

COMMENTS TO THE WASHINGTON CONDOMINIUM ACT

RCW 64.34.010. APPLICABILITY.

1. The question of the extent to which a state statute should apply to particular condominiums involves the extent to which the statute should require or permit different results for condominiums created before and after the statute becomes effective.

Two conflicting policies are proposed when considering the applicability of this Act to "old" and "new" condominiums located in Washington. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the uncertainties existing under RCW 64.32, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically apply to "old" condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this section reflects a desire to maximize the uniform applicability of the Act to all condominiums in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to pre-existing condominiums.

2. In carrying out this philosophy with respect to "new" condominiums, the Act applies to all condominiums "created" within the state after the Act's effective date. This is the effect of the first sentence of subsection (1). The first sentence of subsection (2) makes clear that the provisions of old statutes expressly applicable to condominiums do not apply to condominiums created after the effective date of this Act.

"Creation" of a condominium pursuant to this Act occurs upon recordation of a declaration and survey map and plans pursuant to RCW 64.34.200. "Creation" of a condominium under RCW 64.32 occurs upon the recordation of the declaration, survey map and plans and an as-built verification for constructed units pursuant to RCW 64.32.020, .090 and .100. The focus of the applicability language of subsections (1) and (2) is on whether a condominium project was created before or after the effective date of this Act, and not on whether all of the units (and/or related common and limited common areas and facilities) contemplated to be part of the project have been completed or are a part of the condominium by that date. Thus, with respect to a "phased" condominium project, if prior to the effective date of this Act a declaration (together with the survey map and plans and as-built certificate for units then constructed) has been recorded, and if that declaration specifically provides for the subsequent addition of further units (and/or related common and limited common areas and facilities), then the condominium project was "created" prior to the effective date of this Act, and the subsequent addition of further units (and/or common and limited common areas and facilities) to that project is governed by RCW 64.32 and the provisions of the declaration, and not by this Act.

3. The section adopts a novel three-step approach to condominiums created before the effective date of the Act. First, certain provisions of the Act automatically apply to "old" condominiums, but only prospectively, and only in a manner which does not invalidate provisions of condominium declarations and bylaws valid under RCW 64.32. Second, RCW 64.32 remains applicable to previously created condominiums where not automatically displaced by the Act. Third, owners of "old" condominiums may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by RCW 64.32 so long as (a) the amendment is adopted in accordance with the procedure required by RCW 64.32 and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act.

4. Elaboration of the principles described in Comment 3 may be helpful.

First, the second sentence of subsection (1) provides that the enumerated provisions automatically apply to condominiums created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of condominiums created under early condominium statutes. To avoid possible constitutional challenges, these provisions, as applied to "old" condominiums, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to any inconsistent provisions of the instruments creating the condominium, and this Act does not invalidate those instruments.

EXAMPLE:

Under subsection (1), RCW 64.34.425 (Resale of Units) automatically applies to "old" condominiums. Accordingly, unit owners in condominiums established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units in "old" condominiums. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

Second, RCW 64.32 is not repealed by this Act because those laws will still apply to previously-created condominiums, except when displaced.

Third, the Act seeks to alleviate any undesirable consequences of RCW 64.32 by a limited "opt-in" provision. More specifically, subsection (2) permits the owners of a pre-existing condominium to take advantage of the provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the condominium instruments as specified in those instruments and in the pre-existing statute.

EXAMPLE 3:

Under RCW 64.32, unit owners have no express statutory power to relocate boundaries between adjoining units. Under RCW 64.34.244 of this Act, unit owners have such power, unless limited by the declaration. While RCW 64.34.244 does not automatically apply to "old" condominiums, if the unit owners of a pre-existing condominium amend their condominium instruments in the manner permitted by the old statute and their existing instruments to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under RCW 64.32.

5. In considering the permissible amendments under subsection (2), it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of the condominium created under RCW 64.32, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original condominium instruments, and in compliance with RCW 64.32.

EXAMPLE:

RCW 64.32 requires the approval of 100% of the unit owners to amend the percentages of interest used in determining the allocation of voting rights under the declaration, but the unit owners wish to amend the declaration to provide for only 90% of the unit owners' approval of all such amendments in the future, as permitted by RCW 64.34.264 of this Act. The amendment would not be valid unless 100% of the unit owners approved it because of the procedural requirement in RCW 64.32. Once approved, however, only 90% would be required for subsequent amendments.

6. The last sentence of subsection (2) addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.

EXAMPLE:

Assume that pursuant to the declaration, the declarant may exercise control over the association for only 3 years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the fact that RCW 64.32 does not expressly limit the declarant control provisions would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to subsection (2) to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for 2 additional years, because RCW 64.34.308(4) does not limit the number of the years the declarant may specify as a control period.

Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for 2 years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in RCW 64.34.308(4). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the fact that there is no corresponding restriction expressed in RCW 64.32.

7. This section does not permit a pre-existing condominium to elect to come entirely within the provisions of the Act, disregarding RCW 64.32. However, the owners of a pre-existing condominium may elect to terminate the condominium under pre-existing law and create a new condominium which would be subject to all the provisions of this Act.

RCW 64.34.020. DEFINITIONS.

1. The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude itself in an attempt to avoid assessments for units which it owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "affiliate of a declarant" (RCW 64.34.020(1)) is similar to the definitions for persons deemed to be associated with a broker or dealer in the federal securities laws.

3. Definition (2), "allocated interests," refers to all of the interests which this Act requires the declaration to allocate. See RCW 64.34.224.

4. Definition (3), "assessment," includes items such as fines, interest and late charges. Pursuant to RCW 64.34.304(1)(k) and RCW 64.34.364(10), fines may be imposed only pursuant to a previously established schedule furnished to the owners and following notice and an opportunity to be heard by the Board of Directors or its designated representative, and the association may only establish late charges on all assessments becoming delinquent thereafter. Under RCW 64.34.364(10), delinquent assessments bear interest from the date of delinquency at the maximum rate permitted under RCW 19.52.020, unless the rate is otherwise established by the association for future assessments. The question of whether interest on assessments is subject to state statutory usury limitations is not addressed in the Act and its resolution is left to other applicable laws.

5. Definitions (6) and (31), treating "common elements" and "units," should be examined in light of RCW 64.34.204, which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real property in the condominium not designated as part of the units.

6. Definition (19), "condominium," makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.

7. Definition (10), "conversion condominium," is important because of the protection which the Act provides in RCW 64.34.440 for residential tenants in rental projects which are being converted into a condominium. The definition not only includes residential rental apartment projects in which the units are located within a building and have physical boundaries, but also projects such as mobile home parks in which the units may be defined by planes in space and have no physical boundaries. The definition

distinguishes condominiums which prior to creation were occupied by residential tenants entitled to the benefits of RCW 64.34.440 from those condominiums not so occupied.

Frequently, in the early stage of marketing a newly constructed residential condominium, units may be occupied under what legally might be considered a landlord-tenant relationship. This may occur as a result of accommodating a purchaser's desire to occupy a unit prior to the actual closing of the sale, or during the period in which a developer is still attempting to satisfy a "pre-sale" requirement imposed by a lender. Clause (b) of the first sentence is intended to permit such pre-closing occupancy or rental arrangements without invoking the provisions of RCW 64.34.440. Clause (b) is also, however, intended to assure that each tenant of a declarant is aware that the unit being rented is subject to sale as a condominium. Thus, after creation of the condominium and before the sale of any units, a declarant's failure to advise a tenant in writing that the unit was subject to sale will cause the project to become a conversion condominium.

The last sentence of the definition is intended to avoid certain constitutional issues, including impairment of contracts that might arise if RCW 64.34.440 was imposed on rental projects in the process of conversion on the effective date of the Act.

8. Definition (13), "declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. (Of course, such a person could become a declarant by subsequently succeeding to a special declarant right.)

9. Definition (16), "development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974.

Some of these techniques relate to the phased development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than it is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the condominium by adding an additional building on Parcel B, containing additional units, as part of the same condominium. If it reserves the right to do so, i.e., to "add real property to a condominium," it has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the condominium from the outset, even though it may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will extend into both parcels. If the project is a success, its documentation will be simpler if both parcels were included in the condominium from the beginning. If its hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the condominium and devote it to some other use, it may do so if it has reserved such a development right "to withdraw real property from a condominium." The portion of the garage which extends into Parcel B may be left in the condominium (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" is frequently useful in commercial or mixed-use condominiums where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach it until the condominium has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchaser will want to buy the whole floor as a single unit or whether several purchasers will want the floor divided into several units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential condominiums, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial condominiums, but can occasionally be useful in certain kinds of residential condominiums as well.

10. Definition (17), "dispose" or "disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "purchaser," *infra*. However, the term includes more than fee conveyances and would, for example, cover leases and real estate contracts.

11. Definition (21), "leasehold condominium," should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, a leasehold interest in real property which has been subjected to the condominium form of ownership. In such a case, units located on the leasehold real property are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real property underlying the unit would be removed from the condominium if the lease were not extended or renewed. On the other hand, real property not subjected to condominium ownership may be leased directly to the association or to one or more unit owners for a term of years.

This distinction is very significant. Under RCW 64.34.320, the unit owners' association is empowered, following expiration of the period of declarant control, to cancel any lease of recreational or parking areas or facilities to which it is a party, regardless of who the lessor is. The association also has the power to cancel any lease for any land if the declarant or an affiliate of the declarant is a party to that lease. If the leased real property, however, is subjected by the declarant to condominium form of ownership, that lease may not be cancelled unless it is unconscionable or unless the real property was submitted to the condominium regime for the purpose of avoiding the right to terminate the lease.

While the subjective test of declarant's "purpose" may not always be clear, the rights of the association to cancel a lease depend upon the test. Thus, for example, a declarant who wishes to lease a swimming pool to the unit owners would have a choice of subjecting the pool for, say, a term of 20 years to the condominium form of ownership as a common element. At the end of the term, the lease would terminate and the real property containing the pool would be automatically removed from the condominium unless there were a right to renew the lease. During the 20-year term, the lease would not be cancellable, regardless of the terms, unless it were found to be unconscionable under RCW 64.34.080, or cancellable because submitted for the purpose of avoiding the right to cancel. On the other hand, if the pool were not submitted to the condominium form of ownership and was leased directly to the association for a 20-year term, the association could cancel that lease 90 days after the period of declarant control expired, even if, for example, 18 years remained of the term.

12. Definition (26), "purchaser," includes a person who acquires any interest in a unit, even as a tenant, if the tenancy entitles such person to occupy the premises for 20 or more years (including renewal options). Excluded from the definition, however, are mortgagees, declarants, and "dealers," as such term is defined in RCW 64.34.020(12). Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (RCW 64.34.405(3)) and the right to rescind (RCW 64.34.420).

13. Definition (27), "real property," is very broad, and is very similar to the definition of "real estate" in Section 1-201(16) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real property is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real property is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend *ab solo usque ad coelu*, because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

14. Definition (29), "special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.

Any person who possesses a special declarant right would be a "declarant", including any who succeed under RCW 64.34.316 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under RCW 64.34.316, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to RCW 64.34.316.

15. Definition (31), "unit," describes a tangible, physical part of the project, rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons each of whom has the right to occupy the unit for one month does not create 12 new units--there are, rather, 12 owners of the unit. (Under the section on voting (RCW 64.34.340), a majority of the time-share owners of a unit are entitled to cast the votes assigned to that unit.)

While a separately described part of the project is not a unit unless it is designed for, and is subject to, separate ownership by persons other than the association, the association developer can hold or acquire units unless otherwise provided in the declaration.

16. Definition (32), "unit owner," makes it clear that declarants, so long as they own units in the condominium, are unit owners and are therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments against those units.

