

**UNDERSTANDING THE DELAWARE
UNIFORM COMMON INTEREST
OWNERSHIP ACT**

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UNDERSTANDING THE DELAWARE COMMON INTEREST OWNERSHIP ACT

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I. HISTORY OF CONDOMINIUM AND COMMON INTEREST OWNERSHIP LAWS IN DELAWARE

A. What is a Condominium?

In its simplest terms, the condominium form of ownership contemplates that a unit owner will own the air space within the unit and the real estate will be owned by all of the unit owners as tenants in common according to a percentage of ownership set forth in the Condominium's Declaration.

B. Early History.

The concept of condominium ownership was not recognized under common law. Common law tradition holds that real property ownership must involve land. French civil law, however, recognized condominium ownership as early as 1804 in the Napoleonic Code. Some scholars have even suggested that the Romans, as early as the 6th century BC, had a form of condominium ownership. The United States was one of the last of the industrialized countries to embrace the concept of condominium ownership. Condominium laws in the United States evolved from Caribbean Islands that had a hybrid legal system based on both the common law and French civil law. These Caribbean Islands had long recognized the condominium ownership through their French heritage. It appears that the first statute creating condominiums in the United States was enacted in Puerto Rico in 1958. The Puerto Rican condominium law was perhaps principally derived from its neighboring Caribbean Islands. Additionally, in 1962 the Federal Housing Administration crafted a model condominium statute in 1962. The explosion of condominium laws through out the United States can be attributable to some extent by the 1961 National Housing Act which allowed the Federal Housing Authority to insure mortgages on condominiums which supplied an infusion of capital for the purchase of condominiums.

C. History in Delaware.

Delaware's first condominium law was enacted in 1963 called the "Unit Property Act". The UPA was based in large part on the Puerto Rican act. Until recently, condominium laws in Delaware remained largely the same since the UPA was first enacted. Amid mounting complaints regarding problems with the operation and governance of condominium associations, the Uniform Condominium Act was introduced as House Bill 451 in 1990.¹ HB 451 didn't get too far, and it died when the legislative session ended.

Senator Amick introduced the Uniform Common Interest Ownership Act in 1999 as Senate Bill 142. UCIOA had been around since 1982 when the original version was first promulgated by the Uniform Law Commission. The Uniform Common Interest Ownership Act was created by the ULC to provide a model set of laws to govern condominium, cooperative and planned unit development communities in the United States. UCIOA dealt not only with condominiums but also with other common interest communities such as cooperatives and planned communities. UCIOA is a comprehensive act that governs the formation, management, and termination of a common-interest community. Variations of the act have been adopted in numerous states including Pennsylvania and New Jersey.

The version introduced by Senator Amick in 1999 incorporated the 1994 amendments promulgated by the ULC. Additionally, SB 142 also reflected revisions proposed by the DSBA Real and Personal Property Section. The draft bill went through various public hearings and was further modified based on this input. SB 142, however, died when the legislative session ended. Senator Amick again introduced UCIOA in 2001 as Senate Bill 225. Again this Bill died. In 2005, Senator Amick considered re-introducing UCIOA in the form of SB 142, but decided against it.

In response to a number of legislators requesting assistance in addressing their constituents concerns and problems regarding governance in condominiums and

¹ The Act was a "Uniform" act based on the Uniform Act promulgated by the Uniform Law Commission. The ULC is a non-partisan group of lawyers who conceive of legislation designed to bring clarity and stability to certain critical areas of law. The uniform laws suggested by UCL are designed to make such laws consistent from state to state.

maintenance associations, the DSBA Real and Personal Property Section revised UCIOA in substantially the same form that that had been introduced in the original SB 142. This was done because such Bill had a significant amount of input already from the builder, realtor and association community. The major difference, however, was the inclusion of New Castle County maintenance associations. Adding maintenance associations in this version was done at the behest of various legislators whose constituents were having the same governance issues as condominiums. The new version also incorporated revisions under consideration by the UCL that would end up in the 2008 version of UCIOA. The Delaware version of UCIOA was completed before the 2008 amendments were approved by ULC to address the timetable required by the legislators. This Bill was introduced as Senate Bill 273 in May 2008. To the surprise of the Bill's sponsors, SB 273 was passed in the early morning of July 1, 2008, without any vetting, hearings or debate. To address this unanticipated passing of SB 273, the Bill's sponsors immediately reached out to various constituencies most affected by the legislation to work on necessary and proper amendments that would be introduced in the next Session. Additionally, to minimize the effects of this new Act in the form in which it was passed, the Act was delayed in being presented to then Governor Minner for signature. The Governor finally signed the Act (which is now known as DUCIOA) on October 31, 2008, and on that date went into effect. In February 2009, the Act was amended by HB 45. Such amendments amongst other things postponed the effective date of DUCIOA to July 1, 2009.

Further substantive amendments to DUCIOA were developed during the spring of 2009 eliciting input from the builder, realtor and association communities. The resulting amendments were introduced as HB 156 (pertaining to DUCIOA) and HB 183 (pertaining to the Unit Property Act). Both amendments passed on July 1, 2009 and were signed by Governor Markell on July 2, 2009. The amendments, amongst other things, pushed the effective date of DUCIOA back to September 30, 2009.

