

TUCA TURNS 25

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- **Member, Federal Affairs Task Force, Community Associations Institute. The Federal Affairs Task Force is a national task force organized to respond and comment upon Federal legislation affecting community associations and home ownership.**
- **Community Associations Institute, 2010 Award of Excellence for Government & Public Affairs - Federal Affairs Task Force (award conferred based on advocacy regarding federal mortgage lending requirements for residential product).**
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- Texas
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Presentations and Papers

- *Drafting Community Rules*, Advanced Property Owners Association Law (September 2018)
- *Leasehold Condominiums*, 40th Annual Advanced Real Estate Law Course (July 2018)
- *Density Developments*, Community Association Institute (April 2018)
- *Risky Business: Avoiding Coverage Gaps and Overlaps When Insuring Mixed-Use Projects*, sponsored by the American Bar Association RPTE and the American College of Real Estate Attorneys (February 2018)
- *The Trouble with "Townhomes"*, Community Association Institute (January 2018)
- *85th Texas Legislature Update: Developers, Builders and POAs*, State Bar of Texas Webcast (November, 2017).
- *Insurance Issues for Mixed-Use Projects*, American College of Real Estate Attorneys (October 2017).

- *Life Cycle of a Master Planned Community*, First Service Residential Workshop (March 2017)
- *Condominium Tort Reform in Texas*, Texas Lawyer (2016).
- *84th Texas Legislative Update: Condos and Owners Associations HOA*, State Bar of Texas Webcast (July 2015).
- *HOA Pre-Foreclosure Due Diligence*, Handling Your First (or Next) HOA Assessment Lien Foreclosure for Condos and Subdivisions, Texas Bar CLE (October 2014).
- *Master Planned Communities: A Survey of Governance Models*, American College of Real Estate Attorneys (October 2014).
- *Commercial Restrictions: Advanced Real Estate Drafting Course* (March 2014).
- *Using the Condominium Form of Ownership to Segregate (Plat) Land*, Advanced Real Estate Strategies, State Bar of Texas (December 2013).
- *Drafting Condominium Documents to Comply with FHA, FannieMae and VA Requirements*, Advanced Real Estate Drafting Course (March 2013).
- *Uncommon Condominiums*, Texas Land Title Association Webcast (November 2012).
- *Condominium Alternatives, Mixed and Non-Traditional Uses*, 34th Annual Advanced Real Estate Law Course (July 2012).
- *HOA Reform Laws, Select Issues: Developers and Declarants*, State Bar of Texas Webcast (April, 2012).
- *The 82nd Texas Legislature and Community Association Reform—Developer Issues*, State Bar of Texas Webcast (April, 2012).
- *Planned Community Governance Models: Serial, Expandable, Nested and Busted*, 21st Annual Advanced Real Estate Drafting Course (March, 2010).
- *MOMUPs, Lollypops, and Snowmen*, Princeton University Higher Education Real Estate Lawyers (HEREL8) (October 2009).
- *Transitioning Property Owner Association Control*, 20th Annual Advanced Real Estate Drafting Course (March 2009).
- *Texas Condos 101*, State Bar of Texas Real Estate Section (December 2007).

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I. INTRODUCTION

From July 2017 to June 2018, 14,279 condominiums were sold in Texas at a dollar volume of \$3,414,945,120.¹ In the twenty-five years since the enactment of the Texas Uniform Condominium Act (“TUCA”),² the demand for both new-build and re-sale condominium units remains strong. To commemorate TUCA turning twenty-five, we reflect back on the history that helped shape and develop TUCA into a codified body of law, discuss a few issues associated with drafting of a condominium declaration, and briefly examine the changes that have been made to TUCA since its enactment. A quick note regarding the use of the term developer and declarant: in this article, I use developer and declarant interchangeably. Both terms mean, for the purpose of this article, the party who is developing the project, causes the condominium declaration to be recorded, is the named declarant under the condominium declaration, and will sell and convey units to purchasers. This is not always the case. There are circumstances where a project will include multiple parties with similar rights related to the development and sale of condominium units in the same project.³

II. FANTASTIC VOYAGE⁴

A. Condominium Law in the United States

1. Joannes Est Nomen Ejus⁵

In 1902, Puerto Rico was the first United States jurisdiction to adopt legislation recognizing the condominium form of ownership.⁶ In 1958, a shortage of land and an increasing population prompted Puerto Rico to replace the 1902 enabling statute with a more

comprehensive statutory scheme.⁷ Entitled the Horizontal Property Act,⁸ the new statutory scheme was more comprehensive than the 1902 enabling statute, and included provisions regarding identification of types of common elements, use rules, and maintenance of shared areas. To create a condominium under the 1958 Puerto Rico statute required the recordation of a deed and bylaws. The deed described each real property interest created out of the land submitted to the deed. The condominium units were created pursuant to the deed, which described the land submitted to the condominium, described each unit, assigned a number to each unit, included a description of the common elements, and established the percentage of common elements assigned to each unit. The bylaws were required to include owner meeting provisions, the community management structure (one administrator or a board of administrators), procedures for the collection of community expenses, and insurance requirements.⁹ The bylaws also included procedures for the administration of the building and processes for decision-making by and among the owners. Prior to adoption of the 1980 Model UCA (defined below in Section II.B.), condominiums created in Texas and elsewhere in the United States often used the same legal mechanics to create the condominium regime, i.e., a “master deed” was recorded to segregate the land into units and bylaws were recorded to address operation and administration of the community.

2. The FHA Housing Act of 1961 and the “First-Generation” Texas Enabling Statute

Following the end of World War II, a severe housing shortage in urban areas created a “need for the

¹ Texas Association of Realtors, *Texas Condominium Sales Report 2018 Edition*, available at: <https://www.texasrealestate.com/wp-content/uploads/2018TexasCondominiumSalesReport.pdf>.

² Texas Uniform Condominium Act, Texas Property Code, §82.001 et seq.

³ Though beyond the scope of this article, multiple party developers can be particularly challenging under TUCA. TUCA includes the ability to transfer certain rights needed to develop the project to another developer non-exclusively, or exclusively, as it relates to a specific project component, but an experienced practitioner will find that TUCA was designed for a single developer project. It is particularly challenging to address how control of the condominium association will work with multiple declarant parties, and such an arrangement will almost always require a separate agreement between such parties.

⁴ Fantastic Voyage, Coolio (1994). Fantastic Voyage was number 20 on Billboard magazine’s Top Hot 100 songs of 1994.

⁵ “Joannes Est Nomen Ejus” translated into English means “John is his name”, which appears on the Puerto Rico coat of

arms officially re-adopted by the Commonwealth government on June 3, 1976. The patron saint of Puerto Rico is St. John the Baptist.

