

# The New Jersey Common Interest Real Property Act

## Introduction

The New Jersey Common Interest Real Property Act developed from several initiatives taken in 1995 to update statutes governing horizontal property rights, condominiums, cooperatives and planned real estate developments. A modified version of the Uniform Common Interest Ownership Act (1994) was prefiled in the State Assembly for consideration in the 1996 session. The Assembly created a Task Force to Study Homeowner Associations which met with homeowners from 1995 until it issued A report of Findings and Recommendations in January 1998. Pursuant to its general responsibility to review uniform laws the Law Revision Commission also undertook comprehensive revision of the statutes in question employing the uniform act as a framework in 1995. After examining the Uniform Act, the Commission decided that it was preferable to prepare a comprehensive act specifically designed for New Jersey using the Uniform Act as a guide.

The act creates a single framework for statutes governing all types of common interest real property. "Common interest real property" refers to real property which consists of separately owned units, irrespective of form, to which an undivided interest in common elements is attached. It includes condominiums, cooperatives, planned communities, mobile parks and time shares. Most of these properties are forms of condominium. Condominiums are statutory creations, there being none at common law. *The Berkley Condominium Association, Inc. v. The Berkley Condominium Residences, Inc.*, 185 N.J. Super. 313, 319 (Ch. Div. 1982). As a matter of history, it appears that the first statute creating condominiums enacted in the United States was that enacted in Puerto Rico in 1958. All states presently have statutes modeled after either the Puerto Rican statute or after the 1962 Federal Housing Administration model condominium statute. UNIFORM REAL PROPERTY ACTS. OFFICIAL 1990 TEXT WITH COMMENTS. St. Paul, MN: West Publishing Co., 9. While real estate cooperatives appear to have existed before the enactment of legislation specifically authorizing them, cooperatives, now, are controlled by statute. NJS 46:8D-1 et seq.

The act is divided into five articles: Article 1. General provisions; Article 2. Creation, alteration and termination of common interest community; Article 3. Management of the common interest community; Article 4. Sales and Warranties; and Article 5. Protection of Purchasers.

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## **Article 1. General Provisions.**

### **101. Short title.**

This Act shall be known and may be cited as the “New Jersey Common Interest Real Property Act.”

Source: New.

#### COMMENT

The title of the act is new. It emphasizes that the act encompasses only real property that is owned in such forms as condominiums or cooperatives. A term embracing the various subtypes of ownership covered by this act is not a simple matter. The intent is to include condominiums, cooperatives, planned community developments, time-shares and any other entity sharing the characteristic of ownership of a separate unit of real property along with co-ownership with other unit owners of common elements of real property. The uniform law commissioners have used “common interest ownership.” This title chosen is not burdened by identification with one of the subtypes, yet inclusive of all. The term “common interest property,” which would yield the same acronym is perhaps too narrowly focused on the title and recording aspects of the statute.

### **102. Applicability.**

a. This act shall govern the rights, duties and powers of all persons relating to common interest real property in this State or relating to properties established as real estate cooperatives, or created pursuant to the “Horizontal Property Act,” (P.L. 1963, c. 168), the “Condominium Act” (P.L. 1969, c. 257), or subject to the Planned Real Estate Development Full Disclosure Act” (P.L. 1977, c. 419).

b. Any action relating to common interest real property that occurred prior to the effective date of this act shall be governed by the law at the time of the action.

c. This act shall not be construed to impair the obligations of any contract made prior to the effective date of the act.

d. Within two years after the effective date of this act, by an affirmative vote of 75 percent of the entire board, the board of a common interest real property created prior to the effective date of this act may propose an amendment to its declaration or master deed to make the property subject to specific provisions of law which were in effect before the effective date of this act provided that:

(1) The amendment specifically identifies the provisions.

(2) The board delivers or sends to the mailing address of each unit owner notice of the amendment with a brief statement explaining the effect of the action.

(3) If unit owners holding more than 33 percent of all allocated voting rights file written objection to the proposed amendment within 30 days of the delivery or mailing, the amendment shall not take effect.

