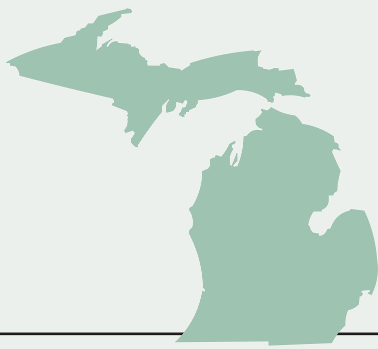

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The Michigan Condominium Act: Time for a Change

Why Michigan should adopt a modified version of the Uniform Condominium Act

*by Kevin M. Hirzel**

Approximately 1.6 million people live in one of the over 8,000 community associations in Michigan, many of which are condominium associations.[1] While there has been an increase in the popularity of condominium developments, the law has been slow to evolve. The Michigan Condominium Act (the "Act")[2] was enacted in 1978 and is now over thirty-five years old. While significant amendments were made to the Act in 2001 and 2002, the Act does not currently meet the needs of various stakeholders, such as attorneys, accountants, banks, condominium associations, co-owners, developers, property managers, potential purchasers, municipalities, realtors, surveyors and title companies.

The problems with the Michigan Condominium Act can typically be classified into one of the following categories:

1. The Michigan Condominium Act is disorganized and contains inconsistent terminology.
2. The Michigan Condominium Act is outdated and needs to be modernized.
3. The plain language of the Michigan Condominium Act does not directly address common situations that stakeholders are forced to deal with in practice.
4. The Michigan Condominium Act fails to provide remedies for the inevitable human error that occurs in drafting and amending condominium documents.

Frustration with the Michigan Condominium Act has resulted in a flurry of new legislative proposals. The following bills to amend the Act have recently been proposed, after relatively few legislative changes have been proposed in the past decade:

- House Bill 4861 (2015)[3] was introduced on September 10, 2015. House Bill 4861 would amend MCL 559.152 to change the requirements to serve on a board of directors of a condominium association. Specifically, House Bill 4861 would require that all directors of an association reside in the condominium and sign a certification that they are "familiar" with the condominium documents.[4]
- House Bill 4919 (2015)[5] was introduced on September 29, 2015. House Bill 4919 would amend MCL 559.160 to prevent the inclusion of anti-lawsuit provisions in condominium documents. Anti-lawsuit provisions have been an increasing concern for con-

1 Community Association Institute, Michigan Community Associations Facts & Figures (Sept 2015) *available at* https://www.caionline.org/Advocacy/Resources/Documents/MI_FactsFigures_Info_9-8-15.pdf (accessed June 16, 2016).

2 MCL 559.101 et seq.

3 2015 HB 4861, *available at* https://www.legislature.mi.gov/documents/2015-2016/billintroduced/House/pdf/2015-HIB-4816.pdf (accessed June 16, 2016).

4 It is unclear if this bill would apply to non-residential condominiums. 2015 HB 4861 does not differentiate between residential, non-residential or mixed use condominiums.

5 2015 HB 4919, *available at* https://www.legislature.mi.gov/documents/2015-2016/billintroduced/House/pdf/2015-HIB-4919.pdf (accessed June 16, 2016).

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dominium associations as a recent decision from the Michigan Court of Appeals precluded an association from enforcing restrictions that were violated by a co-owner due to the fact that the association did not obtain two-thirds co-owner approval to initiate litigation.[6] Anti-lawsuit provisions have also been used to preclude condominium associations from defending themselves in litigation. House Bill 4919 would allow for the board of a condominium association to make decisions relating to litigation and protect the association's interests in litigation in the same manner as all other Michigan corporations.

- House Bill 5655 (2016)[7] was introduced on May 17, 2016 and would make three radical changes to the Act. First, House Bill 5655 would require co-owners to approve a condominium association's budget at a meeting with quorum by a majority vote in order to pay for essential services that are necessary to operate a condominium. House Bill 5655 would require in person voting and would not allow co-owners to vote by proxy in approving an annual budget. Condominium associations would not be allowed to increase the annual budget unless co-owner approval was obtained at a meeting with quorum or multiple meetings were called and quorum could not be obtained. Second, House Bill 5655 would repeal MCL 559.239, which precludes a co-owner from asserting a defense that services were not provided by the association in answering a complaint for nonpayment of assessments. Third, House Bill 5655 would revive the authority of a governmental administrator, which has not had enforcement authority since 1983,[8] to monitor co-owner complaints regarding condominium associations and their directors. House Bill 5655 would also allow for the administrator to investigate co-owner complaints and refer complaints to the prosecuting attorney or attorney general to file lawsuits against condominium associations.

- Senate Bill 309 (2015)[9] was introduced to amend MCL 559.166 on April 30, 2015 and became law on February 1, 2016.[10] MCL 559.166, as amended by 2016 PA 170, now requires that a condominium subdivision plan be prepared by a licensed architect, surveyor or professional engineer. A survey plan must now be signed and sealed by a licensed surveyor. Additionally, a notice indicating that any detailed design plans are on file with the local municipality must appear on the cover sheet of the condominium subdivision plan.

- Senate Bill 610 (2015)[11] was introduced on November 10, 2015 and became law on September 21, 2016.[12] MCL 559.167, as amended by 2016 PA 233, will eliminate the automatic reversion of "need not be built" units to common elements after the expiration of the six year or ten year statutory time periods. MCL 559.167(4) will now require two-thirds of the co-owners that are in good standing to vote to approve a reversion of "need not be built" units to common elements by adopting a declaration that will be recorded in the register of deeds after the expiration of the statutory time periods. If two-thirds co-owner approval is obtained, the condominium association must then send the declaration to a developer or successor developer at its last known address. The developer or successor developer may withdraw the land on which the "need not be built" units were to be located or amend the master deed to make the units "must be built" within a sixty day time period. If the developer or successor developer fails to withdraw the land or amend the master deed within sixty days, the condominium association may record the declaration, which becomes effective upon recording and the "need not be built" units will remain in the condominium as common elements. The statute also purports to have retroactive effect.[13]

6 *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389; 875 NW2d 234 (2015).

7 2016 HB 5655, *available at* https://www.legislature.mi.gov/documents/2015-2016/billintroduced/House/pdf/2016-HIB-5655.pdf (accessed June 16, 2016).

8 The Michigan Department of Licensing and Regulatory Affairs, *The Condominium Buyer's Handbook*, updated 1/12/16, *available at* http://www.michigan.gov/lara/0,4601,7-154-10573_45007_45038---,00.html (accessed June 16, 2016).

9 2015 SB 309, *available at* http://www.legislature.mi.gov/documents/2015-2016/billintroduced/Senate/pdf/2015-SIB-0309.pdf (accessed June 16, 2016).

10 2016 PA 170, *available at* http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2015-PA-0170.pdf (accessed June 16, 2016).

11 2015 SB 610, *available at* http://www.legislature.mi.gov/documents/2015-2016/billconcurred/Senate/pdf/2015-SCB-0610.pdf (accessed July 7, 2016).

12 2016 PA 233, *available at* http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0233.pdf (accessed July 7, 2016).

