Common Interest Ownership in Pennsylvania: An Examination of Statutory Reforms and Implications for Practitioners

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INTRODUCTION

Home ownership is the essence of the American dream.\(^1\) For most families, a home represents the largest single financial investment they will ever make.\(^2\) Although owning a single family detached house remains the quintessential embodiment of this ideal, the communities in which we have chosen to purchase our homes have undergone a dramatic transformation since World War Two. A significant number of homeowners now purchase their homes in communities with some type of common interest ownership.\(^3\) Common interest ownership can assume various forms — all with different legal and practical implications.\(^4\)

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1. As noted by the American Law Institute, "[an] important factor in determining rules appropriate for residential common interest communities is the importance accorded the home in American society. The home is not only a haven of personal autonomy, liberty, and security, but, for many, it is also a major financial investment." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, introductory note (Tentative Draft No. 7 1998).

2. The proportion of income used to pay the mortgage has risen steadily since 1976 when the mortgage payment as a percent of income stood at 24%. By 1996 this figure had risen to 32.6%. STATISTICAL ABSTRACT OF THE UNITED STATES 730 (1997). Home prices have also increased dramatically. In 1980 the median sales price of one-family houses was $64,600. By 1996 that same home cost $153,900. Id. at 719. This increase in cost, however, has not negatively impacted the desire to own a home. Home ownership rates have risen from 63.9% of the population in 1985 to 65.4% in 1996. Id. at 725. The single family detached house continues to increase in popularity representing 59.9% of all units in 1991 and 60.5% in 1995. Id. at 722.

3. The American Law Institute defines "common interest community" as "a real estate development in which individually owned units . . . are burdened by a servitude . . . that cannot be avoided by nonuse or withdrawal . . . to pay for the use of, . . . or maintenance of, . . . property held . . . by the owners of the individually owned property . . . ." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.1(1) (Tentative Draft No. 7 1998). The National Conference of Commissioners on Uniform State Laws defines common interest community as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration." UNIFORM COMMON INTEREST OWNERSHIP ACT § 1-103 (7), 7 U.L.A. 479 (1994).

4. The three most significant forms of common interest ownership are the cooperative, the condominium, and the planned community. Although there are subtle variations of these forms, any deviation from these three basic models is slight and principles discussed in this comment can be applied by analogy to other types of common interest ownership.
This comment begins with an overview of the three most significant forms of common interest ownership, namely, the condominium, the cooperative, and the planned community. It then examines the planned community in greater detail, including a look at planned communities from a zoning perspective and their treatment under the common law. A look at the move toward legislation of planned communities follows, focusing particularly on the efforts of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Because Pennsylvania is the only state that has adopted the NCCUSL's Uniform Planned Community Act ("UPCA"), this comment provides an overview of Pennsylvania's Uniform Planned Community Act ("PUPCA"). The comment concludes by suggesting future legislative action in this area and pointing out some areas of concern for the practitioner in the emerging area of community association law.

5. A recent survey conducted by the Research Foundation of the Community Associations Institute received 1,768 responses. Of these 1,768 responses, 59% were from condominium communities, 38% from planned communities, 1% from cooperatives, and the remaining 2% claimed to be "other types." DOREEN HEISLER, PH.D. & WARREN KLEIN, PH.D., INSIDE LOOK AT COMMUNITY ASSOCIATION HOMEOWNERSHIP — FACTS PERCEPTIONS (1996). Although this data does not indicate the absolute proportion of various forms of ownership, it should give the reader some perspective of the relative percentage of the various forms of common interest ownership.


7. The National Conference of Commissioners on Uniform State Laws drafts statutes with the goal of achieving greater uniformity of law among the various states. Of the numerous acts drafted and proposed, the Uniform Commercial Code, having been adopted in some form in every jurisdiction, is probably the most notable. See generally, WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1991).


9. Pennsylvania was the first, and as of this writing, only jurisdiction to adopt the Uniform Planned Communities Act. The PUPCA can be found at 68 PA. CONS. STAT. §§ 5101-5509 (1996).
Condominiums

The condominium is a particularly popular form of common interest ownership. Typically, the owner holds a fee simple interest in his or her individual unit and an undivided interest in common property as tenant in common with other unit owners. Common property typically includes stairwells, hallways, parking lots, designated open spaces, recreation areas, and similar areas. Although frequently associated with high-rise apartment buildings and resort communities, the condominium ownership concept can be applied to a variety of residential and commercial developments. It is the form of ownership of common areas that differentiates the condominium from the cooperative and the planned community.

Condominium developments, unlike the other forms of common interest ownership, are largely creatures of statutory law. In fact, all fifty states and most territories have adopted some form of a condominium enabling statute. Commentators generally divide condominium enabling statutes into first and second generation laws. The principal difference between first and second generation

10. The NCCUSL defines a condominium as “a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions.” UNIFORM COMMON INTEREST OWNERSHIP ACT § 1-103 (8), 7 U.L.A. 479-80 (1994).

11. Of the various forms of common interest ownership, the condominium appears to be the most popular. See HEISLER & KLEIN, supra note 5, at 5-6.

12. A fee simple interest is “[a]n estate limited absolutely to a person and his or her heirs and assigns forever without limitation or condition . . . .” BLACK'S LAW DICTIONARY 615 (6th ed. 1990).

13. See ROGER A. CUNNINGHAM et al., THE LAW OF PROPERTY §2.2, at 34 (2nd ed. 1993). A tenancy in common is “[a] form of ownership whereby each tenant (i.e., owner) holds an undivided interest in property . . . . Unlike a joint tenancy or a tenancy by the entirety, the interest of a tenant in common does not terminate upon his or her prior death.” BLACK'S LAW DICTIONARY 1465 (6th ed. 1990). Note that the undivided interest in common property under the condominium concept differs somewhat from a true tenancy in common because that interest cannot be separately alienated and is an integral part of the ownership of the individual unit.