RCW 64.34.030. VARIATION BY AGREEMENT.

1. The Act is generally designed to provide great flexibility in the creation of condominiums and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers,

lenders, and declarants. Accordingly, this section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the Act or of the declaration.

3. The following sections permit variation:

RCW 64.34.010. [Applicability.] Pre-existing condominiums may elect to conform to the Act.

RCW 64.34.020. [Definitions.] All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.

RCW 64.34.060. [Condemnation.] The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

RCW 64.34.204. [Unit Boundaries.] The declaration may vary the distinctions as to what constitutes the units and common elements.

RCW 64.34.216. [Contents of Declaration.] A declarant may add any information it desires to the required content of the declaration.

RCW 64.34.224. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities.] A declarant may allocate the interests in any way desired, subject to certain limitations.

RCW 64.34.228. [Limited Common Elements.] The Act permits reallocation of limited common elements unless prohibited by the declaration.

RCW 64.34.232. [Plats and Plans.] There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

RCW 64.34.240. [Alterations of Units.] Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

RCW 64.34.244. [Relocation of Boundaries Between Adjoining Units.] Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

RCW 64.34.248. [Subdivision of Units.] If the declaration expressly so permits, a unit may be subdivided into two or more units.

RCW 64.34.256. [Use By Declarant.] The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

RCW 64.34.260. [Easement Rights.] Subject to the provisions of the declaration, the declarant has an easement to facilitate its exercise of or performing its obligations related to special declaration rights.

RCW 64.34.264. [Amendment of Declaration.] The declaration of a non-residential condominium may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

RCW 64.34.268. [Termination of Condominium.] The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential condominium, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

RCW 64.34.276. [Master Associations.] The declaration may provide for some of the powers of the Board of Directors to be exercised by a master association.

RCW 64.34.304. [Powers of Unit Owners' Association.] The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.

RCW 64.34.308. [Board of Directors and Officers.] Except as limited by the declaration or bylaws, the Board of Directors may act for the association.

RCW 64.34.324. [Bylaws.] Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

RCW 64.34.328. [Upkeep of the Condominium.] Except to the extent otherwise provided in the declaration, the declarant must pay the expenses of and is entitled to the income derived from real property subject to development rights.

RCW 64.34.332. [Meetings.] The bylaws may provide for special meetings at the call of less than 20 percent of the Board of Directors or the unit owners.

RCW 64.34.336. [Quorums.] This section permits statutory quorum requirements to be increased by the bylaws.

RCW 64.34.340. [Voting--Proxies.] A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.

RCW 64.34.352. [Insurance.] The declaration may vary the provisions of this section in non-residential condominiums, and may require additional insurance in any condominium.

RCW 64.34.356. [Surplus Funds.] Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to common expense liability.

RCW 64.34.360. [Assessments for Common Expenses.] To the extent otherwise provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the

units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

RCW 64.34.400. [Applicability.] Article 4 is not applicable to a condominium or the portion of any condominium which is not restricted to residential use.

RCW 64.34.445. [Implied Warranties of Quality.] Implied warranties of quality may be excluded or modified by agreement.

RCW 64.34.264 requires the consent of the holders of 90% of the allocated votes to make certain amendments to the declaration and bylaws. If a declarant were permitted to use powers of attorney to accomplish such changes, the substantial protection which RCW 64.34.264(4) provides to unit owners would be illusory. RCW 64.34.030 prohibits the declarant from using powers of attorney for such purposes.

4. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, see RCW 64.34.090, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. See RCW 64.34.080. This section derives from Section 1-102(3) of the Uniform Commercial Code.

RCW 64.34.040. SEPARATE TITLES AND TAXATION.

A condominium may be created, by the recordation of a declaration and survey map and plans, long before the first unit is conveyed. This happens frequently with existing rental apartment projects which are converted into condominiums. Subsection (4) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the condominium is created may be permitted under other law. When separate tax assessments become mandatory under this section, the assessment for each unit must include the value of that unit's common element interest, and no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively.

RCW 64.34.050. APPLICABILITY OF LOCAL ORDINANCES, REGULATIONS, AND BUILDING CODES.

1. The first sentence of this section prohibits discrimination against condominiums by local law-making authorities. Thus, this section makes it unlawful to impose a local law, ordinance or regulation on a condominium if it would not be applied if all of the property constituting the condominium were owned by a single owner. For example, in the case of a high-rise apartment building, if a local requirement imposing a minimum number of parking spaces per apartment would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher number of spaces per apartment merely by virtue of the same building being owned as a condominium.

2. The second sentence makes clear that, except for the prohibition on discrimination against condominiums, the Act has no effect on real property use laws. For example, a particular piece of real property submitted to the condominium form of ownership might be of such size that all of the real property is required to support a proposed density of units or to satisfy minimum setback requirements.

Under this Act, part of the submitted real property might be subject to a development right entitling the declarant to withdraw it from the condominium, but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real property, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

3. This section does not prohibit local condominium conversion ordinances to the extent they are permitted by RCW 64.34.440(6).

RCW 64.34.060. CONDEMNATION.

1. The provisions of this statute are not intended to supplant the usual rules of condemnation but merely to supplement them to address the unique problems which condemnation raises in the context of a condominium.

2. When a unit is taken or partially taken by condemnation, this section provides for a recalculation of the allocated interests of all units.

EXAMPLE 1:

Suppose that all allocated interests in a 9-unit condominium were originally allocated to the units on the basis of size. If eight of the units are equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is taken out of the condominium by a condemning authority. Subsection (1) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22 2/9% while each of the small units would have 11 1/9%.

EXAMPLE 2:

Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (2) provides that the allocated interests would automatically shift to 5 5/19% for the partially taken unit, 21 1/19% for the largest unit, and 10 10/19% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken unit's reallocated interests are 5 5/19% rather than 5%.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by condemnation has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of condemnation. While there is no question that a governmental body may acquire any real property by condemnation, there is no Washington case law on the question of whether or not the governmental body may take a condominium unit as a part of the condominium or must take the unit and have the unit excluded from the condominium.

Subsection (1) merely requires that the taking body compensate the unit owner for all of its unit and its interest in the common elements, whether or not the common element interest is acquired. The Act also

requires that the allocated interests are automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the common element interest, votes, and common expense liability to the government) is an unanswered question in Washington.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interest to be reallocated. Subsection (2) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. This right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

EXAMPLE 1:

Suppose, in a commercial condominium consisting of four units, each unit consists of a factory and parking lot, and that the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit #1 are equal, and that 1/2 the parking lot is taken by condemnation, leaving the factory and 1/2 the lot intact. Under the formula set out in the statute, unit #1's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

EXAMPLE 2:

Suppose that a condominium contains ten units, each of which is allocated at 1/10 undivided interest in the common elements. Suppose further that a taking by condemnation reduces the size of one of the units by 50%. In such case, the common element interest of all the units will be reallocated so that the partially-taken unit has a 1/19 undivided interest in the common elements and the remaining 9 units each a 2/19 undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to 1/2 of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining 9 units each having a 10% undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and reallocation of interest, votes, and liabilities.

RCW 64.34.070. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW APPLICABLE.

This Act displaces existing law relating to condominiums and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely an illustration: no listing could be exhaustive.

RCW 64.34.080. UNCONSCIONABLE AGREEMENT OR TERM OF CONTRACT.

This section is similar to Section 2-302 of the Uniform Commercial Code. The rationale and comments provided in those sections are equally applicable to this section.

RCW 64.34.090. OBLIGATION OF GOOD FAITH.

This section sets forth a basic principle running throughout this Act: in condominium transactions, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards, "honesty in fact" and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.

RCW 64.34.200. CREATION OF CONDOMINIUM.

1. A condominium is created pursuant to this Act only by recording a declaration and survey map and plans. As with any instrument affecting real property, the declaration must be recorded in every county in which any portion of the condominium is located.
2. A condominium has not been lawfully created under this Act unless the requirements of this section have been complied with.
3. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate the condominium. However, if that lien is prior to the declaration, the lienholder may exclude that real property from the condominium after foreclosure. See RCW 64.34.268(8) and (9). See also RCW 64.34.435(1) pertaining to the release of liens against a unit prior to the first conveyance of that unit.
4. RCW 64.34.200(2) requires that all units which are intended to be created by the recording of a declaration or amendment thereto be substantially completed in accordance with the survey map and plans required to be recorded by RCW 64.34.232. Because a condominium (and the units located therein) may only be created under RCW 64.34.200(1) by the recording of a declaration and related survey map and plans, RCW 64.34.200 prohibits the creation of "phantom" units; that is, units which may be described in the declaration but which are not then physically in existence. Because RCW 64.34.200 prohibits the conveyance of an interest in a unit until a declaration is recorded, RCW 64.34.200 and RCW 64.34.200 effectively prohibit the conveyance of "phantom" units.
5. RCW 64.34.200(2) does not require that all units ultimately intended to be constructed within a condominium be completed when the initial declaration is recorded, but only that the units which will be created by the declaration recording be completed. For example, if ten of twenty proposed units are completed, a declaration may be recorded to create ten completed units with declaration amendments later being recorded to create the remaining units as they are completed.
6. The plans pertaining to units and the buildings in which the units may be located, which plans are required under RCW 64.34.232 and must be recorded simultaneously with the declaration under RCW 64.34.200(1), primarily focus on the vertical and horizontal boundaries of units, and thus do not reflect the kind of construction detail which is required for the issuance of a building permit or which must be completed before the issuance of a final certificate of occupancy. Thus, a condominium and units located therein may be created by the recording of a declaration and survey map and plans prior to all of the units being completed to the point of qualifying for the issuance of a final certificate of occupancy.

7. In addition to requiring substantial completion of all horizontal and vertical boundaries of units, RCW 64.34.200(2) also requires substantial completion of the "structural components and mechanical systems of all buildings containing or comprising any units". The intent of the subsection (2) is that if any buildings are depicted on the survey map and plans which are required by RCW 64.34.232, and these buildings contain or comprise spaces which become units by virtue of recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the survey maps and plans recorded pursuant to RCW 64.34.232 depict only the boundaries of the buildings and the units created in those buildings, and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected.

The concept of "structural components and mechanical systems" is one commonly understood in the construction field and this comment is not intended as a comprehensive list of those components. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weathertight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting, and the like. Similarly, typical examples of "mechanical systems" include the plumbing, heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

8. "Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A201, General Conditions of the Contract for Construction (1976 Ed.) at para. 8.1.3, states:

The Date of Substantial Completion of the Work . . . is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work . . . for the use for which it is intended.

This standard is also one often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, leaking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

9. RCW 64.34.200(2) requires that completion certificates be recorded as evidence of the fact that the required levels of construction have been met. Although the completion certificate for boundaries must be signed by a licensed surveyor, the completion certificate for structural components and mechanical systems is signed by the declarant. Once the certificates have been recorded, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the declarant may have failed to completed the required levels of construction and the certificates filed may be false. Such acts might create a cause of action in the purchaser, but would not affect the validity of the purchaser's title to the condominium.

10. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units which may ultimately be located have been "structurally" completed, the

declarant may create a condominium in which he reserves particular development rights. In such a project, only the completed units might be treated as units from the outset, and the development rights would be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements, or by subdividing units previously created. The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

11. RCW 64.34.__ requires that, before any individual unit may be conveyed, the unit must be "substantially completed." A prospective unit purchaser, by agreement with the declarant, may complete much of the construction work, either directly or by the purchaser's contractor, so as to reduce the unit purchase price or to obtain more elaborate custom finish work. However, the fact that units may be created that are not completed does not alter a unit seller's obligation to comply with the requirements of RCW 64.34.443 (pertaining to express warranties) or RCW 64.34.445 (pertaining to implied warranties). Also, developers and lenders must continue to be sensitive to the completion requirements of the secondary mortgage market, particularly those of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC).