13 It remains to be seen whether Michigan courts will ap-

As will be discussed below, the entire Michigan Condominium Act must be redrafted and the above bills, whether good or bad, are just the tip of the iceberg for significant legislative changes that will likely come in the near future. While the issues with the current version of the Michigan Condominium Act are too numerous to be addressed in a single article, this article will briefly identify a variety of problems with the current Act and discuss how the adoption of a modified version of the Uniform Condominium Act ("UCA") would resolve these problems. While the various stakeholders will certainly have their own opinions on policy, the intent of this article is merely to begin a dialogue amongst the various stakeholders and raise awareness of the various issues with the current Act, as "[t]he first step in solving any problem is recognizing there is one."[14]

Article I - General Provisions

1. The Michigan Condominium Act lacks structure and needs to be organized.

One of the chief complaints about the Michigan Condominium Act is that it lacks organization.[15] The Act has no breakdown by chapter and fails to reflect any meaningful or comprehensive plan. Rather, the Act "is a hodgepodge of rules and regulations, each affecting in some way the creation, maintenance, and termination of condominium interests."[16] This hodgepodge of rules and regulations that form the Michigan Condominium Act is not unique to Michigan. The summary for the Uniform Condominium Act[17] states:

> The current law pertaining to condominiums remains inchoate and incomplete in most jurisdictions. Even those jurisdictions which have pioneered condominium legislation have not developed fully comprehensive acts.
>
> …
>
> A condominium has four critical phases: creation, financing, management and termination. A comprehensive act deals with each phase and with the problems of consumer protection and regulation.[18]

In order to determine the best way to overhaul the Michigan Condominium Act, I have read the condominium act or other statutory scheme that governs common interest communities in all fifty states. While the UCA is not perfect, a version of the UCA is the most widely adopted model act, and has been adopted in fourteen states.[19] The Uniform Common Interest Ownership Act ("UCOIA") has been adopted in eight states,[20] and has a similar organizational structure to the UCA. Adopting a modified version of the UCA would create an organized statutory scheme composed of the following sections:

Article I – General Provisions

Article II – Creation, Alteration and Termination of Condominiums

Article III – Management of Condominium

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ply MCL 559.167, as amended by 2016 PA 233, retroactively in situations where the six year or ten year statutory time periods have already expired under MCL 559.167, as amended by 2002 PA 283. In *Gorte v Dept of Transp*, 202 Mich App 161; 507 NW2d 797 (1993), the Michigan Court of Appeals held that MCL 600.5821, as amended by 1988 PA 35, could not retroactively eliminate a claim for adverse possession against the state, when the statutory time period to establish adverse possession had already accrued and MCL 600.5821, as originally enacted by 1961 PA 236, had previously allowed for a claim for adverse possession against the state. Specifically, the Court of Appeals held that a "statute may not be applied retroactively if it abrogates or impairs vested rights." *Gorte*, *supra*, at 167.

14 "The Newsroom: We Just Decided To (#1.1)" (2012), *available at* http://www.imdb.com/ character/ch0308974/quotes (accessed June 16, 2016).

15 Rudy Nichols, a retired Michigan Circuit Court Judge, best summarized the Michigan Condominium Act as "frustrating, incomprehensible, or both." Hon. Rudy Nichols, *Time for an Overhaul of Michigan's Condominium Act*, 93 Mich B J 22 (July 2014).

16 *Id*. at 23.

17 The Uniform Condominium Act is *available at* http://www.uniformlaws.org/shared/docs/condominium/uca_80.pdf (accessed June 16, 2016).

18 Uniform Law Commission, *Uniform Condominium Act–Act Summary*, *available at* http://uniformlaws.org/ActSummary.aspx?title=Condominium%20Act (accessed June 16, 2016).

19 Alabama, Arizona, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Mexico, Pennsylvania, Rhode Island, Texas, Virginia, Washington and West Virginia have adopted a version of the Uniform Condominium Act. *See* Uniform Law Commission, *Legislative Fact Sheet, available at* http://www.uniformlaws.org/ LegislativeFactSheet.aspx?title=Condominium Act (accessed June 16, 2016).

20 Community Association Institute, *Uniform Acts by States*, *available at* https://www.caionline.org/ Advocacy/StateAdvocacy/PriorityIssues/UniformActs/Pages/default.aspx (accessed June 16, 2016).

Article IV – Protection of Condominium Purchasers[21]

In addition to lacking a general organizational scheme, the Michigan Condominium Act starts off with numerous definitions, which are contained in MCL 559.103 through MCL 559.110. However, additional definitions are randomly scattered throughout the Act. By way of example, the following terms are defined in areas of the Michigan Condominium Act other than the above listed definitional sections: "persons with disabilities,"[22] "qualified conversion condominium project,"[23] "qualified person with disabilities,"[24] "rent,"[25] "resident,"[26] "restricted unit"[27] and "successor developer."[28] Compounding the problem is that the administrative rules that accompany the Michigan Condominium Act have numerous additional definitions that are not contained in the Act.[29]

Finally, the current Act does not use consistent terminology. By way of example, MCL 559.235 provides a statutory definition of a "successor developer," yet other areas of the Act confer obligations and rights on a developer or its "successors."[30] Because the term "successors" is not defined by the Act, disputes often arise as to whether a "successor developer" is also a "successor" under the Act and the condominium documents.[31] Similarly, MCL 559.190(8) indicates that co-owners that are "entitled to vote" may vote to amend a master deed. In contrast, MCL 559.167(3), as amended by 2016 PA 233, indicates that co-owners in "good standing" may vote to have "need not be built" units remain in the condominium as common elements. Given that the terms "entitled to vote" and "good standing" are not defined by the Act, is there a difference between these terms? While the answer to this question remains to be seen, adoption of a modified version of the UCA would resolve the use of inconsistent terminology that has been created by piecemeal amendments to the Act. The UCA has a single definitional section that contains all of the definitions that are consistently used in the statute.[32] Having all of the definitional terms at the beginning of the Act, and in one location, and using the definitional terms consistently throughout the statute would make the Act more user friendly and decrease the likelihood of potential disputes between the various stakeholders.

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21 The UCA has an optional Article V–Administration and Registration of Condominiums, which creates a state regulatory agency to adopt rules and regulate the condominium industry. Of the states that have adopted the UCA, only Virginia has adopted portions of Article V of the UCA. *See* Va Code Ann 55-79.86. As noted in the prefatory comment to Article V of the UCA, "in some states the public's response to administrative regulation has become increasingly negative. The adoption of so-called 'sunshine' and 'sunset' laws, consolidation or merger of many agencies, and abolition of some outmoded boards and commissions reflect a growing public perception that administrative enforcement may at times be neither efficient nor effective." UCA, Article V prefatory comment, *available at* http://www.uniformlaws.org/shared/docs/condominium/uca_80.pdf.

Moreover, "disputes between a homeowner and an elected community association board are disputes of private contract." Community Association Institute, *Memorandum on Offices of Community Association Ombudsmen*, *available at* https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/Ombudsman/Documents/Ombudsman_Report.pdf (accessed June 16, 2016). Mandating "a state commissioned office to investigate complaints is essentially outsourcing the administrative and democratic process of community associations over issues that are easily resolved through a process listed in an association's governing documents." *Id*. at p. 24. Finally, as noted by the Community Association Institute, "residents are consistently satisfied with the actions of their elected boards, with 88 percent of residents surveyed reporting that the board absolutely or 'for the most part' serves the best interest of their community. This empirical and longitudinal data demonstrates that community association boards serve the needs of their residents and that a majority of cases of complaints…are unfounded." *Id*. Not adopting optional Article V of the UCA would also be consistent with current Michigan policy, as the current administrator, the Michigan Department of Licensing and Regulatory Affairs, has not had power to enforce the Michigan Condominium Act since 1983. *See* note 8 *supra*.

22 MCL 559.147a(7).

23 MCL 559.204(b).

24 *Id*.

25 *Id*.

26 *Id*.

27 *Id*.

28 MCL 559.235.

29 Mich Admin Code, R 559.101 et seq.

30 *See* MCL 559.132, MCL 559.133 & MCL 559.167.

31 A "successor" is "a person or thing that succeeds or follows" or "a person who succeeds another in an office, position, or the like." *Random House Webster's College Dictionary* (2001). Accordingly, a successor developer, as defined by MCL 559.235, may also qualify as a "successor" under other areas of the Act. However, consistent use of terminology would make the Act more user friendly.

32 UCA 1-103.

2. The Michigan Condominium Act does not address the taxable status of units that are never completed and remain in a condominium as common elements.