14. The NCCUSL defines a condominium as “a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions.” UNIFORM COMMON INTEREST OWNERSHIP ACT § 1-103 (8), 7 U.L.A. 480 (1994).


16. See HYATT, supra note 15, § 1.05(b)(2), at 15.

17. See, e.g., HYATT, supra note 15, § 1.05(b)(2), at 15; NADELSON, supra note 15, § 1.3.2,
statutes is the degree of detail and breadth. First generation statutes generally relied on the Federal Housing Administration's ("FHA") Model Statute for the Creation of Apartment Ownership and focus primarily on formation of the condominium development. Modern second-generation statutes are more detailed and address, not only formation, but also operation of the development. This second type of statute is often adopted and enacted with little or no modification from the NCCUSL's Uniform Condominium Act ("UCA"). Pennsylvania is one of twelve jurisdictions to have adopted the UCA.

The condominium concept has an interesting history. The first modern American condominium statute was the Puerto Rican Horizontal Property Act which served as the model for most early condominium enabling statutes. However, developers were slow to embrace the concept and not until the 1960s did they begin to reject the cooperative paradigm and accept the condominium model for owner occupied multiple unit housing. The turning point for condominiums came in 1960 with the amendment of the National Housing Act which allowed the FHA to insure mortgages on condominium units. State legislatures reacted quickly to pass condominium enabling statutes that allowed developers to take advantage of this type of shared facilities arrangement. However, many of these first generation statutes proved to be inadequate highlighting the need for more comprehensive legislation.

In 1977, the NCCUSL unveiled the UCA, which purported to address many of the problems inherent in earlier condominium legislation. The UCA has enjoyed a fair amount of success; it has been adopted in twelve jurisdictions as of this writing.

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19. Cunningham, et al., supra note 13, § 2.2, at 34.
20. Id.
22. Nadelson, supra note 15, § 1.3.2.3, at 29.
23. Id. at 29-32.
24. Id. at 29-30.
25. Id. at 30-31.
26. Id.
27. Nadelson, supra note 15, § 1.3.2.3, at 31-2. Early statutes tended to focus primarily on formation of the development and contained little detail regarding continuing operations. This resulted in frequent litigation that was, in large part, responsible for the mobilization of the NCCUSL in this area. Id. See also Hyatt, supra note 15, §1.05(b)(2), at 15.
29. The following states have adopted the UCA: Alabama; Arizona; Maine; Minnesota;
NCCUSL continued to remain active in the area of condominium legislation reform by promulgating the first Uniform Common Interest Ownership Act ("UCIOA") in 1982.\(^{30}\) The NCCUSL substantially amended the 1982 version of the act in 1994.\(^{31}\) Both UCIOAs have enjoyed some measure of success; together they have been adopted in seven jurisdictions.\(^{32}\) It appears therefore, that after a slow start, efforts by the NCCUSL to achieve some uniformity in the area of condominium law may be gaining momentum.

**Cooperatives\(^{33}\)**

Before the condominium emerged as the vehicle of choice for owner-occupied multiple unit housing, the preferred shared facilities model in many jurisdictions was the cooperative.\(^{34}\) This model went unrecognized, however, in many other jurisdictions.\(^{35}\) Because of the lack of uniform acceptance, enabling statutes were nonexistent, so the body of law pertaining to corporations and the common law generally controlled the formation and operation of the cooperative.\(^{36}\) Today, the cooperative form of ownership is quite rare in most jurisdictions, with the notable exception of New York.\(^{37}\)

As noted, the essential feature that differentiates the cooperative from the condominium and the planned community is the ownership of common areas.\(^{38}\) The cooperative association "owns" all of the property and the occupants own shares in the

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\(^{30}\) The Uniform Common Interest Ownership Act is intended to unify the various model acts proposed in this area by the NCCUSL. The UCA was approved by the NCCUSL in 1977, the UPCA in 1980, and the Model Real Estate Cooperative Act ("MRECA") in 1981. See Uniform Common Interest Ownership Act prefatory note, 7 Pt. II U.L.A. 1 (amended 1994), at 7.


\(^{32}\) The following jurisdictions have adopted the 1982 act: Alaska; Colorado; Minnesota; Nevada; and West Virginia. Two states, Connecticut and Vermont, have adopted the 1994 act.

\(^{33}\) The NCCUSL defines cooperative as "a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit." Uniform Common Interest Ownership Act § 1-103 (10), 7 U.L.A. 480 (1994).


\(^{35}\) 7 Pt. II U.L.A. 1, at 6-7.

\(^{36}\) 7 Pt. II U.L.A. 1, at 6-7

\(^{37}\) See 4 Thompson on Real Property § 36.05(b) (Thomas, ed. 1994), at 194.

\(^{38}\) See generally 8 Powell on Real Property § 54A.01(3) (1999), at 14.
This ownership interest entitles each occupant to exclusive use and possession of his or her individual unit and shared access to common facilities. Although the cooperative model is unique, it appears to hold no advantage over the much more common and versatile condominium or planned community form of ownership.

Although cooperatives have not proven to be a particularly important form of common interest ownership in most jurisdictions, states have, in recent years, passed legislation regarding cooperatives. The NCCUSL has also been active in drafting proposed legislation pertaining to cooperatives. In 1981, the NCCUSL approved the Model Real Estate Cooperative Act ("MRECA"). Like the NCCUSL's other efforts in this area, the MRECA has not enjoyed much success; however, this may be a function of the relative unimportance of the cooperative as a form of common interest ownership and not to any failure on the part of the NCCUSL.

Pennsylvania is one of the states that have passed legislation affecting cooperatives. On December 18, 1992, Pennsylvania enacted its own Real Estate Cooperative Act. Although Pennsylvania does not claim to have adopted the NCCUSL's MRECA and the NCCUSL does not indicate that it has done so, the Pennsylvania statute generally tracks the structure and language of the model act. One notable difference between the MRECA and Pennsylvania's Real Estate Cooperative Act is that Pennsylvania did not choose to borrow from the optional Article 5 of the MRECA, which pertains to administration, and registration of cooperatives.

