Common Rights and Obligations Among Unit Owners Under the Minnesota Uniform Condominium Act

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I. INTRODUCTION

Condominium’s recent growth in popularity is often attributed to its

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1. As expressed by one commentator, “[d]espite its recent arrival, or perhaps because of it, [the term “condominium”] has taken on more meanings than it can safely carry.”

Bergin, Virginia’s Horizontal Property Act: An Introductory Analysis, 52 VA. L. REV. 961, 963 (1966). Therefore, an explanation of the term is worthwhile. Condominium is a form of real property ownership in which there are individually owned units in a multiple-unit project. See K. Romney, Condominium Development Guide § 1.01[1] (1974). The unique attributes of this form of ownership are evidenced by the word’s derivation. “Essentially, it means to have control (dominium) over a certain property jointly with (con) one or more other persons.”

D. Clurman & E. Hебard, Condominium and Cooperatives 2 (1970) [hereinafter cited as Clurman & Hебard]. Thus, condominium combines individual real property ownership with co-ownership of certain areas and facilities; the product is a homestead plus an undivided ownership shared with one’s neighbors. Id.

Statutory definitions differ from state-to-state and vary considerably in terminology. Minnesota’s first condominium law, the Minnesota Condominium Act (old Act), MINN. STAT. § 515.01-29 (1982), does not specifically define the term condominium. The state’s second generation condominium law, the Minnesota Uniform Condominium Act (MUCA), id. § 515A.1-101 to .4-118 (1982), defines condominium as “real estate, portions...
attractive combination of real property ownership and freedom from the traditional burdens of such ownership. In reality, these burdens remain, but are shared responsibilities of all unit owners. The proximity of the individually owned units, the co-ownership of common areas, and the resulting common liabilities necessitate a governing scheme which addresses the concerns of both the individual owners and the community of owners. As a result, condominium law is simultaneously a statutory form of real property ownership and a process of collective decision-making.

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." Id. § 515A.1-103(7).

This Note is concerned only with condominiums. Townhouses and cooperatives are distinct entities under the law, and are not within the scope of this Note. For a comparative study of these forms of residential real estate ownership, see Note, Cubes of Air: Planning A Condominium Development Under the Minnesota Act, 1 WM. MITCHELL L. REV. 89, 97 (1974).

2. See infra note 13.


The condominium concept will not work until all condominium owners understand that: they are the owners; they are responsible for the operation and maintenance of the community; they must share in the common expenses regardless of how high those expenses may be; and they must abide by the covenants and restrictions of the community.

Id. In the words of a Florida district court judge, "Every man may justly consider his home his castle and himself the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others." Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685, 688 (Fla. Dist. Ct. App. 1971).


5. A few commentators have likened the condominium to a mini-government. See Reichman, Residential Private Governments: An Introductory Survey, 43 U. CHI. L. REV. 253, 253 (1976); Vial, The Oregon Condominium Act: A Question of Vested Interest, 18 WILLAMETTE L. REV. 95, 95 (1982). Every unit owner is a mandatory member of an owners' association governed by the state enabling act and the condominium documents. Article 3 of the Uniform Condominium Act (UCA), entitled "Management of the Condominium," sets out the organization and powers of the association. Section 3-101 requires that the association be organized as a profit or nonprofit corporation. Thus, the method of corporate organization and, to a certain extent, decisionmaking is imposed on condominium owners by the UCA. See UNIF. CONDOMINIUM ACT § 3-101, 7 U.L.A. 178 (1980) [hereinafter cited as U.C.A.].

6. A local practitioner observed that the dual purpose of condominium law imposes a greater burden on attorneys than does traditional real estate law. [Condominium real estate] transactions are more complicated than traditional ones because they involve the purchase and sale of not only the title to a residence but also documents which set forth the legal rights and obligations of the owner of the residence with respect to other owners of residences similarly situated and an association consisting of those owners.
Integral to this decision-making process is the allocation of common rights and liabilities among the owners. All unit owners rightfully expect an allocation of common elements, common expenses, and voting rights approximating their interest in the condominium. Consequently, the distribution of rights and liabilities among the unit owners must take into account the actual physical structures and the uses the owners make of the common facilities in the condominium project. The more diverse the project, the more likely the project’s characteristics will affect allocation of the common rights and liabilities.

The drafters of condominium documents are responsible for making allocations. They must refer to condominium legislation for permissible methods of allocation. Five bases for determining allocations

Lynden, Representing A Seller in the Resale and A Buyer in the Purchase of a Condominium Unit or Cooperative Apartment, in RESIDENTIAL REAL ESTATE FOR THE '80s: ALTERNATIVE FORMS OF FINANCING AND OWNERSHIP 85, 89 (Minn. Continuing Legal Education 1981).

7. The common rights and obligations in question are: (1) ownership of shares in the common elements; (2) liability for common expenses and rights to share in the common profits; and (3) voting rights in the unit owners association. For a detailed discussion on the individual rights and obligations, see infra notes 66-162 and accompanying text.

8. The Federal Home Loan Mortgage Corporation emphasizes the importance of equitable condominium documents in its Underwriting Guidelines. Although state statutes set out certain basic guidelines for the declaration and bylaws of condominiums, the Underwriting Guidelines caution that “[i]t cannot be assumed that all declarations and bylaws were drafted competently and adequately. Equity can be an important underwriting consideration, as the risk of a project's failure increases substantially if either the developer or the unit owner is treated unfairly or believes himself to be treated unfairly.” THE MORTGAGE CORPORATION, PUB. NO. 66, UNDERWRITING GUIDELINES—CONDO/PUD 3 (1982) [hereinafter cited as MC GUIDELINES].


Typically, state condominium statutes require a declaration. A declaration is a legal document in which the property it governs is submitted to the provisions of the relevant
predominate in current state condominium statutes: equality, unit size, par value, market value or purchase price, and relation back.\textsuperscript{10}

It is the purpose of this Note to review the several common rights and liabilities of condominium owners. The Note examines the alternative bases for allocating common rights and liabilities focusing on those available under the Minnesota Uniform Condominium Act\textsuperscript{11} (MUCA). It suggests that the MUCA allocation provision is unnecessarily restrictive.

\section{II. BACKGROUND}

Condominium real property is "probably the single most important and instantly successful development in housing and real estate in the history of America."\textsuperscript{12} Moreover, there is no indication that condominium's popularity will abate in the near future.\textsuperscript{13} Condominiums offer a

\begin{quote}
\textit{See, e.g., Minn. Stat. §§ 515.11, 515A.2-101(a), 515A.2-105 (1982). The declaration must contain an allocation of the common rights and liabilities to each unit. Thus, the declarant is responsible for making the allocations pursuant to provisions in the relevant state statute. Specific allocation provisions generally designate the bases upon which the allocation may be made. See state statutes cited supra. For instance, Section 11(6) of the FHA Apartment Ownership Act requires that the declaration provide for the "[v]alue of the property and of each apartment, and the percentage of undivided interest in the common areas and facilities appertaining to each apartment and its owner for all purposes, including voting." FHA Apartment Ownership Act § 11(6) (1962), reprinted in P. Rohan & M. Reskin, 1A Condominium Law & Practice App. B-3 (1982) [hereinafter FHA ACT]. The National Conference of Commissioners on Uniform State Laws took a much less restrictive view of allocation bases in the Uniform Condominium Act:

Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formulas the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating expenses and common element interests, while "equality" is used for allocating votes in the association.}
\end{quote}


10. These bases are discussed at length in the text of this Note. \textit{See infra} notes 37-40 and accompanying text.


13. Statistics on condominium construction and conversion in Minnesota are scant, and those that exist are hard to obtain. An admirable group effort by the Center for Urban and Regional Affairs (CURA) at the University of Minnesota, graduate students at the Humphrey Institute of Public Affairs in Minneapolis, Minnesota, and others resulted in five publications on condominium and cooperative conversions in the Twin Cities metropolitan area between 1970 and 1980. The researchers obtained and compiled figures from the County Recorder, County Assessor, and Municipal Planning Offices, among others. The following graph illustrates the popularity of condominium conversions during the 1970s despite some significant fluctuations.

