

**Do the HOA or Condo?
Helping the Developer Decide**

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In developing common interest communities in Pennsylvania, developers frequently face a critical decision whether to create a planned community under the Uniform Planned Community Act, 68 Pa.C.S. 5101, *et seq.* (the “UPCA”) or a condominium regime under the Uniform Condominium Act, 68 Pa.C.S. 3101, *et seq.* (the “UCA”). As a practitioner, you need to understand the similarities and differences between these two acts so you can best advise your developer clients on how to decide.

I. When a Statutory Structure Chooses Your Project

In today’s market, a subdivision where the lot owners do not have any shared responsibilities is becoming increasingly rare. This is in large part because of stormwater management considerations and a growing unwillingness of municipalities to accept dedication of interior community roads. Any project in which an owner will or may become obligated to pay for real property taxes, insurance, maintenance, repair, improvement, management, administration or regulation of any part of the community other than the owner’s lot is, by statutory definition, deemed a “planned community” under the UPCA, and therefore is subject to the UPCA. (UPCA § 5103). Once this statutory test is affirmatively met, a developer has no choice but to develop the project as a common interest community.

If a common interest community structure is required, the developer and his lawyer should analyze the product being built, special features of the project, and the type or types of purchasers targeted for the product to determine whether the UPCA or the UCA provides a better legal framework. In this section, we will discuss some of the basic conceptual differences between the UCA and the UPCA, and how project features, size and product type and marketing concerns or perceptions influence the decision of which statute to use.

A. Pros and Cons of Forming Condominiums versus Planned Communities

1. Fundamental Differences and Similarities

From an historical perspective, the UCA and the UPCA were meant to serve different purposes and uses: the UCA is geared more toward “stacked” or apartment-style products, whereas the UPCA is geared to encompass a variety of mixed-use products, from single-family homes on lots to all varieties of stacked and/or attached products. A generalized comparison of the two acts is that the UPCA, while slightly more complex, is a more flexible statute to work with than the UCA. So, if a developer plans on building a typical stacked unit development, the UCA will work well; otherwise, the UPCA generally will provide a better framework. These basic differences between the acts are discussed below in more detail, with specific and comparative references to statutory provisions.

The UCA and the UPCA have identical wording in many of their provisions. These similarities sometimes make it difficult to understand the fundamental differences between the

¹ Materials prepared with permission from Nancy S. Cleveland and based in substantial part on her materials entitled “Project Structuring Getting the Governing Documents Right Disclosure Considerations.”

acts. It is only through understanding the fundamental differences between the UCA and the UPCA, however, that you can effectively counsel your client and an informed decision about which act to use can be made by the developer.

Under the UCA, a “condominium” 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. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

A purchaser in a condominium purchases fee simple title to a unit, together with an undivided percentage interest in the common elements. By definition, a UCA unit cannot contain any common elements, because common elements are defined as “all portions of a condominium other than the units.”

By contrast, under the UPCA, a “planned community” is defined as:

Real estate with respect to which a person, by virtue of ownership of an interest in any portion of the real estate, is or may become obligated by covenant, easement or agreement imposed on the owner’s interest to pay any amount for real property taxes, insurance, maintenance, repair, improvement, management, administration or regulation of any part of the real estate other than the portion or interest owned solely by the person. The term excludes a cooperative and a condominium, but a condominium or cooperative may be part of a planned community. For purposes of this definition, “ownership” includes holding a leasehold interest of more than 20 years, including renewal options, in real estate. The term includes nonresidential campground communities.

The purchaser of a unit in a planned community purchases fee simple title to a unit, together with a percentage membership interest in the community association. The association, in turn, owns fee simple title to all of the common elements.

The term “real estate” has essentially the same definitions under both acts, which is:

Any fee, 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. The term includes parcels with or without upper or lower boundaries and spaces that may be filled with air or water.²

Common elements under the UPCA are defined as “common facilities or controlled facilities.”³ A common facility is “any real estate within a planned community which is owned

² In part, this definition exists to accommodate time-shares or “interval estates”, which are beyond the scope of this program.

³ Note that these two types of common elements can be further designated as limited common elements, which, in turn, can be limited common facilities or limited controlled facilities.

by the association or leased to the association. The term does not include a unit.” A controlled facility is “any real estate within a planned community, whether or not a part of a unit, that is not a common facility but is maintained, improved, repaired, replaced, regulated, managed, insured or controlled by the association.” (Emphasis added.)

The concept of controlled facilities simply does not exist under the UCA, which limits the flexibility of the UCA. The definition of real estate, when combined with the definition of a planned community and the concept of controlled facilities, creates a powerful tool for addressing special features of a complex project using the UPCA. For example, because controlled facilities under the UPCA are not limited to being located in open space or other common areas, designers have the flexibility to design stormwater controls, sidewalks, streetlights and landscaping and other improvements in the most suitable location on the site, even if that location falls within a unit.