**Planned Communities**

The planned community with homeowners' association is second only to the condominium in popularity as a model for common

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39. Id.
40. Id.
42. To date, only one state, Virginia, has adopted the MRECA having done so in 1982, the year after its approval by the NCCUSL.
45. Pennsylvania defines a planned community as:
Real estate with respect to which a person, by virtue of ownership of an interest in any portion of the real estate, is or may become obligated by covenant, easement or
interest ownership. In many areas of the country, the planned community with a homeowners' association is quickly becoming synonymous with suburban residential development. Unfortunately, courts, commentators, the American Law Institute ("ALI"), and even the NCCUSL and have been inconsistent in the use of terms to describe this model. However, it is not terminology but the method of common interest ownership that distinguishes the planned community from the condominium and the cooperative.

Unlike the condominium form of ownership, owners of individual units in a planned community do not own an undivided interest in common areas. Also, unlike the cooperative, all of the real estate is not owned by an entity separate and apart from the individual unit owners. Instead, ownership of common areas is typically vested in an incorporated homeowners' association, and residents retain fee simple ownership in their individual units. It is this unique legal structure that gives rise to the growing popularity of the planned community.

**Importance of the Planned Community**

The importance of the planned community cannot be overstated. The Urban Land Institute ("ULI") is credited with first describing the prototypical planned community in its landmark publication, *The Homes Association Handbook*. The ULI describes how the

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


46. See Heisler & Klein, supra note 5, at 5-6.

47. Homeowners' Associations are often referred to as Property Owners' Associations, Community Associations, Landowners' Associations, and Owners' Associations. Hyatt, supra note 15, § 1.05(c), at 19-20. The Planned Community itself is often referred to as a Planned Unit Development ("PUD") which is a term of art in zoning law and has a particular meaning in that context. Id.

48. See Powell, supra note 38, § 54A.01(6), at 17.

basic model of the planned community evolved, tracing its origin to early seventeenth-century England. Samuel Ruggles introduced the concept to the United States in 1831, when he developed Gramercy Park in Manhattan for which he used a trust arrangement whereby legal title to the park was vested in a trustee for the benefit of the surrounding owners. At the same time, the property owners of Louisburg Square in Boston drafted and recorded a land agreement to provide for maintenance of the park area in the center of the Square, thus becoming the first homeowners' association in the United States.

The first modern example of the typical suburban planned community to use covenants running with the land to enforce contractual arrangements between homeowners was Roland Park in Baltimore, which Edward H. Bouton developed in 1891. Another important development came with the development of Kensington in Great Neck, Long Island in 1909. This community helped establish the concept of automatic membership in a homeowners' association and concomitant assessments for maintenance of common areas, the obligation for which ran with the land. Kensington became the modern archetype of the planned community.

The planned community concept has proven exceptionally popular for many reasons. Homeowners overwhelmingly endorse the concept of shared ownership and association management of

50. Note that the ULI does not use the term "planned community." This term has only gained widespread acceptance and usage recently and has now become the preferred method of referring to the type common ownership arrangement discussed herein.

51. The ULI states "[the planned community] originated ... when the Earl of Leicester built his London townhouse and laid out Leicester Square in front of it. By 1700 the Square was surrounded by buildings and, by 1743, the property owners had employed a legal device to assure the exclusive use and maintenance of this park." HOMES ASSOCIATION HANDBOOK, at 39 (Italics in original).

52. Id. This is the first and oldest example of this form of ownership in the United States and is still in existence today. Id. Title to the park is vested in a trustee for the benefit of 66 surrounding plots. Id.

53. Id. Other early examples of this type of arrangement include Ocean Grove (New Jersey); Squirrel Island (Maine); and, Delano Park (Maine). Id.

54. A covenant running with the land is one "which goes with the land, as being annexed to the estate, and which cannot be separated from the land, and transferred without it." BLACK'S LAW DICTIONARY 365 (6th ed. 1990).

55. HOMES ASSOCIATION HANDBOOK, at 39. The use of covenants running with the land secured permanence in contractual arrangements and discounted such variables as changes in cultural or religious ideals. Id.

56. Id.

57. Id.
common areas. Volunteer members who serve on boards of directors of homeowners' and condominium associations also express satisfaction with the arrangement. One of the reasons for the success of the planned community concept may be the feeling of community or belonging that this type of arrangement engenders. Although these concepts may be somewhat nebulous and certainly have different degrees of importance and meaning to different individuals, there is, nevertheless, empirical support for this proposition.

This is not to suggest, however, that shared ownership coupled with community association management is an edenic solution. Such problems as apathy, misunderstanding or deliberate disregard of covenants or community rules, failure to pay association fees, and interpersonal conflict among homeowners are all problems that associations face. Notwithstanding these inherent shortcomings, the planned community managed by a homeowners' association continues to enjoy an unprecedented level of popularity and growth. The innate flexibility of this arrangement may have contributed to its growing importance. Developers, home purchasers, city planners, and the zoning and land use legal community have long sought solutions that provide a greater degree of flexibility.

58. A recent survey conducted by the Research Foundation of the Community Associations Institute indicated that homeowners were satisfied with community association home ownership (common interest ownership coupled with a condominium association or homeowners' association). When asked the question whether “[h]omeowners think that community association homeownership [sic] is a satisfactory housing choice.” Thirty percent agreed completely, fifty-two percent mostly agreed, and seven percent slightly agreed. See Heisler & Klein, supra note 5, at 43.

59. Both the condominium model and the planned community model of common interest ownership typically rely on residents voluntarily serving on a board of directors. In smaller communities, this board of directors assumes management functions, while in larger communities the board of directors may employ a professional management company.