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practical solution to the needs of today's potential real estate owners.\textsuperscript{14}

Condominium law has developed in response to the recent growth in condominium's popularity.\textsuperscript{15} State legislation can be categorized as first or second generation condominium law. Most first generation legislation

\begin{center}
\begin{tabular}{lccc}
\hline
County & Converted Units & New Units & Total Units \\
\hline
Anoka & 0 & 0 & 0 \\
Carver & 0 & 143 & 143 \\
Dakota & 756 & 456 & 1,212 \\
Hennepin & 4,169 & 2,939 & 7,108 \\
Minneapolis & 1,153 & & \\
Ramsey & 1,712 & 837 & 2,549 \\
St. Paul & 549 & & \\
Scott & 6 & 11 & 17 \\
Washington & 0 & 487 & 487 \\
\hline
TOTALS & 6,643 & 4,873 & 11,516 \\
Percent Total & 57.7\% & 42.3\% & 100.0\% \\
\hline
\end{tabular}
\end{center}

Source: County Recorder Offices, County Assessor Offices, and Municipal Planning Offices.

\textit{Id.} at 6.


A buyer profile was compiled from 264 responses to a survey taken in the Twin Cities. The profile indicates that the typical condominium buyer in the metropolitan area is educated and single with a median income of $17,900.00. The compilation also shows that conversion has primarily "shifted renters into ownership status, rather than providing new options for owners." \textit{Twin Cities Conversions}, supra note 13, at 22. The condominium buyer is probably attracted by the convenience of apartment rental combined with the psychological satisfaction and tax benefits of home ownership. \textit{See}, e.g., \textit{Madison & Dwyer}, supra note 3, at $10.01 & n.3; Up Date, March 1979, at 1, col. 1.

was patterned after the Puerto Rico condominium law\textsuperscript{16} or the 1961 Federal Housing Administration's model act\textsuperscript{17} (FHA Act). Both prototypes contemplated a single high-rise residential structure.\textsuperscript{18} Within eight years of the FHA Act's drafting, fifty states and the District of Columbia had condominium enabling statutes.\textsuperscript{19}

\begin{itemize}
  \item Section 234 of the National Housing Act was enacted by the United States Congress in 1961 for the avowed and almost exclusive purpose of extending FHA insurance to mortgage loans issued to residents of Puerto Rico. Because of population concentrations, Puerto Rico was distressingly in need of high-rise and other middle-income developments in urban centers at that time. In view of condominiums already built, it was felt that this form of ownership would receive acceptance at lower levels of the income strata. Moreover, it was hoped that lending institutions, which had balked at making condominium mortgage loans to the island's middle class, might be willing to channel funds into this area under a guarantee umbrella.

\textsuperscript{16} P.R. LAWS ANN. tit. 31, §§ 1291-93(k) (1968).

\textsuperscript{17} FHA ACT, supra note 9. In 1961, the FHA Act was drafted by the FHA "[t]o establish guidelines for state legislation that would satisfy the requirements of section 234 and yet allow necessary modification by local law . . ." MADISON & DWYER, supra note 3, at ¶ 10.01.

\textsuperscript{18} Symposium, supra note 15, at 87. Minnesota was the first state to adopt the FHA Act and by 1969 the fifty states and District of Columbia had enabling statutes. Id.; see MINN. STAT. §§ 515.01-29 (1982). Although Minnesota was a forerunner in condominium legislation, remarkably, the state has no decisions of record relating to condominium law.


The initial novelty of condominium as a form of "horizontal property ownership" is explained as follows:

Unit ownership in a condominium is a specific abrogation of the common-law doctrine cujus et solum, ejus est usque ad velum et ad infernos—he who owns the soil owns everything below to the center of the earth and everything to the heavens—as well as its successor doctrines which recognize that ownership extends
In Minnesota, the condominium law changed extensively when the 1980 legislature adopted a modified version of the National Commission's upward to any height that may reasonably be put to use. . . . [C]ondominium has been described as 'a freehold interest in a horizontal piece of vertical air.' K. Romney, supra note 1, at § 1.01[1] (footnote omitted). These statutes were probably patterned after the Puerto Rico condominium law. 1 Rohan & Reskin, supra note 19, at § 2.03.

20. In Minnesota, several changes in the first condominium law preceded the second generation law. The 1976 legislature addressed some of the more pressing concerns by adopting several amendments. The consumer protection measure enacted in 1979 contains elaborate disclosure requirements. See Minn. Stat. § 515.215, subd. 1 (1982). Liability is imposed on a vendor who makes misleading statements or omits a material fact during the transaction. Id. at subds. 2, 3. The right to rescind a purchase agreement within five days of receipt of the required information is conferred upon a purchaser and any attempted waiver of the right is void. Id. at subds. 4, 6.

A provision requiring incorporation of the owners' association addresses the issues of unit owner liability and association standing to sue. Id. § 515.175. The incorporation provision applies to all associations created after July 1, 1976. Incorporation under the first Minnesota condominium act was made pursuant to Chapter 317 of the Minnesota Statutes governing nonprofit corporations. Id.; cf. id. § 515A.3-101 (association under MUCA may be organized as profit or nonprofit corporation).

Termination of office and contract restriction provisions give the association greater control over condominium management. Id. § 515.195. Subdivision 1 of Section 515.195 provides for an automatic termination of officers either five years after the condominium's creation or when unit owners other than the condominium's creator achieve three-fifths ownership. Control of the condominium then shifts from the declarant to the unit owners' association. Subdivision 2 limits the permissible duration of contracts and leases made by or on behalf of the association. The provision prevents the declarant and subsequent associations from having too much influence on the project. Id.

21. Id. §§ 515A.1-101 to .4-118. The MUCA was added to the Uniform Limited Partnership Act in the Minnesota House of Representatives. In the bill's final reading, Senate President Davies explained that the Act was not a pure UCA. The committee, chaired by Frederick Thorson, a local practitioner, tailored the Act to harmonize with existing Minnesota real estate law and condominium communities. See Tape Recording of Third Reading and Final Passage of S.F. 133 Before the Minnesota Senate (1980) (Act passed with a 51 to 4 vote).

The new Act consists of four mandatory UCA articles: Article 1 contains the general provisions; Article 2 the creation, alteration, and termination of condominiums; Article 3, the management of the condominium; and Article 4, the protection of purchasers provisions. See Minn. Stat. §§ 515A.1-101 to .4-118 (1982).

The UCA contains an optional fifth article concerning the establishment of state regulatory agencies. At one time it also contained a sixth article on timesharing. William Breetz, an author of the UCA, commented on those articles in a presentation to the Federal National Mortgage Association's legal staff:

Article V is an optional article concerning the establishment of state regulatory agencies. The committee has made the decision, which I think will be adopted as part of the final act, that establishment of a state regulatory agency shall not be made mandatory. There are many who feel that it is an unwise decision but I think that if we do mandate creation of a state agency, many states would not adopt the Act for that reason . . . .

At one time the act contained an Article VI on timesharing, but the Conference decided to pull the timesharing article out and make it into a separate Uniform Timeshare Ownership Act. . . . It is limited to fee timesharing concepts and
tioners Uniform Condominium Act\textsuperscript{22} (UCA). The MUCA marks the beginning of the second generation of Minnesota condominium law. Its drafters recognized the condominium's potential for commercial, industrial, residential, and mixed uses.\textsuperscript{23} The MUCA accommodates more diverse projects by replacing statutory provisions designed for residential high-rises with provisions allowing greater flexibility in drafting condo-


22. U.C.A., 7 U.L.A. 101 (1977). The Uniform Condominium Act was originally a provision within the Uniform Land Transactions Act (ULTA). It was later decided to develop the ULTA condominium section into a separate uniform condominium act. For a description of the UCA Committee members and the drafting process, see Breetz, \textit{supra} note 21, at 213-14.

