What is common to many is taken least care of, for all men have greater regard for what is their own than for what they possess in common with others." Walter E. Williams, *Economics and Property Rights*, FOUND. FOR ECON. EDUC. (Jan. 1, 2008). The primary critics of property rights, such as Karl Marx, denied this fundamental aspect of human nature. *See* Gerald P. O'Driscoll Jr. & Lee Hoskins, *Policy Analysis No.*

482, Property Rights: The Key to Economic Development, CATO INST. 4–5 (2003). Property rights ensure that people get the benefit of their expended time, effort, and resources.

Our Founding Fathers and Arizona's framers understood the importance of protecting property rights. *See Bailey*, 206 Ariz. at 227. John Adams proclaimed that "[p]roperty must be secured or liberty cannot exist." John Adams, *Discourses on Davila*, *in* 6 WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1851). Alexander Hamilton declared that "one great obj[ect] of Gov[ernment] is the personal protection and security of property." I MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 534 (1937). In *Federalist* 10, James Madison famously wrote that "the first object of government" is the "protection of different and unequal faculties of acquiring property." ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* & THE LIMITS OF EMINENT DOMAIN 37 (2015) (quoting THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed. 1961)).

This understanding was evident in the law of the founding era. In 1776, George Mason wrote the Virginia Declaration of Rights, which helped inspire the Declaration of Independence, other state constitutions, and the federal Bill of Rights. In its first article, the declaration stated that "all men . . . have certain inherent rights, of which . . . they cannot, by any compact, deprive or divest their posterity; among which [is] . . . the means of acquiring and possessing property." Memorandum by R.

Carter Pittman, The Virginia Declaration of Rights: Its Place in History (Oct. 28, 1955). In 1795, Supreme Court Justice William Patterson, riding circuit, wrote that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man." *Vanhorne's Lessee v. Dorrance*, 20 U.S. 304 (C.C.D. Pa. 1795). Even Adam Smith stated in a 1760s lecture in Glasgow that "[t]he first and chief design of every system of government is to . . . prevent the members of society from incroaching [sic] on one another's property, or seizing what is not their own . . . to give each one the secure and peacable [sic] possession of his own property." ADAM SMITH, LECTURES ON JURISPRUDENCE 5 (R. L. Meek, D. D. Raphael & P. G. Stein eds. 1978).

The Founders were particularly interested in protecting property rights from "oppressive majorities, special interests, and government officials." SOMIN, *supra*, at 42. James Madison, author of the Fifth Amendment Takings Clause, feared that property rights would be undermined by the majority under republican government. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 16–66 (1990). Gouverneur Morris agreed, stating that "[e]very man of observation had seen in the democratic branches of the State Legislatures, . . . [and] in Congress . . . excesses ag[ainst] . . . private property." SOMIN, *supra*, at 42 (quoting FARRAND, *supra*, at 512). Morris feared not just that a majority would seize the property of the wealthy minority, but that the wealthy would use their

influence to threaten the property rights of the poor. *See id.* These fears led to the ratification of the Fifth Amendment Takings Clause.

The Founders were correct to prioritize the protection of property rights. A 2001 study measured the correlation of fourteen potential explanatory variables with Gross National Income per capita to determine which variables best explain economic prosperity, and the variable with the highest level of significance was property rights. *See* Richard Roll & John Talbott, *Why Many Developing Countries Just Aren't* 4 (UCLA Anderson Sch. of Mgmt., Finance Working Paper No. 19-01 2001). Two other studies also found a significant relationship between stronger property rights protections and higher income per capita. *See* Germinal G. Van, *Property Rights and Income Inequality* 8–12 (Jan. 2021), MPRA Paper 105195; Timothy Besley & Maitreesh Ghatak, *Property Rights and Economic Development*, *in* 5 HANDBOOK FOR DEVELOPMENT ECONOMICS 4554–56 (Dani Rodrik & Mark R. Rosenzweig eds., 2010). The 2007 edition of *The Economic Freedom of the World* found that the countries in the top quartile of economic freedom had an average GDP per capita of $26,013, versus an average GDP per capita of $3,305 for the bottom quartile. *See* Williams, *supra*. Similarly, the top quartile had an economic growth rate of 2.25% compared to 0.35% for the bottom quartile. *See id*. Given that a 10% increase in a country's average income corresponds to a 20–30% decrease in the poverty rate, *see* DEP'T FOR INT'L DEV., U.K., GROWTH: BUILDING JOBS AND

PROSPERITY IN DEVELOPING COUNTRIES 3 (2008), this provides a real and profound benefit to individual well-being.

The benefits of economic freedom are seen even in places with related language, culture, and traditions. South Koreans have, on average, at least 17 times the income of North Koreans. *See* O'Driscoll Jr., *supra*, at 2. Finland and Estonia are practically neighbors, their languages share a common root, and they have similar cultures and values. Yet while their standard of living was approximately the same in the 1930s, in 2000, after Estonia suffered fifty years of Communist rule, the average Finn earned from 2.5 times to over seven times what the average Estonian earned. *See id.* East Germany was also significantly poorer than West Germany after suffering Communist rule. *See id.* Communist China's real per capita GDP in 2000 was less than $4,000. *See id.* Taiwan, which split from China during the Communist revolution, had a real per capita GDP of more than $17,000. *See id.* Hong Kong, which had ended a century of British rule just a year before, had a real per capita GDP $25,153. *See id.* In every case, the nation that better respected property rights had greater prosperity.

Given this fundamental fact of human prosperity, eminent domain abuse is a much more serious problem than the holdout problem that eminent domain attempts to solve. *Voluntary* exchanges make all parties either better off or no worse off; otherwise not every party would agree to the exchange. *Involuntary* exchanges like

takings do not inherently create a net benefit, since one party is forced to sell at a price they would not choose to sell and thus is made worse off. In many circumstances the benefit will be outweighed by the harm.

Advocates for compelled takings of "holdout" properties argue that the owners are often not worse off when forced to sell, because they only held out to extract extra value from the developer. But it is frequently impossible to distinguish "strategic" holdouts from genuine holdouts. *See* Edward J. Lopez & J. R. Clark, *The Problem with the Holdout Problem*, 9 REV. L. & ECON. 151, 158 n.10 (2013). For sentimental and other reasons, many people value their own property much higher than the "market" price, particularly homes they have long lived in and family heirlooms. It is entirely reasonable that they would refuse to sell at market price. Because of this greater personal valuation, using eminent domain to gift property to developers decreases economic efficiency. *See* SOMIN, *supra*, at 92.

In sum, forced sales undermine property rights and deprive owners of the unique value they derive from their personal property, both of which lead to decreased economic and overall well-being.

B. Abuse of eminent domain causes more harm than the holdout problem.

Even if some takings provide a net benefit, the government cannot be trusted to ensure that eminent domain is used primarily for beneficial takings. The government consists of flawed, corruptible humans who often wield their power in

"efficiency-reducing, opportunistic" ways rather than just to "recover[] lost allocative efficiencies generated by holdouts." Lopez & Clark, *supra*, at 153.

Given that most takings benefitting private businesses can be rationalized as promoting "economic development," *see* SOMIN, *supra*, at 74–75, such takings create great opportunity for private businesses to rent-seek—to use the government to take property for the private businesses' own private gain. *See id.* at 81. Rent-seeking comes with its own economic costs. *See id.* at 75. And government officials are incentivized by rent-seekers to take property from genuine good-faith holdouts, causing economic inefficiency. *See* Lopez & Clark, *supra*, at 162–63. Further, the "economic development" rationale is so broad that it allows corrupt officials to come up with *some* benefit, even when those supposed benefits often fail to materialize. *See* SOMIN, *supra*, at 76–78.

No case better showcases this issue than *Kelo* itself. Private interests hopelessly compromised the project from the beginning. When New London, Connecticut, created the New London Development Corporation (NLDC) to establish an economic development plan to help with the city's economic troubles, the appointed head of the NLDC was married to a high-ranking employee of Pfizer. *See id.* at 15. This led the head to recruit an executive of Pfizer to join the NLDC board, partly in the hope of getting Pfizer to build a new headquarters in New London. *See id.* Pfizer conditioned its move to the area on New London condemning

90 acres of property to turn into "upscale housing, office[] space, a conference center, a five-star hotel, and other facilities . . . useful to the corporation and its employees." *Id.* at 16. This demand directly led to the condemnations at issue in *Kelo*. Much of the condemnation was not even practically necessary for the redevelopment but was sought for aesthetic reasons. *See id.* at 17. Yet Pfizer and the NLDC's representatives insisted that Pfizer was not involved in the condemnation decision and did not make it a condition for moving into the area. The full truth of Pfizer's involvement was not revealed until after the Supreme Court's ruling. *See id.*

Worse, after the tremendous legal battle, the redevelopment plan fell through. Largely due to flaws in the project, Pfizer abandoned its New London facility in 2009, costing New London 1,400 jobs. *See id.* at 235. A decade after the *Kelo* decision, the condemned properties at the center of *Kelo* remained "empty and undeveloped," occupied only by feral cats. *Id.*

But *Kelo* is not the only example of eminent domain gone wrong. In 1998 in Garden Grove, California, a mobile home park for fixed-income senior citizens was condemned for a private mall project that was never completed. *See* Dana Berliner, *Government Theft: The Top 10 Abuses of Eminent Domain*, INST. FOR JUST., at 1 (Mar. 2002). In another case, a family was forced to sell their home of 20 years at below-market value as part of a plan to create yet another golf course in West Palm Beach, Florida, which was never built. *See* Jake Rossen, *7 Maddening Examples of*

Eminent Domain, MENTAL FLOSS (Apr. 28, 2015); Stephen Deere & Andy Reid, *College Pitches Hillcrest Plan: Apprehensive Residents Want to See Details*, SUNSENTINEL (Sept. 19, 2005).

In the early 1990s, Bremerton, Washington, settled a suit about odor complaints from a sewage treatment plant and agreed to install odor controls. *See* John Stang, *Bremerton Case Among Inspirations for Anti-Eminent Domain Legislation*, KITSAP SUN (Jan. 19, 2011, 7:33 PM). The city then condemned 53 homes near the sewage treatment plant, including one owner's home of 40 years, supposedly to create an odor easement. *See id.* However, days after the condemnations were finalized, the city rezoned the land and sold it to a car dealership for $1.99 million. *See id.* The city never created an odor easement. *See id.*

In 1997, St. Luke's Pentecostal Church in North Hempstead, New York, managed to purchase property for a new church using more than a decade of savings. *See* Berliner, *supra*, at 9; Jane Lampman, *Property Rights: Not a Given for Churches*, CHRISTIAN SCI. MONITOR (Feb. 16, 2005). The building department denied the church permits for the previously unmentioned issue of insufficient parking, forcing the church to engage in costly litigation. *See* Berliner, *supra*, at 9. And after all that, the North Hempstead Community Development Agency (NHCDA) condemned the property. It turned out that the property had been slated for condemnation before the church even purchased it, though no one mentioned that to the church. S*ee id.* The

government offered the church $80,000 for the property, $50,000 less than what the church had paid. *See* Lampman, *supra*. When the church tried to object, the NHCDA successfully argued to the court that New York's 30-day window for objecting to condemnations expired in 1994, before the church bought the property. *See id.* at 9. After title passed to the NHCDA, the church discovered that the time limit never applied to the case. It tried to sue again, but the litigation was unsuccessful. *See* Lampman, *supra*.

In 1997, Hurst, Texas, used eminent domain to seize 127 homes to expand a real estate company's mall, hoping to increase sales and property tax revenue. *See* Rossen, *supra*; Berliner, *supra*, at 11. Ten couples, who had lived in those homes for as many as 30 years, sued to stop the condemnations. *See* Berliner, *supra*, at 11. The trial judge refused to stay the condemnations while the suits were ongoing, so the residents lost their homes. S*ee id.* The judge also refused an extension to a resident whose wife was in the hospital for brain cancer, forcing him to leave her bedside to move out his belongings. *See* Rossen, *supra*. A total of three couples died and four others suffered heart attacks during the litigation. *See* Berliner, *supra*, at 11. There was evidence that the land surveyor who designed the roads for the mall was told to change the path of one road to run through eight of the litigants' houses. S*ee id.* After years of litigation and receiving no compensation, the families were forced to settle. S*ee id.*

This is far from an exhaustive list; one can find many more examples of abuse. But the true amount of harm caused by eminent domain is unknown. One report estimated that there are approximately 80 municipal projects per year involving the use of eminent domain for the benefit of private businesses, and many involve condemnation of multiple properties. *See id*. Frequently, property owners cannot afford litigation and therefore settle. *See id.* Many of those who do litigate have the legal decisions in their cases go unpublished and unpublicized. But just because these cases are not covered does not mean that they do not exist. And it's well known that the harm disproportionately falls on the politically powerless, such as minorities and the poor. *See* SOMIN, *supra*, at 82–83.

