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# Mixed Use Condominiums Under the Minnesota Uniform Condominium Act

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# MIXED USE CONDOMINIUMS UNDER THE MINNESOTA UNIFORM CONDOMINIUM ACT

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## I. INTRODUCTION

Real estate owners and occupants represent diverse interest groups requiring different types of services and project management. The ultimate success of a condominium project rests upon

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the ability of the declarant<sup>1</sup> and the condominium owners' association to accommodate these often competing interests. This requires effectuating the goals and expectations of distinct groups of owners and occupants while simultaneously avoiding infringement of one competing interest upon another.

The Minnesota Uniform Condominium Act<sup>2</sup> (MUCA) simplifies utilization of the condominium form of ownership for residential, commercial, and mixed use purposes. Under the MUCA, it is possible to form areas within condominiums, or related groups of condominiums, designed to accommodate diverse uses. This Article examines some potential problems of mixed use condominiums and the various mechanisms available under the MUCA that address those problems. For purposes of this Article, the designation of "mixed use" is not applied to any innate characteristics of human behavior, but is limited to those types of projects in which significant use differences are part of the project design.

The primary goals of analyzing a mixed use condominium project are threefold: to allocate common expenses in an equitable manner; to allocate maintenance and repair responsibilities, insuring efficient, prompt performance; and to provide fair, responsive, nondiscriminatory management of the project.

## II. CHARACTERISTICS OF MIXED USE CONDOMINIUMS

The specific uses of condominium units will vary even in a wholly residential project. Individual owners and occupants differ in their choice of lifestyles, consumption of energy, and preferences for project management. By simplifying the structure of mixed use condominiums, the MUCA offers the declarant new opportunities for integrating diverse interests into a single condominium project. The MUCA also provides the declarant with flexibility in

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1. The term "declarant" means:

(a) if the condominium has been created, (1) any person who has executed a declaration or an amendment to a declaration to add additional real estate, other than persons holding interests in the real estate solely as security for an obligation, persons whose interests in the real estate will not be conveyed to unit owners, or, in the case of a leasehold condominium, a lessor who possesses no special declarant rights and who is not an affiliate of a declarant who possesses special declarant rights, or (2) any person who succeeds under section 515A.3-104 to any special declarant rights; or,

(b) any person who has offered prior to creation of a condominium to dispose of his interest in a unit to be created and not previously disposed of.

MINN. STAT. § 515A.1-103(9) (1982).

2. MINN. STAT. §§ 515A.1-101 to .4-118 (1982) (commonly referred to as the MUCA).

organizing condominium management, establishing responsibilities for maintenance, and allocating common expenses. This flexibility will likely minimize conflict among unit owners.

Mixed use condominium analysis can be applied to any project in which management goals or priorities, maintenance requirements, or generation of common expense differ substantially among unit owners. A typical mixed use condominium project contains both residential and commercial units.<sup>3</sup> Projects of exclusively commercial or residential units also merit mixed use condominium analysis. Purely commercial condominiums should be evaluated as mixed use projects because the owners' businesses will normally differ from one another in terms of energy consumption, customer traffic, and maintenance requirements. The desire to maximize profits fosters business owners' reluctance to pay common expenses attributable to the higher use requirements of other owners in the same project. In contrast, owners in purely residential condominiums are more willing to share common costs. This is due to the expense of separate metering and to the difficulty in accounting for variations in consumption. Nevertheless, properly structured residential developments that integrate buildings of different ages, construction designs,<sup>4</sup> and unit types<sup>5</sup> can minimize conflicts among owners and disparity in common expense allocations.

### III. MANAGEMENT AND ORGANIZATIONAL ALTERNATIVES

#### A. *Basic Operation and Management of Condominiums*

A condominium is established and operated under four basic documents: the articles of incorporation creating the condominium association;<sup>6</sup> the declaration establishing the property as a

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3. An example of such a project is the Towers Condominium in Minneapolis, Minnesota. Established in 1973, it is primarily residential, but has commercial units in the lower floors. The Crossings and Commerce at the Crossings are, respectively, a residential condominium and commercial condominium occupying the same building in downtown Minneapolis.

4. A residential condominium may contain significantly different types of buildings, such as a high-rise elevator building and a low-rise garden apartment building.

5. Some units or buildings may be intended as luxury housing while others may be intended for middle income owners. One building may permit families with children while another building may be restricted to adults only.