2. When Size Matters: Small and “Limited” Communities under the UPCA.

One additional difference between the acts is that the UPCA distinguishes what are commonly referred to as small and limited planned communities, and provides for much more limited or reduced regulation of such communities. These provisions allow the developer to avoid providing purchasers with a formal public offering statement generally required under Chapter 34 of the UCA or Chapter 54 of the UPCA.⁴

Under UPCA Section 5102(a) (1) a “small” planned community is defined as a planned community in which:

- There are not more than 12 units; and
- None of the units is subject to subdivision or conversion under Section 5215; and
- There are no declarant rights reserved for additional real estate, convertible real estate or withdrawable real estate.

To take advantage of this Section, a developer cannot have or reserve any flexibility to change the scope of the planned community in terms of number of units, the limited common elements appurtenant to the units, or the size of the common elements.

Under UPCA Section 5102(a) (2) a “limited” planned community is defined as a planned community in which:

- There are any number of units; and
- None of the units is subject to subdivision or conversion under Section 5215; and
- There are no declarant rights reserved for additional real estate, convertible real estate or withdrawable real estate; and
- The common and limited elements include only:

⁴ Both acts contain small community exemptions from certain public offering statement requirements (*see* § 3402(b) and §5402(b)), but the UPCA exempts small communities entirely, and limited communities in large part, from Chapter 54, unless the declaration expressly makes the act, and therefore those provisions, applicable as a whole.

- Storm water management facilities and related devices; and/or
- Real estate containing:
 - ❖ signage
 - ❖ lighting
 - ❖ landscaping
 - ❖ gates, walls, fences or monuments
 - ❖ open space.

This provision of the UPCA goes on to define “open space” as including land and/or water that is intended for common use or enjoyment of the community, “including, but not limited to, ball fields and courts, parks, walking, hiking or biking trails, wetlands, wooded areas and walkways and driveways providing access thereto or parking intended for users of such open space.” “Streets, utility lines or facilities or swimming pools or clubhouses owned or leased and maintained by the association” are expressly excluded from the definition of “open space.” Any project that includes private roadways other than driveways providing access to open space would not qualify as a limited planned community. Since one cannot know for certain whether streets will become public until acceptance of dedication, and since acceptance of dedication normally occurs after the sale of units, under a literal reading of the limited planned community provisions in Section 5102(a) (2) the developer must retain the risk of non-acceptance of dedication of streets in order to use a limited planned community structure. Any developer who is not willing to accept that risk should not take advantage of the limited planned community provisions.

Once it is determined that a project qualifies as either a small or limited planned community under the UPCA, Section 5102 (a) provides for limited applicability of the UPCA to the community. Under both small and limited scenarios, Sections 5105 (separation of titles and taxation), 5106 (applicability of local ordinances, regulations and building codes), 5107 (eminent domain), and 5218 (easement to facilitate completion, conversion and expansion)⁵ apply. These four provisions are the full extent to which the UPCA applies to a small community.

A limited planned community, however, is subjected to various additional provisions of the UPCA, including: Sections 5103 (relating to definitions), 5104 (relating to variation by agreement), 5108 (relating to supplemental general principles of law applicable), 5109 (relating to construction against implicit repeal), 5110 (relating to uniformity of application and construction), 5111 (relating to severability), 5112 (relating to unconscionable agreement or term of contract), 5113 (relating to obligation of good faith), and 5114 (relating to remedies to be liberally administered); all of Chapter 53; and Sections 5407 (relating to resales of units), 5408 (relating to escrow of deposits), 5409 (relating to release of liens), and 5411 (relating to warranty against structural defects).

⁵ Section 5218 applies to small or limited planned communities under the UPCA only with regard to the non-flexible nature of such a small or limited planned community. Under this section, a statutory easement (subject to provisions of the declaration) is provided throughout the common elements for (i) a declarant, for the purpose of discharging obligations and exercising “special declarant rights”; and (ii) a unit owner and its agents, contractors and invitees, as is reasonably necessary for the purpose of construction related to a unit.

Although a formal public offering statement is not required for either a small or a limited planned community, Section 5102(a) (2) imposes certain of the consumer protection requirements on a declarant for the sale of units in a limited planned community. A declarant of a limited planned community must include in an agreement of sale for any unit:

- A statement that an association “exists or may be created to own and manage” the common elements;
- A general description of the common elements (including any limited common elements); and
- A statement that there may be association assessments relating to the ownership, management, administration or regulation of the common elements.

The declarant of a limited planned community must also prepare and record a declaration or “covenants and restrictions as may be appropriate for the planned community” in accordance with Section 5205. The declarant must provide the purchaser with:

- A copy of the recorded or proposed declaration or covenants and restrictions for the community; and
- A copy of the actual or proposed bylaws and budget of the community, with the budget being prepared in accordance with Section 5402(a) (7) of the UPCA, which provides a list of matters that must be addressed in an association budget and disclosed to purchasers.⁶

In addition, the purchaser of a unit in a limited planned community has the right to cancel the agreement of sale within seven (7) days after receipt of the declaration or covenants and restrictions and the actual or proposed bylaws and budget.

Perhaps the single greatest advantage of having a small or limited planned community is the avoidance of having to prepare complex, statute-driven community documentation, in the case of a small community, and the reduced level of complexity in the community documentation, in the case of a limited community; as compared to the detailed and statute-driven community documentation required for a fully-regulated planned community or condominium. The unobtrusive nature of the UPCA provisions applicable to a small planned community makes drafting a declaration for such a community a straight-forward endeavor, requiring no reference to the UPCA requirements for the contents of a declaration. The level of complexity for drafting documentation for a limited planned community declaration and bylaws relates primarily to the control and management of the community under Chapter 53 (most notably including requirements relating to the transition and turnover of control of the association from the declarant to the unit owners), the handling of purchaser’s escrows and the provision of a structural warranty under Chapter 54.