In contrast, the holdout problem is not as problematic as some suggest; economic development has long managed to succeed despite holdouts. In 1902, Macy's decided to move its flagship New York store to the corner of 34th Street and Broadway. *See* Mimi Kirk, *The World's Most Stubborn Real Estate Holdouts*, BLOOMBERG (Apr. 17, 2017, 3:05 PM). The new store was planned to cover the entire block. *See id*. However, the owners of the competing Siegel-Cooper Co. bought one parcel on the corner of the block to bargain for a lease of the old Macy's location. *See id.*; Lauren Glen, *Real Estate Holdouts Who Held Out To The Bitter End*, RANKER (June 22, 2023). Macy's thwarted this plan by refusing to negotiate, and it instead built the store around the tiny parcel. Glen, *supra*. Macy's has never

owned the parcel since, but it advertised on the parcel's exterior from the 1940s until Amazon outbid it in 2021. *See* Kirk, *supra*; Glen, *supra*. Despite Macy's being unable to get part of the property it sought, it still successfully built the store and even leased the holdout parcel for advertising space.

In 1983, Japan planned to expand the Osaka section of its Hanshin Expressway. *See* Kirk, *supra*. However, the site of a planned exit ramp was already owned. *See id.* The owners, who had held the property since the mid-19th century, wanted to build a 16-story office building on the land and refused to sell. *Id*. After five years of negotiations, the government and the landowners managed to come to a compromise without the use of eminent domain: in exchange for approving permits for the office building, the government leased the fifth, sixth, and seventh floors of the building and built the exit ramp through it. *See id.*; Glen, *supra*.

In 2005, the legal practice Acker + Associates P.C. moved to the Figo House in Portland, Oregon, built in 1894 in Queen Anne Victorian Style. *See* Glen, *supra*; *The Figo House*, ACKER + ASSOCIATES P.C. (last visited Sept. 25, 2023). TriMet, a local transportation development authority, sought to acquire the house by eminent domain on the theory the land was needed to build a public transit system. *See* Glen, *supra*. Acker + Associates attorneys managed to stop the eminent domain action when they discovered that TriMet really intended to acquire the land and sell it to

Portland State University for the construction of a dormitory. *See* Glen, *supra*. This shows how eminent domain can be—and is—abused for private gain.

Advocates of using eminent domain to solve the holdout problem miss the insight of Arthur Pigou:

> In any [market failure], there is a *prima facie* case for public intervention. The case, however, cannot become more than a *prima facie* one, until we have considered the qualifications, which governmental agencies may be expected to possess for intervening advantageously. . . . [W]e cannot expect that any public authority will attain, or will even whole-heartedly seek, that ideal. Such authorities are liable alike to ignorance, to sectional pressure and to personal corruption by private interest.

Lopez & Clark, *supra*, at 164 (quoting ARTHUR PIGOU, THE ECONOMICS OF WELFARE 331–32 (4th ed. 1932)).

Ultimately, the choice to permit the forced sale of property by unwilling sellers for the benefit of others is a choice between two systems: the first enforces and protects private property rights, even when that means individuals can stand in the way of economic development projects that would provide benefits to others. The second grants the government the power to seize private property to support projects it likes, with enormous potential for abuse. The Framers believed that the first system was the better one, and history has proven them correct. Arizonans have made the same choice. This Court should faithfully enforce it.

CONCLUSION

This Court should reverse and rule for Plaintiffs/Appellants.

Respectfully submitted,

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IN THE ARIZONA SUPREME COURT
STATE OF ARIZONA

JIE CAO, et al., Petitioners/Appellants/ Cross-Respondents v. PFP DORSEY INVESTMENTS, LLC., DORSEY PLACE CONDOMINIUM ASSOCIATION Respondents/Appellee/ Cross-Petitioners	Arizona Supreme Court Case No: CV-22-0228-PR Court of Appeals Div. 1 No: 1CA-CV-21-0275 Maricopa County Superior Court No: CV2019-055353

SUPPLEMENTAL BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLEE

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INTEREST OF CAI AS AMICUS CURIAE

As noted in its previously-filed Amicus Brief, Community Associations Institute's (CAI) is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 43,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 74.1 million homeowners who live in more than 355,000 community associations in the United States. Approximately 9,900 community associations are located in Arizona serving 2,264,000 homeowners. Of that number, approximately one-third, 755,000, live in a condominium.[1] CAI is representing not only itself, but also its tens of thousands of members on this important issue. CAI submits this brief to address the updated questions presented in this Court's August 23, 2023 Order.

INTRODUCTION

Appellants present the taking issue as though condominiums are creatures of common law and must be administered using common law real estate principles.

[1] https://foundation.caionline.org/publications/factbook/statistical-review/

But the condominium is a unique form of real property ownership and present-day condominiums throughout the United States, Arizona included, are created and governed by specific statutory schemes that deal with ownership, administration, transfer, and termination of commonly held property interests. More fundamentally, it is that statutory scheme, not the common law, that frames the issues in this controversy. And it is that statutory scheme that, in turn, reveals why no taking occurred in the termination and payment of the property interest involved in this proceeding.

ARGUMENT

I. The History of Condominium Law in the United States

Although condominiums have existed since Greek and Roman times, modern condominium law is derived from civil law. Because condominiums combine the horizontal division of land with the inseparable combination of fee simple ownership of a unit as well as common ownership of "common elements" as tenants in common, condominiums cannot legally be formed under the common law in the absence of statutory authority.

In fact, it was not possible to finance or obtain title insurance for a condominium unit—and arguably create a valid condominium—until a state passed an **enabling** statute in the 1960s. At that point, the Federal Housing Administration (FHA) agreed to finance condominium units if—and only if—a state enacted a

statute enabling condominium ownership. By 1965, almost every state had enacted a short and simple statute—a "Horizontal Property Act" or "Unit Property Act" or "Condominium Act"—authorizing the creation of condominiums based on the FHA Model Act which was taken from the Puerto Rican statute. Arizona was no exception, passing its Horizontal Property Act in 1962. *See* Appendix APP019

These statutes, Arizona included, provide for termination of the condominium by a vote of a supermajority (typically at least 80%) of the condominium unit owners.[2] The reason for that again follows directly from the modern condominium being a creature of statute. Specifically, under common law, as applied in the United States, there could *not* be a valid condominium without a state enabling statute. As a result, accepting the statutory provision for termination and sale is a precondition to allowing the formation of a condominium in the first place. That termination provision likewise is implicitly incorporated into the condominium formation documents—none of which would be valid under state law in the absence of the statute.

Developments after the mid-1960s revealed that the original enabling acts lacked needed flexibility and requisite consumer protection. The National Conference of Commissioners on Uniform State Laws (now the Uniform Laws

[2] Arizona's 1962 Horizontal Property Act originally required 100% consent. See A.R.S. § 33-556 attached.

Commission) accordingly created a drafting committee in 1977 to modernize condominium law in the U.S. The revisions ultimately adopted were modeled on a second generation state statute enacted by Virginia in 1974. The Uniform Condominium Act, approved in 1980, added development flexibility, disclosure and other consumer protection provisions, and, as relevant here, a modified termination provision. The Uniform Act provision based distributions on termination on the relative fair market value of the units, rather than the percentage interest assigned at the creation of the condominium (*see* Unif. Condominium Act 1980 § 2-118 and comments) (*see* Uniform Condominium Act in Appellees' Supplemental Brief as APP 023 – APP 189).

Arizona's codification of the Uniform Condominium Act (referred to hereafter as the "Act") became effective in Arizona on January 1, 1986 (*see* A.R.S. § 33-1201 *et seq.*). Section 33-1203 of the Act, as codified, specifically states that "the provisions of this chapter shall not be varied by agreement and rights conferred by this chapter shall not be waived." This includes the right of 80% of the unit owners to terminate the condominium in accordance with § 33-1228 of the Act.

In short, from the initial state enabling statutes, through the drafting of the Act, and the revised statutes that followed, condominiums have been governed by specific state law addressed to their unique features. Those unique features include the manner in which interests are owned and, concomitantly, by which they can be

terminated. The manner of termination of condominium interests, moreover, aligns with the manner in which condominiums are owned. Without a specific termination provision, the administration and management of condominium associations would be unworkable.

Ignoring the historical background in which condominium law developed, Appellants obfuscate the reality of what happens in a transaction involving the termination of a condominium. It is not the state or a private party that is taking anyone's property. The statute merely facilitates the disposition of the property of a unit owner by the other unit owners. Thus, if Arizona were to find that statutory termination of a condominium is an unconstitutional taking, it would be alone among the states in disallowing the organized disposition of condominium property in accordance with the statutory process that state legislatures across the country have enacted and which courts and condominium associations must follow.

II. Proper Analysis Of Condominium Law Principles Shows That A Statutory Termination is Not a Taking

Appellants have it exactly backwards in claiming that the statutorily-authorized termination here is unprecedented, draconian, and an unconstitutional taking. Under controlling law and well-established condominium law principles, it is none of those things. It is a private payment of fair market value for a private interest pursuant to a private agreement. That transfer is not a confiscation; it is a contractual transfer of ownership for value.

Even beyond the condominium context, the statutorily-authorized transfer of ownership here is no aberration or outlier. It is analogous to the division of interest by partition of real property or in transfers in bankruptcy. These legislative regimes underscore that in appropriate contexts the legislature and the law can authorize transfers of ownership by statute without implicating constitutional taking principles. The statutorily-authorized transfer in this instance is no different.

Partition. A.R.S. § 12-1211 specifically provides that owners may compel partition of real property in the absence of a voluntary contract and against the will of the minority owners. If termination of a condominium violates the Arizona Constitution, then so does partition under § 12-1211. Because of the lack of case law to support their position, Appellants argue simply that because this case involves private property that ends up in the "hands of a private company," that concludes the analysis, and Article 2, § 17 of the Arizona Constitution is violated. Appellants' Supplemental Brief at 6.

But this analysis breaks down quickly because Appellants agree that courts can order partition and the forced sale of property without violating the Arizona Constitution. *Id*. at 6. Partition involves private property that ends up in the hands of a private party, so if the Appellants' terse assertion were correct, partitions of property should also be unconstitutional under the Arizona Constitution. To distinguish the statutory partition of property by a court from an agreement by a

supermajority of condominium owners to terminate property interests by statute, the Appellants cite U.S. constitutional law relating to longstanding governmental rights to access private property under the common law. *See* Appellants' Supplemental Brief at 6 (citing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)). But this case has nothing to do with the government having access over private property and Appellants' arguments fail under their own analysis.

Appellants also make the unsubstantiated assertion that because partition has long been recognized as an appropriate action by a court, it does not violate the Arizona Constitution. *See* Appellant's Supplemental Brief at 6. In support of this argument, Appellants cite to The Institutes of Justinian, citing to "partition, which is available to co-heirs in order to divide an estate." *See* Appellant's Response to Cross-Petitions for Review at 11. Appellants neglect to mention that just a few paragraphs later The Institutes of Justinian identifies causes of action that include "the partition of an inheritance, **and of the division of any particular thing or things, which belong in common to diverse persons**." *See* 4 Justinian, *Institutes*, tit. 6, § 28 (ca. 533) (emphasis added).

That passage reflects that courts in equity have had the power to sell property in common ownership structures. As one court noted:

> The right of partition is incident to all real estate holden in common, whether corporeal or incorporeal, and especially whenever it can not be otherwise enjoyed. The right of beneficial enjoyment of property is as essential as the right of ownership. And, indeed, by the principles of

> the common law…this right of partition enters into the very nature of the title of estates holden in common, and is inseparable from them. The only question is, how can it best be made?

Richardson v. Monson, 23 Conn. 94, 97 (Conn. 1854).

Condominium interests, too, are held in common. The ownership of a unit in a condominium is inextricably intertwined with the common undivided interest each unit owner has in the common elements of the community. Condominium statutes, including § 33-1217E of the Arizona statute, explicitly prohibit the separation of the fee simple interest in the unit from the tenancy in common interest in the common elements. That is why Arizona's Legislature has put into place a procedure by which owners in a condominium form of ownership can dispose of the property by the agreement of a supermajority of owners. This is consistent with traditional principles of property law and the State's Legislature has simply answered the question for Arizona on "how can it best be made." *See Richardson*, 23 Conn. at 97 (Conn. 1854).