The UCA has received both praise and criticism. Some critics laud its thoroughness while others argue that "many of its provisions are an unnecessary intrusion into the document-drafting process." Thomas, \textit{supra} note 19, at 1373.

One of the UCA's authors has explained that the original UCA, in the form of a provision of the Uniform Land Transactions Act (ULTA), was a skeletal Act. He stated that the "UCA is much more flushed out [than the ULTA provisions]. Some would call it a beast, but in any event it is a much more detailed statute than Section IV of ULTA was." Breetz, \textit{supra} note 21, at 213.

Minnesota, Pennsylvania, and West Virginia are the only states that have adopted the 1977 version of the UCA as of the publication of this Note. See MINN. STAT. §§ 515A.1-101 to .4-118 (1982); PA. STAT. ANN. tit. 68, §§ 3101-3414 (Purdon Supp. 1983); W. VA. CODE §§ 36B-1-101 to 4-115 (Supp. 1983). See generally Garfinkel, \textit{The Uniform Condominium Act}, 28 \textit{Prac. Law.}, Dec. 1, 1982, at 43.

The 1980 amended version of the UCA was adopted by the Rhode Island legislature, see R.I. GEN. LAWS §§ 34-36.1-1.01 to -4.20 (Supp. 1982), and in substantial part by the Maine legislature, see ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (Supp. 1982). The Commissioners commented on the amendments as follows:

Most of [the amendments] are of a minor non-substantial nature; they are intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which result in more significant changes, either on particular matters of substance, or in the use of terms throughout the Act which simplify the structure and readability of the Act.


The Model Uniform Condominium Code has been called a superior alternative to the UCA. See generally Rohan, \textit{The "Model Condominium Code"—A Blueprint for Modernizing Condominium Legislation}, 78 \textit{Colum. L. Rev.} 587 (1978). The Model Code, however, has not been completed.

23. Most first generation statutes were inflexibly designed for the basic high-rise residential project. As one commentator noted: "[T]oday's use of condominiums in industrial, medical, retail, and office facilities, as well as with clusters of detached single and low-rise multifamily housing, confounds initial expectations that condominium ownership would be an arrangement peculiarly appropriate to high-rise residential buildings." Walter, \textit{Condominium Government: How Should the Laws Be Changed?} 4 \textit{Real Est. L.J.} 141, 142 (1975).
Changes in the allocation provisions also reflect this accommodation.

III. THE ALLOCATION ISSUE

The governance and management of the condominium is vested in the owners' association, which consists exclusively of all unit owners. The association, in turn, is governed by the provisions of the MUCA and condominium documents. A simple analogy illustrates the effect of statutory provisions and condominium documents on those they govern. Condominium legislation has been described as the constitution, and condominium documents as the laws of a condominium project.

Under the MUCA, the declaration is the primary condominium document containing allocations, floor plans, restrictions on use, occupancy, alienation of units, and descriptions of the real estate and units. The declaration's drafter is responsible for setting out each unit's allo-

25. See, e.g., id. §§ 515A.2-107, .2-111, .2-115 (referring to leasehold condominiums, expansion of flexible condominiums, subdivision or conversion of units respectively). Compare id. §§ 515.06(a), (b), 515.11(6) with id. § 515A.2-108.
26. See id. §§ 515A.3-102, .3-103, .3-107, .3-112. Article 3 of the new Act contains most of the provisions relevant to the condominium's management.
27. Id. § 515A.3-101. "The membership of the association at all times shall consist exclusively of all unit owners or, following termination of the condominium, of all former unit owners entitled to distributions of proceeds under section 515A.2-120, or their heirs, successors, or assigns." Id.
28. See id. §§ 515A.2-105, .3-106. A condominium has a declaration and bylaws similar to a corporation's articles of incorporation and bylaws. See id. If the provisions of the declaration and the bylaws conflict the declaration prevails except to the extent that the declaration is inconsistent with sections 515A.1-101 to 515A.4-117. Id. § 515A.2-103(c).

Condominiums are regulated at the state level as well as at the federal and municipal levels. For a discussion of condominium regulation, see Fitzgerald, Government Regulation of Condominiums in Condominium Law 1980, at 51 (Advanced Legal Education). See also Minn. Stat. § 515A.1-106 (1982) (applicability of local ordinances, regulations, and building codes).
29. See Judy & Wittie, supra note 4, at 444; Vial, supra note 5, at 96. One commentator expressed the relationship as follows:

The declaration is not a contract but, as a convenant running with the land, is effectively a constitution establishing a regime to govern property held and enjoyed in common. It further sets forth procedures to administer, operate, and maintain the property. The draftsman must understand this concept and appreciate the association's role in order to provide a flexible and realistic document affording to subsequent owners and managers the ability to deal effectively with the problem to be anticipated in the particular setting. The draftsman must realize that it is his responsibility to write a document which will have effect for a substantial number of years upon people he has never seen and probably never will see.

32. The drafter of the declaration is likely to be the attorney employed by the "de-
cations in the declaration.\textsuperscript{33} Recording the declaration with the county clerk creates the condominium.\textsuperscript{34} Once the allocation is made, the owners are effectively bound to it through the life of the condominium; their unanimous written agreement is required to amend the allocation.\textsuperscript{35}

Inevitably, a successful condominium requires each owner to relinquish some freedom of choice. The sacrifice may be minimized, however, if the allocation of common rights and liabilities reflects as accurately as possible each owner’s interest in the condominium. Ideally, the allocation provisions of a condominium act should permit the declarant to accommodate diverse interests by providing an adequate choice of bases upon which to designate each common right and liability.\textsuperscript{36}

clarant.” \textit{Id}. § 515A.1-103(9). The 1980 version of the UCA simplifies the definition of declarant: “[A]ny person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of, [or] (ii) reserves or succeeds to any special declarant right . . . .” U.C.A. § 1-103(9), 7 U.L.A. 131 (1980).

\textsuperscript{33} Id. § 515A.2-105(6) (1982).

\textsuperscript{34} Id. § 515A.2-101. The condominium declaration and bylaws must be recorded in every county in which any portion of the condominium is located. \textit{Id}. § 515A.2-101(a).

\textsuperscript{35} Id. § 515A.2-119(c).

\textsuperscript{36} Dean Rohan has commented on the desirability of a flexible method of common expense allocation. He classified the “two principal statutory methods” as those determined in the declaration or bylaws that leave the final determination to the unit owners, and those providing for a statutory determination on the basis of owners’ interests in the common elements. In his words:

\begin{quote}
[The] latter statutory method . . . appears considerably more inflexible than that which permits the matter to be determined by the condominium instruments. On the other hand, however, it is likely that the instruments themselves will often provide for a method of allocation based on the value of the unit in relation to the value of the building. Thus, differences in result may be minimal, although a particular project may provide for equality of contributions or some other method of allocation. Of the two methods, the more flexible appears the more desirable . . . .
\end{quote}

\textbf{ROHAN & RESKIN, supra note 19, § 6.03[1].}

The MUCA allocation provision is a hybrid of Dean Rohan’s two methods and is applicable to allocations of all common rights and liabilities. The MUCA sets out a choice of permissible bases by which the declaration drafter assigns allocations:

(\textit{a}) The declaration shall allocate a fraction or percentage of the undivided interests in the common elements, common expenses and votes in the association to each unit in such manner that each of the items is equally allocated or is allocated according to the proportion of the area or volume of each unit to the area or volume of all units, and the items need not be allocated the same for all purposes. The declaration may provide that a portion of each common expense assessment may be allocated on the basis of equality and the remainder on the basis of area or volume of each unit. The sum of the percentages or fractions shall equal 100 percent or 1.