⁶ P.R. Laws Ann., Tit. 31, §1291 (1902). Section 1291 was based on Article 396, Title III of the Spanish Civil Code adopted by Royal Decree in 1889. Title III of the Spanish Civil Code pertains to rights and obligations associated with the co-ownership of property. Article 396 specifically recognizes that parts of buildings “capable of independent use” may be separately owned. There is no specific operational guidance in Article 396, but Article 396 does contemplate regulation by additional statutory provisions.

⁷ Michael J. Moriarty, *A Comparison of United States and Foreign Condominiums*, 48 St. John’s L. Rev. 1012, FN 15 (1974).

⁸ The term “Horizontal” was used since the statute allowed areas of a building to be separated into horizontal segments. See Charles E. Ramsey, *Condominium*, 9 Prac. Law. 23 (March 1963).

⁹ See Horizontal Property Act of 1958, P.R. Laws Ann. tit 31, §1291-1293K (1969).

more efficient use of land through high rise multi-family dwellings located in those areas where facilities for employment, education, recreation, and public services already exist[ed].¹⁰ Prompted by newly elected President Kennedy's initiative "to provide decent housing for all of our people",¹¹ Congress passed two important pieces of legislation that spurred rapid development of condominium law in the United States. On June 30, 1961, President Kennedy signed the Housing Act of 1961.¹² Section 234(c) of the Housing Act recognized the condominium concept of real property ownership throughout the United States.¹³ The Housing Act also permitted the Federal Housing Administration ("FHA") to insure mortgages in states where the state had enabled the creation of condominiums.¹⁴ In response to the passage of the Housing Act of 1961, FHA promulgated the Model Statute for Creation of Apartment Ownership in 1962 ("FHA Model Statute") based on Puerto Rico's Horizontal Property Act.¹⁵ The FHA Model Statute was intended to provide a template for states to establish an enabling condominium statute. If the state statute conformed to the FHA Model Statute, the state could be assured that its statute would permit the issuance of FHA mortgage insurance for condominium loans in the state.¹⁶

Based largely on the FHA Model Statute, in 1963, the Texas Legislature enacted a condominium enabling statute, codified in 1983 as Chapter 81 of the Texas Property Code and known as the Texas Condominium Act.¹⁷ Thirty-eight other states passed condominium enabling legislation, mostly guided by the FHA Model Statute, by the end of 1963.¹⁸ By 1969, all fifty states, the District of Columbia, and the Virgin Islands had enacted legislation enabling condominiums.¹⁹

B. Development of the 1980 Model Uniform Condominium Act

As noted in Section II.A., above, a principal driver for state condominium enabling legislation was a desire by each state to allow their citizens to participate in the national mortgage insurance program offered by FHA. FHA promulgated the FHA Model Statute as a means to provide each state a "safe harbor". If the state adopted enabling legislation using the FHA Model Statute as its guide, lenders making loans to condominium unit purchasers could further secure their collateral with mortgage insurance. A mortgage insurance program intended to be implemented on a national basis, where the collateral is created by each state's enabling statute, necessarily requires consistency among each enabling statute, at least with respect to matters that affect the collateral. Inevitably, and over time, entropy began to erode consistency as each state made modifications to the enabling legislation, either through legislative amendment or as a result of court interpretation of the statute. The accumulation of these differences made for a challenging national mortgage market.²⁰ In addition, years of implementation and application of first-generation statutes revealed the sins of omission and a lack of flexibility. First-generation statutes were woefully ill-prepared to address termination, eminent domain, insurance, and many other issues.²¹ It also became apparent that, relative to the development, design, and structure of more creative condominium projects, the first-generation statutes (especially in regard to describing the unit) were rendered obsolete, clunky, and ill-suited for many projects.²²

In order to address these issues and others, the National Conference of Commissioners on Uniform

¹⁰ William Schwartz, *Condominium: A Hybrid Castle in the Sky*, 44 B.U.L. Rev. 138 (1964).

¹¹ "Message from the President of the United States", in *Hearings on Amendments to the Federal Housing Laws Before a Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess. 8 (1961).

¹² Housing Act of 1961 Authorizing \$6.1 Billion in Housing Programs, S. 1922 87th Cong. §75 (1961). An Act to assist in the provision of housing for moderate and low income families; to promote orderly urban development; to extend and amend laws relating to housing, urban renewal, and community facilities; and for other purposes.

¹³ 24 C.F.R. §234.

¹⁴ *Id.*

¹⁵ U.S. Federal Housing Admin., Dep't of Housing & Urban Development, Model Statute for Creation of Apartment Ownership (Form 3285, 1962).

¹⁶ In 1961, Hawaii was the first state to adopt a comprehensive condominium statute which was similar to the Puerto Rico Horizontal Condominium Act.

¹⁷ Tex. Rev. Civ. Stat. Ann. art. 1301a, §2(c) (Vernon Supp. 1963-1979). Texas Condominium Act, Texas Property Code, §81.001 et seq.

¹⁸ Patricia McQuillen Billow, *An Examination of the Current Ohio Condominium Law*, available at: <https://www.uakron.edu/dotAsset/234c74e2-0b4c-401f-a9d7-6ef572a8763d.pdf>.

¹⁹ Nicholas M. Cannella, *Recent Innovations in State Condominium Legislation*, 48 St. John's L. Rev. 994 (1974).

²⁰ See Unif. Condo. Act, prefatory note (1980), 7 pt. 2 U.L.A. 487 (2009).

²¹ See Unif. Condo. Act, prefatory note (1980), 7 pt. 2 U.L.A. 487 (2009).

²² The author had the difficult task of designing the legal condominium structure for a complicated mixed-use project in Louisville, Kentucky, under a first-generation condominium statute. See https://en.wikipedia.org/wiki/Louisville_Museum_Plaza. Unfortunately, construction was halted in 2008 and the project was abandoned. Fortunately, Kentucky replaced its first-generation statute with a version of the Uniform Condominium Act in 2012.

State Laws²³ undertook the task of drafting a modern real estate code for the United States in 1969.²⁴ In 1975, the National Conference adopted the Uniform Land Transactions Act, but removed the article dealing with the creation and ownership of condominiums.²⁵ The Commissioners elected to create a separate committee charged with drafting uniform laws for condominiums.²⁶ The committee produced seven drafts over the course of two years, finally culminating in a version approved by the Commissioners in 1977.²⁷ In 1978, the Commissioners appointed a committee to draft a uniform act for planned communities which was intended to apply to common interest communities excluding condominiums.²⁸ During the drafting process, it was determined that both the planned community act and the uniform condominium act approved in 1978 should include similar provisions, if possible, to allow states to adopt both acts simultaneously.²⁹ As a result, a number of amendments were incorporated into the 1978 uniform condominium act, culminating in final approval of a revised uniform condominium act in 1980 (“1980 Model UCA”).³⁰

²³ The National Conference of Commissioners on Uniform State Laws was formed in 1892 and is a national organization devoted to the attainment of uniformity in state legislation. Uniform Law Commission, *Overview*, available at: <https://www.uniformlaws.org/aboutulc/overview>.