In Michigan, "a condominium project consists of 'units' and 'common elements' only. Any part of the project that is not a unit *must* be a common element."[33] Units may be taxed as soon as they are created under a master deed pursuant to the Michigan Condominium Act[34] and the UCA.[35] In contrast, common elements can never be taxed separately from the units in a condominium.[36] However, neither the Act nor the UCA address the issue of how to tax land that is originally designated to have units located on it, but ultimately ends up remaining as general common elements in the final configuration of the condominium.[37] MCL 559.167, as amended by 2016 PA 233, does not address what happens to taxes that have been levied on units that are never built and eventually end up as general common elements. Is the owner of the former "units" responsible for taxes, are the co-owners responsible for the taxes or do the taxes simply disappear?[38]

The easiest way to deal with this issue is to completely exempt all units from taxation until they are constructed and a certificate of occupancy (either temporary or permanent) is obtained for the unit.[39] Developers would certainly enjoy the benefits of not paying taxes until a unit is constructed, which in turn may lead to lower purchase prices for condominium purchasers. Moreover, a municipality is unlikely to provide services, or very minimal services, to an unconstructed unit, which is typically only air space.[40] An unconstructed unit likely has little taxable value as well. Waiting to tax units until they are constructed would encourage condominium development, which in turn would add constructed condominium units with a higher taxable valuable to the tax rolls more quickly. Providing tax exemptions for unconstructed units would not be a novel concept either, as the legislature has already demonstrated that it favors short term tax exemptions that result in substantial long term additions to municipal tax rolls. By way of example, an owner of a development property that includes a condominium unit may claim a partial exemption from a school tax imposed on a new construction condominium unit pursuant to MCL 380.1211.[41] Similarly, the Neighborhood Enterprise Zone Act, MCL 207.771 et seq., allows for a municipality to exempt certain condominium units from taxation for up to fifteen years, even after they are constructed. Accordingly, waiting to tax units until they are constructed would not only resolve the conundrum of the status of the taxability of "need not be built" units that ultimately remain in the condominium as common elements pursuant to MCL 559.167, but would also have long term benefits for condominium purchasers, developers and municipalities.

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33 *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 146; 783 NW2d 133, 139 (2010).

34 MCL 559.161 & MCL 559.231.

35 UCA 1-105.

36 *Paris Meadows, LLC*, 287 Mich App at 149; 783 NW2d at 141 ("[T]he plain language of the MCA prohibits the separate taxation of the disputed property except through the condominium units. MCL 559.161; MCL 559.137(5); MCL 559.231(1). The disputed property, as a common element, was subject to ownership and taxation only through the individual condominium units, because the individual condominium units are owned and taxed as individual units plus their inseparable and appurtenant shares of the common elements. MCL 559.161.").

37 MCL 559.167, as amended by 2016 PA 233.

38 *See* Kevin Hirzel, Michigan Community Association Law Blog, *Michigan Senate Bill 610: A fix to Section 67 of the Michigan Condominium Act (MCL 559.167) or the creation of a new set of problems?*, (Nov 30, 2015), *available at* https://micondolaw.com/2015/11/30/michigan-senate-bill-610-a-fix-to-section-67-of-the-michigan-condominium-act-mcl-559-167-or-the-creation-of-a-new-set-of-problems/ (accessed June 16, 2016).

39 The Michigan General Property Tax Act would need to be amended to accomplish this reclassification. The definition of residential property and commercial property that is subject to taxation pursuant to MCL 211.34c would be amended as follows: "Condominium units located within or outside a village or city, which are used for residential purposes and have been issued a temporary or final certificate of occupancy after the initial construction of the unit is completed as set forth in MCL 125.1513." An additional section would also need to be added to the Michigan General Property Tax Act that would exempt pre-certificate of occupancy units from taxation.

40 MCL 559.166(2)(i) states that the condominium subdivision plan is to depict the "vertical boundaries for each unit comprised of enclosed air space." In a traditional apartment or townhouse style condominium, where multiple units are contained in a single building, the land underneath the buildings is typically defined as a general common element in the master deed. In site condominiums, where each unit is constructed as a single family detached home, a master deed will typically define the land as part of the unit.

41 *See* MCL 211.7ss.

Article II – Creation, Alteration and Termination of Condominiums

3. The Michigan Condominium Act does not provide a mechanism to resolve internal conflicts in condominium documents.

In Michigan, a condominium is created by recording a master deed.[42] The master deed includes condominium bylaws, which typically also serve as the corporate bylaws, and a condominium subdivision plan.[43] The condominium bylaws usually allow for a condominium association's board of directors to adopt rules and regulations for the purposes of implementing the condominium bylaws. Finally, most condominium associations are nonprofit corporations, and are subject to the articles of incorporation that created the nonprofit corporation. Given that there is a great deal of interplay between the various governing documents, which are not always created by the same drafter, it is not uncommon for condominium documents to contain internal conflicts. Examples of such conflicts include: (1) condominium units that are described in the text of the master deed and not depicted in the condominium subdivision plan; (2) conflicting provisions in the master deed and condominium bylaws with respect to maintenance and repair responsibilities; and (3) differing requirements to file lawsuits on behalf of the condominium association in the articles of incorporation and the condominium bylaws.

The Michigan Condominium Act does not offer a clear solution to resolve a conflict between the governing documents. The UCA attempts to provide a limited resolution of this issue, stating: "In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this Act."[44] While a federal statute or state statute would certainly take precedence over anything in the governing documents that conflicts with the statute,[45] a hierarchy should be created to resolve internal conflicts between the governing documents. I would propose creating the following hierarchy to resolve conflicts, with the earlier described documents controlling over the later described documents: (a) master deed; (b) condominium subdivision plan; (c) articles of incorporation; (d) condominium bylaws; (e) corporate bylaws, if any; and (f) rules and regulations. Adopting such a hierarchy would provide a resolution to the inevitable human error that occurs in drafting condominium documents and would decrease the likelihood for disputes amongst the various stakeholders.

4. The Michigan Condominium Act does not provide a resolution to a situation in which the condominium subdivision plan fails to properly identify units as either "must be built" or "need not be built."

The Michigan Condominium Act requires that all structures and improvements in a condominium be labeled as "must be built" or "need not be built."[46] The administrative rules that accompany the Act require that this designation occur on the site plan and utility plan sheets of the condominium subdivision plan.[47] However, the problem with this approach is that in some instances, the site plan or the utility plan does not identify any structures as either "must be built" or "need not be built." The Act presently lacks a "default" position in the event that these labels are not properly included on the condominium subdivision plan. Unfortunately, the UCA does not resolve this issue either, as it does not have a "default" position and also indicates that all improvements shall be labeled as "must be built" or "need not be built."[48]

A simple fix to this problem would be that all structures and improvements are "must be built" by default. As the "master" of the initial master deed, a developer is certainly in the best position to control whether an improvement or structure is labeled as "must be built" or "need not be built." A developer would still be free to identify a structure or improvement as "need not be built" if it did not want to obligate itself to complete certain structures and improvements[49] and post security for the same.[50] Moreover, as a practical matter, a potential purchaser likely assumes that the condominium will be completed as depicted on the condominium subdivision plan and they are unlikely to delve into the nuances between a "must be built" and "need not be built" improvement or structure when purchasing. Finally, condominium associations would have more certainty as to which units will eventually be built when making

42 MCL 559.108.

43 *Id.*

44 UCA 2-103.

45 *See, e.g., Allied Supermarkets, Inc v Grocers' Dairy Co*, 391 Mich 729, 735; 219 NW2d 55, 58-59 (1974).

46 MCL 559.166(j).

47 Mich Admin Code, R 559.401.

48 UCA 2-109.

49 MCL 559.166.

50 MCL 559.203b.

future plans with respect to assessments, budgets, maintenance and reserve funds in the event that a developer forgets to properly label a structure or improvement as "must be built" or "need not be built." Accordingly, making all buildings and structures as "must be built" by default would bring further clarity to the Act.