(\textit{b}) Except in the case of eminent domain (section 515A.1-107), expansion of a flexible condominium (section 515A.2-111), relocation of boundaries between adjoining units (section 515A.2-114), or subdivision of units (section 515A.2-115), the common element interest, votes and common expense liability allocated to any unit may not be altered, except as an amendment to the declaration which is signed by all unit owners and first mortgagees, and which complies with section 515A.2-119. The common elements are not subject to partition, and any pur-
A. Types of Allocation Bases

As noted earlier, the predominant bases included in condominium laws are par value, unit size, equality, value, and relation back to the allocation basis of another right or obligation.37

"Par value" refers to a number or numbers assigned to each unit by the declarant, which may or may not reflect the fair market value of the unit.38 The declarant designs a formula for assigning the number so that substantially identical units receive the same par value.39 Par value enables the drafter to consider the greatest number of variables when allocating each common right and liability. This basis results in allocations which most closely reflect the owners' interests in the project.

Allocations using an equality basis create identical interests in the common rights and liabilities. If all allocations were based on equality, each unit owner would have one vote in the association, own an equal interest of the common elements, receive an equal portion of any profits, and pay an equal amount of the condominium's expenses.

Unit size and value allocations are based on a unit's relation to the entire project. Size may be determined by volume or area, and value

Ported conveyance, encumbrance, judicial sale or other voluntary or involuntary transfer of an undivided interest in the common elements without the unit to which the interest is allocated is void.

(c) The association may assess certain common expenses against fewer than all units pursuant to section 515A.3-114.


Although the allocation is "determined in the declaration," the "final determination" is not left to the unit owners. The unit owners' influence on allocations is limited to their ability to amend the provision by unanimous written consent. Thus, the flexibility of an allocation choice is built into the MUCA, but basically is reserved for use by the initial declaration drafter, not the individuals affected by it.

37. See Judy & Wittie, supra note 4, at 441.

38. Id. at n.2. The assignment of par value to common stock is similar. "Par value has little significance so far as market value of common stock is concerned." Black's Law Dictionary 1011 (5th ed. 1979).

The Virginia legislature codified the definition of par value in its condominium statute as follows:

"Par Value" shall mean a number of dollars or points assigned to each unit by the declaration. Substantially identical units shall be assigned the same par value, but units located at substantially different heights above the ground, or having substantially different views, or having substantially different amenities or other characteristics that might result in differences in market value, may, but need not, be considered substantially identical within the meaning of this subsection. If par value is stated in terms of dollars, that statement shall not be deemed to reflect or control the sales price or fair market value of any unit, and no opinion, appraisal, or fair market transaction at a different figure shall affect the par value of any unit, or any undivided interest in the common elements, voting rights in the unit owners' association, liability for common expenses, or rights to common profits, assigned on the basis thereof.


39. See Judy & Wittie, supra note 4, at 460.
may refer to purchase price or market value.\textsuperscript{40} Statutory provisions for these bases often define their meanings.

Finally, the concept of relation back to the allocation basis of another right or obligation is an especially common basis found in first generation condominium statutes.\textsuperscript{41} The drafter is required to allocate all common rights and liabilities on one basis. The basis may be designated in the statute,\textsuperscript{42} or the drafter may be given a choice of bases.\textsuperscript{43} When the basis is designated by statute, in effect, the legislature rather than the drafter decides the allocation issue. Regardless of the statutory provision, the relation back concept automatically allocates rights and liabilities without referring to the characteristics of the particular project.

\textbf{B. Allocation Provisions}

State allocation provisions range from highly restrictive to extremely flexible. The predominant\textsuperscript{44} and most rigid allocation provision is the relation back basis set forth in the \textit{FHA} Act,\textsuperscript{45} which was adopted verbatim.

The nuances of valuation analyses are discussed at length in the Federal Home Loan Corporation's Underwriting Guidelines and are summarized as follows:

Generally, the market value of a property is supported by reconciliation of the three approaches to value, i.e., cost, market data and income. The reconciliation is not an averaging technique, but a reasoning process. In arriving at the market value of an individual condominium/PUD unit, this reconciliation is simpler, as the cost approach is frequently not applicable, and the income approach is often unreliable, as the market typically gives it little consideration. Therefore, the market data comparison approach is the most meaningful market value indicator. This market value of the individual condominium/PUD encompasses the proportionate share of the common elements and recreational facilities, the management of the project, the validity of the budget and its replacement reserves, and the limitations of use, as outlined in the declaration. The underwriter must

\begin{footnotesize}
\textsuperscript{40} See, e.g., \textsc{Minn. Stat.} \S 515.06(a) (1982). Minnesota's first condominium act utilizes the value basis without defining the term "value." \textit{Id.} The presumption from the statute is that market value was intended, given the fact that the condominium is not created until the declaration stating the allocations is recorded. See \textit{id.} \S 515.03. For a comment on value reappraisal, see \textsc{Rohan & Reskin, supra} note 19, at \S 6.01[4].

\textsuperscript{41} See, e.g., \textsc{Alaska Stat.} \S 34.07.380 (1975); \textsc{Ark. Stat. Ann.} \S\S 50-1006, 50-1017 (1947); \textsc{Ky. Rev. Stat.} \S\S 381.830, .870 (Supp. 1982); \textsc{Mass. Gen. Laws Ann. ch. 183A, \S\S 5(a), 6(a) (West 1977); \textsc{Mo. Ann. Stat.} \S\S 448.030(1)(3), .080(1) (Vernon Supp. 1983); \textsc{Mont. Code Ann.} \S\S 70-23-403, -501 (1981); \textsc{Neb. Rev. Stat.} \S\S 76-802(6), -817 (1943); \textsc{N.H. Rev. Stat. Ann.} \S\S 479-A:5, .9, .10(VI) (1968); \textsc{N.C. Gen. Stat.} \S\S 47A-6, -12 (1976); \textsc{Ohio Rev. Code Ann.} \S\S 5311.04, -21, -22(A) (Page 1981); \textsc{Okla. Stat. Ann. tit. 60, \S\S 505, 512, 513 (West 1971); \textsc{Or. Rev. Stat.} \S\S 94.243, 260 (1981); \textsc{S.C. Code Ann.} \S\S 27-31-60, -190 (Law. Co-op. 1977); \textsc{Utah Code Ann.} \S\S 57-8-24 (Supp. 1981); \textsc{Vt. Stat. Ann. tit. 27, \S\S 1306(a), 1310 (1975); \textsc{Wash. Rev. Code Ann.} \S\S 64.32.050, .080 (1966).}

\textsuperscript{42} \textit{E.g.}, \textsc{Minn. Stat.} \S 515.11(6) (1982).

\textsuperscript{43} \textit{E.g.}, \textsc{Ind. Code Ann.} \S\S 32-1-6-7, -11, -12(5), -22 (West 1979).

\textsuperscript{44} \textsc{U.C.A.} \S 2-107 comment 4, 7 U.L.A. 153 (1980).

\textsuperscript{45} See \textsc{FHA Act, supra} note 9, at \S 6(a) (percentage of undivided interest shall be "computed by taking as a basis the value of the apartment in relation to the value of the property").
\end{footnotesize}
tim in Minnesota’s first condominium act. It provides a single basis for allocating common areas, profits, expenses, and voting: the value of the condominium unit in relation to the value of the entire parcel of real estate. Thus, the designated value of the condominium unit when the declaration is recorded fixes the unit owner’s rights and liabilities for the life of the condominium. This method of allocation has received much criticism, and has been either eliminated from, or made one of several bases available under second generation statutes. Automatic allocation on a designated basis assumes that one basis adequately accommodates the unit owners’ interests and that the drafter need not examine those interests.

At the opposite end of the spectrum are open ended allocation provisions and those following the UCA provision. The UCA specifies that, “the declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas used to establish those allocations.” Thus, the Commissioners provided great flexibility with a safeguard that prevents arbitrary or unfair allocations. The drafter may choose any basis to allocate common rights and liabilities, but must explain the choice.