6. See MINN. STAT. § 515A.3-101 (1982). The MUCA requires that the association be a corporation. *Id.*

condominium;<sup>7</sup> the by-laws regulating the procedures of the condominium association;<sup>8</sup> and the rules and regulations addressing the association needs, which are appraised from time to time by the association.<sup>9</sup>

In subjecting himself to community governance, a unit owner risks restriction and limitation imposed by other unit owners. Under the MUCA,<sup>10</sup> the board of directors and officers of a condominium association are given broad quasi-governmental power, including the authority to hold hearings, levy fines, and impose penalties for violations of the governing documents.<sup>11</sup> The association is authorized to enact new rules and regulations through amendment to the declaration.<sup>12</sup>

In mixed commercial-residential projects, this authority must be checked to prevent inequities. The commercial minority<sup>13</sup> must be assured that the residential majority will not unreasonably interfere with its economic use of commercial units. For example, a chiropractor in an office-clinic condominium must be assured that the medical doctor majority will not ban or restrict his practice within the project. Various restrictions, such as restrictions on children,<sup>14</sup> pets,<sup>15</sup> and leasing arrangements,<sup>16</sup> have created con-

7. *See id.* § 515A.2-101. Section 515A.2-101 provides that a condominium is created by the proper filing of a declaration. *Id.* Section 515A.2-105 and other provisions in the MUCA set forth the requirements for a condominium declaration. *Id.* § 515A.2-105.

8. *See id.* § 515A.3-106.

9. *Id.* § 515A.3-102(1). Subsection (1) confers upon the association the specific power to adopt rules and regulations. *Id.* Although the MUCA does not mandate adoption of rules and regulations, it is customary for associations to do so.

10. *See id.* § 515A.3-102. Section 515A.3-102 sets forth the general powers of the condominium association.

11. *Id.* § 515A.3-102(11). Subsection (11) provides that the association may "impose charges for late payment of assessments and, after notice and opportunity to be heard, levy reasonable fines for violations of the declaration, by-laws, and rules and regulations of the association." *Id.*

12. *See id.* § 515A.2-119.

13. Commercial unit owners require assurance from the residential unit owners because the commercial unit owners typically occupy a minority position both in total size and voting strength.

14. *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979); *Star Lake N. Commodore Ass'n v. Parker*, 423 So. 2d 509 (Fla. Dist. Ct. App. 1982); *Del Valle v. Biltmore II Condominium Ass'n*, 411 So. 2d 1356 (Fla. Dist. Ct. App. 1982); *Pacheco v. Lincoln Palace Condominium, Inc.*, 410 So. 2d 573 (Fla. Dist. Ct. App. 1982). Age restrictions are a reasonable means of identifying and categorizing the varying desires of the condominium population. Constitutionally, age is not a suspect classification; therefore, the restriction need not pass the "strict scrutiny" test. *See White Egret Condominium, Inc. v. Franklin*, 379 So. 2d at 351. In *White Egret* the Florida Supreme Court set forth a two-prong test to determine the reasonableness of age restrictions in condominiums: the restriction itself must be "reasonable" and it must not be arbitrary, discriminatory, or op-

troveries<sup>17</sup> in residential projects. By analogy, judicial treatment of residential restrictions can serve as a useful tool in analyzing restrictions in mixed use projects.

### *B. Structural Alternatives*

Careful drafting can produce an appropriate condominium structure that maximizes protection of minority rights. The declarant has three basic alternatives in selecting a structure: the entire project may be organized as a single condominium managed by a single association; a two-tier condominium; or a group of separate condominiums operated by their own associations and bound by a comprehensive declaration of covenants, restrictions, and easements.

#### *1. Single Condominium - Single Association*

The traditional approach to structuring a mixed use condominium is the single condominium operated by one association.<sup>18</sup> This structure, with appropriate drafting, is suitable to many mixed use condominiums. It is particularly appropriate for projects containing various groups of units with roughly equal voting strength in the association. In such a project, domination of one group over another is unlikely. The single association structure provides several advantages: economies of scale lead to more efficient professional management, maintenance, and other necessary services; contracts are more economical than separate contracts entered into by separate associations; and common elements are operated

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pressive in its application. *Id.* See generally Annot., 100 A.L.R.3d 241 (1980) (restricting occupancy by children in condominiums).