Finally, describing the transfer as a "forced sale" does not aid Appellants' "taking" label either. Arizona law already provides for judicial partition and forced sale of co-tenancy property. A.R.S. §12-1211. There generally are no defenses that ultimately block a partition action from resulting in a property sale unless the property owners can agree on an alternative solution. As a result, partition actions often result in a forced sale of the property and the distribution of the sale proceeds

according to the percentage of ownership interests that each owner has in the real estate. Here, the Act provides more protections for owners than would exist in a typical partition process.

Bankruptcy. The extinguishment of joint co-ownership interests under bankruptcy law provides another example of when private property ends up in the hands of a private party but is not considered a private taking. As Amicus Curiae Goldwater Institute notes in their Supplemental Brief, in the extinguishment of joint co-ownership interests under bankruptcy law, as in this case, the government is not appropriating anything. *See* Supplemental Brief of Goldwater Institute at 5.

The Goldwater Institute cites to an outlier case from the United States Bankruptcy Court in the Eastern District of New York that found (incorrectly) that such a case involved a private taking. Subsequent decisions explain why that reasoning cannot be followed:

> Apparently, the trustee was too exhausted to take an appeal from this interesting, if questionable, decision, so the Second Circuit never opined on Judge Holland's analysis.
>
> Judge Holland's decision is rarely cited and never, to the best of this Court's knowledge, followed for the proposition that property owned by the entireties is not subject to sale by a trustee under Section 363(h) of the Bankruptcy Code. On the other hand, numerous cases decided in this Circuit and elsewhere since *Persky II* have continued to apply Section 363(h) to authorize the sale of property owned as tenants by the entireties. *See, e.g., In re Kahan*, 28 F.3d 79 (9th Cir.1994); *In re Garner*, 952 F.2d 232 (8th Cir.1991); *655 *In re Rivera*, 214 B.R. 50 (D.P.R.1997); *In re Grabowski*, 137 B.R. 1 (S.D.N.Y.1992); *In re Pielli*, No. 91–4364(CSF), 1991 WL 274225 (D.N.J. Dec. 16, 1991).

Sapir v. Sartorius, 230 B.R. 650, 654–55 (S.D.N.Y. 1999).

Of course, the fact that the specific section of the United States Bankruptcy Code, 11 USCA § 363(h), allows for the sale of property, including "the interest of any co-owner in property," and is being applied by Bankruptcy Courts across the nation is good evidence that such sales are not a private taking. The Bankruptcy Code provisions, like the partition statutes, simply provide for a means of transferring property that aligns with the context in which the property rights are adjudicated. The transfer in the context of condominium statutes stands on the same footing.

III. The Condominium Termination Process Provided by the Arizona Legislature is Not a Taking.

The language of Sec. 17 of the Arizona Constitution is clear: "No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide,…" The obvious intent of this taking protection is that private property cannot be taken without just compensation. *City of Scottsdale v. Cgp-Aberdeen, LLC*, 177 P.3d 1198, 1200, 217 Ariz. 626, ¶8 (Ariz. App. 2008); *Calmat of Arizona, v. State ex rel. Miller*; 859 P.2d 1323, 1325, 176 Ariz. 190, 192 (Ariz. 1993).

The disposition of condominium property by termination under A.R.S. § 33-1228 is not a taking under this Article. Rather, in perfect harmony with that constitutional principle, A.R.S. § 33-1228 provides for and enumerates how compensation will be paid. First, the private property is not taken. Instead, the property interest is sold after a decision by the unit owners to sell the common elements held as tenants in common. The condominium concept (and § 33-1217) precludes selling those interests separately from the units so they must be sold together. Second, the statute's termination provision provides for compensation at fair market value.

Such a sale thus is not a taking by a third party but rather a decision to sell by a supermajority of the unit owners with a corresponding payment of just compensation.

In that regard, Section 33-1228 requires notice to all unit owners and the vote of at least 80% of the unit owners (or a higher percentage, or a lower percentage in a nonresidential condominium, if the declaration so provides). The unit owners are protected by the requirement that their share of any distribution is based on the relative fair market value of their units. The law grants each owner "the fair market value of their units, limited common elements and common element interest immediately before the termination, their pro-rata share of any monies in the association's reserve fund and the operating account and an additional five percent

of that total amount for relocation costs." A.R.S. § 33-1228(I)(1). Furthermore, the law contains an appraisal process that allows for two independent appraisals, along with an arbitration process, if there is a disagreement on the value. *Id.* None of these protections exist in the common law.

In sum, as structured under § 33-1228, this transfer has none of the attributes of a taking. It is a consensual disposition of the condominium property by a supermajority of the property owners in full accordance with the law governing condominiums and to which all unit owners were subject when they decided to purchase a condominium unit. Likewise, termination is not a taking without compensation; every unit owner receives full value for their fee simple unit and their tenancy in common interest in the common elements.

In contrast to termination, in a taking by a public or private party, there is nothing consensual about it and no private agreement is involved. Declaring the termination and disposition here to be an unlawful taking not only would contravene existing law, but it would also produce unworkable and undesirable results. As noted, Arizona would stand alone in rejecting this aspect of what is otherwise uniform statutory law nationwide. But more fundamentally, as the nationwide consensus across state condominium statutes reflects, divergence from these well-established principles would make condominium ownership unworkable. If termination without a contract consented to by all unit owners were an unlawful

taking, then it would become almost impossible to dispose of an obsolete or destroyed condominium. Requiring unanimous agreement would only encourage extortion of the majority by a dissident minority holding out for a disproportionate and unfair share of the proceeds. The Arizona Legislature obviously agreed when it reduced the 100% requirement in § 33-556 to 80% in § 33-1228.

For all these reasons, this Court should reject the taking argument and instead declare that a change of ownership that follows from the unit owners' agreement in accordance with the requirements of the statute is lawful.

IV. Statutory Amendments are Incorporated into a Condominium Declaration by Operation of Law.

All parties agree that statutory amendments are incorporated into a condominium declaration. As Appellants state in their supplemental brief, "subsequent statutory amendments apply by operation of law, subject to ordinary constitutional limits." Appellants' Supplemental Brief at 25. Appellees also state that "Yes," statutory amendments are incorporated, "to the extent such statutory amendments do not impair express vested rights under the condominium declaration." Appellees' Supplemental Brief at 17.

Indeed "[i]t has long been the rule in Arizona that a valid statute is automatically part of any contract affected by it, even if the statute is not specifically mentioned in the contract." *Qwest Corp. v. City of Chandler*, 217 P.3d 424, 435, 222 Ariz. 474, ¶37 (Ariz. App. 2009) citing *Banner Health v. Medical Sav. Ins. Co.*,

163 P.3d 1096, 1100, 216 Ariz. 146, 150, ¶15 (Ariz. App. 2007). Moreover, "contractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract, regardless of whether the agreement refers to the governing law." *Qwest*, 217 P.3d 424, 435, 222 Ariz. 474, ¶37 (citation omitted).

The question of whether a declaration incorporates a subsequent statutory amendment was analyzed and answered in the affirmative by the Court of Appeals in *Hawk v. PC Village Association, Inc.*, 233 Ariz. 94, 309 P.3d 918 (Ariz. App. 2013). The court in *Hawk* was presented with an argument that A.R.S. § 33-441, enacted years after the Association's declaration was recorded, did not govern the declaration, which specifically prohibited certain signs except for "signs…the prohibition of which is precluded by law." *Id*. at ¶3, ¶9-10.

The court noted that, to be successful in a challenge of a statute as violating the federal and state contract clauses, a party must first show that the statute substantially impairs the contractual relationship. *Id*. at ¶ 15 (citation omitted). "To determine whether an impairment is substantial, we must consider the parties' reasonable expectations. The absence of contractual language contemplating permanency, or the presence of language affirmatively contemplating change, may also be relevant." *Id*. at ¶ 16 (citation omitted).

The language in the declaration anticipating applicable statutory law provided just that. As the court explained:

> Though the [condominium documents] generally prohibit nearly all signs, and specifically prohibit "for sale" signs, they exempt from the ban those signs "the prohibition of which is precluded by law." This exception is flexible—it contemplates that there will be types of signs that the law will protect, and it is not limited to legal protections in effect at the time of recordation. Because the parties anticipated that the [condominium documents] would yield to laws concerning signs, we conclude that A.R.S. § 33–441 does not significantly impinge on the parties' reasonable expectations.

Id.

Because the statute did not significantly impinge on the parties' reasonable expectations, the Court of Appeals held that the statute did not violate the constitutional contract clauses and held that the statute was properly applied to invalidate a restriction recorded before the statute was enacted. *Id*. at ¶ 17-18.

This same analysis should be applied in this case. Considering that statutes are automatically made part of the declaration and the declaration is subject to the Condominium Act, "as amended from time to time," the amendment to A.R.S. § 33-1228, which did not create anew the ability of a condominium to be terminated, "does not significantly impinge on the parties' reasonable expectations." Accordingly, amendments to a statute that is already incorporated as a term of the declaration must be incorporated into the agreement allowing the language of the declaration to be interpreted in light of "existing law."

As CAI explained previously (*see* Amicus Curiae Brief of Community Associations Institute in Support of Cross-Petition for Review, p. 5-9), *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022) did not and was not intended to apply to statutory—as opposed to contractual—amendments, especially when a declaration incorporates by reference the Condominium Act, as amended from time to time. To conclude that a homeowner's reasonable expectation does not include an amendment to an applicable statute implemented after the homeowner purchases a unit would serve to create uncertainty and non-uniformity and an unworkable set of rules for all associations in the state. *See* Amicus Curiae Brief of Community Associations Institute in Support of Cross-Petition for Review, p. 5. It is undisputed in this case that all unit owners in the association were on notice that they were subject to the Condominium Act and that the statute could be amended in the future. The 2018 changes to A.R.S. § 33-1228 fell "within the [unit owners'] 'reasonable expectations based on the declaration in effect at the time of the purchase.'" (Opinion ¶ 20 (citing *Kalway*, at 544, ¶ 15).

CONCLUSION

For the reasons noted, this Court should reject the argument that a termination of a condominium interest constitutes a taking and should find that statutory amendments in this context are incorporated into a condominium declaration.

RESPECTFULLY SUBMITTED this 26th day of September, 2023.

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APPENDIX

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CHAPTER 4.1

HORIZONTAL PROPERTY REGIMES

ARTICLE 1. IN GENERAL

Sec.

ARTICLE 1. IN GENERAL

Chapter 4.1, article 1, consisting of sections 33–551 to 33–561, was added by Laws 1962, Ch. 89, § 1, effective March 22, 1962.

§ 33–551. Definitions

In this article, unless the context otherwise requires:

1. "Apartment" means one or more rooms occupying all or a part of a floor or floors in a building of one or more floors or stories, but not the entire building, and notwithstanding whether the apartment be intended for use or used as a residence, office, for the operation of any industry or business or for any other use not prohibited by law.

2. "Building" includes the principal structure erected or to be erected upon the land described in the declaration provided for in § 33–552 which determines the use to be made of the improved land whether or not such improvement is composed of one or more separate buildings of one or more floors or stories.

3. "Co-owner" means a person, corporation, partnership or other legal entity capable of holding or owning any interest in real property who owns all or an interest in an apartment within the building.

4. "Co-owner's interest" means the fractional or percentage interest ascribed to each apartment by the declaration provided for in § 33–552.

5. "Council of co-owners" means all of the co-owners of the building.

6. "General common elements" includes:

(a) The land on which the building is erected.

(b) The foundations, basements, floors, exterior walls of each apartment and of the building, ceilings and roofs, halls, lobbies, stairways, and entrance and exit or communication ways, except as may be specifically otherwise provided in the declaration provided for in § 33–552.

(c) The compartments or installations of central services for public utilities, common heating and refrigeration units, reservoirs, water tanks and pumps servicing other than one apartment.

(d) Premises for lodging of service personnel engaged in performing services other than services within a single apartment.

(e) All devices and premises designed for common use or enjoyment by more than the owner or owners of a single apartment.

7. "Limited common elements" includes those elements designed for use by the owners of more than one but less than all of the apartments included in the building.

8. "Majority of co-owners" or "per cent of co-owners" means the owners of more than one-half or owners of that per cent of interest in the building irrespective of the total number of co-owners.

9. "Property" includes the land whether committed to the horizontal property regime in fee or as a leasehold interest, the building, all other improvements located thereon, and all easements, rights and appurtenances belonging thereto.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇐1. C.J.S. Estates § 1 et seq.