In June of 2010, further technical amendments to DUCIOA were introduced a HB 475, and was rapidly passed and was signed by Governor Markell on July 12, 2010 (with effective date of August 12, 2010). These amendments, amongst other things, extended the number of days the resale certificate is good from 90 to 120 days.

Additionally, the amendments amended the Unit Property Act, by extending the number of years that pre-existing Condominiums would have to become fully funded for their Repair and Replacement Reserves.

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II. PROTECTION OF PURCHASERS – RESALE OF UNITS

A. Requirement of Resale Certification.

Section 81-409 of Delaware Uniform Common Interest Ownership Act (“DUCIOA”) requires (as of **September 30, 2009**) a resale certificate to be furnished by the unit owner in a “common interest community” to a purchaser of a unit no later than the time of the signing of the contract to purchase.

B. Applicability.

In what “common interest communities” are unit owners required to provide the resale certification?

1. Common Interest Community. A “common interest community” under DUCIOA is defined as real estate described in a declaration with respect to which a person, by virtue of that person’s ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvements of or services or other expenses related to common elements, other units or other real estate described in the declaration.” 25 *Del. C.* §81-103(11).

A “common interest community” under DUCIOA includes condominiums (§81-103(12), cooperatives (§81-103(14), and planned communities (§81-103(33).

2. Nonresidential Common Interest Communities. DUCIOA and the resale certification requirements of §81-409 do not apply to nonresidential and mixed use common interest communities, unless the declaration governing the community so provides. 25 *Del. C.* §81-122.

3. Leasehold Units. Ownership of a unit under DUCIOA does not include a leasehold interest in a unit of a stated term of less than 20 years, including renewal options. 25 *Del. C.* §81-103(11).

4. Campground Units. DUCIOA does not apply to campgrounds subject to Chapter 28 of Title 6. *25 Del. C. §81-103(11)*.

5. New Common Interest Communities. DUCIOA and the resale certification requirements of §81-409 apply to all new common interest communities created after the effective date (September 30, 2009). *25 Del. C. §81-116*.

a. Exception for Small Condominiums and Cooperatives. A condominium or cooperative that contains no more than 20 units is not subject to the resale certification requirements of DUCIOA (The declaration, however, may subject such community to DUCIOA requirements). **There is a further requirement that the bylaws of such communities be recorded to be exempt.** *25 Del. C. §81-117*.

b. Exception for Small Planned Communities. A planned community that contains no more than 20 units that is not subject to development rights is not subject to the resale certification requirements of DUCIOA (The declaration, however, may subject such community to DUCIOA requirements). **There is a further requirement that the bylaws of such communities be recorded to be exempt.** *25 Del. C. §81-118(a)*.

c. Exception for Limited Expense Liability Planned Communities. In a planned community where the declaration provides that during the period of declarant control the average annual average common expense liability of all units restricted to residential purposes may not exceed \$500 per unit, then the resale certification requirements of DUCIOA would not apply. **There is a further requirement that the bylaws of such communities be recorded to be exempt.** *25 Del. C. §81-118(b)*.
The declaration, however, may subject such community to DUCIOA requirements.

6. Preexisting Common Interest Communities and Approved Common Interest Communities. The resale certification requirements of DUCIOA apply to all

preexisting common interest communities and approved common interest communities created before the effective date (September 30, 2009).

a. Exception for Small Preexisting Cooperatives and Planned Communities. A cooperative or planned community created before the effective date that contains no more than 20 units is not subject to the resale certification requirements of DUCIOA (The declaration, however, may subject such community to DUCIOA requirements). **There is a further requirement that the bylaws of such communities be recorded to be exempt.** 25 *Del. C.* §81-120. This section does not provide an exception for condominiums.

b. Exception for Preexisting Limited Expense Liability Cooperatives and Planned Communities. In a cooperative or planned community that was created prior to the effective date (September 30, 2009) if the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, does not exceed \$500 per unit, then such community is not subject to the resale certification requirements of DUCIOA (The declaration, however, may subject such community to DUCIOA requirements). 25 *Del. C.* §81-120. The \$500 amount is adjusted upward by 3% each year after 2009. **There is also a requirement that the bylaws of such communities be recorded.** Preexisting condominiums are not included.

7. Out-Of-State Common Interest Communities. DUCIOA and the resale certification requirements of §81-409 do not apply to common interest communities located outside Delaware. 25 *Del. C.* §81-123.

8. Continuing Care Common Interest Communities. DUCIOA and the resale certification requirements of §81-409 do not apply to common interest communities

that is a continuing care facility governed by the Delaware Life-Care Registration Act. 25 *Del. C.* §81-124.