5. The Michigan Condominium Act is inflexible with respect to expanding condominiums.

MCL 559.132 provides in pertinent part:

> If the condominium project is an expandable condominium project, the master deed ***shall*** contain the following:
>
> (a) The explicit reservation of an election on the part of the developer or its successors to expand the condominium project.
>
> (b) A statement of any restrictions on the election in subdivision (a), including, without limitation, a statement as to whether the consent of any co-owners is required, and if so, a statement as to the method whereby the consent is ascertained; or a statement that the limitations do not exist.
>
> (c) A time limit based on size and nature of the project, of not more than 6 years after the initial recording of the master deed, upon which the election to expand the condominium project expires.
>
> …

The plain language of MCL 559.132 provides that an expansion of a condominium shall not occur more than six years after the initial recording of the master deed. Some attorneys take the position that the six year time period is only applicable to an expansion by a developer, and that a condominium can later be expanded pursuant to a two-thirds co-owner and mortgagee vote.[51] However, given that the term "developer" is completely absent from MCL 559.132(c), and MCL 559.132(b) states that a master deed may provide the co-owners with an opportunity to vote on an expansion during the six year time period, my opinion is that a condominium cannot be expanded more than six years after recording the initial master deed.[52] While there is no appellate decision that addresses this issue, there is at least one circuit court opinion that has held than an expansion cannot occur after the six year time period via a co-owner vote based upon the plain language of MCL 559.132(c).[53] Accordingly, the Act should be amended to clarify that a developer or successor developer has a set time period to expand the condominium and that after the expiration of that time period, the co-owners and mortgagees also have the ability to expand the condominium through a vote.[54]

6. The Michigan Condominium Act overly complicates the contraction of condominiums.

MCL 559.133 provides in pertinent part:

> If the condominium project is a contractable condominium project, the master deed ***shall*** contain the following:
>
> …
>
> (c) A time limit of not more than 6 years after

51 MCL 559.190 & MCL 559.190a.

52 In addition to MCL 559.132, MCL 559.136 allows for land to be added to a condominium at any time so long as the land is common elements and there are no condominium units located on the land. This further demonstrates that MCL 559.190 was not intended to be used to be for the purposes of expanding condominiums.

53 *Clark v Pointe North Inn Condo Ass'n*, unpublished opinion of the Grand Traverse County Circuit Court, issued Feb 17, 2012 (Docket No. 11-28675-CH).

54 The UCA itself does not set a definitive statutory time period for expanding condominiums. However, UCA 2-105 does require that the condominium documents contain a time period when development rights expire, which would also include the right to expand the condominium. States that have adopted the UCA have included express time limits for expansion. *See, e.g.,* 68 Pa Stat 3206 (10 years from the recording of the declaration); Va Code Ann 55-79.54 (10 years from the recording of the declaration). Other states that have not adopted the UCA also have a definitive time period on expansion of the condominium. *See, e.g.,* Conn Gen Stat Ann 47-70 (7 years from the recording of the declaration); Ga Code Ann 44-3-77 (7 years from the recording of the declaration, but allowing two-thirds of the co-owners to vote to extend this time period); Kan Stat Ann 58-3111 (7 years from the recording of the declaration); NH Rev Stat Ann 356-B:16 (7 years from the recording of the declaration, but allowing two-thirds of the co-owners to vote to extend this time period.); Ohio Rev Code Ann 5311.05 (7 years from the recording of the declaration); Utah Code Ann 57-8-10 (7 years from the recording of the declaration); Wis Stat Ann 703.26 (10 years from the recording of the declaration).

> the initial recording of the master deed, by which the election to contract the condominium project expires, together with a statement of the circumstances, if any, which terminate that option before the expiration of the specified time limit.

Similar to MCL 559.132, the plain language of MCL 559.133 appears to disallow the contraction of a condominium, either by the developer or a co-owner vote, more than six years after the recording the initial master deed. However, MCL 559.167, as amended by 2016 PA 233, also allows for withdrawal of any land or units that are identified as "need not be built" on the condominium subdivision plan: (1) within ten years of the date that the master deed is recorded; (2) after the expiration of the ten year time period if two-thirds of the co-owners in good standing do not vote to have the units revert to common elements; (3) or within six years of the exercise of a right of expansion, contraction or convertibility. The existence of a separate "contraction" provision, MCL 559.133, and "withdrawal" provision, MCL 559.167, is unique to Michigan, as neither the UCA[55] nor any other condominium act provides multiple ways to remove land and units from a condominium.

Moreover, if withdrawal can be accomplished for a potentially indefinite time period pursuant to MCL 559.167, as amended by 2016 PA 233,[56] a developer is unlikely to exercise a right of contraction under MCL 559.133, as MCL 559.133 requires a developer to insert numerous provisions in a master deed to contract the condominium within six years after the creation of the condominium. Accordingly, MCL 559.133 and MCL 559.167(3) should be combined into a single section of the Act. The section would allow for "need not be built" land and units to be withdrawn within ten years of the recording of the initial master deed, so long as appropriate notice that a withdrawal may occur is contained in the master deed.[57] If the undeveloped land and units are not withdrawn, the possibility would still exist for the undeveloped land and units to remain in the condominium as common elements.[58]

7. The Michigan Condominium Act lacks a mechanism to easily correct obvious mistakes contained in the master deed.

One of the most frustrating things about the Michigan Condominium Act is that it fails to account for human error in drafting condominium documents. Unfortunately, co-owner apathy often makes it difficult to fix obvious drafting errors after the developer can no longer unilaterally amend the master deed.[59] The current version of the Act contains little flexibility to remedy the above types of issues, other than through a co-owner vote or a developer making an immaterial change.[60]

While the UCA itself does not remedy this issue, at least one UCA state has codified the common law concept of judicial reformation of condominium documents to fix certain errors in condominium documents.[61] Specifically, the Virginia Condominium Act allows for an association to file a petition in circuit court to resolve: "(i) ambiguities or inconsistencies in the condominium instruments that are the source of legal and other disputes pertaining to the legal rights and responsibilities of the unit owners' association or individual unit owners or (ii) scrivener's errors, including incorrectly identifying the unit owners' association, incorrectly identifying an entity other than the unit owners' association, or errors arising from oversight or from an inadvertent omission or mathematical mistake."[62] The statute allows for the court to: "1. Reform, in whole or in part, any provision of the condominium instruments; and 2. Correct mistakes or any other error in the condominium instruments that may exist with respect to the declaration for any other purpose."[63] Given that Michigan case law already recognizes common law reformation,[64] the same concept could be codified in a modified version of the UCA that would provide stake-

55 The UCA only has one method to withdraw land from a condominium. *See*, *e.g.,* UCA 2-105, UCA 2-110, 68 Pa Stat 3206 & Va Code Ann 55-79.54.

56 The only notice that a co-owner would receive that units could be withdrawn is that the units are identified as "need not be built" on the condominium subdivision plan. However, unless the co-owner has read and understood the Act, they are unlikely to know the significance of identifying land and units as "need not be built."

57 *See*, *e.g.,* UCA 2-105, UCA 2-110 & MCL 559.133.

58 This approach would be consistent with the current version of MCL 559.133 and the UCA, as it would provide an unsophisticated purchaser with notice that the condominium may be contracted at some future point in time. *See, e.g.,* UCA 2-105, UCA 2-110, 68 Pa Stat 3206 & Va Code Ann 55-79.54.

59 *See* MCL 559.190 & MCL 559.190a.

60 *Id*.

61 Va Code Ann 55-79.73.2; *see also* Fla St 718.110.

62 *Id*.

63 *Id*.