§ 33-552. Recording of declaration to submit property to regime

When the sole owner or all of the owners, or the sole lessee or all of the lessees of a lease desire to submit a parcel of real property upon which is located a building to the horizontal property regime established by this chapter, a declaration to that effect shall be executed and acknowledged by the sole owner or lessee or all of such owners or lessees and shall be recorded in the office of the county recorder of the county in which such property lies.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇐1. C.J.S. Estates § 1 et seq.

§ 33-553. Contents of declaration

The declaration provided for in § 33–552 shall contain:

1. A description of the land.

2. A description of the cubic content space of the building with reference to its location on the land.

3. A description of the cubic content space of each apartment located within the building, and a description of the cubic content space of each carport or garage or any other area to be subject to individual ownership and exclusive control.

4. A description of the common elements which may be the description provided for in paragraph 2 less the descriptions provided for in paragraph 3 and less the descriptions provided in paragraph 5, if applicable.

5. A description of the cubic content space of the limited common elements, if any.

6. The fractional or percentage interest which each apartment bears to the entire horizontal property regime. The sum of such shall be one if expressed in fractions and one hundred if expressed in percentage.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇐1. C.J.S. Estates § 1 et seq.

§ 33-554. Reference to declaration for description of apartment and common elements

All subsequent deeds, mortgages, or other instruments shall describe the land, but may describe the individual apartments, the common elements, other than the land, or limited common elements by reference to appropriate numbers or letters if such appear on the declaration provided for in § 33–552 without repeating in detail the descriptions of such apartments, common elements other than the land, or limited common elements. Such reference shall include the docket and page of the recorded declaration.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇐1. C.J.S. Estates § 1 et seq.

§ 33-555. Interest in common elements; reference to them in instrument

A. The fractional or percentage interest in the general common elements and the fractional or percentage interest in the limited common elements where such exist are hereby declared to be appurtenant to each of the separate apartments.

B. Any conveyance, encumbrance, lien, alienation or devise of an apartment under a horizontal property regime by any instrument which describes the land and apartment as set forth in § 33–552 shall also convey, encumber, alienate, devise or be a lien upon the fractional or percentage interest appurtenant to each such apartment under § 33–553, paragraph 6, to the general common elements, and the respective share or percentage interest to limited common elements where applicable, whether such general common elements or limited common elements are described as in § 33–553, paragraphs 4 or 5, by general reference only, or not at all.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇐1. C.J.S. Estates § 1 et seq.

§ 33-556. Withdrawal of property from regime; recording; subsequent regime

A. Any property so constituted as a horizontal property regime may be removed therefrom at any time, provided the sole owner or all of the owners execute, acknowledge and record a declaration evidencing such withdrawal. If at such time there are any encumbrances or

liens against any of the apartments, such declaration will be effective only when the creditors holding such encumbrances or liens also execute and acknowledge such declaration, or their encumbrances or liens are satisfied other than by foreclosure against the apartment, or expire by operation of law.

B. No withdrawal of any property from a horizontal property regime shall be a bar to any subsequent commitment to a horizontal property regime.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇐1. C.J.S. Estates § 1 et seq.

§ 33-557. Individual apartments and interest in common elements are alienable

When real property containing a building is committed to a horizontal property regime, each individual apartment located therein and the interests in the general common elements and limited common elements if any, appurtenant thereto, shall be vested as, and shall be as completely and freely alienable as any separate parcel of real property is or may be under the laws of this state, except as limited by the provisions of this chapter.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇐1. C.J.S. Estates § 1 et seq.

Notes of Decisions

1. Condominiums

If a condominium consists of five or more units, it constitutes a subdivision and is subject to prior approval of state real estate commissioner before an offering is made to the public. Op.Atty. Gen.No.63-26.

§ 33-558. Real property tax and special assessments; levy on each apartment

A. All real property taxes and special assessments shall be levied on each apartment and its respective appurtenant fractional share or percentage of the land, general common elements and limited common elements where applicable as such apartments and appurtenances are separately owned, and not on the entire horizontal property regime.

B. Any exemption from taxes that may exist on real property or the ownership thereof shall not be denied by virtue of the registration of the property under the provisions of this chapter.

Added Laws 1962, Ch. 89, § 1.

Library References

Taxation ⇐62. C.J.S. Taxation § 67.

§ 33-559. Liens against apartments; removal from lien; effect of part payment

A. Subsequent to recording the declaration provided for in § 33-552, and while the property remains enrolled in a horizontal property regime, no lien shall thereafter arise or be effective against the property. During such period liens or encumbrances shall arise or be created only against the individual apartment and the general common elements and limited common elements where applicable, appurtenant to such apartment, in the same manner and under the same conditions in every respect as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership.

B. In the event a lien against two or more apartments becomes effective, the owners of the separate apartments may remove their apartment and the general common elements and limited common elements where applicable appurtenant to such apartment from the lien by payment of the fractional or proportional amounts attributable to each of the apartments affected. Such individual payment shall be computed by reference to the fractions or percentages appearing on the declaration provided for in § 33-553, paragraph 6. Subsequent to any such payment, discharge or other satisfaction the individual apartment and the general common elements and limited common elements applicable appurtenant thereto shall thereafter be free and clear of the lien so paid, satisfied or discharged. Such partial payment, satisfaction or discharge shall not prevent the lienor from proceeding to enforce his rights against any apartment and the general common elements, limited common elements where applicable appurtenant thereto not so paid, satisfied or discharged.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇐1. C.J.S. Estates § 1 et seq.

§ 33-560. Limitation upon availability of partition; exception as to limitation of partition by joint ownership

A. The provisions of title 12, chapter 8, article 7, relating to partition of real property shall not be available to any owner of any interest in real property included within a regime established under

this chapter as against any other owner or owners of any interest or interests in the same regime, so as to terminate the regime.

B. Nothing contained in this chapter shall be construed as a limitation on partition by joint owners of one or more apartments in a regime as to individual ownership of such apartment or apartments without terminating the regime, or as to ownership of such apartment or apartments and lands outside the limits of the regime.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇨3. C.J.S. Estates § 2 et seq.

§ 33-561. Management by council of co-owners; rules and regulations

A. The council of co-owners shall be required to make provisions for maintenance of common elements, limited common elements where applicable, assessment of expenses, payment of losses, division of profits, disposition of hazard insurance proceeds and similar matters and shall be required to adopt bylaws, rules and regulations.

B. The bylaws, rules and regulations as amended shall be reduced to writing and available to every owner of any interest in the horizontal property regime.

Added Laws 1962, Ch. 89, § 1.

Library References

Estates ⇨1. C.J.S. Estates § 1 et seq.

SUPREME COURT OF ARIZONA

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Arizona Supreme Court No. CV-22-0228-PR Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS/APPELLANTS (FILED WITH PARTIES' CONSENT)

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation ("PLF") respectfully submits this amicus curiae brief in support of Plaintiffs/Appellants, Jie Cao, Haining "Frazer" Xia, and Stone Xia (collectively "the Xias"), to address the first and second questions presented:

1. Either on its face or as applied in this case, does A.R.S. § 33-1228 authorize the taking of private property for private use in violation of Article 2, § 17, of the Arizona Constitution?

2. If any common elements or units in a condominium are to be sold pursuant to a condominium termination agreement, does A.R.S. § 33-1228 require all the common elements and units to be part of that sale?

See Order Granting Review, *Cao v. PFP Dorsey Invs., LLC*, No. CV-22-0228-PR (Ariz. Aug. 23, 2023) ("Order"), at 1.

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in many landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369 (2023); *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City and Cnty. of San Francisco*, 141 S. Ct. 2226 (2021); *Knick v.*

Twp. of Scott, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). PLF also regularly participates in important property rights cases as amicus curiae in other federal and state courts nationwide. *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Walton v. Neskowin Reg'l Sanitary Auth.*, 369 Or. 338 (2022) (decision forthcoming).

PLF submitted an amicus curiae brief in the Court of Appeals in this case.

INTRODUCTION

Because A.R.S. § 33-1228 abrogates an owner's fundamental right to possess and keep private property, the authority it delegates must be viewed through an extraordinarily careful lens, strictly avoiding any construction that may raise constitutional concerns. Thus, the statute must be read as authorizing a condominium termination agreement to require sale of "*all* … units" following termination, not just the units held by holdout owners.

But as applied by PFP Dorsey Investments, LLC ("Dorsey Investments") here—where a private investment company has taken over a condominium association and singled out individual unit owners to force the sale of their property to the investment company at the investment company's price—Section 33-1228 authorizes an unconstitutional private seizure of another's private property. Because the government cannot take the Xias' private property and transfer it to Dorsey

Investments for its private use and benefit, a statute cannot be applied to authorize Dorsey Investments to do the same thing itself.

FACTS

In 2018, the Xia Family purchased one of the 96 units in the Dorsey Place condominium for their home. However, less than a year later, Dorsey Investments acquired as many of the units as it needed to convert the condominium from privately-owned units to a Dorsey Investments-owned rent-generating apartment building. The Xias and five other families wanted to keep their homes, and they declined to sell.

Ultimately though, their refusal amounted to nothing because Dorsey Investments had acquired 90 of the 96 units and had thereby garnered control of the condominium association's board.[1] As the controlling member of the condominium association, Arizona law authorized the condominium termination agreement to require "that all the common elements and units shall be sold following termination."

[1] A.R.S. § 33-1228(A) ("Except in the case of a taking of all of the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies. . . .").

Id. § 33-1228(C).[2] However, Dorsey Investments maintained that the statute authorizes the sale of "all common elements," but does not require the sale of *all units*, permitting the piecemeal sale of *individual* units. In short, it read the requirement of "all" in the statute's text that "all common elements and units" be sold, to apply only to "common elements" and not "all . . . units." Under the purported authority of the statute, it sold the Xias' unit to itself at a price established by its own appraiser.

The Xias asserted that the Dorsey Investments-controlled association had no authority to sell the Xias' unit alone, without selling all other units. The Xias argued that as-applied by Dorsey Investments, Section 33-1228 allows a private for-profit entity to forcibly acquire private property in an insider sale for private benefit, which violates the U.S. and Arizona Constitutions' requirements that takings of private property be for public use and provide just compensation. The superior court dismissed the Xias' complaint.

[2] The language regarding the sale of "all common elements and units of the condominium" is currently found in A.R.S. § 33-1228(E). However, in 2018, when the Xias purchased their condominium the 1986 version of A.R.S. § 33-1228 was in effect. *Cao v. PFP Dorsey Investments, LLC,* 253 Ariz. 552, 556–57 (App. 2022). In the 1986 version, the "all common elements and units" language was found in A.R.S. § 33-1228(C). As the operative version of § 33-1228 is the 1986 version, this brief cites to A.R.S. § 33-1228(C) for the "all common elements" language.

The Court of Appeals agreed with Dorsey Investments and held that Section 33-1228 does not require the sale of "all … units," but allows picking-off of units for individual sale. *Cao*, 253 Ariz. at 557. Both parties cross-petitioned for review. This Court granted both petitions in part.

SUMMARY OF ARGUMENT

1. Section 33-1228 should be read to effectuate its plain and natural meaning, permitting a condominium termination agreement to require a free-market sale of the *entire* property. A.R.S. § 33-1228(C) ("*all* the common elements and units shall be sold") (emphasis added). The statute cannot authorize the association to carve out a single unit and forcibly acquire it. Property owners have a fundamental right to keep property and to decide whether to sell it, except in the face of a valid exercise of the sovereign power of eminent domain. To avoid an unconstitutional application of Section 33-1228(C), the statute cannot be construed as authorizing a private for-profit investment company to forcibly acquire—for its own private benefit and without any judicial determination of just compensation—another's private property.

2. If the Xias' property is sold, Section 33-1228 should be read in a manner that grants the Xias constitutionally-required just compensation. Just compensation is the price that their property would obtain at a public sale, not the reduced price that Dorsey Investments itself valued the property at.

ARGUMENT

I. Section 33-1228 Should be Construed to Avoid Authorizing a Taking of the Xias' Private Property for Dorsey Investments' Private Use

A. Arizona Zealously Guards Private Property Rights

As a necessary corollary of the fundamental right to exclude others, the right to keep and possess property includes the right to not be forced to sell property, absent a lawful exercise of eminent domain. *See Culp v. United States*, 131 F.2d 93, 98 (8th Cir. 1942) ("The right to the enjoyment of life and liberty and the right to acquire and possess property are fundamental rights[.]"); *United States v. Dominion Oil Co.*, 241 F. 425, 427 (S.D. Cal. 1917) ("Possession of property, with an accompanying presumptive right of ownership, such as exists in the case at bar, carries with it a right to the use and enjoyment of such property until by due process of law and after full hearing it has been finally adjudged that such possession and claim of title are unfounded."); *Arizona Elec. Power Coop., Inc. v. DJL 2007 LLC*, 246 Ariz. 534, 540 (App. 2019) ("Possession is certainly one of the greatest attributes of ownership of property. The possessor exercises dominion over the property, and *a condemnor, be it municipality or private corporation* thereafter denies the owner of its usage, its rental value, and its enjoyment.") (citation omitted); *see also* Donald Kochan, *The [~~Takings~~] Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 FLA. STATE U. L. REV. 1021 (2018)

(the right to keep property and protect it from unjust acquisition is a fundamental property right).