12. The requirement of completion would be irrelevant in some types of condominiums comprised of units without physical boundaries, such as campsite condominiums or some subdivision condominiums where the units might consist of unimproved lots, and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this Act would require any residence to be built before the lots could be treated as units.

RCW 64.34.204. UNIT BOUNDARIES.

1. It is important for title purposes and other reasons to have a clear guide as to precisely which parts of a condominium constitute the units and which parts constitute the common elements. This section fills the gap left when the declaration merely defines unit boundaries in terms of floors, ceilings, and perimeter walls.

The provisions of this section may be varied to the extent that the declarant wishes to modify the details for a particular condominium.

For example, in a townhouse project structured as a condominium, it may be desirable that the boundaries of the unit constitute the exterior surfaces of the roof and exterior walls, with the centerline of the party walls constituting the perimeter boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternatively, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In the second alternative, it would not be appropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner. The differentiations made clear here, in conjunction with the provisions of RCW 64.34.328, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of components--such as pipes--are resolved by RCW 64.34.328, which imposes liability on the unit owner who causes damage to common elements, or under the broader provisions of RCW 64.34.360(5), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that owner. This would include, of

course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of common elements.

2. The differentiation between components constituting common elements and components which are part of the units is particularly important in light of RCW 64.34.324(1), which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of common elements and each unit owner individually responsible for upkeep of his unit.

3. The differentiation between unit components and common element components may also be important for insurance purposes under this Act. See generally RCW 64.34.352 and RCW 64.34.360(3)(c) pertaining to insurance.

RCW 64.34.208. CONSTRUCTION AND VALIDITY OF DECLARATION AND BYLAWS.

1. Subsection (2) does not totally invalidate the rule against perpetuities as applied to condominiums. The language does provide that the rule against perpetuities is ineffective as to documents which would govern the condominium during the entire life of the project, regardless of how long that should be. With respect to deeds or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

2. In considering the effect of failures to comply with this Act on title matters, subsection (4) refers only to defects in the declaration and the survey map and plans, because the declaration and survey map and plans are the instruments which create and define the units and common elements. No reference is made to other instruments, such as bylaws, because these instruments have no impact on title, whether or not recorded. However, in all cases of violations of the Act, a failure of the bylaws--or any other instrument--to comply with the Act, would entitle any affected persons to appropriate relief under RCW 64.34.455.

3. No special prohibition against racial or other forms of discrimination is included in this Act because the provisions of generally applicable federal and state law apply as much to condominiums as to other forms of real property.

4. Some examples may help to clarify what sorts of defects in the declaration are to be regarded as "insignificant" within the meaning of the first sentence of subsection (4).

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by RCW 64.34.224. This would be a significant defect if the assigned interests were unequal, but if all units were assigned identical interests it would be possible to infer that the basis of allocation was equality--and the failure of the declaration to say so would be an insignificant defect. Were this to happen in a condominium where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common element interests unless a different formula were specified pursuant to RCW 64.34.224(2).

Other examples of insignificant defects that might occur include failure of the declaration to include the word "condominium" in the name of the project, as required by RCW 64.34.216(1), or failure of the survey map and plans to comply satisfactorily with the requirement of RCW 64.34.232(1) that they be "clear and legible," so long as they can at least be deciphered by persons with proper expertise. Failure

to organize the unit owners' association at the time specified in RCW 64.34.300 would not be a defect in the declaration at all, and would not affect the validity or marketability of titles in the condominium. It would, however, be a violation of this Act, and create a claim for relief under RCW 64.34.455.

5. Each state has case or statutory law dealing with marketability of titles, and the question of whether significant failures of the declaration to comply with the Act affect marketability of title should be determined by that law and not by this Act.

RCW 64.34.212. DESCRIPTION OF UNITS.

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements so long as the requirements of this section are satisfied, and so long as the declaration, together with the survey map and plans which are recorded with the declaration, provides a legally sufficient description.

2. This section makes clear that an instrument which does meet those requirements includes all interest appurtenant to the unit. As a result, it will not be necessary under this Act to continue the practice required by RCW 64.32.090(4) and (5) of describing the common element interests, or limited common elements, that are appurtenant to a unit in the instrument conveying title to that unit.

RCW 64.34.216. CONTENTS OF DECLARATION.

1. This Act seeks functionally to distinguish between the declaration and the public offering statement. It requires the declaration to contain only those matters which affect the legal structure or title to the condominium. This includes the reserved powers of the declarant to exercise development rights within the condominium. A list of these rights also is contained in the public offering statement. See RCW 64.34.410.

2. This section requires a statement of the name of the association for the condominium as well as the name of the condominium.

3. Subsection (1)(c) requires the declarant to state the number of units which the declarant has created and reserves the right to create. Unlike many current condominium statutes, this Act imposes no time limit, measured by an absolute number of years, within which the declarant must relinquish control of the association. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a 2-year period during which development or sales are not proceeding. See RCW 64.34.308(4). The flexibility afforded by this section may be important to a declarant when responding to unanticipated future changes in the market.

In theory, a declarant might overstate the maximum number of units in an attempt to artificially extend the period of declarant control, since the time might never come when a declarant has sold 75% of that number of units. As a practical matter, however, such a practice would not likely achieve long-term control.

However, there are practical constraints on the declarant's decision in this matter. Substantial exaggeration of the future density of the development might tend to impede sales of units in that project. Moreover, such a statement might also produce negative governmental reaction to proposals which might

require local approval. Even if the declarant did overstate the number of units to retain control, however, other limitations imposed by RCW 64.34.308(4) will require turnover at an appropriate time.

4. Subsection (1)(d) requires that the boundaries of each unit created by the declaration be identified "if and to the extent they are different from the boundaries stated in RCW 64.34.204(1)". The words "created by the declaration" emphasize that in an expandable project, new units may be created in the future by amendments to the declaration. Until those new units are actually added to the project by amending the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

5. RCW 64.34.204 makes it possible in many projects to satisfy subsection (1)(d) of this section by merely providing the identifying number of the units and stating that each unit is bounded by its ceiling, floor, and walls. The survey map and plans will show where those ceilings, floors, and perimeter walls are located, and RCW 64.34.204 provides all other details, except to the extent the declaration may make additional or contradictory specifications because of the nature of the project.

6. Subsection (1)(h) makes clear that the limited common elements described in RCW 64.34.204(2) and (4) need not be described in the declaration. These limited common elements are typically porches, balconies, patios, or other amenities which may be included in a project. Such improvements are treated by the Act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specially referred to in the declaration. Porches, balconies, patios, parking spaces and storage areas must be shown on the survey map and plans (see RCW 64.34.232(2)(j)), but other limited common elements described in RCW 64.34.204(2) and (4) need not be shown.

7. Subsection (1)(i) contemplates that the common elements in the project may be allocated as limited common elements at some future time, either by the declarant or the association. For example, a swimming pool might serve an entire project during early phases of development. At the outset, that pool might be a common element which all the unit owners may use. At a later time, with more units and additional pools built in subsequent phases, either the declarant or the association might determine that the first pool should become a limited common element reserved for the use only of units in the first phase, while the other pools should be reserved exclusively for units in the subsequent phases. Such a potential allocation should be described in the declaration pursuant to this section.

8. Subsection (1)(j) requires the declaration to describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real property to which each right applies, and state the time limit within which each of those rights must be exercised. The Act imposes no maximum time limit for the exercise of those rights, and the particular language of a declaration will vary from project to project depending on the requirements of each project. This Act contemplates that those rights may be exercised after the period of declarant control terminates.

9. The "conditions or limitations" referred to in RCW 64.34.216(l) are only those expressly set forth in the declaration.

10. Subsection (1)(p) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as RCW 64.34.224 on the allocations of allocated interests or RCW 64.34.232 on survey map and plans, will affect all projects. Others, such as RCW 64.34.220 on leasehold condominiums, will apply only to particular kinds of projects.

11. Subsection (3) contemplates that, in addition to the content required by subsection (1), other matters may also be included in the declaration if the declarant or lender feel they are appropriate to the particular project. In particular, the draftsman should carefully consider any desired provisions which would vary any of the many sections of the Act where variation is permitted, including such matters as expanding or restricting the association's powers. A list of sections which may be varied appears in the comment to RCW 64.34.030.

RCW 64.34.220. LEASEHOLD CONDOMINIUMS.

1. Subsection (1) requires that the lessor of any lease, which upon termination will terminate the condominium or reduce its size, must sign the declaration. This requirement insures that the lessor has consented to use of his land as a condominium.

2. This section sets out requirements concerning leasehold condominiums which are not typically contained in the statutes of most states. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. The section also contains a number of other consumer protection provisions. However, in contrast to the result under some states' laws, unit owners have no statutory right to renewal of a lease upon termination.

3. The most significant matter of consumer protection in this section is subsection (3), which provides that unit owners who pay their share of the rent of the underlying lease may not be deprived of their enjoyment of the leasehold premises, if the Declaration fails to provide for the collection by the association of the proportionate rents paid on the lease by unit owners.

4. Subsection (5) considers the problems created when termination of a lease reduces the size of a condominium. In the event that some units are thereby withdrawn from the condominium, reallocation of the allocated interests would be required; the section describes how that reallocation would occur.

RCW 64.34.224. ALLOCATION OF COMMON ELEMENT INTERESTS, VOTES, AND COMMON EXPENSE LIABILITIES.

1. RCW 64.32 requires a single common basis related to the "value" of the units to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests, while equality is used in allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant or an affiliate of the declarant. Otherwise, each

of the separate allocations may be made on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

2. While the flexibility permitted in allocations is broader than that permitted by RCW 64.32, it is likely that the traditional bases for allocation will continue to be used, and that the allocations for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality, or value of units. Each of these is discussed below.

3. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formulas he has chosen.

4. RCW 64.32 requires that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in Comment 2, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

5. The purpose of subsection (2) is to afford some advance disclosure to purchasers of units in the first phase of a flexible condominium of how common element interests, votes and common expense liabilities will be reallocated if additional units are added.

6. Subsection (5) means what it says when it states that a lien or encumbrance on a common element interest without the unit to which that common element interest is allocated is void. Thus, consider the case of a flexible condominium in which there are 50 units in the first phase, each of which initially has a 2 percent undivided interest in the common elements. The declarant borrows money by mortgaging additional real property. When the declarant expands the condominium by adding phase 2 containing an additional 50 units, it reallocates the common element interests in the manner described in his original declaration, to give each of the 100 units a 1 percent undivided interest in the common elements in both phases of the condominium. At this point, the construction lender cannot have a lien on the undivided interest of phase 1 owners in the common elements of phase 2 because of the wording of the statute. Thus, the most that the construction lender can have is a lien on the phase 2 units together with their common element interests. The mortgage documents may be written to reflect the fact that upon the addition of phase 2 of the condominium, the lien on the additional real property will be converted into a lien on the phase 2 units and on the common element interest as they pertain to those units in both phase 1 and phase 2; however, see Comment to RCW 64.34.236.

Unless the lender also requires phase 2 to be designated as withdrawable real property, the phase 2 portion may not be foreclosed upon other than as condominium units and the construction lender may not dispose of phase 2 other than as units which are a part of the condominium. In the event that phase 2 is designated as withdrawable land, then the construction lender may force withdrawal of phase 2 and dispose of it as it wishes, subject to the provisions of the declaration. If one unit in phase 2, however, has

been sold to anyone other than the declarant, then phase 2 ceases to be withdrawable land by operation of RCW 64.34.236(4)(b).