9. Other Exceptions. Pursuant to Section 81-401(a) of DUCIOA, the requirement of the resale certificate may be waived by agreement of purchasers of units in a nonresidential common interest community or as to units restricted to nonresidential use. Section 81-401(b) also does not require the resale certification in the case of (1) a gratuitous disposition of a unit; (2) a disposition pursuant to court order; (3) a disposition by a government or governmental agency; (4) a disposition by foreclosure or deed in lieu of foreclosure; (5) a disposition to a dealer; (6) a disposition that may be cancelled at any time and for any reason by the purchaser without penalty; (7) a disposition by operation of law upon the death of the unit owner; (8) a disposition of a unit restricted to nonresidential purposes; or (9) a disposition of a unit to a purchaser for which a declarant, dealer or existing unit owner has entered into a written contract with such purchaser for the purchase and sale of such unit at any time prior to the effective date (September 30, 2009).

C. Resale Certificate.

The Act requires the furnishing of certain community documents and statements to be made by a unit owner to the purchaser no later than the signing of the contract to purchase. 25 *Del. C.* §81-409(a)

1. Documents to be Supplied. Section 81-409 requires the unit owner to furnish a copy of the declaration (other than plats and plans), all amendments to the declaration, the bylaws, and rules of the association (including all amendments to the rules).

2. Statements Required in Certificate. In addition to the above documents Section 81-409 requires a certificate containing or attaching the following, to be correct to within 120 days² prior to the date the certificate of the unit owner is furnished to the purchaser:

- A statement disclosing how any right of first refusal or similar right held by the association affects the sale of the unit being sold.

² Prior to HB 475, the number of days the resale certificate was good for was only 90.

- A statement of the periodic common expense assessment and any unpaid common expense or special assessment currently due and payable from the seller.
- A statement of any other fees payable by the owner of the unit being sold.
- For a condominium or cooperative, a statement of the current number of unit owners delinquent in the payment of assessments and the aggregate amount of the delinquency.
- In a condominium or cooperative, a statement of the current balance in the repair and replacement reserve.
- A statement of any capital expenditures approved by the association for the current or succeeding fiscal years including a statement of the amount of capital expenditures to be taken from the repair and replacement reserve.
- In a condominium or cooperative, a copy of the most recent reserve study.
- The most recent regularly prepared balance sheet and income expense statement, if any, of the association.
- The most recent report of auditors (if one is required under the Act for the community).
- The current operating budget of the association.
- A statement of any unsatisfied judgments against the association and the status of any pending suits in which the association is a defendant.
- A statement describing any insurance coverage provided for the benefit of unit owners.
- In a condominium or cooperative, a statement as to whether the executive board has given or received written notice of any violations of the declaration relative to the unit being sold or the limited common elements assigned to that unit.

- In a condominium or cooperative, a statement as to whether the executive board has received written notice from any governmental agency of violation of laws.
- In a condominium or cooperative, a statement of the remaining term of any leasehold estate affecting the community.
- In a cooperative, an accountant's statement, if any was prepared, as to the deductibility for federal income tax purposes by the unit owner of real estate taxes and interest paid by the association.
- A statement describing any pending sale or encumbrance of common elements.
- A statement of any fees payable by the purchaser of the unit to the Association at settlement (added by HB 475-effective August 12, 2010)
- Copies of the minutes for the executive board meeting for the preceding 6 months or, if none, for the most recent executive board meeting for which minutes are available.

3. Resale Certificate Form. Attached as Exhibit A is a form of Resale Certificate.

D. Responsibility for Furnishing Resale Certificate.

1. By Owner of Unit. The owner of the unit is required to furnish the resale certificate to the purchaser no later than the time of the signing of the contract for purchase. *25 Del. C. §81-409(a).*

2. By Association to Owner. Within 10 days after a request by a unit owner, the association shall furnish a certificate containing the information necessary to enable the unit owner to provide the resale certificate. *25 Del. C. §81-409(b).*

a. Inability to Obtain Information from Association. If the unit owner has requested the information from the association, and the association fails to provide any portion of the requested information or if the unit owner, after reasonable investigation, has no information on any particular item included in the certificate, or if the

requested information does not exist, the unit owner shall include a statement to that effect in the certificate from the unit owner. 25 *Del. C.* §81-409(b).

b. Liability for Erroneous Information Supplied by Association.

A unit owner is not liable for erroneous information provided by the association and included in the certificate and is not liable to the purchaser if the owner had reasonable grounds to believe, and did believe, at the time the information was provided to the purchaser, that the statements were true and there was no omission to state a material fact necessary to make the statements made not misleading, in light of the circumstances. 25 *Del. C.* §81-409(b).

c. Electronic Format. The association may require that such certificate and information be furnished in electronic format. 25 *Del. C.* §81-409(b).

d. Fees. The association may charge a fee for the certificate and information. Such fee cannot exceed \$200.00, except that if the association agrees to furnish a certificate and related information in a paper format, it may charge an additional fee not to exceed \$50.00. If the association fails to provide the requested certificate within the 10 day period, the association may not charge any fee for providing that certificate. 25 *Del. C.* §81-409(b).³

3. Failure of Owner to Supply. Prior to HB 475 (effective August 12, 2010) DUCIOA did not specify any particular ramifications for failing to supply the resale certification. An earlier version of DUCIOA provided that a purchaser of a unit in a condominium or cooperative (not planned communities) shall have 10 days from receipt of the declaration, bylaws, rules and the certificate to cancel the contract to purchase without penalty and receive a refund of the deposit. That penalty provision was deleted by the Amendments that were passed on July 2, 2009 and was found in former section 81-409(c). HB 475 (effective August 12, 2010) added a penalty that applies to ALL planned communities. This penalty provision was added to Section 81-409(b). The provision provides that unless the purchaser is given the resale certification before the execution of a

³ Given that an Association is required to supply the Certificate within 10 days of the request or forego the right to collect a fee, it appears that an Association cannot make payment of the fee a condition for supplying the Certificate.

contract for purchase of a unit, the purchaser, before conveyance, may cancel the contract within five (5) days after receiving the resale certification.