15. Restrictions on pets must fall within a state's statutes and local ordinances, serve a legitimate purpose, be asserted in a timely fashion, have reasonable and uniform application, and be expressed in unambiguous language. *White Egret Condominium Ass'n*, 379 So. 2d at 346; *Winston Towers Zoo Ass'n v. Saverio*, 360 So. 2d 470 (Fla. Dist. Ct. App. 1978); *Johnson v. Keith*, 331 N.E.2d 879 (Mass. 1975).

16. *Pine Island Ridge Condominium "F" Ass'n v. Waters*, 374 So. 2d 1033 (Fla. Dist. Ct. App. 1979); *Kroop v. Caravelle Condominium, Inc.*, 323 So. 2d 307 (Fla. Dist. Ct. App. 1975); *Holiday Out In Am. At St. Lucie, Inc. v. Vowes*, 285 So. 2d 63 (Fla. Dist. Ct. App. 1973); *Breene v. Plaza Tower Ass'n*, 310 N.W.2d 730 (N.D. 1981); *Le Febvre v. Osterndorf*, 87 Wis. 2d 525, 275 N.W.2d 154 (1979). Any restriction on use, alienation, or occupancy of condominium units must appear in the declaration. MINN. STAT. § 515A.2-105(9) (1982).

17. See Poliakoff, *Conflicting Rights in Condominium Living*, 54 FLA. B.J. 756 (1980).

18. The MUCA does not prohibit the creation of a single condominium containing units intended for different types of use.

more efficiently, benefiting all units and facilitating communication among all owners.

A single association operates equitably and effectively when variation among condominium units is evidenced by physical characteristics rather than by use. Assuming that common expenses can be fairly allocated,<sup>19</sup> the single association structure is appropriate for a mixed use residential project containing a high-rise elevator building and a low-rise garden apartment building. The single association may be less desirable in a condominium containing substantial variation other than building type. For example, if the high-rise building is restricted to occupants without children and the garden apartment building is open to children, special care will be required to ensure adequate maintenance and efficient management of the garden apartment building's common elements. The distinct needs of the two buildings may be more effectively addressed in the two-tier separate association structure.

Commercial projects may be structured as single condominiums despite a mixture of business, professional, or retail owners. An office building, professional building, or shopping center often should be structured as a single condominium although the businesses, professional specialties, product lines, and hours of business may vary substantially. The declarant can accommodate variations in maintenance requirements, energy consumption, management goals, and customer traffic by combining the MUCA provisions with good drafting and planning. In addition, a single condominium structure retains the advantages of a single association: simple documentation, efficient management and maintenance, and ease of communication among owners.

Careful planning by the declarant can assist in resolving potential controversies or inequities. When selecting a single association for a mixed use project, care must be taken in allocating common expenses among different types of users<sup>20</sup> and designating certain portions of the common elements as limited common elements.<sup>21</sup>

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19. See *infra* Parts IV and V.

20. Practitioners and commentators have long recognized that the allocation of common expenses in commercial and mixed use condominiums is of critical importance to unit owners. Most state condominium laws significantly restrict flexibility in this regard and have probably restrained the acceptance and growth of such developments. See Frankel & Rohan, *Statutory Problems*, in COMMERCIAL AND INDUSTRIAL CONDOMINIUMS 61 (P.L.I. 1974); see also P. ROHAN & M. RESKIN, *CONDOMINIUM LAW AND PRACTICE* § 21.04 (1983); Note, *Regulating Timeshare Interests In Minnesota: A Comprehensive Solution*, 10 WM. MITCHELL L. REV. (1984).

21. See *infra* notes 42-43 and accompanying text. The judicious designation of limited

The declaration and by-laws should contain provisions protecting minority owners from unfair acts by the majority. This can be achieved by requiring super majorities<sup>22</sup> or the consent of certain unit owners to amend governing documents.<sup>23</sup> Since the MUCA limits declarant flexibility in allocating voting strength,<sup>24</sup> challenges to innovative, untried methods for protecting minority interests may arise.

Two other techniques exist to equalize the voting strength and board representation among different groups of owners: the grid system and the establishment of subcommittees. To allocate votes according to the grid system, a grid is superimposed upon the floor plans of the commercial portions of the condominium.<sup>25</sup> The number of squares on the grid equals the number of votes allocated to the residential portion of the condominium. This system equalizes the voting strength of the two portions without subdividing units or relocating unit boundaries.<sup>26</sup> Since the MUCA permits smaller commercial units to have voting strength equal to larger units,<sup>27</sup> equal voting power in a mixed commercial-residential condominium is effectuated.