Some statutes provide little or no guidance or restriction on allocations. For example, under the California Code, absent agreement to

<table>
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<th>relate each of these elements of market value to the amount, term and ratio of the loan.</th>
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<td>MC GUIDELINES, supra note 8, at 14.</td>
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<td>46. MINN. STAT. § 515.06 (1982).</td>
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<td>47. Id. Subdivision (b) of the statute states that the percentages expressed in the declaration shall have a “permanent character” unalterable without the consent of the unit owners. Id.</td>
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<td>48. One commentator expressed the following criticism: Typically, [drafters of state laws] have chosen a basis for allocation of a particular right, usually the ownership of the common elements, and have used that right as the basis of allocation of one or more other rights. The result of that interrelationship has been to make the ownership of common elements the ‘sun’ around which all the other rights and obligations revolve. A major conclusion of this analysis is that such a result is improper for two reasons. First, the ownership of common elements is really a residual concept which is relatively insignificant during the life of the condominium regime. Thus, if any right or obligation should be the ‘sun,’ it should not be common element ownership. Second and more generally, it is a mistake to make the allocation of any right or obligation the basis of allocation of another unless the relationship between the two itself serves an identified interest to be furthered. Judy &amp; Wittie, supra note 4, at 442-43; see also Garfinkel, The Uniform Condominium Act, supra note 22, at 43. For a thorough discussion of allocation by unit value, see Note, supra note 1, at 117-22.</td>
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| 50. See, e.g., ALA. CODE §§ 35-8-6(d), -7(5), (6), (8), (10) (1977); ARIZ. REV. STAT. ANN. § 33-553(6) (1974); CAL. CIV. CODE § 1353 (West 1982); MD. ANN. CODE §§ 11-107(a), (b), -110(a), (b) (1981); N.D. CENT. CODE § 47-04.1-03(5) (1978); OR. REV. STAT. §§ 94.243, 260 (1981); S.D. CODIFIED LAWS ANN. § 43-15A-7 (Supp. 1982); TENN. CODE
the contrary, unit owners are given equal rights in the common elements and bear an equal share of assessments. A drafter of the California Condominium Code explained that the Code drafters' intended to leave as much as possible to the private agreement of the parties. The drafters of the MUCA compromised between the rigidity of the first Minnesota act and the flexibility of the UCA. The most flexible basis, par value, is not an option under the MUCA. To permit flexibility for different types of projects, the drafters provided three bases: equality, area, and volume. The relation back concept was eliminated. Whereas all allocations were based on value under the first act, the MUCA states that "the items need not be allocated the same for all purposes." Unit allocations are to be expressed in either percentages or fractions equalling one hundred percent or one respectively. The UCA

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**Notes:**


52. Id

53. Telephone conversation with Frederick Thorson, Chairman of Minnesota Condominium Law Revision Committee (March 5, 1982). The legislative history of the MUCA contains no discussion of the allocation issue. Recorded discussion of the MUCA adoption focused exclusively on the issues of tenant protection in conversion projects, state preemption of local ordinances regulating condominium conversion, and filing of the declaration and bylaws. See Tape Recordings of Senate Proceedings on S.F. 133 (final reading). Mr. Thorson was of the opinion that allocation was not a very controversial area.


55. Id

56. A local practitioner commented:

Although it may seem obvious that the percentage of undivided interest in the common areas should total 100%, nevertheless, an examiner of a condominium document should always add the percentages of undivided interest to determine that they do equal 100%. Not all documents show total undivided interests equal to 100%. In such instances if the percentages total less than 100%, then the developer will retain such percentage of interest since it will never have been conveyed, or if the percentage is in excess of 100%, then some apartment owners will of necessity have to have their percentage reduced.

Thorson, *A Progress Note on Condominiums*, 34 BENCH AND B., Jan. 1978, at 40. The failure of a condominium declaration to assign a common element interest to a unit was deemed a fatal defect in Daytona Dev. Corp. v. Bergquist, 308 So. 2d 548 (Fla. App. 1975). In Bergquist, the declarant attempted to reserve a separate condominium ownership interest in the "Recreation Unit." The applicable statute required that each unit be assigned a percentage share of common element interest. Because the Recreation Unit was not assigned an interest, its creation was held to be void. Id. at 549; cf. MINN. STAT. § 515A.2-108 (1982) ("The declaration shall allocate a fraction or percentage of the undivided interests in the common elements, common expenses and votes in the association to each unit. . . .").
requirement that the drafter explain the formulas used in the allocation was not included in the MUCA.

IV. ALLOCATION OF INTERESTS IN THE COMMON ELEMENTS

A. Definition

Ownership of a condominium interest includes, in addition to the right to exclusive ownership and use of a particular unit, an undivided interest in the common areas and facilities—the common elements. All unit owners are entitled to use the common elements. The MUCA describes the common elements as unalterable, appurtenant to, and inseparable from the respective units. Any attempt to separate the two is void.

Most condominium acts set forth the particular areas designated as common elements. Others, such as the MUCA, simply state that the

57. This factor, the undivided interest in the common elements, is unique to condominium ownership. The uniqueness made the need for legislation paramount, because common elements were not adequately covered by recognized principles of real property law. See Comment, Areas of Dispute in Condominium Law, 12 WAKE FOREST L. REV. 979, 1002-04 (1976). Before the enactment of condominium enabling statutes "there were occasional attempts to form condominiums by complex agreement among residents." CLURMAN & HEBARD, supra note 1, at 13. Nonetheless, opined one commentator, "without statutory enactments, the condominium form in the United States would have been relegated to an interesting historical curiosity." Id.

58. "Common elements other than limited common elements may be used in common with all unit owners." MINN. STAT. § 515A.2-109 (1982). For comment on the limited common elements concept, see infra notes 64-67 and accompanying text.

A conflict concerning the regulation of limited common elements arose when twenty covered and seven uncovered parking spaces were assigned to unit owners in Juno By the Sea N. Condominium Ass'n (The Towers) Inc. v. Manfredonia, 397 So. 2d 297 (Fla. App. 1980), reh'g granted, 397 So. 2d 301 (Fla. App. 1981). The condominium documents provided for three separate parking areas. Lot A contained covered spaces which were designated limited common elements in the condominium declaration and were purchased for $2,000.00 each. Upon rehearing, the district court reversed the trial court judgment for the limited common element owners, finding that the Board was authorized to regulate the limited common elements as well as the common elements. Id. at 304.

59. Section 515A.2-108(b) states in pertinent part: "The common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale or other voluntary or involuntary transfer of an undivided interest or involuntary transfer of an undivided interest in the common elements without the unit to which the interest is allocated is void." MINN. STAT. § 515A.2-108(b) (1982). Although common elements are deemed unalterable, unanimous written agreement of the unit owners will permit an amendment to the declaration altering the common elements. Id. § 515A.2-119; see, e.g., Makeever v. Lyle, 125 Ariz. 384, 609 P.2d 1084 (Ariz. App. 1980) (unanimous consent of unit owners needed to alter common elements).

60. MINN. STAT. § 515A.2-119(c) (1982).

61. The FHA Act adopted by many states defines common areas and facilities as follows:

(f) 'Common areas and facilities,' unless otherwise provided in the Declaration or lawful amendments thereto, means and includes:
term includes “all portions of a condominium other than the units.”

Generally, included as common elements are the land on which the building is located, all parts of the building except the individual units, the yards, the parking and recreation areas, and the installations of central services.

Areas and facilities with features of common elements but reserved for use by fewer than all unit owners are designated limited common elements. Limited common elements should be specified as such in the declaration. The declaration must specify the unit or units to which each

(1) The land on which the building is located;
(2) The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building;
(3) The basements, yards, gardens, parking areas and storage spaces;
(4) The premises for the lodging of janitors or persons in charge of the property;
(5) Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerating;
(6) The elevators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;
(7) Such community and commercial facilities as may be provided for in the Declaration; and
(8) All other parts of the property necessary or convenient to the existence, maintenance and safety, or normally in common use.

FHA Act, supra note 9, at App.26 (footnote omitted).