²⁴ William Griffith Thomas, *The New Uniform Condominium Act*, 64 A.B.A. J 1370 (1978). William Griffith Thomas was a member of the Uniform Laws Conference’s Special Committee on the Uniform Condominium Act.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Unif. Condo. Act, prefatory note (1980), 7 pt. 2 U.L.A. 487 (2009).

²⁹ *Id.*

³⁰ *Id.*

³¹ Texas House of Representatives, Committee on Business & Industry, 66 Leg., *Interim Report to the 67th Texas Legislature* (1980).

³² Texas House of Representatives, Committee on Business & Industry, 66 Leg., *Interim Report to the 67th Texas Legislature* (1980). The report noted that condominium construction and conversion was now a big business, and that for many Texans, condominium housing was the only affordable option in the real estate market. Some of the concerns discussed in the report included the need for: (1) a minimum building and fire code, (2) disclosures to purchasers concerning the condominium unit and building, (3) conscionable due process for tenants living in conversion buildings, (4) insurance requirements, (5) escrowing purchaser earnest money deposits, and (6) restrictions on resale or leasing of units. The report recommended that the following provisions should be

C. Enactment of TUCA in 1994

In 1979, the Speaker of the House of the Texas Legislature directed the Committee on Business and Industry to evaluate existing statutes and regulations for condominiums and the possible need for revision.³¹ The committee drafted a comprehensive report discussing ownership issues in condominiums, how other states handled similar issues, and the committee’s recommendations for resolving these issues.³² The report concluded that the Texas Condominium Act should be updated and revised, and as a result, Texas began working on a replacement condominium statute.³³

To create Texas’s “second-generation” condominium statute, the drafters used the 1980 Model UCA as a template. In the early 1980s, the drafters of TUCA substantially revised the document several times at the behest of the homebuilder and realtor lobbies. In 1985, a bill proposing to adopt the revised version of the condominium statute was filed but did not have the sufficient support or interest for passage. No similar bill was filed during the 1987 and 1989 legislative sessions. A bill was filed in 1991 with broad support, but the legislative session ended prior to passage.³⁴ In 1991, a

included in a new statute: (1) 120-day notice requirement to tenants in condominium conversions, (2) escrow requirement for purchaser’s deposits, (3) requirement that the association maintain comprehensive general liability insurance and property insurance on the common elements and units, (4) requirement that the declarant is responsible for all expenses of the condominium until a common expense assessment has been made, (5) requirement that assessments be made annually based on a budget adopted annually by the association, and (6) inclusion of express and implied warranties, and a time period for which declarant is obligated to complete and restore the condominium.

³³ Texas House of Representatives, Committee on Business & Industry, 66 Leg., *Interim Report to the 67th Texas Legislature* (1980).

³⁴ TUCA was introduced with the support of (or lack of opposition from) the Texas College of Real Estate Attorneys; Texas Association of Bankers; Independent Bankers Association of Texas; Texas Mortgage Bankers Association; Texas Land Title Association; Texas Lumberman’s Association; Texas Apartment Association; Texas Building Owners and Managers Association; Texas Association of Builders; Texas Association of Realtors; Independent Insurance Agents of Texas; Association of Fire and Casualty Companies in Texas; Dallas/Fort Worth Chapter of Community Associations Institute; San Antonio Chapter of Community Associations Institute; and individual members of the State Bar’s Subcommittee on Condominium and Common Interest Ownership. See HB 2308, 72nd Regular Session, Bill Details, Legislative Reference Library of Texas, available at: <https://lrl.texas.gov/legis/billsearch/BillDetails.cfm?legSession=72->

bill was filed by Representative Robert Eckels of Houston proposing passage of the revised condominium statute.³⁵ Supporters of TUCA believed that it would provide clear, comprehensive guidelines for condominium associations to follow in governing their communities.³⁶ Supporters further believed that TUCA would make it easier for board members to govern and preserve condominium associations' autonomy, enhance associations' ability to collect fees and fines from owners, and be fair to consumers and owners without creating a disincentive to developers to build condominium projects.³⁷ Although the Texas Condominium Act lessened hardships of the 1960s housing crisis, it was destined to be left behind, as it proved inadequate to address real world issues faced by condominiums.³⁸ On May 22, 1993, TUCA was signed into law by Texas Governor Ann Richards. After thirteen years of drafting, re-drafting, rallying support, and battling opposition, TUCA was finally enacted on January 1, 1994, and codified as Chapter 82 of the Texas Property Code.

Although TUCA began as the 1980 Model UCA, the drafters of TUCA eliminated, revised, and added many new sections and provisions in order to create Texas's unique body of condominium law. Some examples of TUCA's key revisions and additions to the 1980 Model UCA are: (1) the almost complete overhaul of 1980 Model UCA Section 3-116, addressed in Section 82.113 of TUCA, which pertains to the association's continuing lien on the owners' units, rents, and insurance proceeds associated with the units; and

(2) the revision of 1980 Model UCA Section 4-108, addressed in Section 82.156 of TUCA, which pertains to a condominium unit purchaser's five-day right (rather than the 1980 Model UCA's fifteen-day right) to cancel the contract for sale if the purchaser does not timely receive certain documents associated with the condominium. For a more in depth list of TUCA's key revisions and additions to the 1980 Model UCA, please refer to the attached **Exhibit A**. For a summary of amendments to TUCA since its adoption, see **Exhibit B**.

III. AVOIDING DRAFTING DOOM³⁹

The good news is that TUCA is flexible! The other news (sometimes good, sometimes bad) is that TUCA is full of nuances, several interpretation challenges, and a few unexpected surprises. In reading, applying, and drafting condominium documents for over twenty-five years, I have developed a profound respect for the drafters of the 1980 Model UCA, on which TUCA is based, and the leaders of the bar who made TUCA a reality for Texans.⁴⁰ TUCA is quite an accomplishment. As shown on **Exhibit B** attached to this article, in the twenty-five years since enacting TUCA, a major, significant, and comprehensive act addressing one of the key forms of ownership in Texas, TUCA has been amended only a handful of times, and none of these amendments upset the fabric of the original. Just a few nips and tucks (mostly)!

The flexibility of TUCA is best demonstrated by the projects developed under its guidance. Mixed-use projects consisting of multiple divergent uses in single

[0&billtypeDetail=HB&billNumberDetail=2308&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100.](https://lrl.texas.gov/legis/billsearch/BillDetails.cfm?billFileID=20699&from=advancedsearch&startrow=1&number=50&IDlist=&unclickList=)

³⁵ See HB 156, 73rd Regular Session, Bill Details, Legislative Reference Library of Texas, available at: [https://lrl.texas.gov/legis/billsearch/BillDetails.cfm?billFileID=20699&from=advancedsearch&startrow=1&number=50&IDlist=&unclickList=.](https://lrl.texas.gov/legis/billsearch/BillDetails.cfm?billFileID=20699&from=advancedsearch&startrow=1&number=50&IDlist=&unclickList=)

³⁶ Tex. H.B. 156, 73d Leg., R.S. (1993).