64 *See, e.g., Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371-72; 761 NW2d 353, 359 (2008) ("Michigan courts sitting in equity have long had the power to reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise.").

holders with an additional option to fix certain types of errors in the condominium documents.

8. The Michigan Condominium Act does not contemplate the formation of master associations and their relationship to condominium associations.

Developers frequently form a master association to govern common areas and recreational facilities that are shared between multiple condominiums. The master association is typically created through the recording of a declaration, easement or some form of restrictive covenant that provides the master association with authority to act as a matter of contract. However, the term "master association" appears nowhere in the Michigan Condominium Act. Thus, there is a gap in the law that fails to identify the parameters of the legal relationship between a condominium association and a master association.

In contrast, the adoption of the UCA would bring clarity to this area. UCA 2-120 specifically allows for the creation of a master association and defines the parameters of the relationship between a condominium association and master association. Under the UCA, powers of a condominium association may be delegated to a master association that is either a corporation (profit or nonprofit) or unincorporated association.[65] The UCA further states that a master association is subject to the same requirements as a condominium association.[66] This is important for a variety of reasons. By way of example, in a condominium association, the following must occur, but need not occur in a master association unless specifically provided for in the restrictive covenant establishing the master association:

- Transitioning control of the master association from the developer to the co-owners by a certain date.[67]
- Requiring the association to have its books and records audited or review if it has more than $20,000 in revenue.[68]
- Requiring a two-thirds co-owner vote to change the restrictive covenant establishing the master association.[69]

The adoption of the UCA would not only codify the common practice of creating master associations, but would also ensure that master associations are being operated in a similar manner to condominium associations.

Additionally, given that the Michigan Condominium Act does not contemplate master associations, it also does not address the relationship between master association liens and other liens recorded on a condominium unit. Currently, MCL 559.208(1) states that a condominium association lien has priority over all other liens "except tax liens on the condominium unit in favor of any state or federal taxing authority and sums unpaid on a first mortgage of record, except that past due assessments that are evidenced by a notice of lien recorded as set forth in subsection (3) have priority over a first mortgage recorded subsequent to the recording of the notice of lien."[70] Accordingly, pursuant to MCL 559.208, if a condominium association foreclosed on its lien, it appears that any lien of a master association would be wiped out in the process. In contrast, the UCA allows a master deed or declaration to determine the priority of the liens. If the master deed or declaration does not determine whether a condominium lien or master association lien has priority, the liens have equal priority. Specifically, UCA 3-116(c) provides as follows,"(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority." Given that master associations have been growing in popularity, it is important to address this lien priority issue in updating the Act.

9. The Michigan Condominium Act needs a simpler process for merging two adjoining condominiums.

It is not uncommon for a developer or successor developer to cut short a condominium project and withdraw

65 UCA 2-120(a).

66 *Id*.

67 MCL 559.152.

68 MCL 559.157.

69 MCL 559.190.

70 *Cf.* UCA 3-116(b) provides as follows with respect to the priority of condominium liens, "(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. The lien is also prior to the mortgages and deeds of trust described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association."

land, either to avoid the potential consequence of "need not be built" units becoming common elements[71] or to commence the running of the statute of limitations by creating a shorter time period to transition from developer to co-owner control in a smaller condominium.[72] Where smaller condominiums are located directly adjacent to each other and were merely separated for the purposes of the convenience of development, there ought to be an easy way for condominiums to merge after the developer has left the project. While the Michigan Nonprofit Corporation Act would easily allow for a merger of separate nonprofit corporations that govern a condominium,[73] the Michigan Condominium Act appears to only allow for condominiums that meet the requirements of MCL 559.132 to merge.[74] In contrast, UCA 2-121 expressly allows all condominium projects to be merged into a single project at any time, presuming the following requirements are met:

- The separate condominiums prepare a written agreement, detailing the terms of the merger, which will be executed by the president of each condominium association and recorded in the register of deeds after the agreement is approved by the same number of co-owners that are required to terminate a condominium.[75]
- The merger agreement provides for the reallocation of the percentage of value of each unit in the resultant condominium.[76]
- The resultant condominium and condominium association would hold all of the powers, rights, obligations and assets of all preexisting condominium associations.

Accordingly, adopting the UCA would provide a better and less restrictive procedure to merge condominiums. It would also mandate that the co-owners vote on a merger, which is more closely aligned to the procedure set forth in the Michigan Nonprofit Corporation Act.

Article III – Management of a Condominium

10. The Michigan Condominium Act does not adequately define the obligations of a developer after the transitional control date.

The Michigan Condominium Act defines the transitional control date as "the date on which a board of directors for an association of co-owners takes office pursuant to an election in which the votes that may be cast by eligible co-owners unaffiliated with the developer exceed the votes which may be cast by the developer."[77] Prior to the transitional control date, the developer is to create an advisory committee for the condominium association "for the purpose of facilitating communication and aiding the transition of control to the association of co-owners."[78] However,

71 *See* MCL 559.167.

72 MCL 559.276.

73 MCL 450.2701.

74 MCL 559.132(n) provides that an expandable condominium project is required to contain a provision in the master deed that states as follows:

> A statement as to whether the condominium project shall be expanded by a series of successive amendments to the master deed, each adding additional land to the condominium project as then constituted, or whether a series of separate condominium projects shall be created within the additional land area, all or some of which shall then be merged into an expanded condominium project or projects by the ultimate recordation of a consolidating master deed.

Accordingly, MCL 559.132(n) contemplates a potential merger of expandable condominiums by recording a consolidating master deed as part of an expansion to a condominium. Presumably this would need to occur within the six year time period provided by MCL 559.132(c). A merger could occur as part of an expansion if a developer reserved the right to expand without co-owner approval pursuant to MCL 559.132(a) and MCL 559.132(b). However, my opinion is that adoption of UCA 2-121 would bring more clarity to this process and that co-owners should be allowed an opportunity to vote on a merger.

75 UCA 2-118 and MCL 559.151 both require 80% co-owner approval to terminate a condominium if there is a co-owner other than the developer. However, the process for terminating a condominium under the Michigan Condominium Act needs to be clarified. MCL 559.190a(9)(a) was added to the Act in 2001 by 2000 PA 379. MCL 559.190a(9)(a) allows for a first mortgagee to vote on an amendment to the condominium documents that terminates a condominium. However, MCL 559.151 was not updated in 2000 PA 379. MCL 559.151 does not use the term "mortgagee", does not require a mortgagee vote and only requires 80% co-owner approval, of the co-owners unaffiliated with the developer, and the agreement of the developer to terminate a condominium.

76 Similar to the UCA, MCL 559.101(1) requires that a percentage of value be assigned to each unit.

77 MCL 559.110(7).

78 MCL 559.152(1).

beyond the above described amorphous requirement of "facilitating" the transition, there is nothing that indicates what exactly is to occur when a developer transitions control of a condominium association to the co-owners. Moreover, it is not uncommon that a developer fails to form an advisory committee, either due to ignorance or co-owner apathy. This often results in a loss of institutional knowledge when a developer transfers control to the condominium association and makes it difficult for a co-owner controlled board to operate the association.

While this issue is not specifically remedied in the UCA, several states have crafted statutes that identify a developer's obligations in transferring control of the association to the co-owners. In both Alaska[79] and Washington,[80] a developer is required to provide certain information to the co-owner controlled board within sixty days of the transitional control date.[81] Specifically, the co-owner board is entitled to receive all of the current condominium documents, articles of incorporation, meeting minutes of prior meetings, rules and regulations, resignations of former board members, financial records, bank statements, association funds, any personal property belonging to the association, modification agreements, insurance policies, certificate of occupancies, warranties on the common elements, a roster of unit owners, a roster of mortgagees and any contracts that the condominium association entered into.[82] Similarly, these statutes require an audit of the association's books and records, at the association's expense, unless the co-owners vote to opt out of the audit.[83] The adoption of a similar statute in Michigan would reduce the burden on the new co-owner board. It would not impose any new burdens on developers as a developer that was properly operating the association should have this information readily available, and would likely provide this information anyway. Rather, the statute would encourage transparency in the transition process, which may decrease the likelihood of conflict between associations and developers arising out of the transfer of control of the association.