(4) The amendment is recorded in each county in which the common interest real property is located.

e. Notwithstanding an amendment as provided in subsection (d), every common interest real property shall be subject to the following sections of this act: 219 (Termination of Common Interest Real Property), 220 (Merger or Consolidation of Common Interest Real Property), 302 (Board members and officers), 303 (Powers of Unit Owners' Association), 306 (Meetings), 304 (Penalties), 309 (Dispute resolution), 317 (Association Records), 401 (Sales of Units), 402 (Express Warranties), 403 (Implied Warranties of Quality), 402 (Liability for Public Offering Statement Requirements), 404 (Exclusion or Modification of Implied Warranties of Quality), 405 (Statute of Limitations for Warranties), 508 (Public offering statements requirements), 515 (Labeling of Promotional Material), 516 (Sponsor's Obligation to Complete and Restore), 517 (Substantial Completion of Units), 523 (Effect of Violations on Rights of Action; Attorney's Fees).

f. An amendment as provided for in subsection (d) shall not affect any interest recorded prior to the recording of the amendment.

Source: New.

#### COMMENT

As a basic principle, this section applies the act to every common interest real property in the State whether created before or after the effective date of the act. The rationale is to avoid the inevitable confusion for both lenders and consumers that would arise if different laws apply to different common interest communities.

Subsection (b) reaffirms the common law principle that with respect to actions taken prior to effective date of this act the law in effect at the time will govern. Subsection (c) excludes application of the act to the extent that application would violate the constitutional protection against impairment of contracts.. In *Berkley Condo. Ass'n*, 185 N.J. Super at 320-322, the court held amendments to the Condominium Act creating rebuttable presumptions against certain contractual rights claimed by developers were constitutionally valid so long as the rights had not vested. The court also held that a potential for future profits was not a right that had vested.

Subsection (d) is an opt-out provision allowing a real property to subject itself to specific law existing before the effective date of the act. The subsection requires acquiescence of 75% of votes to be covered by pre-existing law rather than this act. That percentage is higher than that required for other actions of a common interest real property, but a change in applicable law is serious enough to such a safeguard. Compare section 218 (a)(5) requiring 67% generally for changes in by-laws, section 218(a)(6) requiring 80% for enactment of certain restrictions on the use of units and section 219(a) requiring 80% for termination of common interest real properties. Subsection (e) lists certain basic provisions of the act for which there is no right to opt-out. Subsection (f) safeguards lien priorities established prior to recording the resolution.

### 103. Definitions.

As used in this act, unless specifically provided otherwise:

a. "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant.

A person "controls" another, if the person

- (i) is a general partner, officer, director, or employer of the other,
- (ii) directly or indirectly or acting in concert with other persons, or through subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the other,
- (iii) controls in any manner the election of a majority of the directors of the other, or
- (iv) has contributed more than 20 percent of the capital of the other.

Control does not exist if the powers described in this definition are held solely as security for an obligation and are not exercised.

b. "Allocated interests" means the following interests allocated to each unit: (i) In a condominium, the undivided interest in the common elements, the common expense liability, and votes in the property; and (ii) in a cooperative, the common expense liability and the ownership interest and votes in the property.

c. "Common elements" means all portions of the common interest real property other than the units and any other interests in real estate for the benefit of unit owners which are subject to the master deed.

d. "Common expenses" means expenditures made by, or financial liabilities of, the association, together with any allocations to reserves.

e. "Common interest real property" means a real property which consists of separately owned units, irrespective of form, to which an undivided interest in common elements is attached.

g. "Sponsor" means a person who (i) as part of a common promotional plan, offers to dispose of an interest in a unit not previously disposed of or (ii) reserves or succeeds to any special sponsor right, or (iii) applies for registration of a common interest real property under Article 5 of this act.

h. "Department" means the Department of Community Affairs.

i. "Limited common element" means a portion of the common elements allocated by the declaration or by operation of Section 204(c) for the exclusive use of one or more but fewer than all of the units.

Source: New.

#### COMMENT

Most of the definitions have been selected from those appearing in U.C.I.O.A. 1-103. The definition of "common interest real property" follows substantially the definition in the Planned Real Estate Development Full Disclosure Act, N.J.S. 45:22A-21(h), which reads:

“Planned real estate development” or “development” means any real property situated within the State, whether contiguous or not, which consists of or will consist of, separately owned areas, irrespective of form, be it lots, parcels, units, or interest, and which are offered or disposed of pursuant to a common promotional plan, and providing for common or shared elements or interests in real property.