Another method to equalize voting strength is to establish subcommittees of the board of directors. Conceivably, the by-laws could also establish operating subcommittees to manage the different types of units within a mixed use condominium. Use of subcommittees, however, may be challenged as a circumvention of the limitation on voting allocation among units.<sup>28</sup>

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common elements can separate maintenance obligations and responsibilities, common expense obligations, and rights of use and access among different groups in a mixed use condominium. This technique can help avoid conflicts in those areas.

22. See MINN. STAT. § 515A.2-119(a) (1982). Subsection (a) provides that the declaration may require a substantial majority or unanimity for the amendment of the declaration. There is no restriction on the declaration establishing greater majorities for some types of amendments than for others. *Id.*

23. See *id.* § 515A.2-119(c). Subsection (c) provides that some types of amendments require unanimous consent of unit owners. *Id.*

24. See *id.* § 515A.2-108.

25. Unlike many older condominium statutes, the Uniform Condominium Act (UCA) and the MUCA do not require units to be a minimum size, have access to common elements, or contain a minimum number of rooms.

26. See MINN. STAT. § 515A.2-114 (1982).

27. See *id.* § 515A.2-108.

28. Section 515A.2-108 requires allocation of voting strength equally among units or in proportion to area or volume of the units. A provision in the declaration or by-laws stating that fewer than all directors have authority over certain types of units could be construed as a de facto reallocation of voting power in the association. See *id.* § 515A.1-108.

The consumer protection provisions of the MUCA<sup>29</sup> are disadvantageous to single condominium projects containing residential and nonresidential units.<sup>30</sup> If units in a condominium project are to be used for residential purposes, the MUCA requires the declarant to provide a complete disclosure statement to all prospective unit purchasers.<sup>31</sup> Compliance with the disclosure requirement can be an expensive procedure which a declarant may seek to avoid when dealing with commercial customers.<sup>32</sup> Prospective commercial purchasers may wish to negotiate some of the materials and items that normally would be stipulated in a disclosure statement. Consequently, a disclosure statement approaches final form only after protracted negotiations, which predictably terminate after the disclosure is due. To avoid this, the declarant should consider adopting one of the two alternative structures discussed below.

## 2. Two-Tier Condominium

The two-tier condominium structure, while containing substantially different units, retains a continuity of management through the use of a master condominium association. Separate associations manage the special affairs of different areas within the master condominium. The two-tier approach is appropriate for several types of projects: a mixed residential-commercial project; a resort or residential project containing traditional apartment units and hotel or recreational units; and a commercial project containing separate areas for professional, retail, and manufacturing uses.

A two-tier condominium consists of a master condominium, that is, a single condominium covering the entire project area. Within the master condominium, areas are designated for particular uses. These areas comprise the real estate of the second-tier condominiums.<sup>33</sup> The declaration and floor plans of the second-tier condo-

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29. Article 4 of the MUCA contains the consumer protection provisions. *Id.* §§ 515A.4-101 to 4-118.

30. Provisions of article 4 can be waived or modified by commercial purchasers if the condominium is restricted to nonresidential use. *See id.* § 515A.4-101.

31. *See id.* § 515A.4-102 (delineating required disclosures).

32. Disclosure statements tend to be complex documents and preparation is time-consuming and expensive. These statements also increase a declarant's risk because inaccurate assertions or information may be the basis of recovery by a purchaser.

33. No specific authority exists in the MUCA for creating two-tier condominiums. Nonetheless, section 515A.1-105 implies that a unit is a separate parcel of real estate for all purposes. MINN. STAT. § 515A.1-105 (1982). Therefore, a condominium may be created within a condominium as with any other real estate. Typically, the declaration and floor

miniums further subdivide these areas into units for purchase and occupation. Since the MUCA contains certain presumptions regarding maintenance responsibility for common elements and units,<sup>34</sup> it is important to include the boundaries of the second-tier condominiums in both sets of condominium documents. This will ensure that maintenance responsibilities for, and ownership of the condominiums are clearly defined.

The master association administers the common management of all units in accordance with the provisions of the master declaration.<sup>35</sup> The master declaration limits the power of the master association to manage the units comprising the second-tier condominium. Each second-tier association is responsible for those aspects of management primarily affecting its unit owners.