60. The Community Associations Institute asked board members whether “[s]erving on an association board of directors has been a good experience.” Thirty-five of the respondents indicated that they completely agreed, forty-eight percent mostly agreed, and seven percent slightly agreed. See Heisler & Klein, supra note 5, at 44.

61. Id. When asked “[h]ow would you describe the level of community feeling in your development?” fifty-eight percent of residents indicated that their community was “friendly,” and eight percent believed their community was “neighborly.” See id. at 46.

62. Id. Eighty percent of residents indicated that apathy or lack of interest was a problem, sixty-nine percent indicated that not understanding rules was a problem, thirty-four percent indicated that fiduciary irresponsibility was a problem, and thirty-two percent indicated that interpersonal conflict was a problem. Id. at 48.
Planned Communities — A Zoning Perspective

Lack of a consist vocabulary and the occasional misuse of terms by commentators and courts have led to confusion between the zoning concept of the planned unit development ("PUD") and the common interest ownership concept of the planned community. The PUD contemplates an independent community within a particular zone that allows the developer to vary overall density; the proportion of multiple unit dwellings to single unit structures; and the proportion of industrial, commercial, and residential units within fixed ratios established in the zoning ordinance. Thus, the zoning concept of the PUD is much broader than is the common interest ownership notion of the planned community. This is not to suggest, however, that the planned community and the PUD have no connection.

All of the common interest ownership models have a place in zoning law. For example, a zoning ordinance that provides for the development of a PUD may allow a ratio of multiple unit dwellings to single unit dwellings to vary between thirty percent multiple unit dwellings to seventy percent single unit dwellings and fifty percent multiple unit dwellings to fifty percent single unit dwellings provided that the developer does not allow construction on thirty percent of the total land area of the PUD. The developer must then decide what type of common interest ownership scheme will optimize the marketability of the development as a whole. He or she may, for example, elect to develop twenty percent of the total project acreage as multiple unit garden apartment buildings and twenty percent as high-rise apartment buildings, using the condominium model for ownership of common areas for both. He or she may then develop the remaining sixty percent of the total acreage as a mix of single family homes and townhouses using the

63. See Hyatt, supra note 15, § 1.05(c), at 19.
64. A PUD is defined as "a device which has as its goal a self-contained mini-community, built within a zoning district, under density and use rules controlling the relation of private dwellings to open space, of homes to commercial establishments, and of high income dwellings to low and moderate income housing." Black's Law Dictionary 1233 (6th ed. 1990).
65. This requirement to maintain a certain percentage of potentially usable land in an undeveloped state is becoming more common as urban planners attempt to provide residents with land that can be enjoyed in its natural condition. This often obviates the need for municipalities to plan and fund parks and allows residents to decide what level of amenities (such as picnic areas and ball fields) they would like to have.
66. A garden apartment is a "ground floor apartment whose rental unit includes the use of a garden." Webster's Third New International Dictionary 935 (1986).
planned community model for ownership of the common areas. In this way the flexibility of common interest ownership options has helped make the zoning concept of the PUD more attractive. This market-driven demand for flexibility has helped entice the NCCUSL and state legislatures to revisit the relationship between planned communities and the common law.

**Planned Communities and the Common Law**

Although the condominium model of common interest ownership is largely a product of statutory law, until recently, it was the common law that gave recognition to the planned community and controlled its operation and function. Because of this dichotomy, most states enjoyed a fairly well developed body of law concerning condominiums whereas the volume and detail of law pertaining to the planned community varied dramatically among jurisdictions.

Because Pennsylvania courts were not called upon to address issues pertaining to planned communities in any volume, this comment focuses primarily on the assessment of the common law provided by the ALI in its *Restatement of the Law of Property (Servitudes)*.

Under the common law, the developer created a common interest community by filing a declaration. Once the developer established the common interest community, he or she typically provided for an association to manage the common property, however, if the declaration failed to establish the association, a majority of the lot or unit owners, the courts, or the local government had the ability to form an association to manage such common property. In addition to specific powers, the common law vested the common interest community with all powers reasonably

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68. The ALI defines declaration as "the recorded document or documents containing the servitudes that create and govern the common interest community." *Restatement (Third) of the Law of Property: Servitudes* § 6.2(5) (Tentative Draft No. 7, 1998). A servitude is "[a] charge or burden resting upon one estate for the benefit or advantage of another." *Black's Law Dictionary* 1370 (6th ed. 1990). Most declarations are called condominium declarations if the common interest community uses the condominium model or declaration of covenants, conditions, and restrictions ("CC&Rs") if the common interest model is the planned community.


70. § 6.3(2).

71. § 6.3(3).
necessary to carry out the management and enforcement of the
servitude framework established by the declaration.\textsuperscript{72} Specific
powers available to the association included the power to levy
assessments, charge fees, and borrow money;\textsuperscript{73} manage, acquire,
and improve common property;\textsuperscript{74} make rules and regulations for
protection of lot or unit owners;\textsuperscript{75} and to enforce these provisions
through the courts or via the imposition of fines, penalties, late
fees, and withdrawal of privileges.\textsuperscript{76} The board did not, however,
have the power to impose architectural restrictions either on the
home itself or on landscaping.\textsuperscript{77} In addition to the foregoing
operational powers, the association had the ability to make certain
amendments to the declaration.\textsuperscript{78}

Courts also addressed procedural issues pertaining to common
interest ownership. The association had standing to sue in its own
name or on behalf of unit or lot owners.\textsuperscript{79} Under the common law,
courts also had the power to excuse compliance with certain
provisions of the declaration, articles of incorporation, and
association by-laws in the event that these provisions impeded the
association’s ability to effectively manage property or enforce the
equitable servitudes contemplated in the declaration.\textsuperscript{80} Thus, courts
had some ability to reform or address certain declaration
provisions in the event that a drafter lacked the foresight to include
appropriate amendment provisions in the declaration and other
documents.