⁶ It is interesting to note that subpart (8) of Section 5402(a) (which requires the disclosure of any services or expenses being paid by the declarant and use of personal property owned by the declarant, any of which are expected eventually to result in a common expense when the declarant no longer provides for such services, expenses or personal property), is not made applicable to limited planned communities.

A benefit of drafting community documents for either a small or a limited planned community is that the lawyer need not follow the strict requirements of Chapter 52 relating to the required contents of declarations and plats and plans under the UPCA. There are no requirements applicable to small or limited planned communities with regard to allocation of votes and percentage shares of common expenses.

The advantage of using a limited community structure diminishes as the size or complexity of the project increases. For example, the length of time required to complete a development will often drive a decision of whether to use a fully-regulated structure instead of the limited planned community structure.⁷ Because a limited planned community is, by definition, not a flexible planned community, under Section 5304 the maximum period of control that a declarant may enjoy is five (5) years from the date of first conveyance of a unit to a non-declarant, third-party purchaser if the limited planned community model is chosen. For a flexible planned community, the period extends to a maximum of seven (7) years.

Perhaps a more significant disadvantage to using a limited planned community structure for a community with a significant number of units is the effect on assessments charged to the declarant. Under Section 5314, the declarant pays all of the expenses of the planned community until the association makes a common expense assessment. With larger communities, a declarant will often want to begin assessments upon the completion of a phase. In a limited planned community, because there is no convertible real estate, all units in the community are created upon recordation of the declaration. Once an assessment for common expenses is made, the assessment applies to all units that have been created. Consequently, the declarant must pay an assessment for each of the unsold, but created, units in accordance with the common expense liability allocated to each of those units, as required under Section 5314.

B. Marketing Considerations

Developers often consider how their prospective purchasers will respond to buying a condominium unit versus a unit in a planned community. Purchasers of single family homes on traditional lot-style units are often not comfortable with the concept of a planned community. Similarly, purchasers of apartment-style units are often more familiar and comfortable with condominium ownership. In situations where you have only stacked and/or attached units (*e.g.*, townhomes, duplexes), and no need for controlled facilities, the UCA may well be preferable.⁸

As a practical matter, how you define each unit product type in the declaration goes a long way toward easing any marketing concerns. In a mixed-use project, consider defining units as “Home Units,” “Townhome Units,” “Carriage Home Units,” and “Apartment Units.”

⁷ In a small planned community, there are no statutory limits on the length of time during which a declarant can control the community, but presumably the size of the development will relegate such control to a fairly short period of time in any event. In a limited planned community, however, the number of units can range from a few to hundreds, with the desire for a longer period of declarant control increasing as the number of units lengthens the time required to complete development of the project.

⁸ If quality of construction is a concern, the UCA (unlike the UPCA; *see* § 5106(d)) does not set a maximum standard for building codes and regulations. This is a rather minor difference and typically does not weigh much at all in choice of statutes analysis.

II. Preparing Common Interest Community Documents; Flexibility

Most statutes governing the sale of residential real estate are, at heart, consumer protection statutes. For regulated communities, the concept of “Buyer Beware” has been reduced to a minimum. The three consumer protection statutes discussed here, the UCA, the UPCA and the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1701, *et seq.*, all require developers to make a wide variety of disclosures to purchasers in a variety of documents. Because the penalties for non-compliance can be significant, perhaps the more timely statement is “Developer Beware”!

A. Declaration Disclosures Under the UCA and the UPCA.

Under both acts, a declarant is required to include in the declaration a variety of information. See UCA §§ 3205, 3206, and 3210; UPCA §§ 5206, 5206 and 5210. The referenced provisions in the acts provide comprehensive lists of what must be included. There are several areas of disclosure that often present problems and should be given special attention by the lawyer and discussed early in the development process. One notable requirement is the catch-all provision in each of the acts for what must be in every declaration: “Any other matters the declarant deems appropriate.” UCA § 3205(14) and § 5205(17).

An area to pay particular attention to is the description of units and maintenance responsibilities. Unit boundaries must be very carefully and precisely described. A failure to do so with regard to stacked units could, for example, lead to the association having to do maintenance or make repairs on areas not reflected in the budget. Similarly, when providing for controlled facilities under the UPCA, the lawyer must describe in detail who is responsible for what. Not all controlled facilities need be treated the same. Some may only be insured by the association. Others may only be replaced by the association, but are to be insured and repaired and maintained on a day to day basis by the unit owner. Paying attention to such details will avoid any confusion in the operation of the community.

Restrictions on use, occupancy and alienation of units is another area where careful drafting is required. This is the area in which most post-development litigation occurs. A developer’s reputation can be soured by such things! In addition, particularly in the development of large projects over several years, the declarant must be careful to anticipate and not inadvertently preclude uses that may be more attractive to the marketplace later in the development of the project.