79 AS 34.08.340.

80 RCW 64.34.312.

81 *See* notes 79 & 80 *supra*.

82 *Id*.

83 *Id*.

11. The Michigan Condominium Act does not clearly define the rights and duties of successor developers.

MCL 559.235(1) defines a "successor developer" as a "person who acquires title to the lesser of 10 units or 75% of the units in a condominium project, other than a business condominium project, by foreclosure, deed in lieu of foreclosure, purchase, or similar transaction." MCL 559.235(2) indicates that a "successor developer" must comply with the Act in the same manner as a developer before selling any units and that it must assume all express written contractual warranty obligations for defects in workmanship and materials undertaken by its predecessor in title. While MCL 559.235(1) adequately defines who qualifies as a successor developer, in practice, disputes often arise as to what a "successor developer" is actually obligated to do. Clarification is needed in this area so successor developers can feel more comfortable about purchasing units and condominium associations can have a better understanding of what a successor developer's actual obligations are.

UCA 3-104 does a much better job of defining the obligations of a successor developer. UCA 3-104(a) indicates that a voluntary transfer of declarant rights must be evidenced by a written instrument that is recorded in the register of deeds. UCA 3-104(b) indicates that the original developer remains responsible for all of its original obligations, but that a successor developer would be liable for its own actions after the transfer.[84] In the case of an involuntary transfer, such as a mortgage foreclosure, tax sale, judicial sale, receivership or bankruptcy proceedings, UCA 3-104(c) states that the successor developer may request the developer's rights, but is not obligated to take them. The Florida Condominium Act has taken the above approach a step further and specifically creates two classes of successor developers: (1) a successor developer "assignee"[85] and (2) a successor developer "buyer."[86] If Michigan were to adopt a similar scheme, a successor developer "assignee" (i.e., a successor developer that receives a written assignment of development rights) would step into the shoes of the developer and have all the same rights and obligations of a developer to complete the condominium. However, a successor developer "assignee" would not be responsible for warranties of the developer, any liability associated with actions of a prior board of

84 The exception to this rule would be if the successor is an affiliate of the developer or if the original developer does not assign all of its rights. *See* UCA 3-104(b).

85 Fla St 718.703(1).

86 Fla St 718.703(2).

directors or a developer's failure to properly fund the association, unless it expressly assumed these liabilities.[87] A successor developer "buyer" would only be responsible for any obligations of a developer that it expressly chose to assume and would not be required to assume any of the developer's original obligations.[88] However, similar to Florida, the adoption of a successor developer "assignee" and "buyer" framework would also need to include language that prevents potential abuses by developers. Specifically, Florida precludes the conferring of successor developer "assignee" or "buyer" status to limit liability in the event of a fraudulent transfer by the developer or in situations involving transfers between related entities.[89]

It would benefit Michigan to adopt the approach taken by Florida as, in practice, many successor developers are hesitant to complete condominium projects due to "successor developer liability," whether such liability is real[90] or merely perceived.[91] Given that each condominium is different, some successor developers may need to complete common elements or make improvements to existing defective common elements in order to sell units. In other condominium projects, the common elements may already be completed at the time that the successor developer acquired their units. Accordingly, a "one size fits all" approach to successor developers does not appear to be a workable solution and often leads to conflict between condominium associations and successor developers. Under the Florida approach, the more control a successor developer asserts over the condominium, the greater the potential for liability; the less control the successor developer asserts, the lower the potential for liability. The Florida approach not only creates more flexibility for successor developers, but it also creates greater certainty for condominium associations as it more clearly outlines the responsibilities of successor developers.

87 *See, e.g.*, Fla St 718.704.

88 *Id*. This would be similar to MCL 559.235(5), which currently only applies to residential builders.

89 *Id*.

90 Successor developer liability may result from the language contained in the master deed. If the original developer defines the term "developer" as the original corporate entity and its "successors and assigns," a statutory successor developer may also have additional obligations and liability as a matter of contract.

91 *See, e.g.,* Gregory J. Gamalski & Paul A. Thursam, *Legal Considerations Related to Redevelopment, Reconfiguration and Re-sale of Failed Condominium Projects and Subdivisions*, 37 Mich Real Prop Rev 8, 18 (2010) (arguing that strict liability cannot be imposed on statutory successor developers).

12. The Michigan Condominium Act must be amended to account for technological advances.

The Michigan Nonprofit Corporation Act was recently amended to account for technological advances and now allows for online voting[92] and remote participation in meetings by electronic means.[93] The Michigan Condominium Act, which is now over thirty-five years old, needs similar updating to accommodate technological changes. Electric vehicle charging stations and solar panels are two areas that the current Act does not address and that condominium associations frequently encounter.

Between 2008 and August, 2014, approximately 250,000 electric vehicles were sold in the United States.[94] That number increased to approximately 450,000 as of April, 2016.[95] Given the rapid rise in popularity of electric vehicles, some states, such as California,[96] Colorado,[97] Oregon[98] and Hawaii,[99] have passed laws that preclude condominium associations from completely banning electric vehicle charging stations.[100] Rather, in these states, the condominium associations may impose reasonable restrictions on the electric vehicle charging stations relating to aesthetics, location and size.[101] Charging stations are also required to meet applicable health and safety regulations imposed by local or state government.[102] Moreover, the co-owner is required to maintain the electric vehicle charging station and maintain insurance on the electric vehicle charging station.[103] As the home of the "Motor City," it would make sense for Michigan to modernize its Act to prevent potential disputes that can arise between condominium associations and co-owners over installing electric vehicle charging stations. A workable solution would be a balanced approach that prohibits a complete

92 MCL 450.2143, MCL 450.2408 & MCL 450.2409.

93 MCL 450.2405 & MCL 450.2521.

94 Wikipedia, *Plug-In Electric Vehicles in the United States*, https://en.wikipedia.org/wiki/Plug-in_electric_vehicles_in_the_United_States#Markets_and_sales (accessed on June 16, 2016).

95 *Id*.

96 Cal Civ Code 4745.

97 Colo Rev Stat Ann 38-33.3-106.8.

98 Or Rev Stat Ann 100.627.

99 Haw Rev Stat Ann 196-7.5.

100 The UCA does not contain a provision that addresses electric vehicle charging stations.

101 *See* notes 96-99 *supra*.

102 *Id*.

103 *Id*.

ban on electric vehicle charging associations but also provides condominium associations with discretion to regulate charging stations.

In 2006, approximately 30,000 homes in the United States had solar panels.[104] By 2016, that number had increased to more than 1 million.[105] Notwithstanding the rapid growth of solar panels, Michigan is one of only ten states that has yet to enact some form of solar access law.[106] In states that do not allow an outright ban on solar panels, a condominium association typically has the power to restrict the size and location of solar panels for aesthetic purposes.[107] In addition, the condominium association may establish conditions regarding solar panel installation, maintenance and repair, indemnification, insurance and responsibility for liability.[108] The Act must be updated to account for the rapidly increasing number of co-owners that would like to utilize solar energy. Similar to electric vehicle charging stations, a balanced approach that prohibits a complete ban on solar panels and provides condominium associations with discretion to regulate solar panels would be a workable solution.