The right to keep, use, and exclude are private property's most essential attributes and remain the foundation of our concept of property rights. The U.S. Supreme Court recently reaffirmed the fundamental nature of the right to keep private property. *See Tyler*, 598 U.S. at 637–42 (finding the government cannot take more property than it is owed). The Court also recently reaffirmed the fundamental right to possess private property. *See Ala. Ass'n of Realtors v. Dep't of Health & Human Svcs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) ("And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude."). And to control who enters onto property. *Cedar Point*, 141 S. Ct. at 2072 ("The right to exclude is 'one of the most treasured' rights of property ownership.") (internal citation omitted). The right to exclude others from private property obviously encompasses the right to keep it and to not be forced to sell it.

Likewise, Arizona law presumes that owners can keep and maintain their private property. *See, e.g., Calmat of Arizona v. State ex rel. Miller*, 176 Ariz. 190, 195 (1993) ("Possession is certainly one of the greatest attributes of ownership of property.") (citation omitted); *Siemsen v. Davis*, 196 Ariz. 411, 415 (App. 2000) (The owner's "right to preserve and protect their private property is also

constitutional 'and should not be lightly regarded or swept away.'") (quoting *Bickel v. Hansen*, 169 Ariz. 371, 374 (App. 1991)).

A core purpose of government is to protect private property. *See, e.g.*, *Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Warford*, 69 Ariz. 1, 8 (1949) ("The constitutional provision on 'Eminent Domain' gave the right to take private property, in a limited way for 'private use' and in a broader and general way for 'public use,' provided payment is made. If there were no eminent domain provision, private property could not be so taken. Therefore, private property rights existed prior to the enactment of that provision."); *Bailey v. Myers*, 206 Ariz. 224, 227 (App. 2003) ("The framers of our Constitution understood that one of the basic responsibilities of government is to protect private property interests."); *see also* Declaration of Independence (U.S. 1776) ("We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.—That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed[.]"); *Cedar Point Nursery*, 141 S. Ct. at 2071 (The founders recognized "that the protection of private property is indispensable to the promotion of individual freedom.").

B. The Fundamental Right to Keep Property and Exclude Others May Only be Taken by a Lawful Exercise of Eminent Domain for Public Use

The fundamental property rights to possess, keep, and exclude may give way to the public interest in very limited circumstances, such as a valid exercise of the sovereign power to take private property for public use upon payment of just compensation. Arizona's Constitution recognizes greater protections for private property owners—and recognizes more limits on governmental power—than the U.S. Constitution. These protections include stronger prohibitions against taking private property for private use:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Ariz. Const. art. 2, § 17.

Arizona was one of the states that—in the wake of the Supreme Court's infamous decision in *Kelo v. City of New London*, 545 U.S. 469 (2005)—rejected the conflation of the phrase "public use" with "public purpose," which sometimes permits the use of the takings power for private gain. In Arizona, public use "[d]oes not include the public benefits of economic development, including an increase in

tax base, tax revenues, employment or general economic health." A.R.S. § 12-1136(5)(b).

Arizona expressly recognizes the longstanding principle that the sovereign power of eminent domain may not be legitimately exercised to take property from one private owner and give it to another private owner. *See Calder v. Bull*, 3 U.S. 386, 388 (1798) ("[A] law that takes property from A. and gives it to B . . . is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."). In the wake of *Kelo*, the people of Arizona adopted the Private Property Rights Protection Act, prohibiting eminent domain that does not serve a public use. *See* A.R.S. § 12-1131 ("Eminent domain may be exercised only if the use of eminent domain is authorized by this state, whether by statute or otherwise, and for a public use as defined by this article."). Public uses are expressly limited to:

> (i) The possession, occupation, and enjoyment of the land by the general public, or by public agencies; (ii) The use of land for the creation or functioning of utilities; (iii) The acquisition of property to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation or use; or (iv) The acquisition of abandoned property.

A.R.S. § 12-1136(5)(a); *see also*, A.R.S. § 12-1111 (listing the purposes for which eminent domain may be exercised).

Thus, no Arizona government has the power to take the Xias' private property and transfer it to Dorsey Investments for Dorsey Investments' private use and benefit.

C. Section 33-1228 Must be Construed Narrowly to Avoid Authorizing a Private Taking

If the government is prohibited from taking the Xias' property for a private use or purpose, Section 33-1228 cannot be interpreted to empower a private actor such as Dorsey Investments to have greater authority to take private property than the government itself has. *See Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 264–67 (1914) (holding that a mining company was not entitled to forcibly acquire a right of way through another private mine, because the tunnel was purely for the company's private profit, and not a public use). Dorsey Investments' stated purpose in acquiring the Xias' home was to own the entire condominium building and convert it into a rent-generating apartment building for Dorsey Investments' benefit. Appellees' Supp. Br. at 16, *Cao v. PFP Dorsey Investments, LLC*, No. CV-22-0228-PR (Ariz. Sep. 12, 2023). The taking of the Xias' unit for such use and purposes decidedly would not serve a "public purpose" under even the permissive *Kelo* test—let alone the more rigorous "public use" standard adopted by the Arizona Constitution and the Private Property Rights Protection Act.

Before enabling a private purpose taking of property under the authority of Section 33-1228, this Court must examine the statute with an extraordinarily sharp lens to ensure that the Xias' constitutional property rights are not being infringed. Courts have long employed a rule of constitutional avoidance which requires statutes that abrogate property rights to be read narrowly to avoid treading on protected constitutional rights. *See Orsett/Columbia L.P. v. Superior Ct. ex rel. Maricopa Cnty.*, 207 Ariz. 130, 133 (App. 2004) ("[A] policy of strict construction protects private property rights from overreaching by the government."); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 78–82 (1982) (construing a bankruptcy statute narrowly to avoid violating the Takings Clause).

For example, in *Outdoor Sys., Inc. v. City of Mesa*, this Court explained that courts construe zoning ordinances narrowly in favor of the property owner, because such restrictions "exist in derogation of property rights[.]" 169 Ariz. 301, 304 (Ariz. 1991). Similarly, Arizona eminent domain statutes are construed strictly against permitting the unlawful exercise of eminent domain. *See City of Phoenix v. Harnish*, 214 Ariz. 158, 161–62 (App. 2006) ("We are also guided by the strict principles of statutory interpretation applied to exercises of eminent domain power by local governments generally and to extraterritorial condemnations in particular. . . . We narrowly construe these [eminent domain] powers and will not expand them beyond what is expressly granted by the legislature. . . ."); *see also City of Mesa v. Smith*

Co. of Ariz., Inc., 169 Ariz. 42, 44 (App. 1991) ("We interpret the statutes narrowly because the power of eminent domain belongs to the state. . . .").

This Court should apply this rule of construction and read Section 33-1228 narrowly to protect private property. Reading the statute as Dorsey Investments urges would result in an unconstitutional private-benefit taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article 2, Section 17, of the Arizona Constitution.

D. Reading Section 33-1228 To Require All Condominium Units be Sold at Termination Protects Private Property Rights

Reading Section 33-1228 to require all condominium units be sold at termination is consistent with the Xias' private property rights and long-standing Arizona property law that protects the right to jointly own property, and also protects individual owners when terminating collective ownership forms.

The court of appeals incorrectly interpreted the permissive and required clauses in Section 33-1228(C). The statute reads: "A termination agreement may provide that all the common elements and units of the condominium shall be sold." § 33-1228(C). The lower court read "may" to modify "all," so that the termination agreement *could* require the sale of all the elements and all the units, but it could also require the sale of just *some* of the units. *Cao*, 253 Ariz. at 559.

But in the statute, "may" refers to whether the termination agreement requires that the units be sold at all. This statutory section is the first time that the statute

references the units being sold, so it would make sense to read the statute as saying that the termination agreement does not have to provide for the sale of the units *at all*. The very next sentence in the statute further shows that "may" was modifying whether the termination agreement required the sale at all: "If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale." § 33-1228(C). There could be termination agreements that did *not* require the sale of any real estate. In the full context of the statutory provision, "may" qualifies whether the termination agreement required the sale of any units, not how many of the units must be sold. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167–69 (2012) ("The entirety of the [statute] thus provides the context for each of its parts.").

When "may" is properly read as modifying whether the termination agreement requires the units to be sold, then when the termination agreement *does* provide that the units should be sold, the statute requires that "all" the common elements and "all" the units "shall" be sold. Requiring all the common elements and units to be sold is a narrow statutory interpretation that does not violate the takings clauses of the United States and Arizona Constitutions. If all the units are sold, then the units will bring back the highest price on the market. However, if "may" is interpreted as modifying "all" and Dorsey Investments can buy up the individual

units without any competition, then this statute, as applied to the Xias, authorizes an unconstitutional taking for private use.

It may be more advantageous for the Dorsey Investments-controlled association to pick off individual units and sell them to itself than to put the entire building up for sale, which would require Dorsey Investments to compete in the open market for ownership of the entire building. But the careful statutory lens that this Court applies must disregard Dorsey Investments' convenience and counsels against affirming the judgment, unless the statute clearly and unambiguously authorizes the sale of individual units, which it does not. The plainest and most natural reading of Section 33-1228(C) is that the term "all" modifies both "common elements" and "units." But even if that reading is not clear, any ambiguity in the statute's meaning should be resolved in favor of protecting the Xias' right to keep their property.

II. The Xias Are Entitled to Just Compensation, and Section 33-1228 Should be Read to Require that All the Units be Sold

This Court should also read Section 33-1228 narrowly to avoid violating the Just Compensation Clause. If the Xias' property is taken, they are entitled to just compensation, but reading the statute to allow the sale of some of the units prevents the Xias from receiving their constitutionally required just compensation.

When forcibly deprived of property, the owner is at least entitled to fair market value. *State ex rel. Miller v. Filler*, 168 Ariz. 147, 149 (1991) ("Just compensation implies the full monetary equivalent of the loss sustained by the owner whose land

[was] taken or damaged."). Under Arizona law, the preferred method of valuing "fair market value" is based on the sale of similar properties. *See Pima Cnty. v. Gonzalez*, 193 Ariz. 18, 20 (App. 1998); *Maricopa Cnty. v. Barkley*, 168 Ariz. 234, 241 (App. 1990). Under this measure, the homeowner is entitled to an amount as close as possible as what their property would obtain if put up for sale. As the Sixth Circuit recently explained, even in tax foreclosure cases, where the property owner is not entitled to fair market value, the owner is still entitled to what the property would obtain at a public sale. *Freed v. Thomas*, Nos. 21-1248/1288/1339, 2023 WL 5733164 at *2 (6th Cir. Sept. 6, 2023). Here, where the Xias *are* entitled to fair market value, they are entitled to what their property would obtain at a public sale, not the self-dealing price that Dorsey Investments wants to pay.

The forced sale of the Xias' property to Dorsey Investments was not for fair market value but was based solely on an appraisal by Dorsey Investments. *See* Plaintiffs' Second Amended Complaint at 6–7 ("[T]he Draft Condominium Termination Agreement provided that the distribution of the sale shall be allocated to unit owners of five different types of property: Owners of a Type A Unit will receive $234,000 . . . The Xia Condo was determined to be a Type A Unit."). This amount was calculated by Dorsey Investments' own appraiser, who appraised unit *type* without appraising the actual condominium units themselves. *Id.*

This odd valuation scheme violates the Just Compensation Clauses of the Arizona and U.S. Constitutions, which require that compensation reflect "the full and perfect equivalent" of the property taken, generally determined by the fair market value of the property on the date of the taking. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) ("There can . . . be no doubt that the compensation must be a full and perfect equivalent for the property taken[.]"). Just compensation is supposed to be the equivalent of what a willing buyer would pay a willing seller. *S'holders & Spouses of Carioca Co. v. Superior Ct. in & for Maricopa Cnty.*, 141 Ariz. 506, 509 (1984) ("[C]ompensation for condemned property is determined by the market value of the property taken, or the price at which a willing seller will sell and a willing buyer will buy."). The amount determined by Dorsey Investments' appraiser, for which Dorsey is willing to sell itself the Xias' property, is not the price a willing buyer would likely pay to a willing seller. It is not just compensation.[3]

[3] "The Constitution, both State and Federal, requires 'just compensation'. This Court holds that in meeting this test the trial court must use the measure of damages [that] is most appropriate under the circumstances to insure fair compensation to the landowner whose property rights are taken. The constitutional test makes it mandatory upon the trial court to determine what is fair and just compensation, and to use this method or formula to arrive at [the] amount of damages." *State ex rel. Miller*, 168 Ariz. at 150–51 (citing *State ex rel. Herman v. S. Pac. Co.*, 8 Ariz. 238, 242 (App. 1968)).