4. Undisclosed Unpaid Assessments. A purchaser is not liable for any unpaid assessments or fees greater than the amount set forth in the certificate prepared by the association. 25 *Del. C.* §81-409(c)

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III. PROTECTION OF PURCHASERS – PUBLIC OFFERING STATEMENT- CONSTRUCTION PROTECTION

A. Requirement of Public Offering Statement.

Section 81-402 of the Delaware Uniform Common Interest (“DUCIOA”) requires (as of September 30, 2009) a Public Offering Statement (“POS”) to be provided by developers of condominiums, cooperatives and other planned communities (and those who market them). The POS is a statement that discloses accurate statutorily required information to prospective purchasers.

B. Applicability/Exceptions.

The exceptions section governing the Resale Certificate applies also to when a POS is not required. To summarize, a developer is not required to provide a POS under the following property transfers:

1. Non-residential communities or units restricted to non-residential use.
2. Gifts of units or transfers by operation of law upon owner’s death.
3. Disposition by court order or government agency.
4. Disposition to a Dealer (e.g. person selling units for his/her/its own account).
5. Disposition that may be cancelled by purchaser without penalty “at any time and for any reason”.
6. Disposition pursuant to contract entered into before September 30, 2009.

Additionally, a POS need not be supplied with the marketing of units or interest in projects that are not subject to DUCIOA. The applicability section of the materials governing Resale Certificates also applies to POS. Thus, for new common

interest communities created after the effective date of September 30, 2009, a POS would not be required for projects involving 20 units or less (and not subject to development rights). A developer would also not be required to provide the POS for projects where the maintenance/condominium dues does not exceed \$500 per year as set forth in the declaration.⁴

C. Timing.

A POS is required where a developer is offering any interest in a unit governed by DUCIOA to the public. The POS must be prepared before any such offering occurs (§81-402(a)). The developer is required to deliver the POS (and all amendments) before conveyance of the unit, and no later than the date of any contract of sale (§81-408(a)). A purchaser, who is not given the POS before signing the contract, may cancel the contract 15 days after receiving the POS (§81-408(a)). Such cancellation is without penalty, and all payments made by purchaser before cancellation must be refunded (§81-408(b)).

D. Contents.

Sections 81-403 through 406 of DUCIOA dictate the main items of information that the POS must address. Sections 81-403 by itself contain nearly 20 items. If the unit is subject to “development rights”, Section 81-404 adds another 12 items to be disclosed on the POS. If the project involves a time-share, Section 81-405 adds another 4 items. If the project involves the conversion of an existing building to common interest ownership (e.g. converting an apartment building to residential condominiums), Section 81-406 adds even more items.

In general, the various areas of information required to be disclosed in the POS by the above noted Sections of DUCIOA include:

1. Contact and financial information about the developer;
2. Information regarding the funding of the project;
3. A description of the community including its location, type, kinds and numbers of buildings, units and amenities;

⁴ However, with any of the above noted type of community, the declaration may provide that the community is subject to DUCIOA and the POS requirements.

4. Construction timeline;
5. Unsatisfied mortgages and judgments, which may serve as liens on the project;
6. Restriction and other matters affecting title;
7. A narrative description of documents and governance and regulatory scheme for the community;
8. Financial projections and related matters including budget reserves, expenses and assessments;
9. Maintenance deposits required by purchaser at closing;
10. Any developer offered financing; and
11. Terms and limitations of any warranties.

For communities subject to development rights, several additional items of information must be disclosed in the POS informing the purchaser about the nature of such rights and the impact they may have on future development of the project.

E. Amendment.

The developer is required to promptly amend the POS to reflect any material change in the information required to be disclosed in the POS. However, after a purchaser has executed the purchase contract, the developer may not amend the POS without the approval of the purchaser if the amendment would materially affect the rights of such purchaser (§81-421). Approval by the purchaser is not required, however, for any amendment required by any governmental authority or public utility, or, if the amendment is made as a result of actions beyond the control of the developer. (§81-421).

F. Responsibility/Liability.

Many development projects are commenced by a developer who then transfers the units to another developer that sells the units. DUCIOA allows developers to transfer responsibility for preparing the POS, or portions of it, to successor developers who will be offering the units to the public for sale. In such event, DUCIOA requires the transferor developer to provide all information necessary to enable the transferee developer to accurately disclose the information required for the POS. “The person who prepared” all or any portion of the information in the POS is liable for any false or misleading

statement in the part prepared by such person. False or misleading information in the POS allows a purchaser to cancel the purchase contract. Additionally, the developer may be subject to “a claim for appropriate relief” which may include “attorneys’ fees” (§81-417).