The common law also evolved to define certain duties owed by
the common interest community to its members. In addition to the
duties expressly stated in the governing documents, the common
law imposed standards quite similar to those imposed on boards of

\textsuperscript{72} § 6.4.
\textsuperscript{73} § 6.5. Note, however, that the ability to borrow did not encompass the ability to
encumber common property absent assent by a majority of lot or unit owners.
\textsuperscript{74} \textit{Restatement} (Third) of the Law of Property: Servitudes § 6.6 (Tentative Draft No.
7, 1998).
\textsuperscript{75} § 6.7.
\textsuperscript{76} § 6.8.
\textsuperscript{77} § 6.9.
\textsuperscript{78} § 6.10. The common law required a simple majority to extend the term of the
declaration or to make administrative changes. However, it required a super-majority
(two-thirds) for other amendments and unanimous approval for changes affecting use and
allocation of voting rights or assessments among individually owned properties.
\textsuperscript{79} \textit{Restatement} (Third) of the Law of Property: Servitudes § 6.11 (Tentative Draft No.
7, 1998).
\textsuperscript{80} § 6.12. Courts were granted the power to excuse provisions pertaining to
assessment amounts, lender control, voting requirements for administrative amendments and
minor use restrictions, signatures, and quorum requirements.
Common Interest Ownership

directors under the laws pertaining to corporations. The association was required to meet an ordinary care standard,81 treat its members fairly,82 use its discretionary powers in a reasonable manner,83 and disclose to members information regarding association affairs.84 In any suit against the association, the member had the burden of proving both a breach of duty on the part of the association and actual or potential damage to the interests of the community.85 The common law placed similar duties on the individual members of the board of directors.86 Any breach of the foregoing duties usually did not subject the individual owners to joint and several liability; rather liability was limited to the individual owners proportionate share of association expenses.87

The common law also addressed the issue of governance of common interest communities and required that it be a representative form of government with a board of directors entitled to exercise the powers given to the association in the governing documents or via judicial decision.88 Usually, each lot or unit owner was entitled to one vote absent an express provision to the contrary.89 In addition, the law gave members the right to attend board meetings and present their opinions on issues concerning the community.90

Courts were also called upon to fashion a body of law concerning the relationship between the developer and the association. Typically, at the beginning of the development process, the developer formed and retained control over the association. At some point in the process, the developer ceded control to a duly elected board of directors. The common law imposed on the developer the duty to create the association91 and to turn over control of association affairs to the board of directors after a time

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81. § 6.13(1)(a).
82. § 6.13(1)(b).
83. § 6.13(1)(c).
85. § 6.13(2). This burden did not apply of the breach was an *ultra vires* act on the part of the association.
86. § 6.14.
87. § 6.15.
88. § 6.16.
90. § 6.18.
91. § 6.19(1).
sufficient to protect the interests of the developer.\textsuperscript{92} Once this formal change of control had taken place, the association gained the ability to as voidable treat many self-dealing contracts with the developer.\textsuperscript{93} Before the transfer of control, the developer owed certain duties to the association including the duties to use (1) reasonable care in managing common property,\textsuperscript{94} (2) ensure that association finances were handled responsibly,\textsuperscript{95} (3) enforce the servitude regime, including payment of assessments,\textsuperscript{96} and (4) to disclose certain matters to the association.\textsuperscript{97} The developer could not modify the declaration if such a modification would have a material effect on the character of the development or place an unfair burden on existing owners unless the declaration specifically put the unit or lot owners on notice that the developer retained such an ability to modify.\textsuperscript{98}

Despite the evolution of the common law in this area, developers, associations, and unit owners increasingly called upon the courts to adjudicate disputes. This increase in litigation and the market demand for flexibility as applied to common interest communities inevitably attracted the attention of state legislators. In addition, the NCCUSL focused its attention on this area of the law and, in 1977, approved the UCA, the first of several acts to address common interest communities.

**The Uniform Land Acts and Common Interest Ownership**

*The Land Acts*

The last twenty-five years have seen tremendous activity on the part of the NCCUSL in the area of statutory reform of real property law.\textsuperscript{99} The uniform and model acts adopted by the NCCUSL include

\textsuperscript{92} § 6.19(2).
\textsuperscript{93} § 6.19(3). This included contracts whereby the developer would provide services to the association, enter into a lease agreement with the association, or enter into any type of unconscionable contract with the association.
\textsuperscript{95} §§ 6.20(2)-(4).
\textsuperscript{96} § 6.20(5).
\textsuperscript{97} § 6.20(7).
\textsuperscript{98} § 6.21.
\textsuperscript{99} See Marion W. Benfield, Jr., Wasted Days and Wasted Nights: Why the Land Acts Failed, 20 NOVA L. REV. 1037 (1996). Professor Benfield is a professor at Wake Forest University School of Law and represented Illinois at the NCCUSL from 1973 until 1990 and North Carolina from 1990 until the present. Id. His article provides an interesting discussion
the following: the UCIOA, the UCIOA of 1982, the UCA, the Uniform Construction Lien Act, the Model Eminent Domain Code, the Model Land Sales Practices Act, the Uniform Land Security Interest Act, the Uniform Land Transactions Act, the Uniform Residential Landlord and Tenant Act, the Uniform Marketable Title Act, the UPCA, the MRECA, the Model Real Estate Time-Share Act, and the Uniform Simplification of Land Transfers Act. Of the above enumerated uniform and model acts, the UCA, the MRECA, the UPCA, and the UCIOA all deal with the issue of common interest ownership.