63. See CLURMAN & HEBARD, supra note 1, at 2.
64. See MINN. STAT. § 515A.1-103(13) (1982).

One commentator raised the problem of common element designation of the area “at the interface between a unit and the adjacent common elements.” Rosenstein, Inadequacies of Current Condominium Legislation--A Critical Look at the Pennsylvania Unit Property Act, 47 TEMP. L.Q. 655, 673 (1974). For example:

[A] balcony or patio which is intended for the exclusive use of the owner of the adjacent unit is normally located on the building exterior where its appearance, upkeep and repair is of concern to all unit owners. This creates a strong argument for including the balconies and patios in the common elements. By so
limited element is allocated.\textsuperscript{65} The limited common elements, like the common elements,\textsuperscript{66} cannot be altered without the written consent of the unit owners to whom they are allocated.\textsuperscript{67}

The MUCA designates various parts of a project, which do not fall neatly within the common definitions as either a common element, limited common element, or part of the unit.\textsuperscript{68}

B. Goals of Allocation

The bases for a common element allocation may be evaluated by considering the goals to be furthered by the allocation.\textsuperscript{69} The goals may be expressed as follows: to establish easily determinable, constant ownership interests and to insure that owners receive the value of their interests in the condominium upon termination or sale.\textsuperscript{70} An allocation serving both goals enables a unit owner to determine the value of his interest at any given time, and assures that he will receive a fair return on his investment upon sale or termination. These goals also serve the mortgagor's interests. If the fractional common element interest assigned to each unit reflects the unit's value, appraisal of condominium properties is

\textsuperscript{65} MtNN. STAT. §§ 515A.2-105(8), .2-109 (1982).

\textsuperscript{66} See supra note 57 and accompanying text.

\textsuperscript{67} MtNN. STAT. § 515A.2-119(d) (1982).

\textsuperscript{68} The general definition of common elements is refined in section 515A.2-102 entitled "Unit Boundaries," in which the unit's various peripheral elements are designated either common elements, parts of the unit, or limited common elements. See id. § 515A.2-102, subds. 1-4 (1982). For example, subdivision 1 states:

If walls, floors, or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

\textsuperscript{69} See Judy & Wittie, supra note 4, at 447-48; see also Rohan, Condominium Housing: A Purchaser's Perspective, 17 STAN. L. REV. 842, 845-46 (1965); Rosenstein, supra note 64, at 670-71.

\textsuperscript{70} See Judy & Wittie, supra note 4, at 448.
C. Choice of Bases

Under the first Minnesota condominium act the two goals cannot be reconciled. The first act requires that all common rights and liabilities be allocated on the value basis; it does not permit reappraisal of value. The value basis permanently ties the owner's common element interest to the unit's initial value. Although the owner may sell the unit at its reappraised value, the purchaser's common element interest remains as initially designated. Any improvements and increased value of a unit are unrecognized. Moreover, upon termination of the condominium, the common element interests and the condominium property are divided according to the initial value allocations. While the value basis is clear and constant, it does not reflect the inevitable changes in property value over time.

The MUCA resolves the potential problem that a unit owner may receive less than the value of his unit upon termination of the condominium. An appraisal system ensures receipt of the fair market value of the unit, limited common elements, and common element interests upon the condominium's termination. The MUCA requires the association to select one or more independent appraisers to determine the fair market value immediately before termination. The appraisal system addresses a main concern of those who criticize the value basis for allocation. Regardless of the allocation basis chosen, under the MUCA fair market value is still realized upon termination.

Although the MUCA remedies the valuation problem upon termination, it does not permit reappraisal when an individual owner sells a unit. The common element allocation retains its permanent feature under the MUCA. Therefore, the value basis for allocation of the common elements remains subject to the criticism: "[I]f one owner significantly improves his unit and increases its value disproportionately to the other

71. See id.; MC GUIDELINES, supra note 8; Rosenstein, supra note 64, at 670-71.
72. See MINN. STAT. §§ 515.16, .26 (1982).
73. The effect of Minnesota's first Act upon termination of the condominium was stated as follows:

[T]he statute in its present form rewards the careless apartment owner, while penalizing the owner who meticulously maintains and improves his apartment. In small projects the economic implications may be significant. This disadvantage is only partially offset by the fact that an owner whose apartment appreciates in value more rapidly than the other units is not required to bear a larger burden of the common maintenance and repair expenses.

Note, supra note 1, at 119-20 (footnote omitted).
74. See Judy & Wittie, supra note 4, at 449-51.
76. Id. § 515A.2-120.
77. See, e.g., Rohan, supra note 69, at 846; Note, supra note 1, at 119.
78. See MINN. STAT. § 515A.2-120 (1982).
units, which appreciate at the prevalent community rate or depreciate due to abuse or lack of care, the fixed proportional interest will no longer afford the industrious owner a sense of security. 79 In sum, the value basis provides constant and easily determinable interests, however, its permanent tie to initial unit value may not reflect the owner’s interest in the condominium.

The par value basis also satisfies the first goal of common element allocation; it establishes ownership interests which are easily determined and remain constant over time. 80 Once the fractional ownership interest is established, the allocations are permanent. Par value 81 permits consideration of variables other than unit value in assessing the allocations. 82 Such variables include location, view, and unit design. The UCA Commissioners provided the following illustration of the use of par value: “[T]he declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels.” 83

A par value allocation is only as accurate as the individual assigning the par value. In the words of one commentator: “[T]he declarant need not account for . . . [the variables which determine initial market value], or may not do so accurately, in which event par value might even be a worse basis of allocation than unit size.” 84 The UCA’s requirement that the declarant set out the formula used to assign par value, 85 however, discourages misuse of the basis and minimizes the possibility of miscalculations. Although the requirement does not guarantee an accurate assignment, it holds the declarant accountable for his calculations. Furthermore, liberal disclosure requirements 86 provide purchasers with the opportunity to discover flaws in the formula.

The MUCA limits the declarant’s choice of allocation bases to equality, unit volume, or unit area. 87 Although these options satisfy the goals of common element allocation, the equality basis does not account for variations among units, while unit size allocations allow only limited variation.

The most appropriate common element allocation method for some projects is a basis allowing par value assignments that reflect the unique attributes of each unit. Where attributes other than unit size signifi-
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significantly distinguish units, assigned value of the common elements and corresponding common expenses\(^8^8\) may be appropriate. Single family conversions with great diversity among units are likely candidates for par value allocation. If a common area or facility benefits one or several units more than other units, it may be desirable to adjust common element ownership interests. Use of a common element may be restricted to fewer than all units; if so, it could be designated a limited common element.\(^8^9\) When it is more desirable to maintain the common element status and thus retain shared use of, and responsibility for the common element, assigned value would better reflect the owners’ beneficial interests.\(^9^0\)

V. ALLOCATION OF COMMON EXPENSES

A. The Nature and Assessment of Liabilities

Concomitant to each owner’s rights in the common elements is the obligation to maintain those common elements.\(^9^1\) In addition to the cost of general maintenance, the MUCA provides that unit owners are liable for alterations and improvements of the common elements,\(^9^2\) taxes, insurance,\(^9^3\) and special assessments on the condominium. Unless the declaration provides otherwise, the authority to adopt and amend budgets for revenues, expenditures, and reserves, and to collect assessments for

88. See infra notes 91-95 and accompanying text.
89. See supra notes 64-67 and accompanying text.
90. Common element as opposed to limited common element status might be more appropriate in the following example: A single family conversion has a large front porch which forms the front boundary of the front unit. The porch is the only access to that unit; other units have their own entrances. The owner of the front unit will reap the greatest benefit from the porch through daily use and best access. Designating the porch a limited common element would preclude its use by the other owners and would require the benefited unit owner to pay for its maintenance and upkeep. Because the upkeep of the porch is important to all of the owners and the porch may be used by owners of upper story units, a limited common element designation might not be desirable. A par value allocation would allow the drafter to allocate interests according to beneficial interests. Where the other unit owners require ingress and egress through the front porch, they could be restricted to that limited use. See Lynden, supra note 14, at 25.
91. The MUCA expressly addresses the responsibilities of the unit owners in this regard. It provides:

Except to the extent otherwise provided by the declaration or section 515A.3-112(d), the association is responsible for maintenance, repair, and replacement of the common elements and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements or any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

MINN. STAT. § 515A.3-107 (1982).
92. See id. § 515A.3-102(6).
93. Id. § 515A.3-112.
common expenses from the unit owners is vested in the association. The MUCA also authorizes the association to assess "any common expense benefiting less than all of the units against the units benefited . . . in proportion to their common expense liability." The MUCA confers broad authority on the condominium association to assess common expenses. Assessing costs to those who receive no commensurate benefit may create controversy. Thus, the following dispute could arise in Minnesota.