In a residential-commercial project, the master association is responsible for maintaining the building's exterior, structure, and grounds. The master association may also assume responsibility for all residential units, thus obviating the need for a second-tier condominium to manage the residential units. In contrast, the management of commercial units demands the presence of a second-tier commercial condominium association. The association is responsible for managing the commercial units and meeting the particular business requirements. These requirements may include overseeing the frequent cleaning of commercial corridors, providing comprehensive security, enhancing cooperative promotional efforts, and enforcing rules and regulations governing commercial activities.

Unless the master declaration requires that the master association operate in an equitable and nondiscriminatory manner, minority owners may be subjected to unfair treatment. A predominantly residential master association, within the guise of general rules and regulations, could enact noise restrictions preventing the operation of certain businesses in commercial space. It could require, as a reasonable security measure, that all doors to the condominium be opened only by key or buzzer. The master declaration may forestall these undesirable actions by

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plan of the master condominium will designate a large area or areas comprised of partial, single, or multiple floors as a single unit. Thereafter, a second tier condominium can be created within each of those units.

34. *See id.* § 515A.3-107. Section 515A.3-107 states that, except as otherwise limited by the declaration or insurance considerations, the association is responsible for the upkeep of the condominium. *Id.*

35. *See id.* § 515A.3-102.

prohibiting rules and regulations that are inconsistent with the declaration. Furthermore, the declaration may require the consent of commercial owners to amendments to the declaration limiting the commercial use of the second-tier commercial condominium.<sup>36</sup>

### 3. *Related But Separate Condominiums*

Some projects should be designed as separate condominiums connected by a declaration of appropriate covenants, restrictions, and easements. The related but separate condominium structure may be appropriate for large projects containing distinctly different types of units where coordinated management and maintenance are not essential on an ongoing basis. Projects of this type include a multi-building project with residential, office, professional, and retail units, and a large single building project of residential and commercial units.

There are advantages and disadvantages to separate condominiums. Each association is responsible only for the operation of its condominium. Because the administrative burden is reduced, each association is free to concentrate on the unique problems of its unit owners. The disadvantage of a separate structure is inadequate communication, which results in a lack of empathy between the groups of owners.

The documentation regulating the relationships between the separate condominiums will be complicated and detailed. It will be necessary to create easements for support, access, and utilities. The documents of each condominium must specify the location of these easements and the extent to which they may be used.<sup>37</sup> This specificity is in sharp contrast to a single association or two-tier project for which the MUCA merely implies the existence of such easements. Since separate condominiums are not bound by a common association, the governing document must describe the mechanisms for arriving at common decisions, resolving disputes, and paying expenses for items of mutual benefit.<sup>38</sup> Arbitration should be provided to resolve disputes. If these disputes involve mainte-

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36. *See id.* § 515A.2-119.

37. The declaration of easements, covenants, and restrictions governing the relations between separate condominiums must be carefully prepared. The declaration should contain provisions relating to the damage or destruction to either condominium, condemnation, insurance requirements, and required levels of maintenance.

38. Matters of mutual interest are likely to be significant. With respect to building maintenance, the issues will involve the condominium's structure and larger maintenance

nance, repair, rehabilitation, or reconstruction of improvements, it may prove helpful to include architects and other technical professionals on the board of arbitrators.

The declarant may provide a choice between a two-tier or a related, but separate, association project to offer prospective buyers associations attuned to their needs. In return, the declarant must give up certain economies of scale, continuity of management, and the ease of communication among owners found within the single association framework. The use of unit boundaries, limited common elements, and assessment adjustments can assist in equitable division of maintenance responsibilities and common expenses.

Considerations of building design, management, and ease of communication also play an important role in the declarant's choice of a particular condominium structure. Careful evaluation of the ideas discussed in the following two sections of this Article may facilitate a declarant's choice of the less complex, and better suited structure. Both sections discuss techniques for allocating maintenance responsibilities and common expenses to avoid inequities and consequent conflicts among the various types of owners.

#### IV. USE OF UNIT BOUNDARIES AND LIMITED COMMON ELEMENTS TO EQUITABLY APPORTION MAINTENANCE RESPONSIBILITIES AND COMMON EXPENSES

A condominium consists of units and common elements.<sup>39</sup> Units are portions of the condominium intended for occupancy exclusively by their owners.<sup>40</sup> The remaining property comprises the common elements which are intended for the mutual benefit of all unit owners.<sup>41</sup> The limited common element is a special form of common element.<sup>42</sup> Limited common elements are those portions of the common elements that limit use, and the ensuing benefits, to fewer than all the condominium units.<sup>43</sup> Typical limited common elements include doors, windows, decks benefiting only one unit, recreational facilities, corridors, and parking areas intended for the exclusive use by a specified group of units.