³⁷ Tex. H.B. 156, 73d Leg., R.S. (1993). One example of a downfall of the Texas Condominium Act was that it was hard to enforce an association's rights or require owners to comply with the association's rules. Many responsible owners were being forced to compensate for owners who did not pay their share of assessments or who refused to pay fines. TUCA was later drafted to enhance an association's ability to collect fees and fines from owners.

³⁸ Speaking to the Texas Condominium Act's role in the 1960s housing crisis: "Urban land is a scarce, high priced commodity. Home owners have been pushed out of town and into scattered subdivisions, whence their daily commuting grind is exacerbated by every passing year and every passing motorist. Beckoned by the convenience of close-in living, many urbanites have returned to the city, choosing apartment rental over distant home ownership... But when a city dweller chooses apartment living, he loses substantial advantages of home ownership[, such as the homestead exemption from

creditor's levy and the homestead tax exemption.] ...The apartment renter in Texas thus forgoes security, forced savings, tax benefits and social status when he decides against buying a subdivision estate... To combine the convenience of apartment dwelling and the economics of home ownership, home seekers are turning to apartment ownership." Under the Texas Condominium Act, a condominium was referred to as an apartment. John Mixon, *Apartment Ownership in Texas: Cooperative and Condominium*, 1 Hous. L. Rev. 226-227 (1963-1964).

³⁹ In 1994, *Computer Gaming World*, named Doom (a first person shooter video game) its Game of the Year.

⁴⁰ It takes a village, so they say, but we should all thank Sharon Reuler for her advocacy on behalf of TUCA over the past twenty-five years and her instrumental role in passage of TUCA during the 1993 legislative session. Sharon organized the original and informal committee that took the 1980 Model UCA under its wing and was the TUCA advocate during the 1991 and 1993 legislative sessions. Sharon has published extensively in the areas of condominiums and common interest communities, and is a true Texas leader in the law if there ever was one. More information about Sharon's extraordinary achievements (leavened generously with her good natured sense of humor) can be found at www.txlandlaw.com.

or multiple integrated buildings, condominium projects that legally resemble a Russian nesting doll with condominiums within condominiums, horizontal condominiums that resemble traditionally platted residential, commercial or mixed-use subdivisions, dockominiums, regional airports, projects subject to existing ground leases, and others bounded only by the limits of your creativity and understanding of TUCA.⁴¹ Each of these unique structures has proven financeable, insurable, and marketable as a result of the flexibility of TUCA.⁴²

As we celebrate twenty-five years of TUCA, in this Section, I would like to share with you a collection of insights that I hope you find helpful when asked to draft a condominium declaration.

A. The Development Period and the Declarant Control Period. Draft for the Difference.

TUCA recognizes that the developer needs certain unique rights related to the creation, development, and marketing of the project and individual units. These rights include the ability to complete improvements, add land to the condominium regime, create units and common elements, separate larger units into smaller units, withdraw land from the regime, and conduct sales activities. TUCA also allows the developer to control the condominium association, which means that the developer has the right to appoint and remove officers and at least a majority of the board. These two sets of rights (the right to create, develop, and market, and the right to control the condominium association) are defined as “special declarant rights.”⁴³ What can be a bit confusing is that these two sets of rights are conflated under the single defined term “special declarant rights” and that defined term includes another term defined by TUCA as “development rights.”⁴⁴ All the special declarant rights (including the “development rights”), save one, extend for a term of years.⁴⁵ The period that

a developer can control the condominium association is based on unit conveyance benchmarks.⁴⁶ It makes sense to think about these rights by imagining two separate buckets. One bucket includes rights the developer needs to realize a successful project. These rights may be needed until the last unit is conveyed, or longer in certain circumstances. The second bucket includes the right to oversee operation and administration of the condominium association. As the project develops and units are conveyed to owners, it is sensible, especially given the fact that condominium projects usually require a greater degree of board oversight than non-condominium communities, that owners should have the opportunity to learn the ropes sooner rather than later.

The fact that these two buckets have different termination points means that the condominium declaration should separate these control points and time periods. Use of the term “Development Period” for the creation, development, and marketing rights, and the term “Declarant Control Period” for association control allows the drafter to set two distinct time periods for each set of rights. The Development Period is usually for a term of years with the term depending on the project’s expected duration. The Declarant Control Period is self-executing. I have seen condominium declarations that make the mistake of conflating these two periods, or that mix rights the developer should retain for a term of years with the statutory benchmark for control of the condominium association. The developer will need development rights until all units are conveyed or longer. Two buckets, each with its own purpose and time period.

B. Development Period: Time and Trouble

You have wisely separated rights into their respective buckets and now you have to think about the duration of the Development Period. Remember that

⁴¹ I have written or spoken over the years on many of these project types. See *Leasehold Condominiums*, 40th Annual Advanced Real Estate Law Course (July 2018); *Uncommon Condominiums*, Texas Land Title Association Webcast (November 2012); *Condominium Alternatives, Mixed and Non-Traditional Uses*, 34th Annual Advanced Real Estate Law Course (July 2012); *MOMUPs, Lollypops, and Snowmen*, Princeton University Higher Education Real Estate Lawyers (HEREL8) (October 2009).

⁴² A major contributor to the flexibility is the ability to modify certain of TUCA’s provisions. I have characterized this as the “six magic words” of TUCA. The six magic words are “unless otherwise provided by the declaration”, which words appear in §82.052 [Unit Boundaries], §82.055(17) [Contents of Declaration for all Condominiums], §82.057 [Allocation of Common Element Interests, Votes, and Common Expense Liabilities], §82.058 [Limited Common Elements], §82.059 [Plat and Plans], §82.060 [Exercise of Development Right],

§82.061 [Alteration of Units], §82.062 [Relocation of Boundaries between Adjoining Units], §82.063 [Subdivision of Units], §82.065 [Use for Sales Purposes], §82.066 [Easement Rights], §82.102 [Powers of Unit Owners’ Association], and §82.107 [Upkeep of Condominium].

⁴³ Tex. Prop. Code §82.003(a)(22).

⁴⁴ Tex. Prop. Code §82.003(a)(12).

⁴⁵ Tex. Prop. Code §82.055(14). The declaration must include a time limit during which such rights may be exercised.

⁴⁶ Tex. Prop. Code §82.103. §82.103 provides for a two-step transition process related to control of the condominium association. One-third of the board is elected by non-declarant owners on or before 120 days after 50 percent of the units that may be created have been conveyed to owners other than the declarant. On or before 120 days after 75 percent of the units that may be created have been conveyed to owners other than the declarant an election is held for all board members.