The Xias are entitled to just compensation, but Dorsey Investments is trying to bypass this requirement by arguing it is permitted, via Section 33-1228, to sell itself these units at its own set price. The statute cannot be interpreted in such a manner. Instead, the statute should be interpreted narrowly to require the sale of *all* the units, in which case, Dorsey cannot sell the Xias' units to itself for a discounted price. Rather, competing purchasers should be permitted to bid competing offers on the property, putting the "market" in "fair market value" and avoiding a violation of the Just Compensation Clause.

CONCLUSION

This Court should vacate or reverse the court of appeals in part and affirm in part and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 26th day of September, 2023.

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IN THE
SUPREME COURT OF ARIZONA

No. CV-22-0228-PR

Ct. App. No. 1 CA-CV 21-0275

Maricopa County Superior Court
No. CV2019-055353

JIE CAO ET AL.,

Plaintiffs-Appellants,

v.

PFP DORSEY INVESTMENTS, LLC ET AL.,

Defendants-Appellees.

SUPPLEMENTAL AMICUS CURIAE BRIEF OF PAPAGO SPRINGS, LLC, MAHDERE GEBREYESUS DESTA, AND GARY AND ALLIEN STOLOFF

(FILED WITH PARTIES' CONSENT)

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

Amici curiae ("Amici") are the owners of the 14 remaining residential condominium units in Papago Springs (the subject "Units"). As Amici explained in their initial Amicus Brief filed on November 28, 2022, Papago Springs is a condominium community that has been in the midst of turmoil for nearly two years due to a termination initiated and perpetuated by the owner of the majority of the Papago Springs condominium units. The termination was commenced for the purpose of enabling the majority owner to compel Amici to sell their Units to him at the lowest possible price so he could then convert the condominium community to an apartment project under his complete control. As part of the termination process, the "Terminator," unilaterally and without a court order, wrongfully took title to the Units and possession of certain of the Units without affording Amici even so much as the opportunity to dispute the values of the Units.[1] Amici were forced to file a lawsuit and obtain a preliminary injunction ordering the Terminator to participate in arbitration to receive even a modicum of due process with respect to the valuation determinations.

The foregoing is only a snippet of the story regarding the ordeal Terminator has imposed on Amici. They have been subject to outrageous and legally baseless charges, fees and assessments; their repeated requests

[1] This "self help" conduct was later determined to be legally baseless by Judge Sara Agne in *Papago Springs, LLC, et al. v. Gantous Investments, LLC, et al.*, Maricopa County Superior Court Case No. CV2022-015453 (the "Papago Springs Litigation")

for maintenance of the buildings and common areas have been ignored; their tenants have been threatened with eviction and prosecuted in Justice Court; and they have incurred in excess of one hundred thousand dollars in attorneys' fees in their efforts to regain possession of their Units and to obtain a determination of value from a neutral third party. Even now, after Judge Agne entered an initial injunction requiring the Terminator to expunge a wrongfully recorded deed to Amici's Units and to participate in arbitration concerning the values of the Units, the Terminator is threatening to unilaterally record another deed to the Units and deduct nearly $30,000 per Unit of unilaterally imposed fees, assessments, and closing costs—all before the Court has ruled on a pending motion to stay trial court proceedings and/or an Application for Confirmation of Arbitration Award.

Although the Terminator's conduct in the Papago Springs matter is particularly egregious, it is not wholly unprecedented. Experience has proven that, as soon as they gain control, terminators use their power and control to force the remaining unit owners to sell not only against their will, but for far less than fair market value. Further, terminators unilaterally and without notice record deeds to the remaining units thereby conveying title to themselves before they have paid for the units. In sum, it is not much of an exaggeration to analogize the termination process to a trip through Dante's nine circles of hell.

Because Amici have written before, they will limit their Supplemental Brief to two discreet matters addressed in the Defendants/Appellees/Cross-

Petitioners PFP Dorsey Investments, LLC ("PFP") and Dorsey Place Condominium Association's (the "Association") Supplemental Brief. The first are their assertions regarding the purported "reasons" for condominium termination. The second is their novel legal argument regarding the possible use of the legal process of partition as a substitute for A.R.S § 33-1228. The former are factually untrue, whereas the latter is legally baseless.

ARGUMENT

I. There are no acceptable reasons for a condominium termination pursuant to A.R.S. § 33-1228.

In the second paragraph of their supplemental brief, PFP and the Association identify a series of what they contend are "good and practical reasons why condominium terminations occur." Appellees' Supp. Br. at 1. What they fail to acknowledge, however, is that none of the "reasons" they offer have been the primary motivation for any of the condominium terminations that have occurred in Arizona in recent years. Indeed, after considerable research, Amici have not discovered a single condo termination in Arizona that was initiated after a "bankruptcy following a judgment against a condominium association" or due to "structural defects too large for the members to correct through special assessments." *Id.* PFP and the Association point to none. Those problems may exist elsewhere, but have not been the motivation for the condominium terminations in the Phoenix,

Arizona market since the terminations began in earnest in the middle of the last decade.

Instead, as explained in Amici's prior brief, the motivation has been pure and unadulterated financial greed. Uniformly, investors have sought to acquire controlling interests in residential condominiums to terminate the condominium regime and convert the properties to apartment projects. The reason is obvious: the apartment market has been strong and the rents that can be generated result in short term cash flow and long term profits on re-sale.

The Association and PFP do offer one category of "reasons" for condominium terminations that Amici can attest do actually exist in the Phoenix condominium market. There are residential condominium communities in which "poor maintenance, mismanagement, crime and blight" are significant problems. Papago Springs, the condominium community in which Amici owned units, is an example. But termination is not the cure—it is the disease. All of those problems at Papago Springs are the result of mismanagement and misallocation of resources by the majority owner/terminator. Once a single person or entity gains control of 51% of the units, that person/entity controls the Board of Directors. At that point, the majority owner has the ability to make all management decisions regarding the condominium community. In the case of Papago Springs, a deterioration in maintenance and increase in crime and blight followed shortly after Gantous Investments/John Salem acquired ownership of a

sufficient number of units that he was able to put himself, his wife and another hand-picked devotee on the Board of Directors. From then on, the remaining unit owners had no meaningful input to determine the amount of the monthly dues or special assessments, or the allocation of how those funds were spent. In sum, while it is true that mismanagement and blight are problems, they are often problems created by the terminator for what appears to be the purpose of motivating the remaining unit owners to sell quickly and at below market prices.[2]

II. Partition is not a viable alternative to A.RS. § 33-1228.

Later in their brief, the Association and PFP assert a novel—but no more valid—legal argument that warrants a response. Beginning on page 9, PFP and the Association argue that the partition statutes could be used as a

[2] In the Introduction of their Supplemental Brief, PFP and the Association also refer to something they label as a "broken" condominium. That term is one invented by terminators in an effort to describe a condition that they find unacceptable: ownership of units within a condominium community by investors other than the terminator. In other words, if the terminator—who is by definition an investor—owns all the units, the project is "healthy" because the condominium can be terminated and the terminator has total control. However, when other investors own a few units, the condominium community is "broken." There is no cogent explanation for why a condominium property cannot exist as a "healthy" community when multiple investors own different units. Presumably, all the investors are motivated by obtaining good tenants and operating an attractive, successful project. The only reason such a community "breaks" is becausethe majority owner harnesses its voting power to drive out the other investors.

means for compelling a sale of condominium units by unwilling sellers. This concept was not raised in prior briefing, so it cannot be the focus of the Court's analysis or ultimate opinion. However, because it has been mentioned, it is important to recognize that argument is groundless for two independent reasons. First, *any* statute that permits a private person or entity to compel a private property owner to sell his or her property for a private (proprietary) purpose, violates article 2, § 17 of the Arizona Constitution. Second, it has long been settled that the rigors of the constitution are not satisfied by pedantic shell games. As recently as this summer, the United States Supreme Court explained that a party cannot accomplish an unconstitutional objective by replacing one unconstitutional mechanism with another. *See Students for Fair Admission, Inc. v President and Fellows of Harvard College*, 143 S. Ct. 2141, 2176 (2023). In that case, Chief Justice Roberts, writing for the majority, warned that "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows . . . ." That admonition is as true with regard to property rights as it is with regard to racial discrimination. Terminators cannot use partition to effectuate unconstitutional takings any more than they can use A.R.S. § 33-1228 for that illicit purpose.

Further, even if it was constitutional (it is not), partition would not be available in many instances for condominium termination because the units themselves are not co-owned. "Partition" is a mechanism in which "co-owners" of a piece of property may obtain a court order compelling a sale

that will eliminate their co-ownership. *Lawson v. Ridgeway,* 72 Ariz. 253, 265 (1951) ("The right of partition is an incident of common ownership, and specifically authorized by statute."); *Occhino v. Occhino,* 164 Ariz. 482, 484 (App. 1990) ("The right of partition is an incident of common ownership . . . ."). Prior to termination, Defendants were not co-owners with the Plaintiffs of Plaintiffs' Units. Those Units were the sole property of the Plaintiffs. Defendants cannot avail themselves of the partition statutes to compel the sale of Units in which they have no ownership interest.[3]

But, setting those legal and constitutional infirmities aside, a partition action would *still* include significant protections for the minority owners not available in A.R.S. § 33-1228. For example, it is widely accepted that a partition action must include the entire property, not just portions of it, as a matter of law. 59A Am. Jur. 2d Partition § 64. But more importantly, if there is a sale via partition, it is subject to *judicial supervision*, not the whims of a

[3] Defendants may argue that there are CC&Rs that provide for termination as a contract right, separate from A.R.S. § 33-1228. In those circumstances, Defendants may contend that the remaining unit owners have "agreed" to allow termination and thus it does not run afoul of the constitution. That argument, however, ignores the reality that CC&Rs are adhesion contracts that the unit owners are compelled to accept if they want to purchase a residence in the condominium community. Such provisions should not be enforceable as against a private property owner as they offend the explicit protections set forth in article 2, § 17 of the Arizona Constitution. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 21 (1948) (holding that courts cannot enforce racially restrictive covenants because they violate the Fourteenth Amendment).

self-interested (and self-dealing) investor. *See* 59A Am. Jur. 2d Partition § 122. The person conducting the sale would serve as a bona fide trustee with fiduciary duties, meaning the person conducting the sale could not sell the property to himself—unlike what occurs today, where the investor conducting the sale ensures that he/it is the only buyer. Consistent with those duties, "the officer conducting the sale must secure the highest obtainable price for the property sold for the benefit of those persons lawfully entitled to the proceeds of the sale." 59A Am. Jur. 2d Partition § 125. Under the current statutory mechanism, the opposite is true. And, contrary to PFP and the Association's position, a partitioning court would likely order partition in kind, restoring each homeowner's title to their unit. "In a partition action, there ordinarily is a presumption that a partition in kind of the property is feasible and should be made." 59A Am. Jur. 2d Partition § 99. In addition, "a partition sale cannot be decreed merely to advance the interests of one of the owners." 59A Am. Jur. 2d Partition § 118.

In light of all of the above protections, terminators could not be assured that they would end up with the entire property. This means that in the future, the arbitrage opportunity created by abusing A.R.S. § 33-1228 would cease, so in effect these condominium hostile takeovers would stop as a practical matter.

CONCLUSION

As the Court of Appeals correctly observed, A.R.S. § 33-1228 "is unconstitutional on its face." *Cao v. PFP Dorsey,* 253 Ariz. 552, 555 (App.

2022). It cannot be saved by pretending that the remaining unit owners consented to termination in the context of an adhesion contract. An unconstitutional statute is void, period. There are no cogent "reasons" for allowing private persons to take private property from their neighbors for a private, proprietary purpose. Even government does not possess that right.

In striking A.R.S. § 33-1228, the Court should caution investors not to attempt to achieve their objectives via alternative legal remedies. Those remedies were not added to Arizona law in order to allow an end-run around the Constitution. The Court should admonish that the implementation of mechanisms like partition will not be permitted. The law does not allow one to accomplish indirectly what cannot be done directly.