13. The Michigan Condominium Act needs a default quorum requirement to combat co-owner apathy.

Co-owner apathy is one of the biggest impediments to conducting business in a condominium association. Many associations have a difficult time conducting business due to lack of quorum. The Michigan Condominium Act does not currently contain a quorum requirement for associations to hold meetings. However, most condominium associations are nonprofit corporations and quorum is set at a majority of the votes entitled to vote unless otherwise specified in the articles of incorporation or bylaws.[109] Even in cases where the bylaws specify a lower quorum requirement (typically twenty to thirty-five percent of eligible voters), associations still have a difficult time attracting co-owners to meetings.[110] In order to remedy this issue, the UCA sets forth a default quorum requirement of twenty percent of eligible voters.[111] In addition to setting a default quorum of twenty percent, the Act should be revised to allow the co-owners present at a meeting at which quorum is not obtained to adjourn the meeting to a date that is not more than sixty days past the scheduled meeting, and to reduce quorum by one-half at each subsequent meeting until quorum is reached. The purpose of including a reducing quorum requirement would be to allow the condominium association to continue to conduct business based upon the desires of the co-owners that care enough to participate in association meetings.[112]

14. The Michigan Condominium Act needs mandatory minimum insurance requirements for condominium associations.

The Michigan Condominium Act does not require an association to carry a minimum amount of insurance. The administrative rules accompanying the Act set forth the insurance requirements for condominiums as follows:

> The bylaws shall provide that the association of co-owners shall carry insurance for fire and extended coverage, vandalism and malicious mischief, and, if applicable, liability and workers' disability compensation, pertinent to the ownership, use, and maintenance of the premises and that all premiums for insurance carried by the association shall be an expense of administration. The association may carry other insurance cover-

104 Rebecca Harrington, Tech Insider, *The US is about to hit a big solar energy milestone*, (Oct 13, 2015), http://www.techinsider.io/solar-panels-one-million-houses-2015-10 (accessed on June 16, 2016).

105 *Id*.

106 Katie Neal, *A simple guide to convincing your HOA to allow solar panels*, https://solarpowerrocks.com/affordable-solar/can-work-homeowners-association-approve-solar/ (accessed on June 16, 2016).

107 While the UCA does not contain a provision on solar panels, states that have adopted the UCA have included provisions that prohibit a condominium association from completely banning solar panels while allowing the association to adopt reasonable restrictions regarding solar panels. *See, e.g.,* ARS 33-1816 & NM Stat Ann 3-18-32.

108 *See, e.g., Garden Lakes Cmty Ass'n, Inc v Madigan*, 204 Ariz 238, 242; 62 P3d 983, 987 (2003).

109 MCL 450.2415(1).

110 Only 16 to 21 percent of the voting age population in Michigan voted for the President of the United States from 1980 to 2012. Michigan Secretary of State, *Primary Voter Registration/Turnout Statistics*, http://www.michigan.gov/sos/0,4670,7-127-1633_8722-195479--,00.html (accessed on June 16, 2016). Accordingly, it is not surprising that condominium associations have difficulty attracting co-owners to vote in condominium association elections.

111 UCA 3-109.

112 It is not unusual to see a reducing quorum requirement in condominium bylaws.

age, including cross-coverage for damages done by 1 co-owner to another.[113]

Other than indicating that a condominium association is required to have certain types of insurance, the administrative rules provide little guidance as to the minimum amount of insurance to carry, the contents of the insurance policy, etc. In contrast, UCA 3-113 provides minimum parameters for insurance in a condominium. UCA 3-113(a)(1) states that the value of an insurance policy that insures the common elements shall not be less than eighty percent of the actual cash value of the insured property. In the event that the condominium association is not able to obtain insurance in such an amount, it must obtain what is reasonably available and notify the co-owners of the association's inability to obtain the required insurance.[114] Finally, while not contained in the UCA itself, other states have required that both a condominium association and its property manager maintain a fidelity bond, which would protect the condominium association against theft.[115] Accordingly, an overhaul to the Act should set forth minimum insurance requirements.

15. Maintaining a ten percent reserve fund is typically inadequate to make meaningful repairs to the common elements.

The Michigan Condominium Act and administrative rules require that a condominium association maintain a minimum reserve fund "equal to 10% of the association's current annual budget on a noncumulative basis."[116] The purpose of the reserve fund is to ensure that a condominium association does not have to levy a large assessment and has sufficient funds to handle major repairs and replacement to the common elements as they arise. While the arbitrary ten percent calculation is a minimum percentage, in practice, it seems to have become ubiquitous in condominium association budgets. Rather than relying on a reserve study to forecast a budget for major repair and replacement, many associations simply rely on the ten percent figure and later end up imposing large assessments as a result of poor planning. This often leads to situations where co-owners cannot pay the large assessment and risk losing their unit to foreclosure.[117]

113 Mich Admin Code, R 559.508.

114 UCA 3-113(c).

115 *See, e.g.,* LA Rev Stat 9:1123.113.

116 MCL 559.205 & Mich Admin Code, R 559.511.

117 *See* MCL 559.206 & MCL 559.208.

While the UCA provides a condominium association with authority to collect reserves,[118] it does not solve the issue of the arbitrary ten percent calculation. A better approach would be to incentivize an association to obtain a reserve study.[119] Specifically, start with a ten percent minimum reserve requirement, but increase this amount to twenty percent in the event that a condominium association has not had a reserve study performed in the past five years. At the very least, this would incentivize condominium associations to obtain information about the true costs of long term repairs and replacements, instead of relying on the ten percent minimum reserve requirement as a crutch.[120]

Article IV – Protection of Condominium Purchasers

16. A developer should no longer be required to provide a potential purchaser with the condominium buyer's handbook.

MCL 559.184a(c) requires a developer to provide a potential purchaser with a condominium buyer's handbook.[121] MCL 559.184a(c) further states that:

> The handbook shall contain, in a prominent location and in boldface type, the name, telephone number, and address of the person designated by the administrator to respond to complaints. The handbook shall contain a listing of the available remedies as provided in section 145.

118 UCA 3-102.

119 A reserve study is an inspection of the common elements that is intended to analyze the repair and replacement needs of a condominium. An engineer and/or accountant will typically project an anticipated cost and timeframe for repair or replacement of various common elements so that the costs of repair and replacement can be built into an association's budget on an annual basis.

120 Washington is a UCA state and has modified the UCA to encourage the use of reserve studies to create an adequate reserve fund. *See* RCW 64.34.380. However, the issue with Washington's approach is that it lacks an enforcement mechanism and allows for an association to opt out of the reserve study requirement in the event of "hardship."

121 MCL 559.103(8) defines the "Condominium buyer's handbook" as "the informational pamphlet created by the administrator."

However, the administrator, which is currently the Michigan Department of Licensing and Regulatory Affairs ("LARA") has not been responsible for responding to co-owner complaints or taking enforcement action since 1983.[122] Specifically, the first page of the condominium buyer's handbook states as follows:

> Although the Department of Licensing and Regulatory Affairs is the designated administrator in the Act, the Legislature repealed the Department's regulatory and enforcement responsibilities in 1983.
>
> …
>
> **NOTE:** A person or association of co-owners adversely affected by a violation of, failure to comply with, the Condominium Act, administrative rules, or any provision of your bylaws or master deed may take action in a court of competent jurisdiction.[123]

Accordingly, it does not make sense to require a developer to hand out a ten page booklet that merely advises a potential purchaser to hire an attorney to file a complaint in court to remedy a violation of the Act, administrative rules or condominium documents. Adding a disclaimer to the disclosure statement[124] or purchase agreement[125] recommending that a potential purchaser consult with an attorney to answer any questions prior to signing a purchase agreement would seem to be a more efficient approach.[126]

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122 *But see* HB 5655 (2016). HB 5655 would renew the administrator's authority to handle co-owner complaints.