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and renovation projects. The economic or political issues confronting the two associations will be of significant concern to unit owners in each condominium.

39. See MINN. STAT. § 515A.1-103(4), (7), (19) (1982).

40. See *id.* § 515A.1-103(19).

41. See *id.* § 515A.2-109.

42. See *id.* § 515A.1-103(13).

43. See *id.* § 515A.2-109.

### A. Unit Boundaries

The MUCA resolves several questions regarding the location of the boundaries between units and common elements:<sup>44</sup> whether particular common elements are limited common elements;<sup>45</sup> whether the unit owner or the association is responsible for maintenance of limited common elements; and, assuming that the association is responsible, whether direct reimbursement is chargeable against one or more particular unit owners.<sup>46</sup>

The MUCA provides that a unit owner generally is responsible for maintaining his unit.<sup>47</sup> It presumes that unit boundaries are the interior surfaces of boundary walls.<sup>48</sup> The exterior walls of the unit are common elements and the doors and windows they contain are limited common elements.

Unless the declaration provides otherwise, the association has maintenance responsibilities for the common elements and the limited common elements.<sup>49</sup> In some commercial settings, it is preferable for unit owners to be responsible for the repair and maintenance of their boundary walls adjoining the interior corridors or other units. Where unit owners are responsible for the interior corridor wall, the declaration should designate as the unit boundary the exterior surface of that wall. In the case of walls between adjoining units, the boundary can be established in the declaration as a plane in the center of the wall. Each adjoining unit owner is then responsible for maintaining and repairing his half of the wall. Thus, unit owners rather than the association are accountable for items affecting both sides of the wall.

In a two-tier condominium, the choice of boundaries for the second-tier condominium determines the allocation of management obligations for the two associations. The choice of whether the unit boundaries should extend to the exterior of the building or to the interior surface of the exterior wall is important. In a multi-story building where the second-tier condominium is comprised of one or more floors, the exterior boundary of the second-tier condominium is usually the interior surface of the exterior walls. In a two-tier condominium consisting of two or more buildings, each of

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44. *See id.* § 515A.2-102(1).

45. *See id.* § 515A.2-102(2).

46. *See id.* § 515A.3-114(c).

47. *See id.* § 515A.3-107.

48. *See id.* § 515A.2-102(1).

49. *Id.* § 515A.3-107.

which is a separate second-tier condominium, the boundary of each second-tier condominium normally is the exterior wall of its building.<sup>50</sup>

### *B. Use of Limited Common Elements*

In mixed use condominiums, different types of units and owners will create various uses for and burdens upon the common elements. Owners' preferences for maintenance and management arrangements may differ. Costs associated with meeting diverse requirements may also differ. A declarant can avoid potential conflicts through careful architectural planning and documentation designed to separate limited common elements used predominantly by different types of owners. Limited common elements, including corridors, elevators, entries, and other pedestrian areas within buildings, can be established for the exclusive benefit of particular groups. As a practical matter, it is often desirable to separate the pedestrian areas in the project's residential and commercial portions to ensure adequate security. Residential owners may wish to restrict access from the commercial portion. Similarly, commercial owners may wish to restrict access from the residential portion during non-business hours. Pedestrian areas benefiting fewer than all owners may be designated as limited common elements and assigned to their respective units.<sup>51</sup>

The MUCA presumes that common elements and limited common elements will be maintained by the association. Since this presumption can be modified by the declaration,<sup>52</sup> the declarant gains useful flexibility by designating portions of the common elements as limited common elements. In a single association containing both residential and commercial units, the pedestrian area serving the commercial units may be maintained and funded exclusively by the commercial owners, who typically employ their own maintenance crews.<sup>53</sup> The residential pedestrian areas, on the

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50. The boundary specification between the master condominium and the second tier condominium is important because of its effect on maintenance responsibilities. Another consequence of specification is the extent to which one association must have access to common elements in order to accomplish its maintenance responsibilities.

51. Other types of common elements should be limited common elements under some circumstances, thus restricting their use to certain groups of unit owners. These include recreational, laundry, and parking facilities.