DATED this 26th day of September, 2023.

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ARIZONA SUPREME COURT

JIE CAO, et al., Plaintiffs/Appellants/Petitioners,, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees/Cross-Petitioners.	**Arizona Supreme Court No. CV-22-0228-PR** **Court of Appeals Division One No. 1 CA-CV 21-0275** **Maricopa County Superior Court Case No. CV2019-055353**

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I. Introduction

The numerous amici in this case raise many arguments that are entirely beside the point. We will respond to those that are pertinent to this case. The amici also invite the Court to go outside the record here and take as established fact different situations that they allege have occurred without, of course, any evidence that the situations they cite are in any way similar to the facts of this case. Indeed, the parade of horribles cited by most of the amici is not present here. This Court does not have any evidence before it that this transaction was in any way the provocative situations posited by the various amici. The Court should not allow the amici's broad brush of outrage to color its decision *in this case*, which bears no indicia of the unfairness or financial violence that they allege have occurred in other situations. In any event, the Court should not permit the Petitioners and their amici to lead the Court into invalidating provisions of the Statute that have not been invalidated in any other state adopting the Uniform Condominium Act.

II. The Court Need Not Examine the Constitutionality of A.R.S. §33-1228,[1] but if it Does, its Decision Should Protect the Freedom of Contract.

Two overarching principles form the lens through which the Court should examine this case. The first is the well-established principle that this Court "will give [a]

[1] All references to A.R.S. §33-1228 herein are to the 2018 version of the Statute as the operative version at the time of termination.

statute a constitutional construction where possible." *Mardian Const. Co. v. Superior Ct.*, 113 Ariz. 489, 493 (1976); *accord, e.g.*, *State v. Tocco*, 156 Ariz. 116, 119–20 (1988). Indeed, the Court will "strive to give statutes meanings that avoid serious constitutional issues" and "reach[es] those only when absolutely necessary." *Bus. Realty of Ariz., Inc. v. Maricopa Cnty.*, 181 Ariz. 551, 559 (1995). "This is another way of saying that [this Court] presume[s] the [L]egislature recognizes the restrictions imposed on it by our state [C]onstitution and tries to abide by that [C]onstitution when it drafts laws." *Id.*

The second principle is that "[c]ontract law … seeks to preserve freedom of contract." *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.*, 223 Ariz. 320, 323 ¶14 (2010). Recognizing that "[Arizona] law generally presumes, especially in commercial contexts, that private parties are best able to determine if particular contractual terms serve their interests," *1800 Ocotillo, LLC v. WLB Group, Inc.*, 219 Ariz. 200, 202 ¶8 (2008), this Court concluded long ago that "a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh." *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 474 (1966); *see also, e.g.*, *Bridges v. Nationstar Mortgage, L.L.C.*, 253 Ariz. 532, 534 ¶9 (2022) ("Parties are generally 'free to contract as they please,' and when entered into voluntarily, courts will enforce the contract's provisions." (internal citation omitted) (quoting *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588 (1997))). Consistent with this principle, "[c]ourts … are hesitant

to declare contractual provisions invalid on public policy grounds." *1800 Ocotillo, LLC*, 219 Ariz. at 202, ¶8.

Amici request that the Court invalidate key provisions of the CC&Rs and the Condominium Termination Agreement (the "Agreement") that incorporate A.R.S. §33-1228 by declaring that statute to be unconstitutional under Article 2, Section 17 of the Arizona Constitution and holding that the Statute cannot be incorporated into the CC&Rs. However, there is no basis for the Court to declare that statute unconstitutional because this case does not involve a "taking" within the scope of Article 2, Section 17 of the Arizona Constitution. Respondent already briefed that issue on page 23 of the Cross-Petition for Review and incorporates by reference those arguments here. Because this appeal does not involve a "taking," the Court should follow the constitutional avoidance canon and refrain from examining the constitutionality of A.R.S. §33-1228.

This appeal cannot involve a "taking" for purposes of Article 2, Section 17 because that provision prohibits an *involuntary* transfer of private property, which is not what happened here. *See, e.g.*, *City of Surprise v. Ariz. Corp. Com'n*, 246 Ariz. 206, 210, ¶12 (2019) (observing that the distinction between voluntary transactions, such as to "'[s]ell, lease, assign' and 'mortgage,'" versus "condemnation," which is an "involuntary governmental taking of assets," is material for purposes of Article 2, Section 17 of the Arizona Constitution). Indeed, Petitioners expressly agreed that their ownership of the Unit in question is subject to Arizona's Condominium Act, including the

post-termination sale provisions in A.R.S. §33-1228 by purchasing the unit subject to those CC&R provisions.

Petitioners' express agreement that their property rights in the Units would be subject to the Condominium Act's provisions appears throughout the CC&Rs. Section 2.1 of the CC&Rs expressly states as much:

> ***Declarant hereby submits the Property and all easements, rights and appurtenances thereto, to the provisions of the Condominium Act*** and hereby declares that the Property shall be held and conveyed subject to the terms, covenants, conditions and restrictions set forth in this Declaration. *By acceptance of a deed or by acquiring any ownership interest in any portion of the Condominium, each Person … binds himself … to all of the provisions, restrictions, covenants, conditions, rules and regulations now or hereafter imposed by the Condominium Documents and any amendments thereof.*

CC&Rs §2.1 (emphasis added). Additionally, in Section 6.1 of the CC&Rs, Petitioners agreed that the Association has all powers granted to it under the Condominium Act:

> The Association shall have such rights, powers and duties as are prescribed by the Condominium Act … together with such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in th[e] Declaration and the Condominium Act.

Id. §6.1. Numerous other references to the Condominium Act throughout the CC&Rs buttress Petitioners' consent to be bound by, and their ownership of the Unit is subject to, the Act's provisions. *See, e.g.*, *id.* §§2.8.2 (authorizing reallocation of common elements by amendment), 8.6 (governing payment of insurance proceeds).

In short, there is no unconsented taking of private property—only Petitioners' buyer's remorse over having agreed to be bound by the Condominium Act's provisions. The Court should decline Petitioners' and the Amici's invitation to declare A.R.S. §33-1228 unconstitutional and, instead, uphold the Association's actions, which are expressly authorized by the CC&Rs. A contrary outcome contravenes the constitutional avoidance and freedom of contract principles to which this Court has long adhered.

III. Regardless of the Constitutionality of A.R.S. §33-1228, the Contract Allows for Termination.

As Amicus Goldwater Institute stated in its Supplemental Brief, "a condominium purchaser *can* agree by contract to be bound to surrender her unit upon demand of the majority." (*See* Supplemental Brief, pg. 12.) Separate and apart from the Statute, the CC&Rs at Section 13.4, put Petitioners on notice of the possible termination of the condominium. In Arizona, recorded covenants, conditions and restrictions are a contract between the Association and its members, and between the members themselves. *Powell v. Washburn*, 211 Ariz. 553, 555, ¶8 (2006); *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶31 (App. 2011). When a property owner accepts a deed containing property restrictions, the owner is bound by those restrictions. *See Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333 (App. 1977) (citations omitted). Deed restrictions run with the property and "form a contract between the subdivision's property owners as a whole and the individual lot owners." *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448 (App. 1993).

Section 13.4 alerted Petitioners that, upon termination, a further contract would be forthcoming; i.e., a termination agreement. This agreement would be binding on the members of the Association if adopted. In this case, the Association notified its members of a meeting at which the members would discuss termination of the condominium.[2] *See*, Second Amended Complaint at Paragraph 26 [SAC ¶26] [IR40]. As part of the Notice, the Association included copies of appraisal reports for each of the five floor plans within the condominium and a draft Agreement.[3] SAC ¶¶29-33. This draft Agreement provided for sale of the condominium. On April 4, 2019, Petitioners attended the meeting at which the members discussed a modified draft Agreement. SAC ¶35. Petitioners objected to the meeting and the Agreement; however, at no time prior to the Association recording the Agreement[4] did Petitioners move to stop termination and sale of the condominium,[5] which has now been sold, twice.[6] Being bound by the

[2] Neither the 1986 nor the 2018 version of A.R.S. §33-1228 required the Association to notice a meeting of the members in order to terminate the condominium, but the Association went above and beyond the requirements of the law.
[3] *See*, IR45, Ex. 3 (PFP.APP040) at ¶5(a)(ii) on page 3.
[4] The Association recorded the Condominium Agreement with the Maricopa County Recorder's Office on April 9, 2019 at Document No. 201902148170.
[5] Courts may enforce property restrictions by granting injunctive relief. *See Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448 (App. 1993) (citing *Divizio v. Kewin Enters., Inc.*, 136 Ariz. 476, 481 (App. 1983)).
[6] *See* Maricopa County Recorder's Office at Document No. 20190923560, recorded on November 15, 2019, and Maricopa County Recorder's Office at Document No. 20220434140, recorded on May 19, 2022.

CC&Rs and its process for termination including the Agreement, Petitioners were bound by the vote of the Association pursuant to the CC&Rs.

The Agreement set forth in some detail the process through which the Association would determine the value of each owners' unit in order to sell them to Respondent PFP Dorsey Investments, LLC. *See*, Agreement at Paragraph 5 [IR45, Ex. 3]. In the Agreement, the Association afforded a process to Petitioners to challenge the appraisal amount; they failed to avail themselves of its protections. Having been bound by the CC&Rs and having failed to take advantage of the protections of the Agreement, Petitioners should not be permitted to avoid their contractual obligations by attacking a statute, which, although incorporated into the Agreement, is unnecessary to the validity of the termination and sale here.

a. The CC&Rs are Not Contracts of Adhesion

Amicus Papago Springs alleges that the CC&Rs are a contract of adhesion, claiming any provisions in the CC&Rs "should not be enforceable as against a private property owner as they offend the explicit protections" of Article 2, Section 17 of the Arizona Constitution. *See*, Papago Springs Supplemental Brief, pg. 7, fn. 3. Papago Springs makes this statement without support. Moreover, the example to which it cites discusses a racially restrictive covenant that courts universally have found to be unenforceable. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 21 (1948). It is one thing to hold that a court may not enforce a racially restrictive covenant and wholly another to say that

parties in a condominium cannot provide the mechanism of future termination and sale of the condominium.

Arizona courts have consistently defined contracts of adhesion in the consumer context[7] and have not extended the analysis to other areas. *Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, 375, ¶¶12-13 (App. 2001) (A membership contract is not adhesive.); *Dueñas v. Life Care Centers of America, Inc.*, 236 Ariz. 130, §§13-16 (App. 2014) (An arbitration clause in a contract for medical services is not automatically one of adhesion, especially when the plaintiff is not "inexperienced, distressed, or otherwise vulnerable.") Petitioners here are not helpless consumers dealing with a standard form contract.

In this case, at least one Petitioner is an attorney, licensed to practice law in New York and Washington State, and so she clearly is capable of understanding the role and importance of CC&Rs. Petitioners purchased their unit with clear notice of the termination and termination agreement provisions of the CC&Rs as well as notice of the Arizona Condominium Statute.

[7] "An adhesion contract is typically a standardized form 'offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract.'" *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 150 (1992), *quoting Wheeler v. St. Joseph Hosp.*, 63 Cal.App.3d 345, 356, 133 Cal.Rptr. 775, 783 (1976) (citations omitted); *see also Burkons v. Ticor Title Ins. Co. of Cal.*, 165 Ariz. 299, 311, 798 P.2d 1308, 1320 (App. 1989), rev'd on other grounds, 168 Ariz. 345, 813 P.2d 710 (1991) (An adhesion contract is one offered to consumers on essentially a "take it or leave it" basis).

Indeed, even if the Court is persuaded that the CC&Rs are a contract of adhesion, they are still enforceable. *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 151 (1992) (An adhesion contract is still enforceable unless other considerations render it unenforceable. A court should evaluate two factors "the reasonable expectations of the adhering party and whether the contract is unconscionable" to determine if a contract of adhesion is not enforceable.) The Association asserts that under the circumstances of this case, the reasonable expectations of any condominium owner are met; i.e., the Agreement set forth an orderly process to establish the fair market value of Unit 106 and that the termination provision of the CC&Rs are not unconscionable as a result.