This definition shall specifically include, but shall not be limited to, property subject to the “Condominium Act” (P.L. 1969, c. 257, C. 46:8B-1 et seq.), any form of homeowners’ association, any housing cooperative or to any community trust or other trust device.”

The words, “sponsor” and “master deed” have been chosen from various possibilities presented by current and model legislation. In New Jersey, the “Horizontal Property Act” refers to “owners” or co-owners” filing a master deed. The “Condominium Act” refers to the person who creates a condominium as “developer.” The “Cooperative Recording Act of New Jersey” avoids the issue by use of the passive voice so that the cooperative is created by recording a master declaration. Elsewhere, the Uniform Condominium Act (1977), the Uniform Planned Community Act (1980), the Uniform Common Interest Ownership Act (1982) (1994), and the Model Real Estate Cooperative Act (1981) all use the term “declarant.” The Model Real Estate Time-Share Act (1980) uses the term “developer.”

The term “declaration” is used in the Uniform Common Interest Ownership Act (1982, 1994). It also appears in the Uniform Condominium Act (1977), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981). This instrument is called “master deed” in N.J. Condominium Act (N.J.S. 46:8B-1 et seq.). The N.J. “Cooperative Recording Act” (N.J.S. 46:8D-1 et seq.) refers to the parallel document as “master declaration.”

#### **104. Variation by agreement excluded.**

The provisions of this act may not be varied by agreement except as expressly provided in this act.

Source: New.

#### **COMMENT**

This section is derived from the U.C.I.O.A. §1-104.

#### **105. Unit owner’s interest as real estate; security interests; taxation.**

a. A unit owner’s interest under a proprietary lease in a cooperative shall be treated as an interest in real estate except that

(1) the real estate comprising the entire cooperative, including all units subject to proprietary leases, shall be assessed and taxed as an undivided parcel;

(2) a security interest in an individual unit of a cooperative or in shares in a cooperative may be perfected only by the filing of a financing statement as provided in N.J.S. 12A:9-403.

b. In a common interest real property that is not a cooperative, each unit, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

Source: 46:8A-26; 46:8B-19.

#### COMMENT

Subsection (a) of this section classifies the unit owner's interest in a cooperative as an interest in real estate except for two specified purposes, tax assessment and security. This resolves an important theoretical and practical issue which pervades the cooperative field: whether a unit owner in a cooperative holds an interest in real or in personal property. This classification changes New Jersey law, which characterized cooperative property as a hybrid of real and personal property. N.J.S. 46:8D-2. The Cooperative Recording Act (1987) (N.J.S. 46:8D-1 et seq.) acknowledges that (a) the public perceives cooperative units as having at least some of the characteristics of real estate; (b) purchasers of cooperatives seek protections "in cooperative leasing transactions similar to those protections available in transactions for the purchase of real estate, namely, a public title record, title searches to guarantee security of title, freedom from easements or rights in unknown third parties, unpaid liens, unsatisfied judgments, unpaid taxes, freedom from municipal violations, title insurance and the equivalent of a mortgage where a cooperative unit is the asset to be pledged as security for the purchase loan." N.J.S. 46:8D-2. For these reasons the Cooperative Recording Act provided for title registration. A sale or transfer of stock and a proprietary lease in a cooperative has been recorded in the county recording office. N.J.S. 46:8D-12. The same law subjected cooperative sales to the fees prescribed for real property documents. N.J.S. 46:8D-13. Nonetheless, because of uncertainties in current law, to perfect their interests, lenders have had to record financing statements or security agreements on pledges of cooperative stocks and proprietary leases with both the Secretary of State under N.J.S. 12A:9-301 (U.C.C. secured transactions) and with the county recording officer under N.J.S. 46:8D-14. Subsection (a) makes the second recordation unnecessary. Otherwise, subsection (a) furthers the objectives of the Cooperative Recording Act and creates the basis for according all types of common interest communities the same rights and protections and applying the same procedures to them..