Lastly, reservation of any desired special declarant rights is critical. If such rights are not explicitly reserved, they cannot later be created and utilized by the declarant absent unanimous consent of all unit owners. Special declarant rights allow the declarant a variety of important rights ranging from marketing the property (e.g., maintaining sales offices) to the ability to expand or contract the project. In addition, the benefits (discussed in more detail below) of having expressly reserved the special declarant rights to convert, withdraw and add real estate can be severely limited or destroyed without very careful attention to drafting the assurances/no assurances provisions required to be set forth in a declaration with respect to convertible real estate, withdrawable real estate and additional real estate. No assurances provisions should

reflect the scope of flexibility the developer desires to preserve for the future; assurances provisions should reflect the limits of what the developer is willing to commit to at present.

III. Flexibility and Coping with Unforeseen Costs/Market Conditions

Section 5103 of the UPCA defines a “flexible planned community” and Section 3103 of the UCA defines a “flexible condominium” as project “containing withdrawable or convertible real estate or a [planned community] [condominium] to which additional real estate may be added or a combination thereof.” The flexible planned community or condominium provisions under the acts aid developers primarily in developing projects in phases and allowing a project to expand, contract or transform as market conditions change. This capability is important in a variety of circumstances including, for example, where the project involves a large number of units with multiple product types, where there are financing constraints, where the feasibility of the project may not be entirely known from the start of the project, or where multiple developers will be constructing the project. The rights to add, withdraw and convert are special declarant rights which must be expressly reserved and described in the declaration if they are to be effective and available to the developer. Moreover, these rights must be exercised within seven years after recording the declaration or they are lost. If convertible real estate is not converted within the requisite time frame, the real estate is a common element.

A. Using Additional, Convertible and Withdrawable Real Estate.

Section 3206 of the UCA and Section 5206 of the UPCA each sets forth a checklist of the matters that must be included in a declaration to preserve flexibility rights. If properly disclosed in a recorded declaration, a developer may reserve the right to (a) add more land to the community (referred to as additional real estate), even if the developer has no legal interest in the designated land, (b) designate areas of the community as land that may be taken out of the community (referred to as withdrawable real estate), subject to compliance with subdivision requirements, and (c) delay a decision on where units and limited common elements will be created within designated areas of the project (referred to as convertible real estate). If these rights are not expressly reserved and described in a declaration, they are unavailable to the declarant without the consent of every unit owner (see UCA 3219(d) and UPCA 5219(d)). The declaration must clearly state that these rights exist for a period not to exceed seven (7) years after recording the declaration, and any other circumstances that will terminate these rights must also be set forth. The areas of the property designated as convertible, withdrawable or additional must have “legally sufficient descriptions” attached to the declaration.

Any limitation on the exercise of flexibility rights and a description of the timing for converting, adding or withdrawing real estate or any portions thereof, must be described, or there must be a statement included that there are no limitations and/or that no assurances can be given regarding timing. With regard to convertible and additional real estate, additional statements must be made regarding compatibility of use, architectural style, type, size and construction quality and materials for improvements, limitations on location of improvements, similarity of types, sizes and proportions of limited common elements, or a “no assurances” statement must be made. Lastly, if any assurances are made with respect to convertible or additional real estate, a statement must be included to describe the extent to which those assurances apply if the real

estate is withdrawn (if it is also designated as withdrawable real estate) or not added to the community, or to indicate that the assurances do not apply in such circumstances.

A declaration must also include a statement describing how common element interest under the UCA, voting strength in the association and common expense liability for each unit will change with the exercise of flexibility rights by the declarant. Note that under the UPCA, this requirement is slightly different in that each unit owner has an interest in the association, not in the common elements, since the association owns the common elements.

Convertible real estate is an important tool because it allows the declarant to decide how to develop areas of a project until those areas are being brought to market. The declarant is liable for all real estate taxes and all other expenses associated with or assessed against any convertible real estate until conversion occurs or until the period during which conversion must occur has expired. No other unit owner is subject to expenses relating to convertible real estate, and any income derived from convertible real estate inures to the declarant unless otherwise specified in the declaration. UCA § 3211(c); UPCA § 5211(c). Convertible real estate may be treated as a separately taxed parcel and therefore can be sold and mortgaged as convertible real estate. UCA § 3105; UPCA § 5105 (b)(2).

In addition, the declarant can use convertible real estate to avoid assessment for those areas until the time a unit is created and sold to a third-party purchaser. Any units created out of convertible real estate are immediately owned by the declarant and assessable to the declarant. Typically, the declarant will create a unit out of the convertible real estate just prior to sale by filing a supplement to the declaration prior to the deed. By following this procedure, the declarant escapes assessment.

Often convertible real estate is also designated as withdrawable real estate to provide the developer the flexibility of removing part of the land from the project. The withdrawal of withdrawable real estate operates in a similar manner as convertible real estate. A declaration amendment must be prepared, executed and recorded. Appropriate changes must be made to the plats and plans. Common element interests under the UCA, votes in the association and common expense liabilities must be reallocated to the remaining units in the community proportionate to their standing prior to the withdrawal of real estate. Such reallocation becomes effective when the amendment is recorded. Withdrawal is prohibited once there is a unit owned by a party other than the declarant within the withdrawable real estate being removed from the community. While withdrawable real estate is part of the community, the declarant is liable for real estate taxes and other expenses and has all rights to income derived from withdrawable real estate.