7. If a unit owned only by the declarant--as opposed to the same unit if owned by another person--may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into 2 or more units or common elements, within the meaning of the definition of development rights, and is not governed by RCW 64.34.248 (Subdivision of Units).

8. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice. To prevent abuse of class voting by the declarant, subsection (3) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

EXAMPLE:

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting just the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by RCW 64.34.308).

9. The last clause of subsection (3) prohibits a practice common in the planned community or other non-condominium multi- ownership projects, where units owned by declarant constitute a separate class of units for voting and other purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. In those circumstances which such classes were legitimately intended to address, principally control of the association, the Act provides other, more balanced devices for declarant control. See RCW 64.34.308(4).

RCW 64.34.228. LIMITED COMMON ELEMENTS.

1. Like all other common elements, limited common elements are owned in common by all unit owners. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed against all the units. See RCW 64.34.328(1) and RCW 64.34.260(3)(a). This might include the costs of repainting all shutters, or balconies, for example, which are limited common elements pursuant to RCW 64.34.204(4). Accordingly, there may be occasions where, to meet the expectations of owners and to have costs borne directly by those who benefit from those amenities, the declaration might provide that the costs will be borne, not by all unit owners as part of their common expense assessments, but only by the owners to which the limited common elements are assigned.

2. Even common elements which are not "limited" within the meaning of this Act may nevertheless be restricted by the unit owners' association pursuant to the powers set forth in RCW 64.34.304(i) and (j), unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage or deed of trust may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

RCW 64.34.232. SURVEY MAP AND PLANS.

1. The terms "survey map" or "plan" have been given a variety of meanings by custom and usage in the various jurisdictions. Under this Act, it is important to recognize that a "survey map" means a "survey" of the entire real property constituting a project at the time the initial survey map is recorded, including not only the land within the condominium initially created but also any land which may later be added to the condominium.

As to "plan," the Act does not use that term to mean the actual building plans used for construction of the project. Instead, the required content of the plans in this act is described in subsection (4). Essentially, the plans constitute a boundary survey of each unit. Typically, the walls will be the vertical ("up and down" or "perimetric") boundaries, and the floors and ceilings will be the horizontal boundaries. Importantly, these boundaries need not be physically measured, but may instead be projected from the survey map or from actual building construction plans. Thus, the plans under this Act are not conceived to be "as built" plans.

2. Subsection (3) permits, but does not require, the survey map to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real property where no development rights have been reserved, unless the survey map actually show that proposed improvement or unless the association (which the declarant may control) makes the improvement pursuant to RCW 64.34.304(1)(q). Should the association attempt that improvement, in the face of unit owner's objections, it may involve risk of challenge. Within land subject to development rights, of course, construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the survey map. As to the declarant's obligation to complete an improvement that is shown, see RCW 64.34.465(1).

3. As noted in the Comments to RCW 64.34.200, a condominium unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of RCW 64.34.232 relating to plans (but not survey maps) would be inapplicable.

4. Subsection (2)(c) requires that the boundaries of real property which is subject to development rights must be identified. Since different portions of the real property may be subject to differing development rights--for example, only a portion of the total real property may be added as well as

withdrawn from the project--the plan must identify the rights applicable to each portion of that real property. The same reasoning applies to the location and dimensions of easements affecting the condominium and any leasehold real property in subsection (2)(e).

5. Subsection (6) describes the amendments to the survey map and plans which must be made as development rights are exercised. This section requires that the survey map and plans be amended at each stage of development to reflect actual progress to date.

6. The terms "horizontal" and "vertical" are now commonly understood in condominium parlance to refer, respectively, to "upper and lower" and "lateral or perimetric." Thus, RCW 64.34.204 contemplates that the perimetric walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this Act.

7. RCW 64.34.460 and RCW 64.34.465 reveal the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT," as required by subsection (3).

RCW 64.34.236. EXERCISE OF DEVELOPMENT RIGHTS.

1. This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within real property which is added to the condominium, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only within the self-determined constraints originally described by the declarant.

2. The reservation and exercise of development rights is and must be closely coordinated with financing for the project. As a result, lender review and control of that process is common, and the financing documents often reflect the proposed development process.

A typical construction loan mortgage on a portion of a phased condominium might provide that as soon as new units are built on new land to be added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land converts into a mortgage on all of the units located within that portion, together with their respective common element interests. The common element interest of those units will, of course, extend to the common elements in other sections of the condominium. However, failure of a construction loan mortgage to so provide is inconsequential, because conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interests, as a result of the requirements of RCW 64.34.224(5) and RCW 64.34.236(1).

3. A lender who holds a mortgage lien on one portion of a condominium may not cause that portion to be withdrawn from the condominium unless the portion constitutes withdrawable real property in which there is no unit owner other than the declarant. Even then, the amendment effectuating the withdrawal must be executed by the declarant. Consequently, unless the lender wishes to become a declarant subsequent to foreclosure or a deed in lieu of foreclosure in order to execute the amendment, or forecloses in order to require an amendment from the association under RCW 64.34.268(8), a lender might require that the signed amendment be delivered with the deed in lieu of foreclosure.

4. As indicated in the Comments to RCW 64.34.050, the withdrawal of real property from a condominium may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real property is regarded as the "subdivider." In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real property, even though the real property, for title purposes, is a common element until withdrawn. Accordingly, the declarant would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real property from the condominium.

5. Subsection (3) deals with special problems surrounding allocated interests when the declarant subdivides or converts units which were originally created in the declaration into additional units, common elements or both. This development right permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand. The concept is called "convertible space" in several existing state statutes.

For example, a declarant of a 5-story office building condominium may have purchasers committed at the time of the filing of the condominium declaration but a lack of purchasers for the upper 2 floors. In such a circumstance, the declarant could designate the upper 2 floors as a unit, reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide his 2-floor unit into 2 or more units. He may also wish to reserve a portion of the divided floor as a corridor which will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

Alternatively, the declarant may ultimately decide that the entire 2 floors should be turned over to the unit owners' association not as a unit but as common elements to be used perhaps as a cafeteria serving the balance of the building, or for retail space to be rented by the association. In that case, should he choose to make the entire 2 floors common elements, the provisions of subsection (3)(a) would apply.

RCW 64.34.240. ALTERATIONS OF UNITS.

1. This section deals with permissible alterations of the interior of a unit, and impermissible alterations of the exterior of a unit and the common elements, in ways which reflect common practice. The stated rules, of course, may be varied by the declaration where desired.

2. Subsection (3) deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not impaired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2).

3. In considering permissible alteration of the interior of a unit, an example may be useful. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be adversely affected. More over, no trespass would be committed because each unit owner, as a part owner

of the common elements, has a right to utilize them subject only to such restrictions as may be created by the Act, the declaration, bylaws, and the unit owners' association pursuant to RCW 64.34.304.

4. Removal of a partition or the creation of an aperture between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate units within the meaning of RCW 64.34.020(31) and would continue to be treated separately for the purposes of this Act.

5. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed upon the primary residence of a unit owner, it may be appropriate in the case of timeshare or other condominiums.

RCW 64.34.244. RELOCATION OF BOUNDARIES BETWEEN ADJOINING UNITS.

This section contemplates that, upon relocation of the unit boundaries, no reallocation of allocated interest will occur if none is specified in the application. If a reallocation is specified but the board of directors deems it unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's finding as unreasonable.

RCW 64.34.248. SUBDIVISION OF UNITS.

1. This section provides for subdivision of units by unit owners, thereby creating more and smaller units than were originally created. The underlying policy of this section is that the original development plan of the project must be followed, and the expectations of unit owners realized. Accordingly, unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided into 2 or more units unless the declaration is amended to permit it. A subdivision itself is accomplished by an amendment to the declaration.

2. At the same time, situations will often occur where future subdivision is appropriate, and this section permits the declaration to provide for it.

An analogous concept in the context of development rights is subdivision of units by a declarant. The development right is described in RCW 64.34.236.

RCW 64.34.252. MONUMENTS AS BOUNDARIES.

This section recognizes the fact that the actual physical boundaries of a unit may differ somewhat from what is shown on the survey map and plans. This section makes the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent settling or shifting.

RCW 64.34.256. USE BY DECLARANT.

1. This section prescribes the circumstances under which portions of the condominium--either units or common elements--may be used for sales offices, management offices, or models. The basic requirement is that the declarant must describe its rights to maintain such offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element

uses might include a sales booth in the lobby of the building, or a trailer or temporary building located outside the buildings on the grounds of the property.

2. In addition, this section contains a permissive provision permitting advertising on the common elements. The declarant may choose to limit its rights in terms of the size, location, or other matters affecting the advertising. The Act, however, imposes no limitation. At the same time, the last sentence of the section recognizes that state or local zoning or other laws may limit advertising, both in terms of size and content of the advertising, or the use of the units or common elements for such purposes. This section makes it clear that local law would apply in those cases, but subject to RCW 64.34.050 limitations.

RCW 64.34.260. EASEMENT RIGHTS.

1. This section grants to declarant an easement across the common elements, subject to any self-imposed restrictions on that easement contained in the declaration. At the same time, the easement is not an easement for all purposes and under all circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant's rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant's construction equipment to pass and repass over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the "reasonably necessary" test contained in this section to consider limitations on the declarant's easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.

2. The declarant is also required to repair and restore any portion of the condominium used for the easement granted under this section. See RCW 64.34.465(2).

RCW 64.34.264. AMENDMENT OF DECLARATION.

1. This section recognizes that the declaration, as the perpetual governing instrument for the condominium, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (1), is that the declaration, including the survey map and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential condominium, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (1) lists those other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board of directors.

2. RCW 64.34.030 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent requirement in RCW 64.34.264(4) of 90% consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (5) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

4. Subsection (6) prohibits elimination or modifying a special declarant right without the consent of the declarant and any mortgagee of record having a security interest in the right.

RCW 64.34.268. TERMINATION OF CONDOMINIUM.

1. While few condominiums have yet been terminated under present state law, a number of problems are certain to arise upon termination which have not been adequately addressed by RCW 64.32. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real property; the circumstances under which sale of units may be imposed on dissenting owners; the powers held by the Board of Directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire condominium with respect to the validity of the project; and other matters.

2. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter on a project of any size, subsection (1) states a general rule that 80% consent of the unit owners would be required for termination of a project. The declaration may require a larger percentage of the unit owners and, in a non-residential project, it may also require a smaller percentage. Pursuant to RCW 64.34.272 (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, will require the consent of a percentage of the lenders before the project may be terminated.

3. As a result of subsection (3), unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the condominium despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made.

4. Subsection (2) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real property is being accomplished by the agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. Importantly, the agreement becomes effective only when it is recorded.

5. Subsection (3) deal with the question of when all the real property in the condominium, or the common elements, may be sold without unanimous consent of the unit owners.

6. Subsection (4) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on unit owner approval. This section also makes clear that, upon termination, title to the real property shall be held by the association, so that the association may convey title without the necessity of

each unit owner signing the deed. Finally, this section makes clear that, until the association delivers title to the condominium property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real property will not be impaired.

7. Subsection (5) contemplates the possibility that a condominium might be terminated but the real property not sold. While this is not likely to be the usual case, it is important to provide for the possibility.

8. A complex series of creditors' rights questions may arise upon termination. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted, and unsecured creditors of the association. Subsection (6) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those competing claims.

9. Subsection (7)(a) departs significantly from RCW 64.32. Under that act the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of the sales proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollars actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination agreement is approved, so that unit owners may understand the likely financial consequences of the termination.

10. Subsection (7)(b) is an exception to the "fair market value" rule. It provides that, if appraisal of any unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available, which is the common element interest allocated to each unit.

11. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium, but, if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium to be terminated pursuant to subsection (1) of this section.

12. A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to subsection (6).

13. With respect to the association's role as trustee under subsection (6), see RCW 64.34.376.

14. If an initial appraisal made pursuant to subsection (7) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

15. "Foreclosure" in subsection (8) includes deeds in lieu of foreclosure, and "liens" includes tax and other liens on real property which may be converted or withdrawn from the project. See RCW 64.34.020(19).

16. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the condominium which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a condominium which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

17. Subsection (9) recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium declaration was recorded. In the absence of a provision such as subsection (9), recordation of the declaration would constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium documents. For that reason, this section permits the nonconsenting prior lienholder upon foreclosure to exclude the withdrawable real property subject to its lien from the condominium.

RCW 64.34.272. RIGHTS OF SECURED LENDERS.

1. In a number of instances, particularly sale or encumbrance of common elements, or termination of a condominium, a lender's security may be dramatically affected by acts of the association. For that reason, this section permits ratification of those acts of the association which are specified in the declaration as a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would order appointment of a receiver for an association. While this would be possible in a court proceeding, the Act prohibits private contractual granting of such a power.

4. Since it may well be that the association might find itself involved in litigation which would be adverse to the interests of the lender or the declarant, it is inappropriate for a secured party to be able to control the course of litigation in the absence of the consent of the other parties. In an appropriate case, of course, where the lenders' interests are affected, a lender might seek to intervene as a party in that proceeding.

5. RCW 64.34.352 provides for the distribution of insurance proceeds in a particular manner. In particular, it prevents distribution of those proceeds to lenders until the intended purpose of the insurance has been met. For that reason, under this section the declaration may not provide the lender a right to receive insurance proceeds in any manner except the manner provided in RCW 64.34.352.

6. In addition to the provision of the declaration, the provisions of individual mortgages of units may require that unit owner to secure his lender's consent before taking particular actions.

RCW 64.34.276. MASTER ASSOCIATIONS.

1. It is very common in large or multi-phased condominiums, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller condominiums. While it is expected that this phenomenon will be less necessary under this Act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue.

2. Subsection (1) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association if the declaration for the condominium permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several condominiums may amend their declarations in similar fashion to provide for this power. Subsection (1) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, such provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

3. Subsection (2) changes the usual presumption with respect to the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more condominiums. In those cases where it is not so acting, however, the only powers of the unit owners' association which the master association may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of RCW 64.34.304 that all of the powers described in that section may be exercised unless limited by the declaration.

4. Subsection (3) clarifies the liability of the members of the executive board of a unit owners' association when the condominium for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (3) makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (1), that liability lies with the members of the master association.

5. Subsection (4) addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (4) provide certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the condominiums subject to the master board. For that reason, the rights of notice, voting, and other rights enumerated in the Act are available only to the persons who actually elect the board.

6. Subsection (5) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at-large election is reasonable. For that reason, subsection (5) provides that, after the period of declarant control has terminated, there may be 4 ways of electing the master association board. Those four ways are: (1)

at-large election of the master board among all the condominiums subject to the master association; (2) at-large election of the master board only among the members of the boards of directors of all condominiums subject to the master association; (3) each condominium might have designated positions on the master board, and those spaces could be filled by an at-large election among all the members of each condominiums; or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each condominium. It would only be in the case of an at-large election of the master board among all condominiums that subsection (4) would have no relevance.

RCW 64.34.280. MERGER OR CONSOLIDATION OF CONDOMINIUMS.

1. There may be circumstances where condominiums may wish to merge or consolidate their activities by the creation of a single condominium; this section provides for that possibility.

Subsection (1) makes it clear that a merger or consolidation may occur by the same vote of the unit owners necessary to terminate the condominium. If 2 or more condominiums are merged or consolidated, the resulting condominium is for all purposes the legal successor of the pre-existing condominiums, with a single association for all purposes. In the event condominiums did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to RCW 64.34.276.

2. Under subsection (2), the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (3) does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (3) may be included. The important point that subsection (3) makes is that the reallocation of the common element interests, common expense liabilities and votes in the new association must be carefully stated.

Subsection (3) states 2 alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of common element interests, common expense liability, and votes in the association to each unit, or by stating the formulas by which those interests may be allocated to each unit in all of the pre-existing condominiums.

Alternatively, the merger or consolidation agreement may state the percentage of overall common element interests, common expense liabilities, and votes in the association allocated to "all of the units comprising each of the pre-existing condominiums." The agreement might then also provide that the portion of the percentage allocated to each unit from among the shares allocated to each condominium will be equal to the percentage of common expense liability and votes in the association allocated to that unit by the declaration of the pre-existing condominium. An example of how this alternative formulation would operate may be useful.

EXAMPLE:

Assume that 2 adjoining condominiums wish to merge their activities into one condominium. Assume that the first condominium consists of 10 one-bedroom units, with an annual budget of \$10,000. Assume

further that each of the units, being identical, has a common element interest of 10%, equal common expense liability of 10%, and one vote per unit.

The second condominium consists of 40 units, with 20 2-bedroom units and 20 3-bedroom units. The budget of the second condominium consists of \$70,000 per year. Each of the 2-bedroom units has been allocated a 2% interest in the common element and a 2% common expense liability, while each of the 3-bedroom units has been allocated a 3% interest in the common elements, and a 3% common expense liability. Finally, each of the units in the second condominium also has an equal vote.

There is no provision in the Act which mandates a particular allocation among condominiums 1 and 2 as to either common element interest, common expense liabilities or votes. Should the unit owners wish to retain similarity to their previous common element interests and common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (3)(b), to state "the percentage of overall allocated interests of the new condominium" as follows: as to common element interests and common expense liabilities, they might allocate 12.5% of those interests in the merged project to condominium 1, and 87.5% thereof to condominium 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing condominium must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing condominium" as required by subsection (3), each unit in condominium 1 would then have allocated to it 1.25% of both the common element interests and common expense liabilities in the new condominium. It happens that 1.25% of the common expenses of a merged condominium which has a budget of \$80,000 equals \$1,000.

Under the same rationale, if each of the 2-bedroom units in the second condominium, to which were formerly allocated 2% of the common element interests and common expense liabilities, now has allocated 2% of the 87.5% allocated to the second condominium, each of those units would then have allocated to it 1.75% of the common element interest and common expense liabilities of the new condominium. 1.75% of \$80,000 is \$1,400. Similarly, each of the 3-bedroom units would then have allocated to it 2.625% of the common element interest and common expense liabilities in the merged condominium. That percentage of the common expense liabilities of \$80,000 would yield an annual cost of \$2,100, the same cost as previously obtained in this condominium.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both condominiums, this would have the effect of giving 20% of the votes to condominium 1, even though condominium 1 had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the expectations of the unit owners in both condominiums. Alternatively, condominium 1 might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second condominium, then each of the unit owners in condominium 2 would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to subsection (3)(a) rather than (3)(b).

RCW 64.34.300. ORGANIZATION OF UNIT OWNERS' ASSOCIATION.

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the declarant and other unit

owners and makes it easy for the declarant to involve unit owners in the governance of the condominium even during a period of declarant control reserved pursuant to RCW 64.34.308(4).

2. Unlike RCW 64.32, which allows the association to be organized as an unincorporated association, the Washington Condominium Act requires the association to be organized as a profit or non-profit corporation.

RCW 64.34.304. POWERS OF UNIT OWNERS' ASSOCIATION.

1. This section permits the declaration, subject to the limitations of subsection (2), to include limitations on the exercise of any of the enumerated powers.

2. Required provisions of the bylaws of the association, referenced in subsection (1), are set forth in RCW 64.34.324.

3. The Act gives the association the power to sue and be sued in its own name. In the absence of a statutory grant of standing such as that set forth in subsection (d), some courts in other jurisdictions have held that the association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Subsection (h) refers to the power granted by RCW 64.34.348 to sell or encumber common elements without a termination of the condominium upon a vote of the requisite number of unit owners. Subsection (i) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements and to petition for or consent to the vacation of streets and alleys without a vote of the unit owners.

5. The powers granted the association in subsection (k) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. The power to impose sanctions for violations of the association's governing documents is subject to a requirement of minimum "due process" for the accused violator. These due process procedures include notice of the alleged violation and an opportunity for a hearing before either the board of directors or another person or body which has been designated by the board of directors to conduct the hearing. This section also requires that the procedures for enforcement be set forth in the association's governing documents and that the board of directors has previously adopted a fine schedule and communicated it to the owners. The powers granted under this subsection are intended to be in addition to any rights which the association may have under other law.

6. Under subsection (n), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration—for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

7. An association may, pursuant to subsection (p), exercise all other powers which may be exercised by a corporation of the same type. Inconsistent provisions of state corporation law are controlled by the provisions of this Act, as provided in RCW 64.34.070 and RCW 64.34.300.

RCW 64.34.308. BOARD OF DIRECTORS AND OFFICERS.

1. Subsection (1) makes members of the board of directors appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board.

2. The provisions of subsection (3) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect. Failure of the board to provide the budget summary and to call an owners' meeting automatically functions as a rejection of the budget by the owners.

3. Subsections (4) and (5) recognize the practical necessity for the declarant to control the association during the developmental phases of a condominium project. However, any board member appointed by the declarant is liable as a fiduciary to any unit owner for that director's acts or omissions in such capacity.

4. Subsection (4) permits a declarant to surrender the right to appoint and remove officers and board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its board of directors. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which the declarant may deem particularly important. The declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to declarant owned units in the same manner as any other unit owner.

5. Subsection (5), in combination with subsection (4), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

6. Although the declarant's right to control the association terminates upon the happening of the events enumerated in subsection (4), the members of the board of directors appointed or elected by the declarant will continue to serve until their successors are elected by the unit owners unless they sooner resign.

RCW 64.34.312. TRANSFER OF ASSOCIATION CONTROL.

1. RCW 64.34.312 is derived from Alaska Statutes Sec. 34.08.340 rather than the Uniform Condominium Act. It is designed to ensure that the property and funds belonging to the association as well as the information and documents needed for assuming control of the association and the management of the condominium are in fact transferred to the association.

2. In order to ensure that the declarant and the board of directors appointed by the declarant have properly managed the financial affairs of the association during the period of declarant control and that all funds and property belonging to the association has been turned over to the board of directors elected by the unit owners, the Act requires an audit of the association's books and records as of the date of transfer of control by an independent certified public accountant unless the unit owners, other than the declarant, by two-thirds vote elect to waive the audit.

RCW 64.34.316. TRANSFER OF SPECIAL DECLARANT RIGHTS.

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a condominium. There are two issues. First, what obligations and liabilities to unit owners (both existing unit owners and persons who become unit owners in the future) should a declarant retain, notwithstanding a transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest. RCW 64.32 does not address these issues.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the condominium project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that it was in control of the condominium, while relieving a declarant who transfers all or part of its special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor over whom it has no control. Similarly, the section imposes obligations and liabilities arising after the transfer upon a non-affiliated successor to a declarant's interests, but absolves such a transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which it had no control. Finally, the section makes special provision for the interests of certain successor declarants (e.g., a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (1) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to RCW 64.34.308(4), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. In addition, the declarant or successor declarant must furnish a copy of the recorded instrument to all unit owners. The transfer by a declarant of all of its interest in a condominium project to a successor, without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

4. Under subsection (2), a transferor declarant remains liable to unit owners (both existing unit owners and persons who subsequently become unit owners) for all obligations and liabilities, including warranty

obligations on all improvements made by it, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in RCW 64.34.020(1)), the transferor remains subject to all liabilities specified in subsection (2)(a) and, in addition, is jointly and severally liable with its successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (5). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor whose interest in the project is solely for the protection of debt security) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which relate to the rights it holds. Such a transferee is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in subsection (5)(b)(ii). For example, a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is obligated, however, to complete improvements labeled "MUST BE BUILT" on the original plans.