52. See MINN. STAT. § 515A.3-107 (1982).

53. Since the MUCA does not contain a provision for cooperative maintenance by unit owners, the declaration should establish a committee of commercial unit owners for this purpose.

other hand, would most likely be maintained by the association, but the costs would be allocated exclusively to the residential units.<sup>54</sup> Similarly, if the recreational facilities are designated as limited common elements benefiting only the residential units, they need not be made available to the commercial owners, their guests, or employees. The commercial owners, however, would not share the costs of maintaining and operating those facilities.

By carefully designing and establishing limited common elements, the declarant can secure separate portions of the condominium to prevent unwanted access from other portions. The declarant can accommodate differing levels of use and maintenance requirements using straightforward drafting under the MUCA. Furthermore, the declarant can ensure that the cost of maintaining and operating limited common elements will be borne solely by the benefited units rather than by all units.

#### V. USE OF ASSESSMENT ADJUSTMENTS TO EQUITABLY APPORTION COMMON EXPENSES

Common expenses are incurred by the condominium association in managing the condominium.<sup>55</sup> Generally, they are allocated to units in the condominium in proportions set forth in the declaration.<sup>56</sup> The MUCA provides the declarant limited flexibility in determining these proportions by requiring distribution of expenses equally to all units or based on the area or volume of the individual unit.<sup>57</sup> These general methods of allocating common expenses would make some mixed use condominiums economically unattractive to purchasers were it not for other provisions and techniques under the MUCA. Where unit owners in a mixed use condominium have differing use requirements, the use of their units can be expected to generate disproportionate amounts of association expenditures unrelated to the area or volume of the units. In such cases the declaration should be drafted to permit the association to allocate common expenses solely to benefited units rather than to all units.<sup>58</sup>

Using limited common elements to allocate common expenses is a straightforward and legally reliable method to assure an equita-

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54. See MINN. STAT. § 515A.3-114(c) (1982).

55. See *id.* § 515A.1-103(5).

56. See *id.* § 515A.2-108.

57. See *id.*

58. See *id.* § 515A.3-114(d).

ble distribution of costs. Nevertheless, the MUCA does not allow apportionment of common expenses for items utilized in varying degrees by different types of users. Under the MUCA and with appropriate authority in the declaration, however, the association can allocate some common expenses on the basis of actual consumption rather than on the basis of equality or unit size.<sup>59</sup> One instance in which actual consumption allocation is appropriate is the allocation of common expenses relating to the heating and cooling of units. This accommodates the interests of commercial owners who have substantially different use requirements. Actual consumption allocation also is preferable for expenses relating to security systems, personnel, parking, and recreational facilities. The amount of use and its concomitant cost may vary substantially depending on the type of unit or the type of building in which the unit is located.

*A. Methods of Allocating Common Expenses on the Basis of Use or Consumption*

*1. Actual Measurement and Metering*

Actual consumption allocation of common expenses may be based on the theory of actual measurement and metering. It may be feasible to measure or meter certain kinds of common element consumption and use by the units. Energy costs for electricity, heating, and cooling are possible candidates for this treatment. In addition, the association can charge user fees for the use of common elements such as recreational facilities, laundry machines, and parking areas.<sup>60</sup>

Common expenses for many other items can be allocated on the basis of separate metering. For example, commercial units may have substantially different requirements for janitorial services and trash disposal. Consumption levels of such items are readily measurable and may be allocated directly to the benefited units based upon actual use. In a residential condominium containing both a high-rise security building and a low-rise garden apartment building, the costs associated with security in the high-rise building can be directly measured and allocated to the units in that building.

Under the MUCA, declarant documentation and association implementation of separate metering and user fees should be fairly

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59. *See id.*

60. *See id.* § 515A.3-102(8).

simple. The technique is legally justifiable, because the MUCA permits allocation of common expenses against fewer than all units when those units benefit exclusively from the common expense.<sup>61</sup> Since metering of the owners' consumption precisely measures benefits to fewer than all units, it easily qualifies as an appropriate exception to the allocation of common expenses on the basis of equality or unit size. The declaration must provide for separate metering and measurement to ensure that the association uses these methods of common expense allocation.

## 2. Estimation

An alternative theory of actual consumption allocation of common expenses is estimation. Although it is not always feasible to measure variations in use among diverse units or areas within the condominium, significant discrepancies can be estimated with a reasonable degree of accuracy. Energy consumption provides a good example of this approach. In many projects, it may be impractical to install energy metering devices for each unit or even for each type of unit. Yet, techniques of varying degrees of precision exist for estimating relative levels of energy consumption among various units or types of units. The MUCA should be interpreted to permit allocation of common expenses based upon observed or expected variations in use levels, even though inexactly measured.