**The Uniform Condominium Act**

The NCCUSL intended that the UCA unify and update the law pertaining to condominiums. Non-uniform use of language and diverse provisions in condominium documents had made it difficult for national lenders to assess whether these various documents, financing arrangements, and other details were appropriate. The commission believed that the growing trend toward nationwide lending and the increasing mobility of the consumer created the need for statutory reform. The NCCUSL believed that statutory reform and unification of the laws pertaining to condominiums would simplify complex legal issues for real estate purchasers. Finally, the NCCUSL believed that many state statutes were inadequate, particularly in areas of termination of condominiums, eminent domain, insurance, and foreclosure, and that statutory reform and unification would resolve these frequently litigated
issues.\textsuperscript{117}.

A detailed analysis of the provisions of the UCA is beyond the scope of this comment. However, the Act is structured in a logical and helpful order. It is divided into four articles with an optional fifth article. Article One contains general provisions and definitions and addresses the Act’s applicability.\textsuperscript{118} Article Two deals with the creation, alteration, and termination of the condominium.\textsuperscript{119} Article Three controls the operation and administration of the condominium association and addresses such issues as insurance and liability.\textsuperscript{120} Article Four is perhaps the most important addition to the law of condominiums and contains unique provisions dealing with consumer protection. This article imposes substantial disclosure requirements on developers and is designed to address a history of abuse in the industry.\textsuperscript{121} Finally, Article Five is optional and provides for the formation of an administrative agency to oversee developer activities.\textsuperscript{122} Pennsylvania did not elect to include Article Five when it adopted the UCA in 1980.

\textit{The Model Real Estate Cooperative Act}

The NCCUSL adopted the MRECA in 1981. Again, the purpose of the MRECA was to update and unify the law pertaining to cooperatives.\textsuperscript{123} The NCCUSL acknowledged that the cooperative form of ownership is popular in some jurisdictions and relatively unknown in others.\textsuperscript{124} The commissioners primarily intended that the act apply to residential real estate but noted that developers could apply it in an industrial or commercial context as well.\textsuperscript{125} The NCCUSL also acknowledged that cooperatives had existed in some jurisdictions without the benefit of specific enabling statutes, where they generally were formed and operated under the law pertaining to corporations.\textsuperscript{126} Because associations that administer cooperatives perform essentially the same functions as do condominium associations, the NCCUSL believed that similar statutory reform was in order for this type of common interest

\begin{itemize}
\item 117. \textit{Id.}
\item 118. \textit{Id.}
\item 120. \textit{Id.}
\item 121. \textit{Id.}
\item 122. \textit{Id.}
\item 124. \textit{Id.}
\item 125. \textit{Id.}
\item 126. \textit{Id.}
\end{itemize}
ownership model as well. Thus, the NCCUSL adopted the MRECA which shares the same organizational structure as the UCA.

The Uniform Planned Community Act

In addition to adopting the UCA and the MRECA, the NCCUSL has focused its attention on the planned community model of common interest ownership, adopting the UPCA at its 1980 annual meeting. The dramatic rise in the cost of land during the 1970s and the emerging importance of the PUD concept in zoning law reinvigorated interest in the model of a planned community with common facilities and land owned and administered by a homeowners’ association. Like the cooperative and unlike the condominium, the planned community had existed for years without the benefit of enabling statutes. The NCCUSL believed that the planned community could benefit from the same unification and modernization of the law that the commission attempted to provide for cooperatives and condominiums. Thus, the NCCUSL adopted the UPCA, again following the same structure and format as the UCA and containing many identical features. To date, Pennsylvania is the only jurisdiction to have adopted the UPCA.

The Uniform Common Interest Ownership Act

The NCCUSL adopted the first UCIOA at its annual meeting in 1982. It combined the three acts pertaining to common interest ownership, the UCA, the MRECA, and the UPCA, into one comprehensive act. The NCCUSL noted the development of the previous acts dealing with common interest ownership and drafted the UCIOA with the goal of achieving uniformity among all three acts. The commissioners believed that the UCIOA would enable states to choose either to adopt one comprehensive piece of legislation designed to address all of the iterations of common

127. Id.
130. Id.
131. Id.
132. Id.
134. Id. at 7.
135. Id.
interest ownership to adopt updated statutes pertaining to one or two of the common interest ownership models. The high degree of commonality among the three acts and the standardized usage of terms made the commissioners job of unifying the three acts a relatively simple one.

In 1994 the NCCUSL adopted an amended version of the UCIOA. The new version changed substantially some of the provisions of the earlier act. These changes addressed such issues as the definition of common elements, disclosure provisions pertaining to large projects, regulation of occupancy, applicability, and consumer protection. Although the 1994 amendments were comprehensive, only two states have adopted this version; four states have retained the 1982 version.

Colorado (1982 version), Connecticut (1994 version), Minnesota (1982 version), Nevada (1982 version), Vermont (1994 version), and West Virginia (1982 version) have adopted the UCIOA. Pennsylvania has adopted neither version of the UCIOA.

**Pennsylvania's Uniform Planned Community Act**

On December 19, 1996, Pennsylvania became the first and only jurisdiction to adopt the UPCA. The PUPCA joins the Pennsylvania Uniform Condominium Act ("PUCA") and the Pennsylvania Real Estate Cooperative Act ("PRECA") and completes the statutory framework for legislation of common interest ownership. This comment does not examine the Act in detail but does discuss its structure and notes some of its highlights. The PUPCA is divided into four separate articles addressing general provisions; creation, alteration, and termination of planned communities; management of the planned community; and protection for purchasers.

Chapter 51 of the PUPCA contains general provisions and notes that the Act applies to planned communities created after February 2, 1997. However, amendments to the declaration, bylaws, plats, and plans of planned communities formed before this date may

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136. *Id.*
137. *Id.*
139. *Id.* at 472-73.
140. *Id.* at 473.
141. *Id.*
142. *Id.*
144. § 5102(a).
bring such communities within the scope of the Act. Chapter 51 also contains a comprehensive set of definitions and states that the provisions of the Act may not be varied by agreement, and rights conferred by the Act may not be waived. The Act preserves the applicability of local ordinances, regulations, and building codes but prevents local government from prohibiting the planned community form of ownership. The PUPCA also allows for supplementation by common law doctrine to the extent such common law is not inconsistent with the Act. Like other uniform laws and model acts promulgated by the NCCUSL, the PUPCA imposes a duty of good faith in every contract governed by the Act.