G. Promotional Materials/Required Construction.

DUCIOA requires that any display or delivery of promotional materials, site plans or plats, which show or describe improvements be labeled as “MUST BE BUILT” or “NEED NOT BE BUILT”. If an improvement is not labeled “NEED NOT BE BUILT”, the developer must complete all improvements shown on the site plan or graphic representation of the project (even if it was not contained in the POS or otherwise part of promotional any promotional materials).

G. Express Warranties of Quality.

Under DUCIOA, expressed warranties, if relied upon by the purchaser, can be created by:

1. Written affirmations of fact or promises relating to uses and benefits of units and other improvements and facilities (restrictions to a certain use are regarded as expressed warranties that such use is allowed and permitted.
2. Models, plans and specifications or other physical characteristics.
3. Showing or describing the quality or extent of real estate in the community.

It is not necessary to create such expressed warranties by using the words “guaranty” and “warranty”. Also such expressed warranties of quality are in addition to other warranties that would otherwise be required (e.g. County homebuilder warranties).

H. Implied Warranties of Quality.

DUCIOA also imposes implied warranties of quality on existing units. Existing units are to be:

1. In as good condition as at the time of contracting (except for ordinary wear and tear);
2. Suitable for their ordinary uses;
3. Free from defective materials; and

4. Constructed in a workmanlike manner, in accordance with applicable laws, and according to sound engineering and construction standards.

Under DUCIOA, the implied warranties apply to the developer even if the construction was performed by an affiliate. The implied warranties under DUCIOA are also in addition to other warranties that otherwise be required. The implied warranties under DUCIOA cannot be modified unless modified by express agreement of the parties. A general disclaimer or waiver of such implied warranties is not effective as for any residential unit. Only specific waivers of identified defects or other non-compliance is effective.

I. Warranty Time Periods.

DUCIOA has provisions that set forth when certain warranties start and expire. DUCIOA also has provisions that allow for extension of certain warranty time periods that apply when the community is still under developer control or under other circumstances that may keep the purchaser from discovering a defect or breach of warranty.

J. Contract Protections.

DUCIOA also provides for protections for the purchaser by not allowing certain abusive contract provisions. DUCIOA does not allow provisions of the act to be varied or rights to be waived unless expressly permitted by the Act. DUCIOA does not permit the use of a power of attorney to circumvent the intended protections, rights and remedies of the act. Courts are given broad powers to enforce, or limit enforcement, of any contract or provision found to be unconscionable (including gross disparity between price and value readily available at the time) when made. DUCIOA further affirms the duty of good faith in the performance of the contract.

K. Lien Protection.

Under DUCIOA, upon the sale of the unit the developer is required to have all liens released that affect the unit and its interest in the common elements (unless expressly agreed to take subject to or to assume). (§81-411).

L. Escrow Protection.

Under DUCIOA, the developer is required to place in escrow with an attorney or licensed real estate broker any deposit made in connection with the purchase or reservation of a unit. (§81-410).

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IV. DECLARANT (“DEVELOPER”) GOVERNANCE

A. Common Expenses.

Under DUCIOA, units owned by the developer are subject to full assessment for common expenses upon the transfer of the first unit. DUCIOA provides formulas that determine how assessments apply to various kinds of units. Under DUCIOA, benefits that are applied disproportionately to some units should be billed according to the benefits rendered. DUCIOA prohibits a developer from drafting documents in a manner that is intended to benefit or protect the developer and the units it owns.

B. Reserves.

DUCIOA requires the developer to not only pay all common expenses prior to first conveyance of a unit, but also requires the developer to adopt an annual budget and commence funding required reserves for capital replacement, repair and maintenance as fully as if all of the condominium units were completely sold.

C. Insurance.

DUCIOA requires the association to have insurance in effect when the first unit is conveyed, with the association having the right to adjust losses.

D. Liability of Association Members.

Under DUCIOA, members appointed by the developer to the Executive Board of the association have the same fiduciary duties as a director of a for-profit corporation. Members elected by the unit purchasers have the same fiduciary duties as a director of a non-profit corporation.

E. Contracts with Third-Parties.

DUCIOA provides that contracts made by the association while under the control of the developer (i.e. management company agreements and maintenance company

agreements) can be terminated by the association after control is turned over to the unit purchasers.

F. Partial Transfer of Control.

DUCIOA requires, within 60 days after 25% of the units have been conveyed to purchasers, at least 25% of the executive board must be elected by the unit purchasers. Likewise, within 60 days after 50% of the units have been conveyed, at least one-third of the executive board must be elected by the unit purchasers. The members of the executive board appointed by the developer may not meet secretly and must involve the unit purchasers' representatives in making board decisions.

G. Complete Transfer of Control.

DUCIOA requires the developer to transfer complete control over the association to the unit purchasers upon the earlier of (i) 60 days after 75% of the units have been conveyed, or (ii) certain noted time periods have expired (such as 2 years after the last exercise of rights to add units or expand the project, or 2 years after the residential units have ceased being offered for sale).