Withdrawable real estate is still subject to subdivision requirements when being withdrawn, so it is necessary to delineate withdrawable real estate in a fashion that most likely permits the withdrawable real estate to be subdivided off from the original parcel(s) subjected to the common interest regime.

Reserving the right to add additional real estate allows a developer the ability to make the declaration effective against property that the developer does not own, has an equitable interest in, or owns at the time the declaration is recorded. It is important to preserve that right if there is any possibility of bringing in the additional land because doing so can result in cost savings on

creating and administering a new community. A declarant may convert additional real estate directly into common elements, units and/or limited common elements in the same manner as convertible real estate is converted, or create convertible and/or withdrawable real estate out of any additional real estate added to a condominium. In creating new convertible and/or withdrawable real estate out of additional real estate, all of the checklist requirements relating to either must be satisfied in the amendment filed. The seven (7) year time period for development, however, is not extended.

B. Right to “Subdivide” or Combine Units.

One of the most important special declarant rights provided for under the UCA and the UPCA is the right to subdivide or convert units that have been created into additional units and common elements found in UCA § 3215 and UPCA § 5215. Section 5215 of the UPCA provides:

(a) General rule.--If the declaration expressly so permits, a unit may be subdivided into two or more units or, in the case of a unit owned by a declarant, may be subdivided into two or more units, common elements or a combination of units and common elements. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit or upon application of a declarant to convert a unit, the association shall prepare, execute and record an amendment to the declaration, including the plats and plans, subdividing or converting that unit.

(b) Execution and contents of amendment.--The amendment to the declaration must be executed by the owner of the unit to be subdivided, must assign an identifying number to each unit created and must reallocate the allocated votes in the association and common expense liability formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.

(c) Conversion of unit of declarant to common elements.--In the case of a unit owned by a declarant, if a declarant converts all of a unit to common elements, the amendment to the declaration must reallocate among the unit owners votes in the association and common expense liability formerly allocated to the converted unit on a pro rata basis, *inter se*.

These provisions allow a declarant to start out with land units, but end up with building units, or a combination of land units and building units. In the context of phased projects with multiple developers, these rights, if properly preserved in the declaration, can be invaluable to a developer.

C. Master Associations

Master associations are charged with the responsibility of managing and governing facilities shared by homeowner sub-associations, and may be responsible for such things as managing and maintaining non-dedicated roadways or community facilities (*e.g.*, a tennis club or restaurant) or overseeing the management of the sub-associations. Various sections of the UCA

and UPCA govern the interplay between master associations and sub-associations. The right to subject a common interest community to a master association is a special declarant right and must be expressly reserved in the declaration.

If the declaration of a sub-association provides for the delegation of certain duties to a master association, then all provisions of the governing statute that apply to the sub-association shall apply to the master association with regard to those powers delegated to and accepted by the master association. A master association's power to act on behalf of a sub-association is limited to the powers expressly delegated to it by the sub-association's declaration, unless the master association is fulfilling all of the functions of the sub-association. UCA §3222; UPCA §5222.

Voting rights and notice rights for master associations are handled much in the same way as they are for a regular association except that executive board elections for master associations take place in one of four ways, and the particular way of conducting the election must be designated in the declaration. First, an at-large election can take place with all unit owners of all sub-communities participating. Second, an at-large election can take place with all executive board members of all sub-associations participating. Third, elections can occur by unit owners of each sub-association electing specific member-representatives to serve on the master association executive board. Finally, elections can occur by sub-association executive boards electing specific member-representatives to serve on the master association executive board.

The statutes provide relevant procedure for effectuating a master association. First, notice must be given to the unit owners that either the date provided for the applicability of the master association has occurred or that some event provided for in the declaration has occurred which triggers the applicability of the master association statutory provisions. Second, an instrument must be recorded stating that the provisions for establishing a master association have taken effect. Rights and trigger events for establishing a master association must be provided for in the declaration and the triggering events must occur prior to the expiration of seven (7) years after the date of recording the declaration.

D. Mergers of Associations

The acts also provide developers with the flexibility to create separate associations and merge them into one when the entire project is completed, so long as the right to merge is expressly and properly reserved in the declarations. Various, specific statements must be included in the declaration with respect to a declarant's right to cause a merger, including, without limitation, the requirement that all associations/communities and the number of units in each be identified and set forth.

In addition, the unit owners of two communities may decide to merge their associations by a vote of the number of unit owners as is required to terminate each declaration (at least 80%, unless a larger percentage is required in a declaration). In either case, the resulting association becomes the legal successor to the previous entities and the single association holds all rights, powers, obligations, assets and liabilities of the previous entities. UCA § 3223; UPCA § 5223.

A merger is made effective by a written, recorded merger document, which acts as an amendment to all pre-existing declarations. The merger document must further set forth a reallocation of common interest elements if under the UCA, common expense liabilities and voting rights.

E. Other Flexibility Provisions.

There is flexibility inherent in the definition of real estate under both acts. Since real estate can include parcels made up of air or water, a declaration can be drafted to protect views and regulate other physical aspects of the property.