Chapter 52 addresses the formation, alteration, and termination of the planned community. Recording a declaration in the same manner in which a deed is recorded creates a planned community. Any provision of the declaration that is invalid because of the rule against perpetuities is severable and remaining provisions remain valid. In addition, if a provision conflicts with the association bylaws, the declaration prevails to the extent of the inconsistency. Chapter 52 contains extensive requirements concerning the contents of the declaration. Planned communities may also be created on leasehold estates; at the expiration of the lease the planned community terminates. The declaration must state how association voting is to be allocated among units. Under the PUPCA, plats and plans become a part of the declaration and must contain certain information. Chapter 52 also provides for the conversion or expansion of the planned community. The amendment of the declaration generally requires

145. § 5102(d).
146. § 5103.
147. § 5104.
149. § 5108.
150. § 5113.
151. § 5201.
152. § 5203.
153. 68 PA. CONS. STAT. § 5203(c) (1996).
154. § 5205.
155. § 5207.
156. § 5208.
157. § 5210.
158. 68 PA. CONS. STAT. § 5210(b) (1996).
159. § 5211.
a vote of two-thirds of the unit owners\textsuperscript{160} and termination generally requires a vote of four-fifths of the unit owners.\textsuperscript{161}

Chapter 53 concerns management of the planned community. Prior to conveyance of the first lot, the declarant should establish a unit owners' association.\textsuperscript{162} The PUPCA vests this association with significant powers.\textsuperscript{163} Executive board members and officers manage the association and stand in a fiduciary relationship to the association\textsuperscript{164} and are held to a standard of care similar to that to which corporate officers are held.\textsuperscript{165} The declarant (usually the developer) may retain control of the association for a period of time reasonable to protect his or her interests.\textsuperscript{166} However, the declarant must be careful not to engage in self-dealing during such time since self-dealing contracts may be voidable.\textsuperscript{167} The association is generally responsible for upkeep of the planned community.\textsuperscript{168} The association must also hold meetings;\textsuperscript{169} a quorum consists of twenty percent of member for association meetings\textsuperscript{170} and fifty percent for executive board meetings.\textsuperscript{171} Unit owners may vote by proxy.\textsuperscript{172}

The PUPCA requires that the association acquire property insurance on common areas\textsuperscript{173} and also acquire general liability insurance.\textsuperscript{174} The cost of such insurance is born by unit owners in proportion to their share of expenses. The association also assesses unit owners for other common expenses\textsuperscript{175} and has a lien on any unit for unpaid assessments.\textsuperscript{176} Surplus funds accumulated via assessment must be credited against the common expenses assessed against each unit.\textsuperscript{177} The PUPCA requires that the

\begin{itemize}
  \item \textsuperscript{160} § 5219.
  \item \textsuperscript{161} § 5220.
  \item \textsuperscript{162} § 5301.
  \item \textsuperscript{164} § 5303.
  \item \textsuperscript{165} § 5303.
  \item \textsuperscript{166} § 5303(c).
  \item \textsuperscript{167} § 5305.
  \item \textsuperscript{169} § 5308.
  \item \textsuperscript{170} § 5309(a).
  \item \textsuperscript{171} § 5309(b).
  \item \textsuperscript{172} § 5310.
  \item \textsuperscript{174} § 5312(a)(2).
  \item \textsuperscript{175} § 5314.
  \item \textsuperscript{176} § 5315.
  \item \textsuperscript{177} § 5313.
\end{itemize}
association maintain detailed financial records, provide unit owners with annual reports, and establish a due process framework whereby unit owners can contest provisions in the annual report. The association may, with the approval of four-fifths of the unit owners, convey or encumber common property.

Chapter 54 of the PUPCA introduced several consumer protection provisions that were not available under the common law. The declarant must provide each initial unit purchaser with a public offering statement that contains extensive disclosure of provisions pertaining to the planned community. This statement must include, inter alia, the name and address of the declarant; a description of the community and of the various types of units offered; a narrative description of the significant features of the declaration, plats, plans, bylaws, rules and regulations, and certain contracts; financial information; potential encumbrances affecting title to the planned community; warranties provided by the declarant; judgments against the association; restraints on alienation; insurance requirements; current or expected fees; improvements that are the responsibility of the developer; the conditions of structural components and major utility installations and their expected lives; a description of how votes are allocated; an analysis of potential hazardous conditions; and a description of facilities and amenities that the declarant is obligated

178. 68 PA. CONS. STAT. §5316(a) (1996).
179. § 5316(b).
180. § 5316(c).
181. § 5318.
182. § 5402.
184. § 5402(a)(2).
185. § 5402(a)(3).
186. § 5402(a)(6).
187. § 5402(a)(7).
189. § 5402(a)(12).
190. § 5402(a)(14).
191. § 5402(a)(16).
192. § 5402(a)(17).
194. § 5402(a)(19).
195. § 5402(a)(22).
196. § 5402(a)(23).
197. § 5402(27).
to complete.\textsuperscript{198}

Chapter 54 also applies to current unit owners who wish to resell their units. Unit owners who wish to resell their units must provide purchasers with a copy of the declaration, the bylaws, and the rules and regulations of the association.\textsuperscript{199} They must also provide purchasers with a certificate containing information regarding such topics as rights of first refusal and restraints on alienation,\textsuperscript{200} current association finances,\textsuperscript{201} board knowledge of potential violations of the declaration,\textsuperscript{202} and association voting.\textsuperscript{203} The foregoing list is not exhaustive and the reader should refer to the appropriate provisions in the statute for a complete list of disclosure requirements.