H. Audit.

Prior to transferring control of the association to the unit purchasers, the developer is required at its own expense (not an association expense) to provide an audit from an independent certified accountant of all funds collected from unit purchasers and all expenditures of association funds that benefited the developer's units.

I. Transfer of Development Rights.

DUCIOA has numerous and detailed provisions governing the transfer of developer rights and how liabilities may or may not be transferred or imposed on the successor developer where the transfer is voluntary or by reason of foreclosure or bankruptcy of the developer.

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V. DECLARANT (“DEVELOPER”) DEVELOPMENT RIGHTS

Under DUCIOA, the rights of the developer to develop the project (“development rights”) is formally recognized and defined.

A. Sales Models and Signs.

DUCIOA recognizes the developer’s right to use units as models and place sales signs for the project provided such rights are expressly stated and defined.

B. Certification of Completion.

DUCIOA provides that condominium documents creating the units in a building may not be recorded until the structural and mechanical systems in that building have been certified to be substantially completed by an independent registered architect or engineer. This provision perhaps was designed to protect purchasers from buying a unit where construction of the necessary systems was not completed.

C. Expansion and Contraction.

DUCIOA requires that any areas of the project that are subject to development rights (e.g. expansion or contraction) must be defined and shown on plans and drawings. Likewise, time limitations on such rights must be expressly stated.

D. Future Construction.

DUCIOA requires any improvements shown on plans or drawings to be labeled as either “MUST BE BUILT” or “NEED NOT BE BUILT”. The developer is responsible to build any improvements that are not labeled “NEED NOT BE BUILT”. Additionally, plans and drawings must also show or project approximate location, dimension and number of future units and their limited common elements. DUCIOA further requires the developer to state the general type and appearance of future construction so its compatibility with existing buildings can be determined.

E. Master Associations and Consolidation.

DUCIOA allows a developer to create master associations that cover more than one project and allows the consolidation of projections (subject to various constraints).

UNDERSTANDING THE DELWARE COMMON INTEREST OWNERSHIP ACT

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VI. CREATION, AMENDMENT AND TERMINATION

While the scope of this seminar does not encompass an in depth discussion regarding the creation, amendment and termination of common interest communities, such topics bear some level of discussion

A. Creation.

Under DUCIOA it is relatively easy to create a common interest community (be it a condominium, cooperative or planned community). Essentially a common interest community is created through the recording of a declaration with the land records (i.e. the recorder of deeds (§81-201). For cooperatives, there is an additional requirement of conveying the real property to the association. For condominiums, units that are within a building require certification that the structural and mechanical components have been substantially complete before the condominium declaration can be recorded (§81-206(b).

1. Declaration. DUCIOA outlines in some detail what must be included in the declaration create a common interest community. Reference should be made to Section 81-205 for such items. The declaration provisions of DUCIOA are in the nature of default provisions. In other word, if you declaration fails to address an item, DUCIOA has a default provision that would address the issue.

2. Bylaws. The unit owners association must be organized before the date the first unit is conveyed in the common interest community. The organization process includes the adoption of bylaws. Section 81-301 dictates what the bylaws must contain. Again, this aspect of DUCIOA has default provisions that would apply in the event the bylaws fail to address an issue.

B. Amendment.

Section 81-217 of DUCIOA sets forth in detail the process by which the declaration can be amended by either the association, declarant, secured lenders or the executive board.

C. Termination of Community.

Under DUCIOA, a common interest community can be terminated only by agreement of the unit owners holding at least 80% of the votes in the association. DUCIOA contains provisions that allow for the termination of the common interest community in the event of casualty where the units have been destroyed or rendered uninhabitable. In addition, the taking of all units in the common interest community by eminent domain can terminate the community without any consent or vote of the unit owners.

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VII. GOVERNANCE BY UNIT OWNERS

Once the developer has transferred control of the association to the unit owners, DUCIOA has extensive provisions dealing with the governance of the association by the unit owners.

A. Organization of Association.

An association for a condominium, cooperative or other planned community may be organized as a profit or nonprofit unincorporated association, corporation, trust, limited liability company or other lawful form of legal entity. (§81-301).

B. DUCIOA Governance Provisions That Apply to Preexisting Communities.

Except as provided in Section 81-120 (exception for small preexisting cooperatives and planned communities of 20 units or less or where the annual common expense dues do not exceed \$500) and with the exception of continuing care communities under Section 81-124, the following governance provisions apply to all other common interest communities approved or in existence prior to September 30, 2009.

1. Separate Title and Tax Parcels (§81-105).
2. Applicability of Local Laws (§81-106).
3. Eminent Domain (§81-107).
4. Rules of Construction of Government Documents (§81-203).
5. Description of Units (§81-204).
6. Merger or Consolidation of Common Interest Communities (§81-221).
7. Organization of the Association (§81-301).
8. (a) Powers of the Association (§81-302(a) (1) through (6) and (11) through (17)).