"Generally, a covenant or restriction runs with the land in equity if four elements are met: (1) there is an enforceable promise between the original parties; (2) the promise touches and concerns the land; (3) the parties intended to bind their successors; and (4) the successors have notice of the restrictions. 5 Powell, *The Law of Real Property*, ¶673." *Federoff v. Pioneer Title & Trust Co. of Arizona*, 166 Ariz. 383, 387 (1990). All four elements are met with the CC&Rs at issue. The CC&Rs are an enforceable promise that touches and concerns the land upon which the original condominium sat. When the Developer of the Dorsey Place Condominiums recorded the CC&Rs, there can be no question it intended to bind its successors, and with that recording, all successors had notice of the CC&R provisions before those successors purchased their units. Therefore, the

Developer created an equitable servitude. *Federoff*, 166 Ariz. at 389. The *Powell* court determined that Arizona will follow the approach of the Restatement (Third) of Property: Servitudes, and held "that restrictive covenants should be interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and for the purpose for which the covenants were created." *Powell v. Washburn*, 211 Ariz. 553, 554, ¶1 (2006).

Respondents were unable to find any Arizona case where a court determined that recorded covenants, conditions and restrictions were a contract of adhesion. This is likely due to the fact that the Legislature requires every purchaser of a condominium to acknowledge that the CC&Rs are a contract and that the purchaser has read and understood that contract. A.R.S. §33-1260(3)(h). Indeed, courts in other states have found that CC&Rs are not contracts of adhesion. *See, e.g.*, *Graziano v. Stock Farm Homeowners Ass'n, Inc.*, 361 Mont. 332, ¶19, 258 P.3d 999 (Mont. 2011) ("The CCRs here are not a contract of adhesion. First, the CCRs are not a standard form contract without negotiable terms. The CCRs were drafted specifically for the benefit of the *land* within Stock Farm, run with the land, and bind all successive landowners.") (emphasis in original); *Grindstaff v. Oaks Owners' Ass'n, Inc.*, 386 P.3d 1035, ¶25 (App. Okla. 2016) ("[T]he CCRs … appear to have been drafted solely for the benefit either of the land or successive lot owners. No owner or other individual stands to profit from the provisions of the CCRs …; HOA 'is not organized for profit'; and no member is

entitled to receive any profit from the HOA or from the operation thereof.") A condominium declaration is not a contract of adhesion and this Court should not so find. In any event, Petitioners have never raised this issue and they bear the burden of proving unconscionability. *Dueñas*, 236 Ariz. 130, §16.

b. Petitioners' Just Compensation Awaits Them In Escrow

While arguing that the Petitioners are entitled to "just compensation," the amici largely ignore the "compensation" aspect of A.R.S. §33-1228. A.R.S. §33-1228 establishes that any unit owner's interest is the fair market value of that owner's unit, their interest in the limited common elements and the common elements "immediately before the termination" along with their pro rata share of the association's reserve fund and operating account(s), plus five percent for relocation costs. These requirements ensure the payment of just compensation.

A.R.S. §33-1228 provides a procedure to protect the minority owners and ensure they receive a "just compensation." In fact, except for the cost of an appraisal to verify whether the compensation to the minority owners is just, an association bears the cost of arbitration to determine the amount of that compensation. *See*, A.R.S. §33-1228(G)(1). Petitioners never availed themselves of the protections or procedures of A.R.S. §33-1228(G)(1).

In addition, the Association prepared and distributed the Agreement as required under the CC&Rs at Section 13.4 [IR-51, Ex. 1 (APP114)]. In the Agreement, the

Association informed the owners how to challenge the Association's appraisal. *See*, IR-45, Ex. 3 (PFP.APP040) at ¶5(a)(ii) on page 3. The Association obtained an appraisal for the floor plan for Unit 106 and deposited $234,145 in an escrow account, ready to transfer to Petitioners. Under A.R.S. §33-1228(G)(1) and the Agreement at ¶5(a)(ii), Petitioners had the right to challenge that appraisal by obtaining their own appraisal. Both the Statute and the Agreement state that if the owner's appraisal is up to five percent more than the Association's appraisal, then the owner's appraisal controls. If the difference between the appraisals is greater than five percent, the provisions of A.R.S. §33-1228(G)(1) are triggered as are the provisions of ¶5(a)(iii) of the termination Agreement. Under the Agreement, if a unit owner initiates arbitration for their unit, the Association must either accept the owner's appraised amount or begin the arbitration process; i.e., submit the dueling appraisals to arbitration at the Association's expense. In fact, the Arbitration clause of the Agreement at issue is more detailed than A.R.S. §33-1228(G)(1) and arguably, offers greater protections. Petitioners failed to avail themselves of this remedy and their just compensation remains on deposit in an escrow account to this day.

IV. The Partition Statutes Effectuate the Same Result as A.R.S. §33-1228.

Petitioners and amici largely ignore that even as tenants in common, which Petitioners claim they should be, the homeowners have the right of partition irrespective of §33-1228. Therefore, a sale including the Petitioners' property is proper

under the law and will happen, either through termination or partition. Only Papago Springs addresses this point and its argument misses the mark by failing to grasp that Petitioners do not challenge the termination of the condominium—it is undisputed that the termination can occur. OB, p. 24. Rather, Petitioners challenge the forced sale of any unit owners' prior interest **only**, not the termination itself or the creation of a co-tenancy, which necessarily follows a termination where no sale occurs. *See, id.*

Papago Springs mistakenly argues that Respondents did not previously raise the partition issue—that is incorrect. *See* Cross-Petitioners Response Brief p. 13 (Oct. 28, 2022) and Combined Response to Amici, including Papago Springs, p. 13 (Jan. 13, 2023). Indeed, Petitioners first invoked the right of partition in this case at the pleadings stage, in aid of their own argument in response to Defendants' motion to dismiss. *See* Response to MTD at p. 2:15-17 [IR56].

Papago Springs raises two arguments against partition: (1) it is not available because the "units themselves are not co-owned" (pp. 6-7); and (2) in direct contradiction to number one, Papago Springs argues that any partition would be a partition in kind, "restoring each homeowner's title to their unit" (p. 8). Both assertions are incorrect as a matter of law.

The proper analysis is as follows: Termination creates a co-tenancy if there is no sale of the terminated project. A.R.S. §33-1228(E) provides:

> If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection I of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit.

The ownership shifts from a fee simple owner of individual units to a percentage-based ownership of the whole with occupancy rights to what was previously the owner's own unit. In other words, the 90% owner owns a 90% tenant in common interest in the entire project, i.e., all former units, all former limited and common elements, and the minority owners own their limited percentage interest of the whole as well. Under the law, every co-tenant has the right to partition. A.R.S. §12-1211.

Papago Springs alternatively argues that any partition action would be a partition in kind, not by sale, restoring each unit owner's title to their unit. It is plain by the terms of 33-1228(E) that the unit owners lose title to their individual units, and instead, hold only a percentage interest in the whole. Here, the only mechanism to partition a condominium is a partition by sale. In any condominium necessarily, all of the water pipes are owned in common, the roofs, the electrical wiring, the hallways, the walls, elevators, irrigation system, pool, etc. There is no way to partition the condominium in kind; therefore, it must be sold. The vast majority of partition actions are resolved by one party purchasing the other parties' interests at fair market value as determined by competing appraisals. This would be the same result as a termination under the Statute,

but the minority owners would be paid five percent less than current law requires, be forced to litigate the issue in Superior Court rather than submit a competing appraisal that is privately arbitrated, and it would be done at the parties' expense, rather than the Association's expense as the Statute requires.

The termination process is not unconstitutional any more than the right of partition is unconstitutional, and any ruling by this Court to the contrary will have significant consequences in each of the previously identified legal realms, i.e., foreclosure, adverse possession, and option contracts.

Contrary to the suggestion of several amici, the Statute does not require the Association to market the condominium for sale to obtain the highest price for the members. Rather, A.R.S. §33-1228 provides a competing appraisal process. Under the 2018 version of the Statute, the Association's role is quite narrow: (1) it selects an independent appraiser to value "the respective interests" of unit owners and distributes the same to the unit owners [Subsection (G)(1)]; (2) once the Termination Agreement is recorded, the Association takes title to the terminated units [Subsection (D)] and must distribute to the same "the respective interests" as set forth in the statute: the fair market value of their units, limited and common elements "immediately before the termination," plus a pro-rata share of Association accounts, and five percent for moving costs [Subsection (G)(1)]; and (3) if any owners avail themselves of the arbitration process after supplying a competing appraisal, the Association must pay for the

arbitration [Subsection (G)(1)]. Here, there is no dispute that the Association fulfilled its role, instead, it was Petitioners who failed to avail themselves of the arbitration process.

Regardless, no portion of the Statute requires the Association to market the property for sale. On the contrary, the unit owners go through a competing appraisal process to determine what proceeds they are entitled to in the event of a termination. Unless the Association refused to hire an independent appraiser, or pay the appraised amount/arbitrated amount, there is no possibility of a fiduciary duty breach. All of the steps are made public, and if anyone disagrees with the appraisal, they have the right to arbitrate that amount and the Association pays for it.

V. A.R.S. §33-1228 Does Not Require All of the Condominium to be Sold.

When read in its totality, the plain language of §33-1228(C) permits, but does not require, a sale to include the entire condominium, and nothing in the statute prohibits the sale of less than the whole condominium. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167-69 (2012) ("Context is a primary determinant of meaning …. The entirety of the document thus provides the context for each of its parts."). The complete subsection reads as follows:

> A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

A.R.S. §33-1228(C).

The amici erroneously focus on the first sentence of subsection (C) to argue "all the common elements and units of the condominium" must be sold. As the court of appeals correctly concluded, the plain language of the first sentence *permits* a termination agreement to provide for the sale of all the common elements and units, but it does not require it. *See* Opinion ¶30; s*ee also Hughes v. Jorgenson*, 203 Ariz. 71, 73 (2002) ("Generally, if a statute is clear, we simply 'apply it without using other means of construction, assuming that the legislature has said what it means." (internal citation omitted)). Nothing in subsection (C) requires that the entire condominium be sold. The legislature's use of the word "any" in the second sentence of subsection (C) supports the notion that a portion of the condominium can be sold following termination. If the legislature had intended to exclude sales of less than all of the real estate, it could have expressly done so in the second sentence by using the word "all" of the real estate, or omitting the word "any" from the sentence. The legislature did not do so. Therefore, the unambiguous plain language of the Statute allows a termination agreement to provide for the sale of less than all the units and common elements.

Further, the amici Condo Owners improperly conclude that subsection (C) is the only authority permitting a condominium termination agreement to provide for a real estate sale. *See* Brief of Amici Condo Owners p. 5. The amici Condo Owners fail to account for subsection (D), which permits the association, on behalf of the unit owners,

to contract for the sale of real estate in the condominium, which becomes binding on the unit owners once approved pursuant to subsections A and B. That is what occurred in this case. A.R.S. §33-1228(D). As explained *supra*, a private contract between private parties exists in this case by way of the Agreement. Thus, with a valid termination agreement in effect that comports with the requirements of A.R.S. §33-1228(C) and (D), the condominium once known as Dorsey Place was properly terminated and sold.

Amicus Pacific Legal Foundation also argues that reading A.R.S. §33-1228 to require all of the condominium to be sold at termination protects private property rights. *See*, Brief of Amicus Pacific Legal Foundation pp. 13-15. However, such an argument lacks merit as the reasoning does not support the idea that selling a portion of the property is a taking but selling all of it is not. Petitioners' and amici's whole contention of finding A.R.S. §33-1228 unconstitutional is because it is an alleged taking—i.e., the legislature cannot enact a law that allows one person to take another's property. Although the Statute and this case is not a taking (but rather a contractual agreement made by private parties), Amici do not explain how a sale of the entire condominium would thereby rectify a taking by the government. Under Petitioners' and amicis arguments, a taking would still exist whether or not a portion or all of the condominium is sold. Amicis' justification in requiring a sale of the entire condominium is an attempt to require a sale on the open market. Such a requirement is neither expressly required nor contemplated under the Statute. Nowhere in the Statute does it

state the condominium has to be sold to a separate third-party non-unit owner or that the property needs to be placed on the open market, rather the fair market value is determined by licensed appraisals and arbitration, where necessary. The only requirement subsection (C) provides is that the minimum terms of the sale be provided in the termination agreement, which occurred in this case.

VI. Conclusion

Ultimately, the arguments made by the various amici supporting Petitioners add little to the discussion here. They cite inapplicable law and recite facts that are not of record or part of this case at all. The Association properly terminated and sold the condominium (1) pursuant to the provisions of the CC&Rs and Agreement irrespective of the Statute, (2) pursuant to contract by virtue of the CC&Rs incorporating the Statute or (3) pursuant to the Statute. Unless all three of these methods are illegal, the Court need not decide the issues of constitutionality urged by Amici. The Court should affirm the trial court's judgment of dismissal below and reverse the Court of Appeals' award of attorneys' fees to the Petitioners.

RESPECTFULLY SUBMITTED this 16th day of October, 2023.

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