One final factor to consider is the use in both of the acts of the phrase “unless specifically provided otherwise in the declaration” or “unless the declaration provides otherwise.” These are key places where the lawyer has an opportunity to be creative and address the particular concerns of a developer or unique circumstances of a particular development. If trying to choose between a UCA or UPCA project, these provisions provide the lawyer ample opportunity to make a UCA declaration more on a par with UPCA declaration, with the notable exception of the concept of controlled facilities which would under no circumstances be supported under the UCA.

F. Multi-Developer Projects.

Whenever a project involves more than one developer, each developer’s special declarant rights and statutory warranty liability should be delineated in a recorded document. Each of the acts provides a list of special declarant rights as shown below:

Under UCA § 3103:

“Special declarant rights.” Rights reserved for the benefit of a declarant to:

- (1) Complete improvements indicated on plats and plans filed with the declaration (section 3210);
- (2) Convert convertible real estate in a flexible condominium (section 3211);
- (3) Add additional real estate to a flexible condominium (section 3211);
- (4) Withdraw withdrawable real estate from a flexible condominium (section 3212);
- (5) Convert a unit into two or more units, common elements, or into two or more units and common elements (section 3215);
- (6) Maintain offices, signs and models (section 3217);
- (7) Use easements through the common elements for the purpose of making improvements within the condominium or within any convertible or additional real estate (section 3218);
- (8) Cause the condominium to be merged or consolidated with another condominium (section 3223);
- (9) Make the condominium subject to a master association (section 3222); or
- (10) Appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (section 3303(c)).

Under UPCA § 5103:

“Special declarant rights.” Rights reserved for the benefit of a declarant to:

- (1) complete improvements indicated on plats and plans filed with the declaration under section 5210 (relating to plats and plans);
- (2) convert convertible real estate in a flexible planned community under section 5211 (relating to conversion and expansion of flexible planned communities);
- (3) add additional real estate to a flexible planned community under section 5211;
- (4) withdraw withdrawable real estate from a flexible planned community under section 5212 (relating to withdrawal of withdrawable real estate);
- (5) convert a unit into two or more units, common facilities or controlled facilities or into two or more units and common facilities or controlled facilities;
- (6) maintain offices, signs and models under section 5217 (relating to declarant offices, models and signs);
- (7) use easements through the common facilities or controlled facilities for the purpose of making improvement within the planned community or within any convertible or additional real estate under section 5218 (relating to easement to facilitate completion, conversion and expansion);
- (8) cause the planned community to be merged or consolidated with another planned community under section 5223 (relating to merger or consolidation of planned community);
- (9) make the planned community part of a larger planned community or group of planned communities under sections 5222 (relating to master associations) and 5223 (relating to merger or consolidation of planned community);
- (10) make the planned community subject to a master association under section 5222 (relating to master associations); or
- (11) appoint or remove an officer of the association or a master association or an executive board member during any period of declarant control under section 5303 (relating to executive board members and officers).

In determining which special declarant rights to provide to a co-developer, a developer must first review which special declarant rights it retained in the declaration. The document that effectuates the transfer of the special declarant rights must specify exactly which rights are being transferred, and whether, to what degree and for what purpose any rights are being retained by the original declarant. A developer should also consider whether the transfer will be done in phases with the original developer being responsible for some phases, but not all, whether both developers will be constructing improvements at the same time, and whether certain rights vest or expire at different times.

For example, the original developer may want to retain the sole ability to grant utility easements and reciprocal easements for ingress and egress on the roads to be constructed. If the original developer retained the right to add additional real estate, convert convertible real estate or withdraw withdrawable real estate, the developer must consider whether to retain all or some of those rights or allow a co-developer to make some or all of those decisions. Additionally,

there may be some special declarant rights that the original developer wants to share or fully convey. Certainly, both developers would need an easement to facilitate completion, conversion and expansion, as defined in Sections 3218 and 5218 of the UCA and UPCA, respectively, in order to both construct and complete the improvements in different areas of the project.

If the original developer is transferring all units to another developer, but is doing so in phases, the original developer should still reserve its special declarant rights in the event of a default by the other developer under their agreement of sale with the original developer.

The provisions of the acts relating to transfer of special declarant rights provide a comprehensive road map for how to cut off liability arising out of the exercise of those rights. See UCA § 3304 and UPCA § 5304. Most notable is the requirement that the transfer instrument be recorded. The developers in a multi-developer project and their lawyers should work together to clearly and precisely determine the parsing out and sharing of special declarant rights.

G. Public Offering Statement Disclosures Under the UCA and the UPCA.

The public offering statement disclosure requirements under the UCA and UPCA appear in the last chapter of each act and are virtually identical. See, Chapter 34 of the UCA and Chapter 54 of the UPCA. Each act provides a comprehensive list of what must be included in the public offering statement. Section 3402(a) and Section 5402(a).⁹ In addition, if the declarant makes any “material” change in the information required to be disclosed, the declarant must provide unit purchasers with an amended public offering statement. UCA § 3402(c) and UPCA § 5402(c).