TUCA requires that the condominium declaration include the time period during which these special declarant rights may be exercised by the developer.⁴⁷ The time period you put in the declaration will depend on the project, your client's development plans, and perhaps the market. If the period is too short, you have compromised your client's ability to complete the project and respond to market changes. If the period is too long, you may affect the marketability of units or the ability for purchasers to secure acquisition financing for their unit.⁴⁸ The duration decision is a decision that must be made in consultation with the client. Questions to ask include: what are the client's expectations relative to completion of the project, is there the prospect to add land to the regime and create additional units at a later date, what is the current or protected state of the market, will the client retain a unit, and is unit re-subdivision part of the client's business plan? All of these factors, and others, will need to be considered when setting the duration of the Development Period. Though the decision is dependent on factors that can change over time, a reasoned approach is necessary. For a single declaration residential condominium project with no prospect to create additional units, we often see a development period from seven to fifteen years depending on the number of units and projected sell-out. For a mixed-use project with a master condominium declaration separating the units into large units corresponding to use, and a subordinate residential declaration further segregating a large residential unit in the same project into individual for-sale residential units, the development period under the master condominium declaration can range from thirty to seventy-five years depending on the project and the client's continued ownership or involvement. While you probably will not be able to set the duration with perfect certainty, you should overshoot the mark. Section 82.067(e) of TUCA does not allow an amendment to the condominium declaration to increase special declarant rights unless approved by 100 percent of the votes in the condominium association. An amendment to extend the termination date of the Development Period would increase such rights.

Should the duration of the Development Period be based on a discrete event or on the passage of time? TUCA is not entirely clear on this point, though I believe there is a preferred approach. Section 82.055(14) of TUCA states that the declaration must include "a time limit within which" the special declarant

rights "must be exercised."⁴⁹ I have reviewed condominium declarations that set expiration of the Development Period on the date, or after the expiration of a certain number of days or months, after the developer no longer owns a unit in the project. Though there is no guidance in the comments to the 1980 Model UCA, and Section 82.055(14) of TUCA is identical to its 1980 Model UCA counterpart, I believe that the safer interpretation of "time limit" is a period of time measurable on the date the declaration is recorded. It seems sensible to conclude that requiring a termination date is a means to provide purchasers of condominium units the ability to determine when the developer will no longer be permitted to exercise rights which could be disruptive to the purchaser's use and enjoyment of their unit and the project. A time period which terminates based on a final conveyance by the developer, or measured from the date of final conveyance, is indeterminate and does not appear to satisfy the purpose of the requirement. A time period actually measurable from the date the declaration is recorded also seems consistent with the Commissioners' choice to describe the transition of the condominium association control differently, based on events, i.e., the actual conveyance of units, as compared to how the time period is described for special declarant rights related to development of the project, i.e., a time period in the declaration. There are other important reasons for not using a time period based on the occurrence of events, especially the conveyance of units by the developer. One of the special declarant rights includes the right to create limited common elements.⁵⁰ For certain projects, the developer may have additional general common element components, e.g., parking or storage, which may be created at a later date after all units have been conveyed. Most often this occurs in projects with more parking spaces than were assigned to units in conjunction with unit sales, or storage which remains unsold. Provided the Development Period is still in effect, the developer can monetize these unsold and unassigned areas by converting them from general common elements to limited common elements and assigning them to units previously conveyed by the developer. A Development Period which terminates upon the sale of all units, or within months after the sale of all units, unnecessarily constrains this right. There are, of course, other rights which the developer may find beneficial after the conveyance of all units, including certain actions that may mitigate construction defect

⁴⁷ Tex. Prop. Code §82.055(14).

⁴⁸ Though beyond the scope of this article, retail loan underwriting guidelines require that the declaration include certain provisions that conform to mortgage insurance issuer requirements. The three principal mortgage insurance issuers are FHA, Fannie Mae, and the Veteran's Administration. There is presently no maximum development period as a

precondition to FHA and Fannie Mae project approval, but VA has a seven-year limit for expandable projects and a five-year limit for non-expandable projects. An expandable project is a development where units will be added to the condominium declaration over time.

⁴⁹ Tex. Prop. Code §82.055(14).

⁵⁰ Tex. Prop. Code §82.003(a)(12).

liability exposure, e.g., the right to complete improvements, and easements over the common elements for the purpose of making improvements.

C. Special Declarant Rights: Reservation for One

Though TUCA includes unique rights that can be exercised by the developer either during the Development Period (as to rights related to development) or the Declarant Control Period (control of the condominium association), these rights must actually be reserved in the condominium declaration. As noted in Section III.A. of this article, TUCA includes two definitions of rights which will be important to the developer during the creation, development, and marketing of the project and individual units: development rights and special declarant rights.⁵¹ The TUCA defined term “development rights” is included within the TUCA defined term “special declarant rights”. Section 82.003(a)(12) of TUCA, the definition of development rights, identifies these rights as “rights reserved by a declarant in the declaration”. Section 82.003(a)(22) of TUCA, the definition of special declarant rights, identifies these rights as “rights reserved for the benefit of a declarant”. However, there is no need to spend time pondering the difference and whether this means that development rights must be expressly reserved to the declarant in the condominium declaration and special declarant rights, excluding development rights, are automatically granted by the statute. Section 82.055 of TUCA includes a list of the minimum information a condominium declaration must include and requires that the condominium declaration include a description “of the development rights and other special declarant rights reserved by the declarant.”⁵²

There are two approaches to reserving these rights. In most residential for-sale projects, the practitioner would be wise to specifically reserve these rights in the condominium declaration with reference to a separate exhibit attached to the condominium declaration that lists, with particularity, each of the special declarant rights (remember that development rights are included in the TUCA definition of special declarant rights, so list those rights as well) and other rights⁵³ that will expire based on a fixed time period or upon the occurrence of specific events. Outlining these rights with specificity is more important, in the author’s view, for residential condominiums since the likelihood of exercising these rights, and the frequency of exercise, is higher as compared to a commercial development. The residential developer may need to combine or modify

units to respond to market changes since the duration of the project, especially if the project is a phased development, may extend over several years, and these rights will likely be exercised after some or all the units have been conveyed and occupied by residential owners. Listing each of these rights in the condominium declaration can reduce the likelihood of a dispute with owners or a resident-controlled board.⁵⁴ Confusion and misunderstanding over these rights is more likely if you have to rely on the residential owners or the board to consult the statute for a full description of these rights. Describing rights retained by the developer in a separate exhibit structures the condominium declaration in a way that is consistent with the fact that these rights will end at a fixed point in time. The duration of the condominium declaration is not determinable and will exist until terminated by the owners. Removing declarant retained rights from the text of the actual condominium declaration and listing those rights in a separate exhibit will ease administration and management of the regime once the project is complete and the developer is long gone from the project.