Subsection (b) restates New Jersey law with reference to all common interest communities other than cooperatives.

### **106. Applicability of zoning, planning and building codes.**

All laws, ordinances and regulations concerning zoning, planning, construction, maintenance and use of property shall be applied to common interest real property without regard to the form of ownership.

Source: N.J.S. 46:8B-29.

#### COMMENT

Though simplified, this section is substantially identical to its source.

### **107. Eminent domain.**

a. If a unit is taken by eminent domain, the amount of the award to the unit owner be the value of the unit and its allocated interests, whether or not any common elements are acquired. Upon condemnation, that unit's allocated interests shall be automatically reallocated to the remaining units in proportion to the allocated interests of those units before the taking.

b. If part of a unit is taken by eminent domain, the amount of the award to the unit owner shall be the reduction in value of the unit. Upon condemnation, that unit's interests in common elements shall not be reallocated among the units to reflect the change in the unit that was partially taken.

c. If any part of the common elements is taken by eminent domain, each unit owner shall have a right to notice and the right to participate through the association in any proceedings. The award attributable to the common elements taken shall be paid to the association. Unless the master deed provides otherwise, any portion of the award attributable to the taking of a limited common element shall be divided among the owners of the units to which that limited common element was allocated at the time of condemnation.

d. The board of the common interest real property shall amend the master deed to reallocate interests as required by this section.

Source: 46:8B-25.

#### COMMENT

This section supplements the general law on eminent domain (N.J.S. 20:3-1 *et seq.*) by addressing problems raised in the context of common interest communities. Subsections (a) provides that if a unit is taken, the owner is entitled to the ordinary market value of the unit even though some of that value may be based on the use of common elements that are not taken. After the taking, the other unit owners re-allocate their percentage interests in the common interest real property to reflect the fact that there is one fewer unit owner. Subsection (b) provides that if only a part of a unit is taken, the unit owner is entitled to the reduction in the ordinary market value of the unit caused by the loss of the part. The subsection provides that even though the unit is now less valuable, percentage interests in the common interest real property are not adjusted to reflect that fact. Subsection (c) establishes that the association receives the award for common elements that are taken. Awards for general common elements belong to the common interest property to be divided as provided in the master deed and bylaws. Awards for limited common elements are paid to the unit owners who had use of those elements..

### **108. Unenforceable term in declarations, bylaws, leases**

a. The court shall not enforce a term in a master deed or bylaw, if the term is illegal, or if a reasonable person, who had the ability to negotiate terms, would not have accepted the term. A term that is required or specifically permitted by statute shall not be held to be a term that would cause a reasonable person to refuse acceptance.

b. The court shall not enforce a provision in a master deed or bylaw which affords the sponsor or the association an option to purchase or a right of first refusal to purchase on transfer of a unit from a unit owner. This subsection shall not apply to an agency or authority of the State, a political subdivision of the State or an authority established by the State if that right is required by State or Federal law.

Source: N.J.S. 46:8B-31, 46:8B-32, 46:8B-36, 46:8B-38.

#### COMMENT

This section significantly revises the source materials. In place of the equitable principle of unconscionability, it provides for a legal judgment that a contract, lease or term is unenforceable. The purpose is to minimize traps for those drafting common interest real property documents. Subsection (a) states the general rule of law. Subsection (b) applies the rule to the provision in the source (N.J.S. 46:8B-38) prohibiting clauses granting a right of first refusal at the time of transfer of condominiums by unit owners; this subsection continues the exception in the earlier statute on application of this prohibition to common interest real property originally sold by the State of New Jersey. The commission judged that the rebuttable presumptions of unconscionability formerly contained in N.J.S. 46:8B-31, 32 and 36 are effectively covered in subsection (a).

## **Article 2. Creation, alteration, and termination of common interest real property.**

### **201. Creation of common interest real property.**

A common interest real property may be created only by recording a master deed executed in the same manner as a deed; and if the real property is a cooperative, by conveying the real estate to the common interest real property. The master deed shall be recorded in every county in which the common interest real property is located.

Source: N.J.S. 46:8A-9; 46:8B-8; 46:8D-5; 46:8D-9.