There are only two differences in the disclosure requirements of the acts. First, the UCA allows a purchaser the right to cancel an agreement of sale within 15 days, whereas the UPCA provides a 7 day period. Second, under the UPCA, there are two additional disclosures required in Sections 5402(a)(28) and (29), which respectively require (i) a summary and description of the declaration provisions, if any, relating to the special declarant right to designate common facilities, and (ii) various disclosures regarding facilities and amenities the declarant is required to complete.

Both acts provide identical exemptions for the requirement of providing a public offering statement (see, Section 3401(b) and Section 5401(b)), whereby declarant need not provide a purchaser with a public offering statement in the case of:

- Gratuitous transfers;
- Dispositions under court order, by a government or governmental agency, or by foreclosure or deed in lieu of foreclosure;
- Dispositions of units outside of Pennsylvania; or
- Transfers to which the resale certificate requirements apply (see Section 3407 and Section 5407).

⁹ There are also provisions for additional disclosures for time-share projects (*see* § 3403 and § 5403) and projects containing conversion buildings (*see* § 3404 and § 5404).

In addition, as previously discussed, the UPCA fully exempts small communities under Section 5102(a) (1), and partially exempts limited communities under Section 5102(a) (2), from the requirements of Chapter 54.

The easiest way to draft disclosures in a public offering statement is to use the requirements provided in each act as a checklist. What is difficult is determining exactly what is required when the act requires “a brief narrative description” of a particular matter. Some matter’s deserve more detailed disclosure than others. Often the lawyer must weigh in on these decisions based on practical judgment and knowledge of pertinent case law.

Other disclosure pitfalls arise out of requirements to disclose “significant features” or “all unusual and material circumstances, features and characteristics” of the project. The developer must step into the purchaser’s shoes when considering what disclosures are considered material. The lawyer must work with the developer and the developer’s marketing personnel to craft disclosures in the most effective fashion, based on the statutory requirements and case law.

IV. The Interstate Land Sales Full Disclosure Act

If a developer markets product in interstate commerce or through the mail, all sales or offers of sale of lots are subject to the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. Section 1701, *et seq.* (“ILSFDA”), unless the subdivision or sales qualify under one of the registration exemptions provided for in the ILSFDA.¹⁰ The ILSFDA must be read in conjunction with related regulations and guidelines for implementing the ILSFDA set forth in the Code of Federal Regulations, 24 C.F.R. Section 1710, *et seq.* (the “Code”). The ILSFDA requires federal registration and the filing of a statement of record for every land subdivision subject to the statute, and provides for penalties for fraud or deceit. A subdivision is defined as “any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale . . . as part of a common promotional plan.” A common promotional plan means a plan to offer land for sale, by a developer or a group of developers acting in concert, where such land is contiguous or is known, designated, or advertised as a common unit or by a common name.

Section 1703(a)(1) of the ILSFDA makes it unlawful for a developer to use the mails or any other means or instruments of transportation or communication in interstate commerce in the sale of lots in a subdivision that are not exempt for the act (1) without having first (a) filed a statement of record with the Secretary of the U.S. Department of Housing and Urban Development (HUD) and (b) provided a printed property report to the purchaser in advance of signing any agreement of sale, and (2) if the statement of record or property report contains material omissions or falsehoods or advertising or promotional materials are inconsistent with the information required in the property report. The form of the statement of record and the property report are proscribed by the Code.

In all instances, exemptions are allowed unless the method of disposition is adopted for the purpose of evading the ILSFDA. The exemptions provided for in the ILSFDA are divided

¹⁰ Although the ILSFDA also applies to lots being offered for lease, that topic is outside the scope of this discussion.

into two categories in Section 1702: those exempt from the ILSFDA entirely, and those exempt from the registration requirements, but not from the liabilities and remedies sections. If a subdivision is exempt, there is no need to register by filing a statement of record. While there is no required application process for determining whether a subdivision is exempt, for a small fee, a developer can request an advisory opinion pursuant to Section 1710.17 of the Code to confirm entitlement to a claimed exemption.

The most commonly claimed exemptions¹¹ are, under Section 1702(a): (1) a subdivision of less than twenty-five (25) lots; (2) the sale of any improved land on which a residential, commercial, condominium or industrial building is built; and (3) the sale of unimproved land under a contract that obligates the seller to erect such a building within two (2) years from the date of the contract. Phasing of twenty-five lots at a time will not qualify for the exemption if there is a common promotional plan that ties the phases together. The obligation to complete a building within two years must be written in the contract for the sale of the land to qualify for the exemption. Simply allowing a purchaser to cancel the agreement and receive a refund of the deposit if the building is not complete within two years of signing the contract does not meet this exemption. The purchaser must be allowed to pursue all remedies available in equity or at law for a default of the two year construction obligation.

Some of the exemptions from registration and disclosure provided under Section 1702(b) of the ILSFDA are for the sale or lease of lots in a subdivision (1) of less than one hundred (100) lots that are not exempt under Section 1702(a), or (2) if each noncontiguous part of such a subdivision contains not more than twenty (20) lots, and the purchaser (or the purchaser's spouse) has made a personal, on-lot inspection of the lot to be purchased or leased, prior to signing the agreement of sale or lease. Again, developing one hundred lots in separate phases does not exempt a subdivision from the requirements of the ILSFDA if there is a common promotional scheme. In addition, under Section 1710.8 of the Code, interruptions such as roads and recreational facilities are not considered to be a break in contiguity.