Finally, Chapter 54 contains certain structural warranty requirements. The declarant warrants against structural defects in individual units\textsuperscript{204} as well as in common facilities.\textsuperscript{205} Only the association has standing, however, to pursue remedies in the event that the declarant breaches his warranty against structural defects in common facilities.\textsuperscript{206} Actions for breach of the foregoing warranties are subject to a six-year statute of limitations\textsuperscript{207} and may be disclaimed, provided such disclaimer is prominently set forth in the contract for sale or the public offering statement.\textsuperscript{208}

\textbf{SUGGESTIONS FOR FUTURE LEGISLATIVE ACTION IN PENNSYLVANIA}

The Pennsylvania legislature has adopted acts governing all three common interest ownership models. Two of these acts, the PUCA and the PUPCA, are products of the NCCUSL; the third act, the PRECA, is substantially similar in both structure and content to the NCCUSL's MRECA. When Pennsylvania adopted the PUPCA it missed the opportunity to unify the law in the area of common interest ownership. Although different legal and practical consequences flow from the various forms of common interest ownership, the NCCUSL's uniform and model acts primarily address

\begin{itemize}
\item \textsuperscript{198} 68 PA. CONS. STAT. § 5402(a)(29) (1996).
\item \textsuperscript{199} § 5407(a).
\item \textsuperscript{200} § 5407(a)(1).
\item \textsuperscript{201} §§ 5407(a)(2)-(9).
\item \textsuperscript{202} § 5407(10).
\item \textsuperscript{203} 68 PA. CONS. STAT. § 5407(a)(13) (1996).
\item \textsuperscript{204} § 5411(b)(1)(i).
\item \textsuperscript{205} § 5411(b)(1)(ii).
\item \textsuperscript{206} § 5411(b)(2).
\item \textsuperscript{207} § 5411(e).
\item \textsuperscript{208} 68 PA. CONS. STAT. § 5411(f) (1996).
\end{itemize}
issues that are common among the various forms of ownership. Under Pennsylvania’s current legislative scheme, issues such as definitions, applicability, formation, operation, termination, management, and consumer protection are quite similar across the various forms. Therefore, it appears that Pennsylvania overlooked a logical legislative choice when it passed the UPCA in lieu of the UCIOA. Pennsylvania lawmakers should reconsider this choice and revisit the UCIOA. The UCIOA could replace the outdated and unnecessarily repetitive legislative framework currently in place. This change would provide predictability and certainty to attorneys and judges, and more important, would simplify the law for lenders, and consumers. It is time for Pennsylvania lawmakers to scrap Pennsylvania’s outdated laws and replace the three separate acts with the UCIOA.

Areas of Concern for Practitioners in Community Association Law

The PUPCA has profound implications for practitioners in the area of community association law. This Act has dramatically altered the legal environment in this dynamic and fast-growing area of the law. Attorneys who practice in this area must become familiar with many new requirements while retaining the practices and techniques that served them well when the common law reigned supreme and statutory reform of real estate law was a nascent concept.

The NCCUSL introduced the concept of limited common elements in the UCA. This concept may help make some projects more marketable by allowing the individual owners exclusive control over certain common facilities. For example, the developer could elect to use the condominium model for common interest ownership, giving unit owners exclusive control over a limited parcel of common real estate on which they could plant gardens, keep grills, or even build decks. Doing so might make the development more attractive while allowing the developer and the association to enjoy the benefits inherent in the condominium type of community.

Because of the numerous consumer protection provisions contained in the PUPCA it is important that attorneys ensure that the developers are adequately informed of such provisions. Developers are not legal experts and, for non-attorneys, ensuring adequate compliance with these extensive consumer protection provisions is akin to navigating a minefield with an outdated map. Attorneys should be prepared to supervise and counsel developers at every step of the development and transition of control process.
to make certain that the developers comply with the law.

Condominium declarations and declarations of covenants, conditions, and restrictions are, by their very nature, exceptionally long-term agreements. Attorneys should bear this fact in mind when drafting such documents. Attorneys should recognize that tastes, circumstances, and mores change over time and that detailed and restrictive servitudes and covenants may be inappropriate. In addition, references to fixed dollar amounts quickly become inappropriate in periods of rapid inflation. Attorneys must employ foresight and common sense when drafting the controlling documents. It is most important to allow for flexible but restrained amendment and judicial oversight. Attorneys should also consider linking financial provisions to readily ascertainable financial indexes to account for inflation. In short, each attorney must be a long-term thinker and must be able to view the projective from a future perspective.

Finally, attorneys should carefully consider the legal requirements and consequences of the various common interest ownership models, and should be aware of marketability issues and be prepared to counsel developers on issues concerning the selection of the proper common interest ownership model. Attorneys should not only be familiar with the PUCA, the PRECA, and the PUPCA, but should also have a thorough command of the common law principles that supplement these various acts.

CONCLUSION

Community association law is an exciting and fast-growing area. However, it presents unique challenges. Attorneys practicing in this area must be aware that there are three separate models of common interest ownership; the condominium, the cooperative, and the planned community; each with different legal implications. Traditionally, the condominium has owed its existence to enabling statutes whereas the cooperative and the planned community are largely products of the common law. Recent efforts by the NCCUSL and state legislatures have changed this, and many states, including Pennsylvania, now have statutes that control all common interest ownership options. Market dynamics, particularly the demand for flexibility and commonality among jurisdictions, have helped to drive this trend toward statutory reform. Enactment of these statutes has brought about a paradigm shift, and attorneys must be familiar with extensive new statutory requirements. Pennsylvania lawmakers might have made this task easier by unifying the law in
this area and enacting the UCIOA. Pennsylvania lawmakers should revisit this decision in the near future and reconsider the NCCUSL's most recent uniform act in the area of common interest ownership. In the interim, attorneys should carefully review the new laws while retaining the practices that have served them well in the past.

Michael L. Utz