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, subsection (5)(a) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, subsection (2)(b) provides that an original declarant who transfers its rights to an affiliate remains jointly and severally liable with its successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (i.e., persons whose sole interest in the condominium project is the protection of debt security) in three ways. First, subsection (3) provides that, in the case of a foreclosure of a mortgage, a sale by a trustee under a deed of trust, or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold succeeds to all special declarant rights unless that person requests that all or any of those rights not be transferred. Unless such a request is made and a disclaimer is contained in the instrument conveying title, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of all units owned by a declarant, if the transferee of such units requests that the special declarant rights not be transferred, and if the does not provide for transfer of the special declarant rights, then, under subsection (4), such special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described or by deed in lieu of foreclosure, may, pursuant to subsection (5)(d), declare its intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the board of directors of the association in accordance with the provisions of RCW 64.34.308(4). A successor declarant who exercises such a right is relieved of any liability under the Act except liability for any acts or omissions related to its control of the board of directors of the association. This provision is designed to deal with the typical problem of a foreclosing mortgage lender who opts to bid in and

obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits such a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, subsection (5)(c) provides that a successor who has only the right to maintain model units, sales offices, and signs does not thereby become subject to any obligations or liabilities as a declarant except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a condominium project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act.

Under RCW 64.34.236, a declarant may reserve the right to create additional units in portions of the condominium which were originally designated as common elements. The declarant becomes the owner of any units created, but, prior to creation of units, the title to those portions of the condominium is in the unit owners. The right to create the units is an interest in land in which a security interest might be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (3) and (4), the purchaser may limit its liability by agreeing to hold the developments only for the purpose of transfer as provided by subsection (5)(d) or may buy the rights under subsection (3).

RCW 64.34.320. TERMINATION OF CONTRACTS AND LEASES OF DECLARANT.

1. This section deals with a common problem in the development of condominium projects in some jurisdictions: the temptation on the part of the declarant, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem in two ways. First, RCW 64.34.308(1) imposes upon all board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, RCW 64.34.320 provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with itself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the condominium and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a condominium project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of its business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (i.e., any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a

party, or any contract or lease previously entered into by the declarant which is not bona fide or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses the usual leasehold condominium situation where the underlying real estate is subject to a long-term ground lease which is then submitted to the Act. Because termination of the ground lease would terminate the condominium, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (1) will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the condominium was to prevent termination of the lease, the lease may nevertheless be terminated.

RCW 64.34.324. BYLAWS.

1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the condominium. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration. As an alternative, matters which would ordinarily be set forth in the bylaws may instead be contained in the declaration.

2. The requirement, set forth in subsection (1)(e), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include RCW 64.34.060 (Condemnation), RCW 64.34.220(5) (expiration of certain leases), RCW 64.34.244 (Relocation of Boundaries Between Adjoining Units), and RCW 64.34.248 (Subdivision of Units). RCW 64.34.264(5) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

3. Subsection (3) provides for a broad definition of the term "unit owner" for the purpose of determining who may serve as an officer or director of the association. Unless the declaration or bylaws provide otherwise, if a unit is owned, in whole or in part, by a person other than a natural person, certain natural persons affiliated with the unit owner are deemed to be unit owners for the limited purposes of serving as an officer or director of the association. Upon termination of that affiliation, the person serving as an officer or director may not continue in such position unless that person otherwise qualifies as a unit owner.

RCW 64.34.328. UPKEEP OF CONDOMINIUM.

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements (including limited common elements). Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. See RCW 64.34.020(22). As a result, under subsection (1), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under RCW 64.34.360(3), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units benefited. See Comment 1 to RCW 64.34.228.

2. Under RCW 64.34.236, a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit owners. However, under RCW 64.34.328(2), the declarant is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate unless the owners have the right to use the common element and the declaration provides that the expenses associated with its operation, maintenance, repair and replacement are to be paid by the unit owners. As to real estate taxes, see RCW 64.34.040(3).

RCW 64.34.336. QUORUMS.

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort condominiums where many owners may reside elsewhere, often at considerable distances, for most of the year.

RCW 64.34.340. VOTING; PROXIES.

Subsection (3) addresses an increasingly important matter in the governance of condominiums: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the condominium community.

RCW 64.34.344. TORT AND CONTRACT LIABILITY.

1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners or any officer or director of the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because that person is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to RCW 64.34.308, RCW 64.34.344 provides that the association or any unit owner shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control except where the wrong was done by a unit owner other than the declarant. To assure that the decision to bring such an action can be made by a board of directors free from the influence of the declarant, the section also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. If a suit based on a claim which accrued during the period of declarant control is brought against the association after control of the association has passed from the declarant, reasonable notice to, and grant of an opportunity to the declarant to defend, are conditions to declarant liability. If, however, suit is brought against the association while the declarant is still in control, obviously the declarant cannot later resist a suit by the association for reimbursement on the grounds of failure to notify.

RCW 64.34.348. CONVEYANCE OR ENCUMBRANCE OF COMMON ELEMENTS.

1. Subsection (1) provides that, on agreement of unit owners holding 80% of the votes in the association, or such larger percentage as is required by the declaration, parts of the common elements which are not necessary for the habitability of a unit may be sold or encumbered. (80% is the percentage required for termination of the condominium under RCW 64.34.268.) This power may be exercised during the period of declarant control, but, in order to be effective, 80% of the votes allocated to units not owned by the declarant or an affiliate of the declarant must approve the action.

The ability to sell a portion of the common elements without termination of the condominium gives the condominium regime desirable flexibility. For example, the unit owners, some years after the initial creation of the condominium, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

2. Subsection (2) requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite number of the unit owners. The agreement then must be recorded in the real property records of each county in which the condominium is located. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full power to execute a deed or mortgage. Under subsection (3), it is contemplated that the association will execute the actual instrument of conveyance. Under subsection (5), a conveyance or encumbrance of common elements may not deprive a unit owner of rights of access and support.

3. Under the condominium form of ownership, each unit owner owns a share of the common elements as an appurtenant interest to a unit and, when the unit owner mortgages the unit, the owner also mortgages the appurtenant interest. The unit owner cannot convey the unit separately from its interest in the common elements nor can the owner convey the common element interest separately from the unit. Therefore, if there is a mortgage or other lien against any unit, the problem arises as to whether the association under this section can convey a part of the common elements free from the mortgage interest of the unit mortgagee. Subsection (6) answers that question no. Therefore, a sale or encumbrance of common elements under this section would be subject to the superior priority of any prior mortgagee on the unit unless the mortgagee releases its interest therein.

RCW 64.34.352. INSURANCE.

1. Subsections (1) and (2) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive. If the required insurance is not reasonably available or if the insurance is modified, cancelled or not reviewed, the association must give notice of that fact to all unit owners and to eligible mortgagees and those mortgagees to whom a memorandum or certificate of insurance has been issued.

2. Subsection (1) requires that the association obtain and maintain property insurance on both the common elements and the units within buildings. This mandates that the association maintain property insurance on the entire condominium, including the units. Given the great interdependence of the unit owners in the condominium situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach greatly simplifies claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

3. Put simply, if any item is installed, constructed, repaired or replaced by the declarant or a successor in connection with the original sale of a unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If installed by the unit owner, the item may be insured by the association but generally the preferable approach is that these items be insured by the unit owner. Those items, installed by the unit owner and not covered by the association policy, are called "improvements and betterments".

4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an un-renovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value unless a greater amount is required by the declaration, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many condominium documents require insurance in an amount equal to 100% of the replacement cost of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (1)(b) covers only the liability of the association, and unit owners as members, but does not cover the unit owner's individual liability for the owner's acts or omissions or liability for occurrences within a unit.

7. Clause (i) of the third sentence of subsection (8) would operate as follows: (1) if the condominium consists of campsites, restoration after fire damage might consist of merely re-sodding the area damaged; (2) if the condominium consists of separate garden-type buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the condominium consists of a single high-rise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the condominium" would be damaged and unrestored.

8. The scheme of this section, as set forth in subsection (8), is that any damage or destruction to any portion of the condominium must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the condominium or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (4) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance

trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any holder of a mortgage or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the condominium that may be required.

9. In the case of commercial or industrial condominiums, unit owners may prefer to act as self-insurers or make other arrangements with respect to property insurance. Accordingly, subsection (8) provides that the insurance requirements of this section may be varied or waived in the declaration in the case of a condominium all of the units of which are reserved exclusively for non-residential use. Such waiver or modification is not possible in the case of a mixed-use condominium, some of the units of which are used for residential purposes.

RCW 64.34.356. SURPLUS FUNDS.

Surplus funds of the association are generally used first for the prepayment of reserves, and remaining funds are, in the discretion of the board of directors thereafter credited to the accounts of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (e.g., the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

RCW 64.34.360. ASSESSMENTS FOR COMMON EXPENSES.

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium itself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid billing the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which it expects will ultimately be part of the association's budget. Subsections (1) and (2) grant the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (3), the declaration may provide for assessment on a basis other than the allocation made in RCW 64.34.224 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a condominium after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (6) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include RCW 64.34.060 (Condemnation), RCW 64.34.220(5) (expiration of certain leases), RCW 64.34.236 (Exercise of Development Rights) and RCW 64.34.248(2) (Subdivision of Units).

RCW 64.34.364. LIEN FOR ASSESSMENTS.

1. Subsection (1) provides that the association has a lien on a unit for unpaid assessments from the time that the assessment is due.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (2) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and mortgages recorded before the date the assessment became delinquent. However, as to prior mortgages, subsection (3) provides that the association's lien does have a limited priority for assessments based on the periodic budget. (See Comment 3).

3. The association's priority under subsection (3) is usually for a sum equal to the assessments which would normally have come due in the six month prior to the foreclosure of either a mortgage or the lien for assessments. The period dates back from the time of the foreclosure sale, or the recordation of the declaration of forfeiture. A significant departure from existing practice, the priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the assessments demanded by the association which are prior to its mortgage rather than having the association foreclose on the unit and eliminate the lender's mortgage lien.

4. The priority for the assessment lien may be reduced under subsection (4) by up to three months of assessments where a mortgagee has either filed a notice with the secretary of the association making it an "eligible mortgagee" or has made a written request to the association for a notice of delinquencies, and the assessment lien priority relates to a period during which the association was under an obligation to give the mortgagee notice of the delinquencies but failed to do so. In addition, if a mortgage lender forecloses its lien, it will take subject to the association's lien for up to six months' assessments. If the mortgage lender wishes, an impound for assessments can be required.

5. Under subsection (6) the lien priority is automatically waived by the association, however, by electing to foreclose its lien nonjudicially pursuant to subsection (9).

6. Although RCW 64.34.364 is automatically applicable to condominiums created under RCW 64.32 by virtue of RCW 64.34.010(1), it is only applicable with respect to events and circumstances occurring after the effective date of the act. Thus an assessment lien would not have any priority over a mortgage recorded prior to the effective date of this Act. In addition, because RCW 64.34.364 does not invalidate or supersede existing, inconsistent provisions of the governing documents of these pre-Act condominiums, an association would have to amend its declaration to change any language giving mortgages absolute priority over the lien for assessments.

7. A lien for assessments is not subject to the homestead exemption of RCW 6.13 and an association will no longer need to give the notice regarding the effect of foreclosure which is required by that chapter in order to avoid the homestead exemption.