### B. Statutory Compliance

The general rule requiring allocation of expenses based on equality, area, or volume is intended to prevent declarant abuse. The bases provide some flexibility to equitably allocate expenses in relation to the owners' use while guarding against arbitrary or unreasonable allocations by the declarant and association. Although the MUCA specifically authorizes documentation and association action to implement allocation of common expenses based upon benefit,<sup>62</sup> owners could challenge the propriety of the allocation if abuses result. Since allocation of common expenses on the basis of consumption is an exception to the general allocation rule, care must be taken in implementing this procedure.<sup>63</sup>

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61. *See id.* § 515A.3-114(d).

62. Generally, common expenses are allocated equally among units or in proportion to their respective area or volume. *See id.* § 515A.2-108.

63. *Id.* Section 515A.2-108 establishes the general rule that common expenses must

It is certainly reasonable that some common expenses for items of condominium management, maintenance, and operation be paid by unit owners in proportion to their actual demands. When technical or economic factors preclude actual measurement of use or consumption, it is still reasonable to rely upon sound estimation.

Because of the risks of inaccuracy involved in allocating common expenses on the basis of estimated use and consumption, the declarant and the association must employ careful, legitimate means in implementing a cost distribution system. The declaration should detail the cost items for which the association may allocate common expenses on this basis. It should contain guidelines for use by the association in administering the allocation procedures.<sup>64</sup> The association must use accurate estimation practices in determining allocation of common expenses for these types of items. The practices of the association should be reviewed and updated periodically to ensure continuing reliability.<sup>65</sup>

Problems may arise if the declaration and association allocate maintenance and operation costs to the primary users of pedestrian and parking areas. While such common elements are not maintained and operated solely for the benefit of fewer than all units, arguably fewer than all units generate increased levels of maintenance and operation. Since the benefits of supplemental services accrue to a limited number of units, however, the added costs to the association in accommodating specific needs and providing additional service should be borne exclusively by those units producing the costs.

While the imaginations of declarants and associations will create new procedures for allocating common expenses on the basis of

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be allocated equally among units or on the basis of their respective area or volume. This intentionally limits the declarant's flexibility and avoids potential abuse. *Id.* Without restrictions in this area, it might have been necessary to enact Article 5 of the Uniform Condominium Act. *See* UNIFORM CONDOMINIUM ACT §§ 5-101 to -110, 7 U.L.A. 220-31 (1977). Article 5 would have established a Minnesota state agency to govern condominium practice and protect consumers. Several other types of developer flexibility were eliminated from the MUCA for the same reason. For example, the MUCA does not contain provisions for withdrawable or convertible real estate, both of which can aid in phased developments but are confusing and potentially misleading to the public.

64. Sound, articulate, and reasonable drafting will result in effective guidelines. If the common expense allocation procedures set forth in the declaration and practiced by the association yield fair and reasonable results, they should be upheld.

65. Technology and practices can be expected to improve over time, enhancing the estimation of energy consumption. The association should maintain current capabilities in order to minimize complaints and challenges from unit owners.

actual consumption, use, or benefit, not all ideas may prove acceptable. Despite the flexibility that declarants and associations have in this area, the MUCA prohibits procedures that result in unsystematic or unreasonable allocations of common expenses.<sup>66</sup>

## VI. CONCLUSION

As mixed use condominiums become more pervasive, the marketplace will establish standards for management, cost allocations, and interaction among differing types of owners. The MUCA offers declarants and associations sufficient flexibility to accomplish reasonable goals. In selecting the single association, two-tier, or separate condominium structure, a declarant can balance competing management goals and provide a fair and responsive operation for many types of projects. Intelligent architectural design, appropriate differentiation between limited common elements and common elements, and knowledgeable use of the MUCA's common expense allocation provisions allow an equitable spreading of condominium costs over the units in a manner that approximates the expenses they generate.

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66. For example, the association should not be able to allocate the cost of carpet cleaning and replacement on the ground floor of the building to the units on that floor simply because the traffic levels are higher on that floor. The higher traffic levels on the first floor will usually be generated at the convenience of all unit owners, not merely those on the lower levels. Further, the appearance of the common elements on the lower level is of value and importance to all owners. Similarly, roof repair should not be allocated to the units on the top floor because the effects of roof deterioration will generally appear there first.