In Association of Unit Owners of the Inn of the Seventh Mountain v. Gruenfeld, the association brought an action against a unit owner who contended that certain assessments and charges were not common expenses within the association's authority to assess. The court held that the costs of electric power, heat, television signals, firewood, garbage removal, security police, fire protection, insurance, contingency reserves, and television set and furniture rentals were within the association's assessment authority.

The governing condominium statute in Gruenfeld conferred upon the association's board of directors specific authority to assess owners for the costs of insurance and general authority to "fix a monthly assessment for each unit in an amount sufficient to provide for all current expenses, a reasonable reserve for future expenses, and such other expenses as the Board of Directors may deem necessary." When the unit owners purchased their units, they had notice that the authority to make such decisions was vested in the Board of Directors. Based on these factors, the Gruenfeld court rejected the unit owner's argument that the particular items benefited unit owners individually rather than as common owners of the common elements.

Controversy between owners is also likely. For example, owners may

94. Id. § 515A.3-102(a)(2).
95. Id. § 515A.3-114(c).
96. "Common expenses" are defined in the MUCA as "expenditures made or liabilities incurred by or on behalf of the association, together with any allocations to reserves." Id. § 515A.1-103(5). The association is authorized to collect assessments for common expenses. Id. § 515A.3-102(2). Thus, the MUCA confers broad authority on the association to determine what constitutes a common expense.
97. See generally Annot., 77 A.L.R.3d 1290 (cases challenging propriety of associations' assessments).
99. Id. at 261, 560 P.2d at 642.
100. Id. at 265, 560 P.2d at 643.
101. Id. at 265, 560 P.2d at 644.
102. 277 Or. at 265-66, 560 P.2d at 644.
not agree that an item needs immediate maintenance or repair, or that they should share the cost of repair. Despite the near inevitability of controversies, certain safeguards in the MUCA minimize the problem. A disclosure statement that protects purchasers is one such safeguard. Among other things, the statement must contain a budget or projected budget, including the association's projected common expense assessment by category of expenditure, the projected monthly common expense assessment for each unit, and any supplies and services not reflected in the budget or projected budget. The disclosure statement permits prospective purchasers to determine whether they can afford the total projected cost of condominium ownership. Owners and prospective purchasers have access to all financial records kept by the association.

The MUCA provision allowing a choice of bases for allocating common expense liability helps prevent owner disputes. The common expenses may be allocated equally among units, or according to each unit's proportionate area or volume. The MUCA also provides the option to denominate different bases to different common expenses and assess certain common expenses against fewer than all units. In contrast to Minnesota's first condominium law, the MUCA provides some flexibility for fair allocations of common expenses.

B. The Optimum Allocation

The allocation of common expenses should accurately reflect the various owners' use of each common element, while recognizing that condominium ownership requires common responsibility for its basic functions.

103. An example of this in the single family conversion context was provided by a local practitioner: "The small unit owner philosophically might be adamantly adverse to having a new roof put on the house (instead of patching an existing roof) ...." Lynden, supra note 14, at 21. An attorney must anticipate these potential disagreements and advise a prospective buyer accordingly. In addition, where a common element does not benefit all units equally, the allocation should reflect the difference. For example, the condition of the roof of a single structure should be the responsibility of all owners whereas in a multi-structure condominium complex, the unit owners within each structure should be responsible for their respective roofs.

104. See MINN. STAT. § 515A.4-102 (1982).

105. Id.

106. Id. § 515A.3-116.

107. See id. § 515A.2-108.

The new Act does not specifically address allocation of common profits. It does contain a provision for crediting surplus to the unit owners to reduce their future common expense assessments. Id. § 515A.3-113. The clear implication is that the credits should be made according to the owner's common expense percentages. See generally Judy & Wittie, supra note 4, at 456.

108. MINN. STAT. § 515A.3-113 (1982).

109. Id. § 515A.2-108. Subsection (a) states that "the items need not be allocated the same for all purposes. The declaration may provide that a portion of each common expense assessment may be allocated on the basis of equality and the remainder on the basis of area or volume of each unit." Id. § 515A.2-108(a).
The declarant must consider a number of variables when allocating common expense liabilities. Generally, these include the type of occupants, the project's intended use, its location, and physical characteristics. For example, the allocation of expenses in a project comprised of equal sized units inhabited by elderly couples, will differ significantly from a mixed use project or a single family conversion with diverse units and common elements. The nature of the project helps to determine the types of common elements and the degree to which each unit will benefit from them. This initial determination facilitates choice of a common allocation reflecting the benefits each owner receives from the project.

The MUCA does not provide a sufficiently flexible basis for allocating costs. Although the available bases are appropriate for some condominium projects, they may not accommodate variations among units and unit owners in diverse projects. An equal allocation of all common expenses requires each owner to pay the same common expense liability. This allocation method is fair where the common expenses are "use related but where the expected usage by each unit does not vary greatly." A high-rise residential condominium with units of equal size is a likely candidate for such an allocation. Notwithstanding equal-sized units, the declarant must exercise caution by denoting all non-use related elements as limited common elements, so charges are assessed only to those owners who benefit from the element, or by allocating the expenses of those elements upon a different basis.

Unit size may provide the better alternative when common expenses include maintenance of a common element which is use-related and its use by different unit owners varies. A prime target for this type of allocation is a converted single family residence of variously sized units. Use of utilities, for example, heat and electricity, will likely differ among the owners of different sized units. The requirements of a two-bedroom upper floor unit will differ from those of a five-bedroom first and second floor unit.

Although unit size may be an appropriate measure for allocation in a strictly residential condominium, a mixed residential and commercial condominium should account for varying uses. For example, commercial units, depending on the type of business involved, may require a disproportionately greater amount of electricity than residential units. Furthermore, the business may operate only during a limited number of hours per week. These variations weigh against a strict allocation by unit size, and, accordingly, should receive a different allocation. In per-
mitting any basis as long as the formula is stated, the UCA provides flexibility in this type of situation.  

Although the MUCA allows different expenses to be allocated on different bases, its limited choice of bases omits a number of options available under the UCA. One commentator has suggested using limited common elements or charging user fees to alleviate discrepancies resulting from allocations by unit size. The MUCA does not preclude these alternative methods for allocating common expenses.

Despite recommendations to allocate common expenses based on par value, the MUCA does not provide this option. Because the declarant assigns the par value to each unit, its fairness and accuracy depends on the individual making the assignment. Thus, although it is subject to abuse, the UCA's requirement that the formula used to determine the assignment be disclosed may act to alleviate or, at least, minimize this possibility. If the assigned values reflect the unit owners' use of the common elements, the par value allocation eliminates the need to apply different bases to various expenses.

Other possible bases for allocation of common expenses not available under the MUCA are market value, purchase price, and relation back to another right. The lack of correlation between a unit's market or purchase price and the owner's use of common elements, strongly disfavors either as a basis for common expense liability. Similarly, liability assessed as the percentage allocation of another right, does not necessarily reflect usage of the common elements, making its automatic assignment improper.