- (b) Judgment of the Executive Board in Taking Legal Action (§81-302(f)-(g)).
- 9. Executive Board and Officers (§81-303).
- 10. Upkeep of the Community (§81-307(a)).
- 11. Quorum of a Meeting of the Association (§81-309(a)).
- 12. Tort and Contract Liability (§81-311).
- 13. Assessment for Common Expenses (§81-315).
- 14. Liens for Assessments (§81-316).
- 15. Association Records (§81-318).
- 16. Litigation Involving Declarant (§81-321).
- 17. Notices (§81-322).
- 18. Removal of Members of Executive Board (§81-323).
- 19. Adoption of Budget (§81-324).
- 20. Resale Certification/Disclosure on Resale of Units (§81-409).
- 21. Remedies and Attorneys' Fees (§81-417).

C. Repair and Replacement Reserve.

1. Applicability. All residential condominiums existing or approved before September 30, 2009 have the obligation to assess as part of associations' dues a line item for repair and replacement reserve. There is no exception for small preexisting condominiums (e.g. 20 units or less or where annual association dues does not exceed \$500). For residential condominiums created after September 30, 2009, there is an exception for such small condominiums (e.g. 20 units or less-no dues limit).

Small preexisting cooperatives (20 units or less or where annual dues does not exceed \$500) are not required to comply with the repair and replacement reserve requirements of DUCIOA. Likewise, small cooperatives created after September 30, 2009 (20 units or less-no dues limit) do not need to comply with the repair and replacement reserve requirements of DUCIOA. Otherwise, all cooperatives must comply with the repair and replacement reserve requirements of DUCIOA.

Planned communities are not required to maintain a repair and replacement reserve.

2. Reserve Study. The amount to be placed in the repair and replacement reserve is determined by a reserve study (§81-315(a)(2) and UPA§2211). The reserve study is an analysis by one or more independent engineering, architectural, or construction contractor or other qualified person, performed or updated within the last 5 years, of the remaining useful life and estimated cost to replace each separate system and component of the common elements. (§81-103(40) and UPA§2202(17)). The purpose of the reserve study is to enable the Executive Board of the condominium or cooperative to determine the amount necessary to fully fund the repair and replacement reserve. (§81-103(40) and UPA§2202(17)). A fully funded repair and replacement reserve is one where projecting out 20 years, without the necessity to borrow funds, the annual budget reserve will meet the projected costs for repair and replacement of common elements. (§81-103(23) and UPA§2202(19)).

Section 2245 of the Unit Property Act provides for phase in provisions for condominiums still governed by that act. HB 475 (effective August 12, 2010) extended the number of years for a condominium that existed before DUCIOA to have a fully funded Repair and Replacement Reserve (the 8 year phase-in use to be only 3 years; the 6 year phase-in use to be only 2; and the 5 year phase-in use to be only 1 year).⁵

Regardless of the reserve study requirements, DUCIOA (and UPA)) sets minimum requirements for funding the repair and replacement reserve, based on a

⁵ “§ 2245. Compliance phase-in [Effective Sept. 30, 2009-Amendment effective August 12, 2010]

Anything in this title to the contrary notwithstanding, if the amount held by a condominium in its repair and replacement reserve as of October 1, 2009, in lieu thereof,

(1) Constitutes less than 25% of the level of funding required for a fully funded reserve as defined in § 2202(19) of this title, then the council shall have 8 years to make the repair and replacement reserve fully funded (as defined in § 2202(19) of this title);

(2) Constitutes 25% or more, but less than 50%, of the level defined as fully funded, then the council shall have 6 years to make the repair and replacement reserve fully funded (as defined in § 2202(19) of this title); or

(3) Constitutes 50% or more, but less than 70%, of the level defined as fully funded, then the council shall have 5 years to make the repair and replacement reserve fully funded (as defined in § 2202(19) of this title).”

percentage of the budget and the number of the below noted common element components of the community. (§81-315(a)(2) and UPA§2244).

- (i) 1 or more hallways.
- (ii) 1 or more stairwells.
- (iii) 1 or more management or administrative office.
- (iv) 1 or more roofs.
- (v) 1 or more windows.
- (vi) 1 or more exterior walls.
- (vii) 1 or more elevators.
- (ix) 1 or more HVAC systems.
- (x) 1 or more swimming pools.
- (xi) 1 or more club houses.
- (xii) 1 or more parking garages.
- (xiii) 1 or more docks.

Four or more of the above components requires a minimum of 15% of the budget. Three or more of the above components requires a minimum of 10% of the budget, Two or fewer would require a minimum of 5% of the budget.

3. Effects of noncompliance. DUCIOA does not note any specific penalties for not obtaining a reserve study and not maintaining appropriate levels of money in the repair and replacement reserve. Potentially the condominium council or executive board could be sued by the unit owners to force compliance. In addition, when units are marketed for resale, the failure to perform a reserve study and maintain adequate levels in the repair and replacement reserve would be disclosed.

4. Distinct Account. Money set-aside for repair and replacement reserve must be kept a separate and distinct account. It is not to be used for other budget short falls or other expenditures addressed by a contingency reserve.