It may be appropriate, most likely for a commercial condominium project with no residential for-sale component, to reserve these rights in the body of the condominium declaration, usually in a separate section. Commercial mixed-use projects, in many cases, are constructed at a single point in time and there is a greater degree of certainty regarding the configuration of units and shared areas compared to a residential project (especially a phased residential project). The ultimate owners of commercial units in the project are likely more sophisticated and will probably be represented by counsel during the sale and even during the condominium document drafting process. The purchaser, or their counsel, often scrutinizes these rights and may require that certain rights be limited or removed. In other words, the rights retained by the developer will most certainly be negotiated between the parties and well understood prior to a conveyance. In addition, for a commercial project, the developer, or an affiliate, will often retain a unit and operate a use within the unit for an extended period. This is prevalent in mixed-use projects with a residential for-rent component, where the developer will often retain the multi-family and operate the use until stabilization. In these circumstances, developer rights must be reserved, and for periods that will be longer than a residential project, since those rights, at least as they pertain to the developer owned and operated unit, will be important for the purchaser who acquires the unit from the

⁵¹ Tex. Prop. Code §82.003(a)(12) and (22).

⁵² Tex. Prop. Code §82.055(14).

⁵³ See Section III.H. for a description of §82.055(17), the so-called “catch-all” section.

⁵⁴ As noted in Section III.A., the developer’s right to control the condominium association will terminate prior to the rights retained by the developer related to development and marketing of the project. As a result, a resident elected board will, at some point, enter the picture.

developer once the use is stabilized. Generally, the right to subdivide the unit, the right to use easements through the common elements, and the right to conduct marketing activities are especially important.

D. More Votes for Me?

It is customary to assign the developer a higher number of votes attributable to membership in a non-condominium community association. Usually this is done by either allocating the developer a higher number of votes for each lot owned by the developer as compared to non-developer lot owners, or using a formula to assign a higher number of votes to the developer based on the number of lots owned by non-developers.⁵⁵ For condominiums, that “dog don’t hunt.” Section 82.057 of TUCA, which sets the ground rules for allocating the common element interest, votes, and common expense liability to each unit, expressly provides in subsection (a) that none of the allocations, i.e., the common element interest, votes, or common expense liability, can “discriminate in favor of units owned by the declarant.”⁵⁶ In other words, do not allocate a higher number of votes to declarant-owned units. It is not permitted, and it is not necessary. As discussed in Section III.A., TUCA allows the developer to control operation and administration of the condominium association by allowing the developer to appoint and remove officers and a majority of the board during a fixed period of time measured by the conveyance of units from the developer.⁵⁷ The board will manage the community and all acts of the association, with limited exceptions, are made through the board.⁵⁸ If you are worried about non-declarant owner initiated amendments while the developer is still

developing and marketing the community, a well-drafted and thoughtful condominium declaration can significantly mitigate this risk. In almost all cases, other than the 67 percent general amendment right discussed below,⁵⁹ owner-initiated amendments should be limited in the condominium declaration to termination,⁶⁰ restoration in the event of casualty,⁶¹ exchange of limited common elements,⁶² relocation of boundaries between adjoining units,⁶³ and subdivision of units.⁶⁴ The general right for owners to amend with at least 67 percent of the votes in the association is constrained by Section 82.067(e) of TUCA which provides that any such amendment, unless approved by the declarant, “may not reduce or otherwise modify rights granted by a declaration to a declarant, including special declarant rights.”⁶⁵ Despite protection from amendments affecting developer rights in TUCA, it is good form to include an amendment protection provision in the condominium declaration, something similar to the following:

Notwithstanding any provisions in this Declaration to the contrary, no amendment to this Declaration shall modify, alter, abridge, or delete any: (i) provision of this Declaration that benefits the Declarant; (ii) rights, privileges, easements, protections, or defenses of the Declarant; or (iii) rights of the Owners or the Association in relationship to the Declarant, without the written consent of the Declarant, attached to and Recorded with such amendment.

E. Property Insurance Can Be Complicated

Property insurance, in my experience, is one of the least understood aspects of condominium development and administration, especially for the mixed-use

⁵⁵ A reverse super-majority formula, used frequently to allocate votes to a developer in a non-condominium association, is based on the number of votes held by non-developer owners. The actual formula provides that for each vote held by an owner other than the developer, the developer receives a certain number of votes. The allocation of votes is often meaningless since in Texas, the developer controls board appointments and the board of the association makes all operational decisions on behalf of the association (unless the declaration provides otherwise, which is rare—or should be). The owners usually only vote to amend the declaration. §209.0041 of the Texas Property Code, in effect, allows the developer to prosecute or consent to amendments during the Development Period (as defined in §209.002(4-a)). If the non-condominium declaration properly reserves a Development Period and includes other customary amendment rights and protections on behalf of the developer, assigning a higher number of votes to the developer has no meaningful effect.

⁵⁶ Tex. Prop. Code §82.057(a).

⁵⁷ Tex. Prop. Code §82.103.

⁵⁸ Tex. Prop. Code §82.103(a). §82.103(a) has two carve-outs, one for express provisions in the condominium

declaration or condominium association bylaws that provide otherwise, and one for owner amendments required by law (meaning TUCA).

⁵⁹ Tex. Prop. Code §82.067(a).

⁶⁰ Tex. Prop. Code §82.068(a). The default requirement for termination of the condominium is 100 percent of the votes in the condominium association, but the declaration may allow for the condominium to be terminated with no less than 80 percent of the votes in the association.

⁶¹ Tex. Prop. Code §82.111(i). To the extent the condominium association is required to obtain insurance for improvements in the condominium, and if those improvements are damaged, the association is required to restore the improvements unless 80 percent of the unit owners vote not to rebuild.

⁶² Tex. Prop. Code §82.058(b).

⁶³ Tex. Prop. Code §82.062.

⁶⁴ Tex. Prop. Code §82.063.

⁶⁵ Tex. Prop. Code §82.067(e).

project.⁶⁶ Section 82.111 of TUCA, a mandatory provision for all condominiums in Texas, whether created before or after the effective date of TUCA,⁶⁷ provides the minimum requirements for property insurance that must be held and maintained by the condominium association. Specifically, Section 82.111(a)(1) requires that the association maintain property insurance on the common elements. Section 82.111(b) requires that the property insurance cover the units, excluding improvements and betterments installed by unit owners, if the project contains “horizontal” boundaries, that is, if units share an upper or lower boundary. Section 82.111(a) requires that the property insurance cover at least 80 percent of the replacement cost or actual value of the insured property. With very limited exceptions,⁶⁸ a condominium declaration that merely recites the statutory requirements of TUCA related to property insurance, or merely requires the association to comply with such requirements, should be avoided at all costs. The minimum coverage requirements will not meet mortgage underwriting standards,⁶⁹ and are unlikely to meet the expectation of purchasers who acquire units in the project. In addition, for those residential projects that will require mortgage insurance underwriting approval, even though the units may not have horizontal boundaries, e.g., townhomes, the property insurance maintained by the association will need to provide coverage for the units.