123 *See* note 8 *supra.*

124 MCL 559.184a(1)(d) requires a developer to provide a disclosure statement that contains the following:

> (i) An explanation of the association of co-owners' possible liability pursuant to section 58.
> (ii) The names, addresses, and previous experience with condominium projects of each developer and any management agency, real estate broker, residential builder, and residential maintenance and alteration contractor.
> (iii) A projected budget for the first year of operation of the association of co-owners.
> (iv) An explanation of the escrow arrangement.
> (v) Any express warranties undertaken by the developer, together with a statement that express warranties are not provided unless specifically stated.
> (vi) If the condominium project is an expandable condominium project, an explanation of the contents of the master deed relating to the election to expand the project prescribed in section 32, and an explanation of the material consequences of expanding the project.
> (vii) If the condominium project is a contractable condominium project, an explanation of the contents of the master deed relating to the election to contract the project prescribed in section 33, an explanation of the material consequences of contracting the project, and a statement that any structures or improvements proposed to be located in a contractable area need not be built.
> (viii) If section 66(2)(j) is applicable, an identification of all structures and improvements labeled pursuant to section 66 "need not be built".
> (ix) If section 66(2)(j) is applicable, the extent to which financial arrangements have been provided for completion of all structures and improvements labeled pursuant to section 66 "must be built".
> (x) Other material information about the condominium project and the developer that the administrator requires by rule.

125 MCL 559.184.

126 While MCL 559.184(d) does not prohibit a developer from providing the required disclosures to a prospective purchaser via electronic means, this was likely not contemplated when the Act was drafted. MCL 559.184(d) should be clarified to expressly allow developers to provide documents electronically as we move to a paperless world. *See, e.g.,* MCL 450.2406a (allowing for members of a nonprofit corporation to receive electronic notice after consent).

Alternatively, the disclosure statement or purchase agreement could merely include a link to the website where the condominium buyer's handbook is located if a potential purchaser desired to look at it.[127]

17. The Michigan Condominium Act should contain a requirement that certain disclosures be made in re-sale transactions and not just new condominium unit sales.

Many potential condominium purchasers confuse condominium living with apartment living (i.e., the condominium association is responsible for all repairs) or with owning a single family home (i.e., the purchaser can do as they please without any type of restrictions). Many disputes between co-owners and condominium associations could be avoided if more information were provided at the time the co-owner purchased the unit from a non-developer co-owner. As indicated above, the Michigan Condominium Act currently requires extensive disclosures with respect to the sale of new condominium units,[128] but does not require any type of disclosures when a unit is re-sold.

In contrast, the UCA requires a co-owner to furnish a purchaser with a re-sale certificate prior to the execution of a purchase agreement.[129] Common items contained in or attached to a re-sale certificate that would be important to a prospective purchaser include:

- A copy of the current master deed, condominium bylaws, rules and regulations and articles of incorporation.
- A written statement setting forth the amount of unpaid assessments, interest, late charges, fines, costs and attorney's fees against the seller or grantor's unit.
- A statement of any other fees payable by the co-owners.
- A statement of the amount of any reserves for repair or replacement and of any portions of those reserves currently designated by the association for any specified projects.
- The annual financial statement of the association, including the audit report if it has been prepared, for the year immediately preceding the current year.
- The current operating budget of the association.
- A statement of any unsatisfied judgments against the association and the status of any pending suits or legal proceedings in which the association is a plaintiff or defendant.
- A statement describing any insurance coverage provided for the benefit of the co-owners.
- A statement as to whether there are any alterations or improvements to the unit or to the limited common elements assigned thereto that violate any provision of the condominium documents.
- A copy of any modification agreements that the association entered into with any prior co-owners for the unit.
- A copy of the current reserve study or a statement that the association does not have a reserve study.[130]

Under the UCA, a co-owner would obtain the above information from the condominium association. The association would have ten days to produce the above information in exchange for a reasonable fee.[131] However, the co-owner would not have legal responsibility for any misinformation that was provided by the condominium association.[132] Adopting a re-sale certificate requirement would create more transparency in the re-sale process and would likely decrease disputes between ignorant purchasers and condominium associations. While many potential purchasers rely on either the former co-owner or a real estate agent to obtain the above information, it often does not happen in practice, and re-sale disclosures should be part of the revised Act.

18. The escrow and security requirements in the Michigan Condominium Act are unworkable and must be simplified.

MCL 559.203b(3) indicates that a developer is required to maintain an escrow in connection with the purchase of each unit until all of the following occurs:

> (a) Issuance of a certificate of occupancy for the unit, if required by local ordinance.
>
> (b) Conveyance of legal or equitable title to the unit to the purchaser.

127 *See* note 8 *supra*.

128 MCL 559.184a.

129 UCA 4-109.

130 *See, e.g.,* UCA 4-109, RCW 64.34.425 & KRS 381.9203 for examples of required contents in re-sale certificates.

131 *Id*.

132 *Id*.

(c) Receipt by the escrow agent of a certificate signed by a licensed professional engineer or architect either confirming that those portions of the phase of the project in which the condominium unit is located and which on the condominium subdivision plan are labeled "must be built" are substantially complete, or determining the amount necessary for substantial completion thereof.

(d) Receipt by the escrow agent of a certificate signed by a licensed professional engineer or architect either confirming that recreational or other facilities which on the condominium subdivision plan are labeled "must be built", whether located within or outside of the phase of the project in which the condominium unit is located, and which are intended for common use, are substantially complete, or determining the amount necessary for substantial completion thereof.

Given the tedious and expensive nature of fulfilling the above requirements, many developers do not comply with MCL 559.203b (which may be in part due to ignorance), even though a vast majority of disclosure statements indicate that funds are being held in escrow. Alternatively, MCL 559.203b(5) allows for a developer to opt out of maintaining an escrow, which would need to be properly disclosed in the disclosure statement and escrow agreement, if the developer provides the escrow agent with "evidence of adequate security, including, without limitation, an irrevocable letter of credit, lending commitment, indemnification agreement, or other resource having a value, in the judgment of the escrow agent, of not less than the amount retained pursuant to subsection (3)." Many developers are unlikely to provide a letter of credit or lending commitment, as this exposes them to additional liability in the event that the "must be built" structures and common elements are not completed. Additionally, if a developer goes out of business, and fails to complete the project, an indemnification agreement does little to ensure that the condominium is completed.

In contrast, Virginia, which has adopted a modified version of the UCA, requires a developer to post a performance bond to ensure completion of the common elements.[133] If such an approach were adopted, a local municipality would require a developer to post a performance bond for any "must be built" structures or improvements as a condition of the developer, or its contractors, obtaining building permits. The condominium association would be an obligee on the performance bond. Under this approach, condominium associations and municipalities would have greater assurances that the "must be built" portions of the condominium would be completed, as there would be money to complete the condominium in the event that the developer went out of business.[134] Developers would likewise not have to worry about complying with tedious requirements in establishing an escrow to complete "must be built" portions of the condominium or assuming liability via letters of credit or indemnification agreements. Rather, developers could simply build the cost of the performance bond into the sale price of units.

Conclusion

Adopting a modified version of the Uniform Condominium Act would be a great improvement over the current Michigan Condominium Act. First, the UCA is better organized and more user friendly. Second, adoption of a modified version of the UCA would allow for clarification on various areas of the Act that are vague or ambiguous. Third, adoption of a modified version of the UCA would provide greater flexibility with respect to creating and altering condominium projects. Fourth, stakeholders would no longer live in fear that they are somehow running afoul of an archaic statute that does not coincide with modern practice.

A complete overhaul of the Michigan Condominium Act will not be a small task, as it will require some level of compromise by numerous stakeholders, such as attorneys, accountants, banks, condominium associations, co-owners, developers, property managers, potential purchasers, municipalities, realtors, surveyors and title companies. Past piecemeal fixes to the current Act have been akin to plugging holes in a dam that will eventually burst and have made the Michigan Condominium Act more confusing and unintelligible over the years. I hope that this article will serve as a starting point for discussion for a much needed overhaul of the Michigan Condominium Act.

133 Va Code Ann 55-79.58:1.

134 Even though this requirement would be a new addition to the Michigan Condominium Act, many municipalities already require developers or successors developers to post bonds.