#### COMMENT

The section continues provisions of current New Jersey law codified in the source sections. Unlike the uniform law, New Jersey law has never required completion or substantial completion of a real property before the declaration is recorded.

### **202. Required contents of declaration.**

The declaration shall contain:

a. The name of the common interest real property, including the word “condominium” or “cooperative” or followed by the words “a condominium” or “a cooperative.

b. A legally sufficient description of the real property that constitutes the common interest real property.

c. A survey of the land and plans or other graphic description of the improvements erected or to be erected thereon in sufficient detail to show and identify common elements, each unit and their respective locations and approximate dimensions. A licensed engineer or architect shall certify that plans or other graphic descriptions constitute a correct representation of the improvements to the land. The survey shall

(1) Show recorded easements, encroachments on, and licenses appurtenant to or included in the common interest real property; and

(2) Label any contemplated improvement shown either “SHALL BE BUILT” or “NEED NOT BE BUILT.”

d. An identification of each unit by distinctive letter, name or number.

e. The proportionate undivided interests in the common elements and limited common elements, if any, allocated to each unit. Interests shall be stated as percentages aggregating 100 percent.

f. A description of the common elements and any limited common elements.

g. A description of any property that shall become common elements or limited common elements.

h. The percentages and manner of sharing common expenses and owning common surplus.

i. The name of the person designated to receive service of process for the real property.

j. The bylaws of the real property.

k. The method of amending the master deed.

Source: N.J.S. 46:8A-9; 46:8B-9; N.J.S. 46:8B-11; 46:8D-6.

#### COMMENT

This section revises content requirements of New Jersey law in the light of provisions included in U.C.I.O.A. § 2-105.

### **203. Bylaws.**

a. The bylaws of a common interest real property shall be recorded with the master deed and shall provide for:

(1) the voting rights of unit owners;

(2) the number of members of the board and the titles of the officers of the property;

(3) the election or appointment by the board of a president, treasurer, secretary, and any other officers of the property as the bylaws specify;

(4) the qualifications, powers and duties, terms of office, and manner of electing, and removing, board members and officers and filling vacancies;

(5) powers that the board or officers may delegate to other persons or to a managing agent;

(6) the method for amending the master deed and bylaws, but no amendment shall be effective until it is recorded;

(7) which officers may execute and record amendments to the master deed and bylaws on behalf of the property;

(8) the method for adoption and enforcement of administrative rules relating to the use and maintenance of units and common elements, including the imposition of fines and late fees which may be enforced as a lien pursuant to this act; and

(9) the manner of collecting shares of common expenses from unit owners and the method of distribution or use of common surplus.

b. Subject to the provisions of the master deed, the bylaws may provide for any other matters the common interest real property deems appropriate.

Source: N.J.S. 46:8b-13.

#### COMMENT

This section's premise is that the bylaws, which provide for the management of the common interest real property, are an integral part of the declaration. As provided in N.J.S. 46:8B-13, the declaration, bylaws and amendments to them are effective only when recorded. Subsection (a)(8)

embodies a 1996 amendment to the source law authorized communities to adopt administrative rules and fines.

#### **204. Unit boundaries.**

Except as provided by the declaration:

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

b. If any flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture inside the designated boundaries of a unit serves any other unit or the common elements, it is a part of the common elements.

c. Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, windows or other fixtures designed to serve one or more individual single units, but located outside unit boundaries, are limited common elements allocated exclusively to the individual unit or units.

Source: New.

#### **COMMENT**

Though simplified, this section generally follows the U.C.I.O.A. (1994) § 1-102. The uniform law defines unit boundaries and requires that the declaration and amendments to it allocate to each unit interests in the common and limited common elements. This differs conceptually from current New Jersey law (N.J.S. 46:8B-3(o) ; 46:8D-3(l)), which defines units so as to include the proportionate undivided interest in the common and limited common elements allocated to the unit.

#### **205. Description of units.**

A description of a unit that states the name of the common interest community, the recording data for the declaration, and the identifying letter, name or number of the unit, is a legally sufficient description of that unit.

Source: New.

#### **COMMENT**

This section generally follows U.C.I.O.A. § 2-104.