VI. VOTING RIGHTS

A. Function

Voting rights determine the unit owners' control in the condominium. They are similar to the rights of shareholders of a corporation. The por-
tion of votes allocated to each unit is set forth in the declaration\(^{125}\) and different minimum percentages of votes necessary for ordinary or special decisions may be set out in the declaration\(^{126}\) or bylaws.\(^{127}\) The unit owners, as mandatory members of the association,\(^{128}\) may be authorized to take action on a broad spectrum of matters. As a practical matter, however, except for critical decisions,\(^{129}\) voting by unit owners principally involves the election of a board of directors.\(^{130}\)

The declarant or his designee select the members of the first board of directors, who manage the condominium for a specified term.\(^{131}\) To prevent declarant abuse and to assure a smooth transition from declarant to unit owner control,\(^{132}\) the MUCA limits the period of declarant control and the transfer of declarant rights.\(^{133}\) The MUCA further provides that “before termination of the period of declarant control the unit owners shall elect a board of directors of at least three members, at least a majority of whom shall be unit owners or the individual nominees of unit owners other than individuals.” \(^{134}\)

**B. Two Basic Choices**

The MUCA’s provisions let the declarant choose whether to allocate votes to unit owners based on equality or unit size.\(^{135}\) The choice permits condominium governance by a democratic one man, one vote method or, by weighted voting based upon each unit’s proportion to the project’s area or volume.\(^{136}\) In choosing a basis, the declarant must weigh the competing interests of the popular minority and the economic majority.\(^{137}\) The declarant may also use different bases to allocate votes for different purposes.\(^{138}\)

The MUCA provision for weighted voting rights raises constitutional questions. One critic of weighted voting found no justification for alter-
ing the traditional one man, one vote concept.\textsuperscript{139} His argument, based upon the United States Supreme Court decision in \textit{Stewart v. Parish School Board},\textsuperscript{140} concludes that weighted voting is unconstitutional.\textsuperscript{141} In \textit{Stewart}, the court held that there was “no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue.”\textsuperscript{142} The challenged voting scheme entitled only property taxpayers to vote in a local school board referendum, and weighted the votes in proportion to the amount of assessed property owned by each voter. The scheme was held to violate the equal protection clause of the fourteenth amendment.\textsuperscript{143} The critic of weighted voting applied the \textit{Stewart} holding to the condominium context using the “public function” theory.\textsuperscript{144} The argument concluded that, as private governments, condominiums’ governance must pass constitutional muster, thus mandating a one man, one vote principle.\textsuperscript{145}

Subsequent Supreme Court decisions limiting the applicability of the “public function” theory, and factors distinguishing condominiums from other “private governments,” have been cited to refute this argument.\textsuperscript{146} Until the courts are persuaded by this constitutional argument, the MUCA will continue to permit the declarant to choose between one man, one vote or weighted voting. The declarant should weigh the competing interests of prospective unit owners to attain the most equitable allocation. Inequitable voting rights can be fatal to a condominium project. Therefore, they require the declarant’s deepest consideration.

\textbf{C. Allocation of Votes}

Most commentators agree that the appropriate choice of bases is de-
pendent on the type of condominium involved. In light of the attributes of the particular project, three major goals must be considered: First, establishing an efficient way to determine votes per unit and calculate votes; second, protecting minority interests; and third, establishing an allocation which unit owners believe is equitable. The equal allocation of voting rights preserves the one man, one vote concept and serves these interests in a condominium composed primarily of units of like size with equal allocations of common elements.

1. Types of Units

In projects of diverse unit sizes and allocations of common elements, weighted voting based on unit size may best serve the owner's interests. Owners of larger units with greater economic interests will expect proportionate voting power. One commentator expressed the following concern: "If a one-apartment-one-vote method were used in such projects, buyers might well hesitate to buy the more expensive apartments, knowing that they will be the ones who will have to pay the lion's share of the expenses for which the owners of less expensive apartments will happily vote." Although common expense allocations reflecting usage may mitigate this inequity, the ultimate decision to make expenditures will lie with the economic minority. In this situation, the unit size allocation would represent the owners' economic interests to the extent unit size reflects those interests.

A Minnesota practitioner has addressed the special problems arising in small condominiums of disparate economic value or size. He suggested that the declarant allocate the percentage of common element interest on square footages, the common expenses on areas or volumes, and the voting rights on the one man, one vote principle. He also suggested that the board of directors be composed of one representative

147. See, e.g., id.; Vial, supra note 5, at 105.

The UCA Commissioners provided an illustration of different treatment of voting rights in a condominium project composed of two types of buildings. Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting just the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units. U.C.A. § 2-107 comment 9, 7 U.L.A. 154 (1980). Although class voting is not expressly permitted under the MUCA, cf. U.C.A. § 2-107(c), 7 U.L.A. 152 (1980), weighted voting can be used to provide owners of larger units a greater voice on certain issues. One can reach a result similar to class voting by forming separate associations within a single condominium project. For a discussion of this alternative, see Lundquist, supra note 116.

148. Judy & Wittie, supra note 4, at 466.
149. Bergin, supra note 1, at 989.
150. See supra notes 111-24 and accompanying text.
152. Id. at 23.
from each unit and that each director select one non-member director. \(^{153}\)
In the event of deadlock, disputes should be arbitrated. \(^{154}\) This approach is similar to that of close corporation management, \(^{155}\) and satisfies the major interests involved in condominium governance, while recognizing that there is no fool-proof method for resolving conflicting interests in such a project.

### 2. Special Mechanisms

Designating required percentages of votes in the declaration or allocating votes on different bases \(^ {156}\) for certain issues is an additional means of protecting owner interests. For example, weighted voting can be used for voting on financial matters, while the one unit, one vote principle is preserved for other management issues. \(^ {157}\) Furthermore, the necessary majority vote can be two-thirds, three-fourths, or unanimous, depending on the degree the issue affects the community of owners. The MUCA requires unanimous written consent of the unit owners on an amendment creating or increasing the common element interest, common expense liability, or voting strength allocated to a unit. \(^ {158}\) In some instances, it may be appropriate to allow dissenting minority owners to opt out of a decision by selling their units. \(^ {159}\)

Under the MUCA, a unit owner may acquire an "adjoining unit or an adjoining part of an adjoining unit [and] may . . . remove or alter any intervening partition." \(^ {160}\) This option requires that the owners of these units reallocate their common element interest, common expense liabilities, and votes in the association. Under equal allocation, the acquisition of an entire adjoining unit would give an owner an additional vote, whereas the acquisition of part of a unit would give two owners frac-

\(^{153}\). Id.

\(^{154}\). Id. at 23-24.


\(^{156}\). Minn. Stat. § 515A.2-108(a) (1982).

\(^{157}\). The UCA Commissioners provided the following example:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners paid a much larger share than their proportion of the total units, the vote of commercial unit owners would be increased to 3 times the number of votes the residential owners held. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.


\(^{158}\). Minn. Stat. § 515A.2-119(c) (1982). Unanimous written consent also is required for an amendment that creates or increases special declarant rights, increases the number of units, converts common elements to limited common elements, changes the boundaries of any unit, or the uses to which any unit is restricted. Id.

\(^{159}\). See Judy & Wittie, supra note 4, at 470.

tional votes. To preclude controversy over the allocation of fractional votes, the bylaws must state the formula for reallocation.161

VII. CONCLUSION

The success or failure of a condominium project could very well depend upon the declaration's treatment of the allocation issue. As a well-respected scholar in the field has stated: "[e]ven when a project is sound and well located, the ownership, assessment, and voting rights attached to the unit under consideration should receive close scrutiny."162 The purchaser of a condominium interest necessarily relinquishes a measure of independence and freedom in the decisions he can make regarding his investment. Consequently, the success of a condominium project depends upon an equitable allocation of the rights and liabilities of the purchaser.

The MUCA provisions governing allocation of common rights and liabilities generally allow enough flexibility to enable the thoughtful declarant to adequately address this sensitive issue.

Nevertheless, the UCA's added option of allocation by par value and value contingent on stating the formula, provide even more flexibility to address the allocation issue in increasingly diverse condominium projects. The options allow the declarant to weigh the greatest number of variables in calculating the final percentage allocation. The concern of potential abuse by the declarant is mitigated by the formula requirement. Moreover, the MUCA disclosure provisions act to put prospective buyers on notice of the percentages assigned to the units. Given the advantages of an accurate and fair allocation and the several safeguards against abuse, any basis coupled with the formula requirement should be available in the MUCA.

161. Id. § 515A.2-114(a).
162. Rohan, supra note 69, at 845.