Another Section 1702(b) exemption applies to the sale of any lot where: (A)(i) the subdivision meets all local codes and ordinances, and (ii) each lot is zoned for single family residences; (B)(i) the lot is located on a paved street or highway which has been built according to standards applicable to streets and highways in the municipality, or, where the street or highway is not complete, a bond or other surety in the full amount of the cost of completion is posted with the local government to assure completion; and (ii) the local government or a homeowners association has accepted or is obligated to accept responsibility for maintaining such street or highway, for which the developer has provided the purchaser, prior to signing an agreement of sale, a good faith estimate of the cost of such maintenance for the first ten years of ownership; (C) at the time of closing, electricity, potable water and sewage disposal are available through public service or, with respect to water and sewer, on lot; (D) insurable title must be delivered to the purchaser within one hundred eighty (180) days after the signing an agreement of sale by a deed warranting that the developer has not conveyed the lot to another and that the lot is free from encumbrances (other than those approved by purchaser at closing) and all claims

¹¹ While the exemptions discussed are the ones most commonly claimed, there are other exemptions under Section 1702(a) and (b). A developer should consult a lawyer for a thorough review of exemptions that might apply to a particular subdivision.

by, through, or under the developer; (E) the purchaser (or the purchaser's spouse) has made a personal, on-the-lot inspection of the lot prior to signing the agreement of sale; and (F) there are no offers, by direct mail or telephone solicitations, of gifts, trips, dinners or other promotional techniques to induce prospective purchasers to visit the subdivision or purchase a lot.

Under Section 1703(a)(2) of the ILSFDA, it is unlawful for a developer to use the mails or any other means or instruments of transportation or communication in interstate commerce in the sale of lots exempt under Section 1702(b) and the sale of non-exempt lots: to employ any device or scheme to defraud; to obtain money or property by making any untrue statement of material fact or failing to make an admission of material fact with respect to the lot or subdivision; to engage in any action which operates as fraud or deceit on the purchaser; or to represent that roads, utilities or recreational amenities will be built by the developer without making the same statements in the agreement of sale.

Like other consumer protection real estate sales laws, the ILSFDA provides purchasers a cancellation period; the agreement of sale must clearly inform the purchaser that he or she has a seven (7) day period within which to cancel the agreement of sale. In addition, Section 1703(c) of the ILSFDA provides that a purchaser may revoke an agreement of sale within two years after the date of signing if a property report was required, but not provided to the purchaser prior to signing of the agreement of sale; the agreement of sale must clearly state this revocation right.

Under Section 1703(d) of the ILSFDA, a purchaser may revoke an agreement of sale within two years after the date of signing an agreement of sale for a non-exempt lot, if the agreement of sale does not: (i) clearly describe the lot in a form acceptable for recording; (ii) provide for written notice to purchaser of any default and twenty (20) days within which to cure the default; and (iii) provide that if the purchaser defaults after the purchaser has paid 15% of the purchase price of the lot, the seller must refund the amount that remains after subtracting (a) 15% of the purchase price of the lot, excluding any interest owed, or the amount of damages incurred as a result of such breach, whichever is greater, from (b) the amount actually paid by purchaser towards the purchase price of the lot. This right is extinguished if an appropriate deed is delivered to the purchaser within 180 days after signing the agreement of sale.

If an agreement of sale is revoked pursuant to Section 1703(b), (c) or (d), Section 1703(e) and the purchaser re-conveys all of their rights and interests in the lot, in substantially similar condition as when the lot was conveyed, to the seller or the seller's successor, the purchaser is entitled to receive all the money paid under the original agreement of sale.

Section 1709 of the ILSFDA provides that a purchaser may bring an action at law or in equity against a developer if a lot was sold in violation of Section 1703(a). A court is permitted under the statute to order payment of damages, specific performance or any other relief the court deems fair. Section 1709 specifically allows recovery of reasonable attorneys' and appraisers' fees. Section 1711 provides for a statute of limitations of three (3) years for violations of Section 1703(a) (running either from execution of the agreement of sale, discovery of the violation or the date the violation should have been discovered, depending on the type of violation). For violations of Section 1703(b) through (e), no actions may be brought more than three (3) years of signing the agreement of sale, regardless of whether a deed has been delivered to the purchaser.

V. Penalties for Violations

The UCA, the UPCA and the ILSFDA all preclude waiver of their consumer protection provisions. See UCA § 3104, UPCA § 5104 and ILSFDA § 1712. Each of the statutes provides for penalties if a developer commits a violation. Punitive damages are expressly permitted under the UCA and the UPCA for a willful violation of the statute. See UCA § 3412 and UPCA § 5412. Under the ILSFDA penalties may be imposed for willful violations, including criminal penalties of up to a \$10,000 fine, or up to five (5) years of imprisonment, or both, and civil penalties of up to \$1,000 for each violation. Interestingly, the ILSFDA civil penalties can be imposed on anyone who “knowingly and materially” violates the act, and “knowingly” is defined to mean “having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions” of the act. See ILSFDA §§ 1717 and 1717(a).