We sometimes see an insurance provision in a condominium declaration that describes the insurance as “bare walls”, that is, the property insurance will not restore the interior improvements of the unit, e.g., cabinets, flooring, plumbing fixtures, etc. If the project contains horizontal boundaries, and the developer delivered the unit in an improved state, a bare walls policy would not comply with Section 82.111(b) which requires that the property insurance cover the units excluding improvements and betterments installed by unit owners. Taking the position that the improvements installed by the developer are excluded from the requirement since the developer was an owner at the time of installation is contrary to the intent of Section 82.111(b), as expressed in the comments to the 1980

Model UCA (Section 3-113(b) is the corollary to 82.111(b) and is identical in the case of units with horizontal boundaries). As stated in Comment 3 to Section 3-113(b) to the 1980 Model UCA: “Put simply, if any item is installed, constructed, repaired or replaced by the declarant or a successor in connection with the original sale of a stacked unit, the item is insured by the association.”⁷⁰ The better approach is to specifically require that the association insure the units as originally constructed by the declarant:

The property insurance shall be required to provide coverage to repair or reconstruct the Units according to the as-built plans and specifications for each Unit constructed by Declarant. Such coverage shall include all of the Units and the fixtures initially installed therein by Declarant and replacements thereof up to the value of those initially installed by Declarant, but shall not include, any improvements or betterments (including wall coverings and fixtures) made by or on behalf of any Owner other than those made by Declarant, and also shall exclude furnishings and other personal property within a Unit.

Though not required by TUCA, the condominium declaration should allow the association to insure improvements and betterments installed by unit owners. The importance of this option became apparent as a result of Hurricane Harvey and the devastation it caused to several mature condominium projects on the Texas coast. The condominium declarations for several of these projects provided that the association was required to maintain property insurance coverage necessary to restore the project and units back to their original condition. In one case, the condominium project was built and completed in 1982 and over the years the association increased their coverage to an amount necessary to restore the project to its current condition, taking into account remodels and other permanent improvements installed by unit owners. On its face, a wise and prudent practice given that restoration of the project to 1982 standards would be virtually impossible

⁶⁶ For an in-depth discussion of insurance issues associated with complex mixed-use projects, See Mary Alexander, Robert Burton, and David Van Atta, *Insurance Issues for Mixed-Use Projects*, American College of Real Estate Attorneys (October 2017), available at: <https://www.ali-cle.org/publications/Book/3781>.

⁶⁷ TUCA applies to condominiums where the condominium declaration was recorded on or after January 1, 1994. However, §82.002(c) applies certain specific provisions of TUCA to condominiums created prior to the effective date of the act. §82.111 is one of these provisions.

⁶⁸ One exception being a condominium formed as a means to segregate land only, with no improvements to be maintained by the condominium association.

⁶⁹ Fannie Mae requires that the property insurance maintained by the association must cover 100 percent of the replacement cost of the project, including individual units. See Fannie Mae Selling Guide, Part B-3-04 (June, 28, 2016), available at: <https://www.fanniemae.com/content/guide/selling/b7/3/04.html>

⁷⁰ Unif. Condo. Act, § 3-113, comment 3 (1980), 7 pt. 2 U.L.A. 487 (2009).

given advances in construction materials, construction methods, and changes in national and local building code requirements. Unfortunately, when the claim was presented to the insurer, the insurer pointed out that the property insurance policy included the standard condominium endorsement which, in effect, states that the policy provides coverage for property the association is required to insure under the project documents. Since the declaration only required the association to insure the property to the extent necessary to restore the project to its original condition, the insurance company took the position that the policy would only pay to restore to the 1982 condition despite the fact that the coverage amount was sufficient to restore the project to the condition which existed on the date of the storm.

There is also a chicken and egg problem related to the property insurance required to be maintained by the condominium association under TUCA and the timing of placement. Section 82.111(a) requires that before the first conveyance of a unit by the declarant, the association is required to have the property insurance required by TUCA in place. For new construction and prior to commencement of construction, either the developer or the general contractor will have obtained builder's risk insurance for the project. Builder's risk insurance is property insurance obtained for construction and will be in place usually until at least substantial completion of the project. Substantial completion is often determined when a final certificate of occupancy is issued for the building. Often, for multi-story mixed-use or residential projects, a temporary certificate of occupancy is issued on a floor-by-floor basis which allows the conveyance of units on those floors from the developer to the purchaser prior to issuance of the final certificate of occupancy for the building. Since the association is required to maintain property insurance prior to the first conveyance of a unit, there is the prospect of overlap between the two policies raising issues of which policy is primary in the event of a covered loss. Though not yet experienced by this practitioner, there is also the prospect that the association's insurer will refuse to issue a policy knowing that another policy covering the same property is in existence and effective. One solution to this problem is to add the association as a named party to the builder's risk policy. This will require communication and coordination with the developer or contractor and their insurers early in the project to determine if adding the association is an option. If this is a possibility, there will also need to be close coordination with the associations' insurer related to the timing of permanent insurance placement. Our experience is that the prospect of adding the association to the builder's risk

policy is higher when the developer obtains the builder's risk policy rather than the general contractor. In any event, if coordination between the two policies in a project may be necessary, it would be wise to add a provision to the condominium declaration, similar to the following, recognizing that the builder's risk policy may be used to satisfy the association's property insurance requirements:

The Association shall obtain and maintain insurance coverage required pursuant to the Act; provided, however, that with respect to property insurance on the insurable Common Elements and Units prior to completion of construction of the initial improvements, such insurance coverage may be satisfied by the Builder's Risk policy of the Person constructing such Improvements, so long as such policy otherwise satisfies the property insurance coverage required pursuant to the Act and the Association and each Owner is named as loss payees under such policy.

Finally, for the mixed-use non-residential project, it should be noted that the insurance requirements set forth in Section 82.111 of TUCA can be modified in the condominium declaration.⁷¹ This can be a powerful option for projects with sophisticated owners, but caution should be exercised. Separating insurance requirements among unit owners in an integrated mixed-use building and then tailoring that insurance perfectly to the insurance obtained by the condominium association is probably impossible. There is a greater risk of gaps between each policy and overlapping coverage. In other words, the risk of under and over insurance is very high. In most cases, the best practice is to require a single master policy held by the condominium association or an insurance trustee (which may be one of the unit owners). A single master policy avoids the inevitable duel between adjusters and can expedite recovery and reconstruction or distribution of insurance proceeds. A single master policy can also be used to add endorsements or lines of insurance particular to a specific use or user. For example, business interruption insurance often requires, as a condition of issuance, a corresponding property policy. If the policy is held by the association or an insurance trustee other than the owner or user requesting the insurance, the additional coverage can be added as a feature to the property policy with the additional premium charged to the requesting owner or user. A condominium declaration for a mixed-use project should include something similar to the following:

⁷¹ See Tex. Prop. Code §82.111(m).