D. Budget Adoption.

Sections 81-302(a)(2) requires the association to adopt and amend budgets pursuant to the steps outlined in Section 81-324. Section 81-324 sets forth a mandatory step-by-step process of notices and meetings for budget approval.

E. Association Meeting Quorum.

The association meeting quorum requirements are set forth in Section 81-309. Generally 20 percent.

F. Liens for Assessments.

Section 81-316 provides for a six-month lien preference for unpaid assessments.

G. Association Records.

Section 81-318 lists the records that the association must maintain. Section 81-318 (c) lists the records that may be withheld from inspection and copying. Section 81-318(e) provides for association's right to charge for reimbursement of the actual cost of copying.

H. Audit.

Section 81-306(a)(6) requires condominiums and cooperatives with more than 50 units to have their financial records audited by an independent certified public accountant at least every three (3) years. For each intervening year a review of such financial records is required to be performed by an independent accountant (which need not be a CPA). A condominium or cooperative of fewer than 100 units may by a duly adopted resolution elect to have the audit requirement satisfied by a review in lieu of an audit. Again such review would need to be performed by an independent accountant (which need not be a CPA). Section 81-306 is not one of the 21 Sections of DUCIOA deemed to apply to preexisting common interest communities under Section 81-119. Likewise, the Unit Property Act does not contain an audit provision.

**RESALE CERTIFICATE
OF
_____ [CONDOMINIUM] [HOMEOWNERS] ASSOCIATION**

Name of Owner(s): _____

Unit Address or Tax Parcel No.: _____
(the "Unit")

Name of Association: _____ (the "Association")

Section 81-409 of Title 25 of the Delaware Code requires that the Association provide the owner of the Unit with a certificate necessary to enable the Owner to comply with the requirements of Section 81-409 for the sale of the Unit.

1. Attached to this Certificate (if checked) is a copy of each of the following documents:
 - a. Recorded declaration(s) creating common interest community and all amendments
 - b. Bylaws for conduct of the Association
 - c. Rules of the Association and all amendments
 - d. Current operating budget of the Association
 - e. The Association's most recent regularly prepared balance sheet and income statement
 - f. Any accountant's report on any Association balance sheet and income and expense statement, if unaudited
 - g. Copies of the minutes for the Association's executive board or council meetings for the preceding six months or, if more, for the most recent meeting
 - h. If Unit is in a condominium or cooperative and if otherwise applicable, the most recent report of auditors on the Association's balance sheet and income and expense statement
 - i. If Unit is in a condominium or cooperative, the most recent reserve study
 - j. If Unit is in a cooperative, a statement by the Association's accountant, if such statement was prepared, as to the deductibility for federal income tax purposes by the unit owner of real estate taxes and interest paid by the Association

2. The Association is to state the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the Unit now held by the Association:

- Association has no such rights
 - Association has such rights, the effect of which is described as follows:
-

3. The current common expense assessment is \$_____*

- per year
- per quarter
- per month

*Please contact the Association for the status of the assessments at the time of settlement.

4. The amount of any unpaid common expense or special assessment currently due and payable from the selling Unit owner to the Association is \$_____

5. Any other association fees payable by the owner of the Unit:

- None
- \$_____ for _____.

6. Capital expenditures approved by the Association for the current and succeeding fiscal years, including the amount of such capital expenditures to be taken from the repair and replacement reserve:

None

Current Fiscal Year: \$_____ total capital expenditures, of which \$_____ is to be taken from the repair and replacement reserve.

Succeeding Fiscal Year: \$_____ total capital expenditures, of which (if determined) \$_____ is to be taken from the repair and replacement reserve.

7. Unsatisfied judgments against the Association:

- None
- The following judgments have been entered against the Association and have not been satisfied:

<u>Judgment Holder</u> <u>Amount</u>	<u>Court</u>	<u>Case No.</u>	<u>Date Entered</u>

8. The status of any pending suits in which the Association is a defendant:

None

Suits and status: _____

9. To obtain a certificate of insurance coverage provided for the benefit of unit owners, contact

10. Any pending sale or encumbrance of common elements or facilities by the Association:

None

Pending sale or encumbrance: _____

11. For condominium or cooperative communities, the following additional information must be provided:

a. The current number of unit owners delinquent in the payment of common expense assessments is _____ and the aggregate amount of such delinquency is \$_____.

b. The current balance in the repair and replacement reserve is \$_____.

c. The Association's executive board

has

has not

been given or received written notice that any existing uses, occupancies, alterations, or improvements in or to the unit or to the limited common elements assigned thereto violate the declaration.

d. The Association's executive board

has

has not

received written notice from a government agency of any violation of environmental, health, or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the common interest community which has not been cured.

e. The common interest community

is established in a fee simple interest (not in a leased interest)

is established in a leasehold interest, and the remaining term of such leasehold estate and the provisions governing any extension or renewal of the lease thereof are:

12. The amount of any fees payable by the **purchaser** of the Unit to the Association at settlement is \$_____

The Association makes this Certificate as of the date written below.

Name of Association:

By: _____

(print name and title)

Date: _____

ACKNOWLEDGED RECEIPT THIS ____ Day of _____, 20____.

By: _____

Puchaser

By: _____

Puchaser