8. Subsection (7) makes clear that the only document which needs to be recorded to give record notice of and to perfect the association's lien is the declaration. A notice of claim of lien need not be recorded

by an association in order to enforce its lien or to perfect its priority vis-a-vis other liens. Recording of such a notice is permissive and does not satisfy the requirement of actual notice to a mortgagee entitled to notice of their mortgagor's delinquency.

9. Subsection (8) supersedes the six year statute of limitations for an action upon a liability arising out of a written agreement and imposes a three year statute of limitations on a proceeding to foreclose the association's lien for assessments or to collect on the personal liability of any person to pay assessments.

10. In addition to the judicial foreclosure of assessment liens in the manner of a mortgage which has been available to associations under RCW 64.32, the Act in subsection (9) adds the ability for an association to foreclose its assessment lien nonjudicially under RCW 61.24. In order to avail itself of this procedure, the declaration, which serves the purpose of the deed of trust, must contain the same elements found in a deed of trust, that is, (a) a grant of the condominium in trust to a trustee qualified under RCW 61.24.010 to secure the obligations of the unit owners to the association for the payment of assessments, (b) a power of sale, (c) a provision that the units are not used principally for agricultural or farming purposes, and (d) a provision that the power of sale is operative in the case of a default in the obligation to pay assessments.

11. Under subsection (10) the right to the appointment of a receiver to rent out a unit is automatically available to an association once a foreclosure has been commenced even if the declaration does not expressly provide for this remedy. However, the remedy is only available with respect to a unit which is not occupied by its owner.

12. Subsections (12) and (16) make clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

13. In view of the association's powers to enforce its lien for unpaid assessments, subsection (15) provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (1), currently levied against the owner's unit. The statement is binding on the association, the board of directors, and every unit owner in any subsequent action to collect such unpaid assessments.

14. Units may be part of a condominium and of a larger real estate regime. For example, a large real estate development may consist of a larger planned community which contains detached single family dwellings and town houses which are not part of any condominium and a high-rise building which is organized as a condominium within the planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (6) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or become delinquent.

15. One of the remedies for collection of delinquent assessments available to many associations created under RCW 64.32 is the power to terminate utilities to a unit on ten days notice to an owner. Although the Act does not grant this power to associations created after its effective date, RCW

64.34.010(1) makes it clear that the Act does not deprive condominiums formed under the prior law of this remedy.

RCW 64.34.368. OTHER LIENS AFFECTING THE CONDOMINIUM.

1. This section deals with the effect on unit owners of judgments against the association. The Act strikes a balance, making the judgment lien a direct lien against each individual unit, but allowing the individual unit owner to discharge the lien by payment of the pro-rata share of the judgment. The judgment would also be a lien against any property owned by the association.

2. It should be noted that, while the judgment lien runs directly against unit owners, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated association only is liable for a judgment, it will, of course, have no assets to satisfy the judgment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnished by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That additional assessment would be in precisely the amount for which this Act gives a direct lien against the individual unit owners. Unpaid assessments made by the association constitute liens against units just as do judgments.

Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay the proportionate share will end up with a lien against the unit.

The differences, therefore, between the lien system established by RCW 64.34.368 and the system which would be applicable if ordinary corporation rules were applied are these:

(1) The unit owner can discharge the owner's unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on the unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

(2) The judgment creditor through its ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment.

Except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left to a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.

RCW 64.34.372. ASSOCIATION RECORDS.

(1) This section requires that each association shall prepare or cause to be prepared a financial statement in accordance with generally accepted accounting principles, as that term is defined by the American Institute of Certified Public Accountants, at least annually. These annual financial statements must be audited by a certified public accountant for all associations with fifty or more units, however this section grants to associations with fewer than fifty units, which are not otherwise required by their governing documents to have an annual audit, the power to waive the audit requirement. The waiver must be made annually by the affirmative vote of unit owners other than the declarant of units to which sixty percent of the votes are allocated, excluding the votes allocated to units owned by the declarant.

(2) Subsection (2) establishes certain important safeguard with respect to the segregation of association funds and the method of disbursing funds from a reserve account. Persons charged with the custody of association funds may not commingle them with funds which do not belong to the association. In addition, reserve funds must be kept in a separate account and must be disbursed on the signature of two officers or directors of the association.

RCW 64.34.376. ASSOCIATION AS TRUSTEE.

Based on Section 7 of the Uniform Trustees' Powers Act, this section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under RCW 64.34.352 for insurance proceeds, or RCW 64.34.268 following termination.

RCW 64.34.400. APPLICABILITY.

In the case of commercial and industrial condominiums, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection imposed by Article 4 may be substantial. Accordingly, subsection (1) permits waiver or modification of Article 4 protections with respect to units which are restricted to nonresidential use, e.g., in the case of most commercial and industrial condominium units. However, except for certain waivers of implied warranties of quality (see RCW 64.34.450) and certain exemptions from public offering statement and resale certificate requirements (see subsection (2)), no express waiver of the protections of this Article with respect to the purchasers of residential units is permitted by this subsection. Accordingly, by operation of RCW 64.34.030, the rights provided by this Article may not be waived in the case of residential purchasers.

RCW 64.34.405. LIABILITY FOR PUBLIC OFFERING STATEMENT REQUIREMENTS.

This section permits declarants to transfer responsibility for preparation of a public offering statement to successor declarants or dealers. The declarant or dealer who is responsible for delivering the public offering statement is liable for any misrepresentations and material omissions to the extent such person knew or should have known of the misrepresentation or omission. A person who assists the declarant or dealer in preparing a public offering statement is responsible for any such deficiencies only to the extent of that person's actual knowledge.

RCW 64.34.410. PUBLIC OFFERING STATEMENT--GENERAL PROVISIONS.

1. The best "consumer protection" that the law can provide to any purchaser is to ensure that such purchaser has an opportunity to acquire an understanding of the nature of the products which it is purchasing. Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. For this reason, the Act is similar to many so-called "second generation" condominium statutes in that it sets forth a list of specific information which must be provided to each purchaser before acquiring a unit. Unlike some other statutes, however, the Washington Condominium Act avoids lengthy "narrative descriptions" of information otherwise contained in the condominium documents. The objectives fostered by the approach of specifically listing the information to be included in the public offering statement include: providing the drafter with a clear guide as to what the public offering statement is to contain; promoting the preparation of a short, clear and concise public offering statement, which in turn will increase the likelihood that prospective unit purchasers will both read and understand it; avoiding irrelevant, ambiguous and confusing disclosures; avoiding a false sense of security among purchasers who may assume that a lengthy public offering statement contains all of the relevant information regarding the condominium; enabling the declarant to prepare the public offering statement at a reasonable expense; promoting uniform public offering statements among projects and therefore the ease of comparison of information; facilitating the ability of interested parties to obtain legal opinions with respect to the public offering statement's compliance with the statute; and decreasing the need for a state agency review of the public offering statement.

The requirement for providing the public offering statement appears in RCW 64.34.405(3), and RCW 64.34.420 provides prospective purchasers with cancellation rights and imposes liability for damages upon declarants not complying with the public offering statement requirements of the Act.

2. Subsection (1)(i) requires a list of the principal "common amenities" to be indicated. "Common amenities" are not defined in the statute. The term encompasses items within the common areas which constitute significant features of the project and which materially affect its value. The disclosure is intended to enable prospective purchasers to confirm that existing recreational and other facilities conform to the impressions given through advertising, salespersons or others. Items which would fall under this category would include swimming pools, tennis courts, and clubhouses, but need not include landscaping, sidewalks, parking areas, and the like.

3. Subsection 1(l) requires the identification of real property which is not in the condominium but to which unit owners have access. Thus, if the unit owners have an easement over property not within the condominium or if the association (as opposed to the owners) leases recreational or other areas, those properties are to be disclosed, together with a brief description of the terms of the easement, lease or other agreement by which such access is afforded.

4. Subsection (1)(m) requires a statement as to the status of construction and the estimated dates of completion for improvements not completed. Under RCW 64.34.232, the declarant is obligated to label all improvements which may be made in the condominium as either "MUST BE BUILT" or "NEED NOT BE BUILT." Under RCW 64.34.465, the declarant is obligated to complete all improvements labeled "MUST BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with the requirements of RCW 64.34.465.

5. Subsection 1(n) requires a disclosure of the "estimated current common expense liability" for the units being offered for sale. In addition to ensuring that such information will be available to

prospective purchasers, this is intended to eliminate the quotation of deceptively low assessments by the seller when the seller knows that because of the deferral of payments, inadequate reserves, nominal charges for services performed by the declarant which must be obtained from third parties in the future, and other reasons, significant increases in assessments are expected.

6. Under subsection (1)(p), the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the condominium. Such fees or charges might include swimming pool fees, golf course fees, or required membership fees for recreation associations.

7. Subsection (1)(q) requires a disclosure of certain "assessments." The use of that word in this section is not the defined term under RCW 64.34.020(3), but refers to real property special assessments, local improvement district assessments and the like which may be levied against the unit as a result of the condominium's inclusion in a special assessment district.

8. Subsection (1)(t) requires the disclosure of any restrictions against "timesharing." The term "timeshare" has the meaning set forth in RCW 64.36.010(11), and includes use sharing arrangements established through the sale of undivided fee interests and "right to use" programs.

9. Subsection (1)(v) requires a description of the material differences in a model unit available for inspection by a prospective purchaser and the unit being offered to such purchaser. This disclosure is limited to model units which are actually available to the purchaser at the time of an inspection. Consequently, the public offering statement need not be amended if such a model unit is altered or replaced, unless that particular purchaser was led to believe that any resulting alterations or additions would be included in its unit.

10. Subsection (1)(x) requires a listing of physical hazards known to the declarant which particularly affect the condominium. These would not include matters which are obvious, such as hazards resulting from a busy intersection, the possibility of adverse weather conditions, and the like. On the other hand, to the extent unusual environmental conditions would affect the use or enjoyment of the condominium or the condominium is located near the end of an airport runway, such items would be expected to be disclosed.

11. Subsections (1)(ff) and (gg) require certain notices to be contained at the top of the first page of the public offering statement pursuant to RCW 64.34.410(4). These are to be typed or printed in 10-point bold-faced type size using the language set forth in the statute.

RCW 64.34.415. PUBLIC OFFERING STATEMENT; CONDOMINIUMS CONTAINING CONVERSION BUILDINGS.

1. In the case of a condominium containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings, to the extent reasonably ascertainable, is required in the public offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of condominium sales.

2. Subsection (1)(a) requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and

fixed mechanical and electrical installations in the conversion building. Such information is as useful to the declarant as to the purchaser since, under the implied warranty provisions of RCW 64.34.445, a declarant impliedly warrants all improvements made by any person to the building "before creation of the condominium" unless such improvements are specifically excluded from the implied warranty of quality pursuant to RCW 64.34.450(2).

3. Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under subsection (1)(c), the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the condominium) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the same reasons set forth in the Comment to RCW 64.34.400(1), this section does not apply to units which are restricted exclusively to nonresidential use.

RCW 64.34.__. MULTIPLE OFFERING STATEMENTS

In addition to the public offering statement required under RCW 64.34.4103 or RCW 64.34.415, a declarant may be required to file a similar disclosure statement with the Securities and Exchange Commission of the United States or in connection with various state laws, including the Securities Act of Washington, Chapter 21.20 RCW; the Land Development Act of 1973, Chapter 58.19 RCW; the Timeshare Act, Chapter 64.36 RCW; or the Camping Resorts Act, Chapter 19.105 RCW. The goal of RCW 64.34.__ is to assure full disclosure to prospective unit purchasers while at the same time avoiding redundant disclosure documents.

RCW 64.34.420. PURCHASER'S RIGHT TO CANCEL.

1. Subsection (1) requires that each purchaser be provided with both the public offering statement and all material amendments thereto prior to the time that the unit is conveyed. The section makes clear that any material amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

2. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. If such agreements (frequently referred to as "reservation agreements") may be unilaterally canceled at any time by a prospective purchaser without penalty, they do not constitute "contracts of sale" within the meaning of the section.

3. The requirement set forth in subsection (1) that a purchaser be provided with subsequent material amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the

delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the condominium which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be advised of any changes in the nature of the condominium to determine whether cancellation of the contract should be pursued.

4. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (1), the purchaser has the right to extend the date of closing for up to 7 days from the time the public offering statement was provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

5. Under subsection (1), the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance right following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible under the common law that reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (3) are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under RCW 64.34.455 to collect attorney's fees in connection with his action against the declarant.

RCW 64.34.425. RESALES OF UNITS.

1. In the case of the resale of a unit by a private unit owner who is not a declarant or dealer, a public offering statement need not be provided. See RCW 64.34.405(3). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular condominium unit. Accordingly, each unit owner not required to furnish a public offering statement under RCW 64.34.405(3) and not exempt under RCW 64.34.400(2) is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the condominium and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within 10 days after a request for such information. Under

RCW 64.34.304(1)(l), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to RCW 64.34.455.

3. Under subsection (3), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

RCW 64.34.430. ESCROW OF DEPOSITS.

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of RCW 64.34.400. It does not apply, however, to resales of units between private parties.

2. This section provides declarant a number of choices as to the appropriate escrow agent. To minimize record keeping the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted.

3. The escrow requirements of this section apply in connection with any deposit made by a purchaser, whether such deposit is made pursuant to a binding contract or pursuant to a non-binding reservation agreement (with respect to which no public offering statement is required under RCW 64.34.400(2)(f)).

4. This Act does not include bonding as an alternative to the required escrow of deposits.

RCW 64.34.435. RELEASE OF LIENS.

The exemption for withdrawable real estate set forth in subsection (1) is designed to preserve flexibility for the declarant in terms of financing arrangements. Theoretically, a declarant might partially avoid the lien release requirement of subsection (1) by placing part of the common element improvements such as a swimming pool or tennis court on withdrawable real estate. By doing so, it could separately mortgage that part of the common elements without being obligated to discharge the mortgage or secure partial releases when individual units are sold. (However, even if there were no withdrawable real estate exemption from the release of lien requirement, declarants could still separately mortgage such improvements as pools and tennis courts without having to discharge the mortgage on sale of units. All they would have to do is leave the particular real estate out of the condominium and then convey it directly to the association subject to the mortgage.)

If a mortgage or other lien created by or arising against the declarant attaches to withdrawable real estate after the declaration has been recorded, a lapse of the declarant's right to withdraw the real estate would also terminate the rights of the lienor, since the lien would attach only to the declarant's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the condominium declaration was recorded, lapse of the right to

withdraw would not affect the lienor's rights and it could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

If units are created in withdrawable real estate, the units, when sold, are subject to the release-of-lien rule of subsection (1) and after a unit in a particular withdrawable parcel is sold, that parcel can no longer be withdrawn. In that case, any lien created by or arising against the developer which attached to that real estate would be subordinate to the condominium declaration and would automatically expire.

RCW 64.34.440. CONVERSION BUILDINGS.

1. One of the most controversial issues in the field of condominium development relates to conversion of rental buildings to condominiums. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to condominium ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curtailing the problem of declining urban tax bases. Proponents also point out that the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (2) provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to tenants if the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single condominium unit, compliance with the requirements of subsection (b) would be impossible.

3. Except for the restrictions on permissible evictions stated in subsection (1), this Act does not change the law of summary process in this state. As a result, if a tenant refuses to vacate the premises following the 90-day notice, the usual provisions of the state's summary process statutes would apply, while any defenses available to a tenant would also be available.

4. Subsection (6) permits cities and counties, on a local option basis, to require a governmental housing code inspection in addition to the report required under RCW 64.34.415(1)(a), that violations of the housing code be repaired and that such repairs be warranted for one year, and payment of a relocation allowance. Subsection (6)(e) is intended to provide specific authorization for such relocation assistance and to establish the Legislature's clear intent that RCW 82.02.020 is not a bar to such assistance in

connection with residential condominium conversions. Similar provisions are contained in some existing local conversion ordinances.

5. A number of local jurisdictions have adopted conversion ordinances. The evolving "patchwork" of state and local regulation has resulted in property owners, tenants, unit purchasers, lenders, title insurers and others involved in the condominium conversion process being confronted with widely divergent rights, duties, obligations and procedures. Accordingly, except for the "local option" provisions of subsection (6), the Legislature intended by the adoption of this section (as well as other related sections, including RCW 64.34.415 and RCW 64.34.443 - 450) to preempt and replace local condominium conversion ordinances with a uniform statewide set of regulations. See also RCW 64.34.050 and the related comments concerning applicability of local ordinances and regulations.

RCW 64.34.443. EXPRESS WARRANTIES OF QUALITY.

1. This section, together with RCW 64.34.445, RCW 64.34.450 and RCW 64.34.__, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, that is, with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation. Because of the requirements imposed on the declarant to disclose information to the prospective purchasers in writing, a purchaser should not rely on oral statements concerning the unit or the condominium. Accordingly, this section makes it clear that, except with respect to the model unit, express warranties are created only in writing, such as in the public offering statement or a separate writing signed by the declarant or the declarant's authorized agent.

3. Subsection (2) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (1) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning condominium property during the bargaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representations need be shown in order to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Subsection (1)(a) provides that representations as to improvements and facilities not located in the condominium may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts, etc., will be constructed in the future and that unit owners will have the right to utilize such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the condominium." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if they are not completed. Such liability is distinct from the declarant's obligations, under RCW 64.34.465, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under subsection (1)(d), a contract provision permitting the purchaser to use a condominium unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for

that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under RCW 64.34.450.

6. The precise time when representations set forth in subsection (1) are made is not material. The sole question is whether the language of the declarant are fairly to be regarded as part of the contract between the parties.

7. The provision of subsection (3) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate his warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

RCW 64.34.445. IMPLIED WARRANTIES OF QUALITY.

1. This section, which is based upon Section 2-309 of ULTA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of "caveat emptor"). In recent years, that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930's, more and more courts have completely or partially abolished the caveat emptor rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under subsection (2), are imposed only against declarants and dealers and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability although it is broader than interpreted by our Supreme Court. Under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential condominiums. If, for example, a commercial unit is sold for commercial use although it is not suitable for the ordinary uses of condominium units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the condominium.

4. The warranty of suitability and of quality of construction arises only against a declarant and a dealer. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties such seller makes. However, if a non-professional seller fails to disclose defects of which such seller is aware, that seller may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-professional seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the condominium is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (5) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (3), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for any violation of housing codes or other laws which renders any existing use of the condominium unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arm's length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (6) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and RCW 64.34.316(2)(a) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by the declarant, even after the declarant transfers all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor declarant is an affiliate of the original declarant, it is clear, under both RCW 64.34.316(2)(b) and RCW 64.34.445(5), that the original declarant remains liable for warranties of quality or improvements made by his successor even after the declarant himself ceases to have any special declarant rights.

8. As to the liabilities of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to RCW 64.34.316(5)(a), for warranties or improvements made by the successor declarant's predecessor. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improvements made or contracted for by such successor, and is not liable for warranties which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. See RCW 64.34.316(5)(b). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of ULTA. The same result is also reached under ULTA in the case of a successor who, under ULTA Section 3-309(b), would be a seller in the business of selling real estate since under that subsection the seller is liable only for warranties or improvements made or contracted for by such seller.

RCW 64.34.450. EXCLUSION OR MODIFICATION OF IMPLIED WARRANTIES OF QUALITY.

1. This section parallels Section 2-311(b) and (c) of ULTA.
2. Under this section, implied warranties of quality may be disclaimed in writing. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability.
3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to effectively notify the purchaser of the nature of the disclaimer.
4. Under subsection (2), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion condominium might,

consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials comprising or supporting the roof, and all components of the air conditioning system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. However, under the Act, the implied warranty that a new condominium unit will be suitable for ordinary uses (i.e., habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

RCW __.__. STATUTE OF LIMITATIONS FOR WARRANTIES.

1. Unlike Section 4-116(1) of the UCA, the statute of limitations under RCW __.__(1) of the Act may not be shortened even by written agreement between the parties.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of warranty of quality would normally arise with respect to a unit, when the purchaser to whom it is first made enters into possession; and with respect to a common element, when the first unit is sold or, if later, when the common element is created or added to the condominium. Suit on such a warranty would thus have to be brought within four years thereafter, unless such period is extended with respect to the common elements as a result of the declarant's maintaining control of the association under RCW 64.34.308(4). Neither the failure nor the inability to discover the breach will not delay the running of the statute of limitations.

RCW 64.34.455. EFFECT OF VIOLATIONS ON RIGHTS OF ACTION; ATTORNEY'S FEES.

This section provides a general cause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to RCW 64.34.308(4), or the association. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section permits attorney's fees to be awarded in the discretion of the court to any party that prevails in any action.

RCW 64.34.460. LABELING OF PROMOTIONAL MATERIAL.

1. RCW 64.34.232(3) requires that the survey maps and plans for every condominium indicate whether or not any improvement that might be built in the condominium must be built. RCW 64.34.410 requires copies of the survey maps and plans be provided to purchasers as part of the public offering statement. This section requiring the labeling of improvements depicted on promotional material is appropriate to ensure that purchasers are not deceived with respect to which improvements the declarant is obligated to make in a particular condominium project.

2. Since no contemplated improvements on real estate subject to development rights need be shown on survey maps and plans, additional labeling is required by this section to insure that, if the declarant shows any contemplated improvements in his promotional material which are not shown on the survey maps and plans, those improvements must also be appropriately labeled.

RCW 64.34.465. DECLARANT'S OBLIGATION TO COMPLETE AND RESTORE.

1. Subsection (1) requires the declarant to complete any improvement which the plats or plans indicate, pursuant to the requirements of RCW 64.34.232(3), "MUST BE BUILT." This is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under RCW 64.34.316.

2. Under subsection (2), if a declarant exercises the right to use an easement which is created by RCW 64.34.260, or if the declarant maintains model units or signs on the condominium, the declarant is obligated to restore the portions of the condominium used to a condition compatible with the remainder of the condominium.

RCW __.__.__. SUBSTANTIAL COMPLETION OF UNITS.

1. This section makes it clear that contracts for sale can validly be entered into before recording the declaration and survey map and plans.

2. RCW 64.34.200(2) prohibits filing a declaration until all units thereby created are substantially completed in accordance with the plans required to be recorded by RCW 64.34.232 of this act. As discussed in the comments to RCW 64.34.200, a unit may be sufficiently completed to enable plans to be recorded, but not be finished and ready for occupancy. This section requires that the unit at the time of conveyance be substantially completed and ready for occupancy unless the purchaser and seller specifically agree otherwise, thus protecting the purchaser in the usual transaction and also permitting by agreement the purchase and sale of "shell" condominium units.

RCW 64.34.940. CONSTRUCTION AGAINST IMPLICIT REPEAL.

This section derives from Section 1-104 of the Uniform Commercial Code.

RCW 64.34.950. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This Act should be construed in accordance with its underlying purpose of making uniform the law with respect to condominiums, as well as the purposes stated in the Prefatory Note of simplifying, clarifying, and modernizing the law of condominiums, promoting the interstate flow of funds to condominiums, and protecting consumers, purchasers and borrowers against condominium practices which may cause unreasonable risk of loss to them. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

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