The Association will, upon the written request of an Owner or Owners, attempt to obtain, within a reasonable time period after the request, such supplemental insurance coverage pertaining to the Property or a Unit as the Owner of a Unit may request, in addition to that insurance coverage already obtained and maintained by the Association for the benefit of the Units in accordance with this Declaration. The incremental premium increase, if any, for such supplemental insurance coverage will be specifically assessed to the Owner of the Unit that requested and is benefited by the supplemental insurance coverage and will not be allocated as an Assessment among all Units.

F. Unit Boundaries: No Walls, Floors, and Ceilings

Unit boundaries are a big deal, perhaps the biggest deal. When a condominium declaration is recorded, the property submitted to the declaration is converted into two parts: the units and the common elements. Think of this as a simple mathematical equation: common elements = property – units. TUCA does not require that common elements be defined with the same particularity as units since once you define the units, everything else is common elements. However, there is a measurement distinction between general common elements and limited common elements⁷² that should be noted. With the exception of automatic default limited common elements described in Section 82.052 of TUCA,⁷³ limited common elements must be dimensioned on the condominium plat and plans. This is an often-overlooked requirement.⁷⁴ The definition of a unit defines what will be owned and held exclusively by a unit owner. In addition, since in most cases units are maintained by unit owners and common elements are maintained by the condominium association, the unit boundary sets maintenance expectations, common expenses, and insurance requirements,⁷⁵ among other things.

Section 82.052 of TUCA includes a default definition for the unit, generally referred to as “walls, floors, and ceilings”. The definition is default in the sense that if the condominium declaration fails to include a unit definition, the definition in Section 82.052

⁷² Limited common elements are common elements which are assigned for the exclusive use of at least one, but less than all the units. See Tex. Prop. Code §82.003(a)(17). Common forms of limited common elements are parking spaces and storage areas.

⁷³ §82.052 includes certain “default” limited common elements principally being components of a unit which are natural and necessary extensions of the unit, e.g., wires, conduits and chutes exclusively serving the unit. See Tex. Prop. Code §82.003(a)(17).

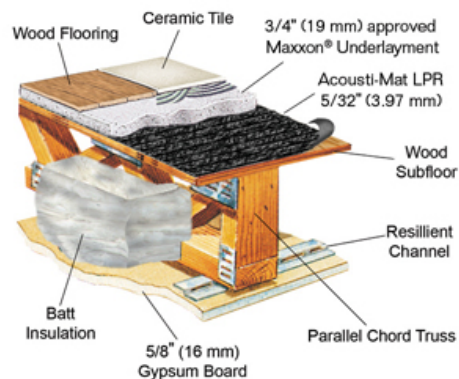
⁷⁴ Most frequently overlooked in the case of parking spaces where parking is assigned as limited common elements to

controls. Some practitioners incorporate the default definition in the condominium declaration, but in my view, the default definition is seldom appropriate. The concern with the default definition stems from the imprecise nature of the words “walls, floors, and ceilings”. Exterior walls, floors, and ceilings, especially in high-rise or complex mixed-use buildings can be composed of complicated construction assemblies. A window wall system that forms the exterior wall may be composed of many parts. A floor or ceiling assembly in a stick frame mid-rise may consist of several layers as noted by the assemblies depicted below.

Window Wall System



Floor Assembly



The walls, floors, and ceilings default definition in Section 82.052 of TUCA is as follows:

units. Parking spaces should be dimensioned on the map since paint fades over time.

⁷⁵ As noted in Section III.E., if the project includes horizontal boundaries (or if required by mortgage insurance underwriting requirements), the association will obtain insurance for the units. However, if the project does not have horizontal boundaries or is restricted to non-residential use, the unit boundaries can set the insurance requirements of the unit owner and the condominium association. See Section III.E.

“if walls, floors, or ceilings are designated as boundaries of a unit, then all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting part of the finished surfaces are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements”

What part of the system or assembly pictured above is within the boundaries of the unit using the default definition? A few assumptions and a bit of deductive reasoning are required. On the other hand, the unit boundaries could be described with reference to the actual and intended boundaries of the unit. For example, if appropriate based on the anticipated use of the unit, the upper facing surface of the wood sub-floor in the assembly picture above could be designated as the lower boundary of the unit. It takes a bit more work and requires that the practitioner review the construction plans, but if an issue arises related to who is responsible for maintenance, insurance, repair, or replacement, a clear and detailed unit boundary can help resolve the dispute. Set forth below are sample vertical and horizontal boundaries for a mid-rise project.

1.0 Horizontal (Upper and Lower) Boundaries.

The upper horizontal boundary of each Unit is the horizontal plane formed by the lowermost unfinished surface of the concrete or other material comprising the permanent ceiling (any dropped soffit areas and/or false ceiling is within the Unit) in the uppermost floor of the Unit. The lower horizontal boundary of each Unit is the horizontal plane formed by the uppermost surface of the unfinished concrete of the lowermost floor of the Unit. Any decorative or finished flooring, carpet pads, and sub-flooring above or on the unfinished concrete floor is within the boundaries of the Unit. The upper and lower horizontal boundaries of each Unit extend to their intersections with the Unit's vertical boundaries, as described in *Section 2.0*.

2.0 Vertical (Perimeter) Boundaries.

The vertical or perimeter boundaries of each Unit are (i) for portions of the Unit which adjoin an exterior wall of the Building, the vertical plane created by those portions of the innermost surfaces of the exterior window

wall of the Building which extend from the lower horizontal boundary of the Unit to the upper horizontal boundary of the Unit as described in *Section 1.0*; (ii) for portions of the Unit which adjoin a window, window wall system, or exterior glass surface of the Building, the interior-facing surface of the window, other glass surface or window system extending from the lower horizontal boundary of the Unit to the upper horizontal boundary of the Unit as described in *Section 1.0*; (iii) for portions of the Unit which adjoin a wall separating the Unit from another Unit, the vertical plane created by the centerline of such wall, extending from the lower horizontal boundary of the Unit to the upper horizontal boundary of the Unit as described in *Section 1.0*; (iv) for portions of the Unit which adjoin a Common Element corridor or hallway, the vertical plane created by the outermost unfinished surface of the Common Element corridor or hallway, extending from the lower horizontal boundary of the Unit to the upper horizontal boundary of the Unit as described in *Section 1.0*; (v) for portions of the Unit which adjoin any Common Element core components, e.g., the area including the central stairway, central entry and elevators on each floor, as depicted on the Plats and Plans, the vertical plane created by the outermost unfinished surface of the Common Element core concrete wall, extending from the lower horizontal boundary of the Unit to the upper horizontal boundary of the Unit as described in *Section 1.0*; and (vi) for portions of a Unit not otherwise addressed by subsections (i) through (v) above, the vertical or perimeter boundaries reflected on the Plat and Plans.

G. Assessments and Phasing: Scratching the Three-Year Itch

Similar to the voting allocation issues discussed in Section III.D., above, the condominium declaration cannot exempt developer owned units from the payment of assessments. Section 82.057 of TUCA provides that the common expense liability⁷⁶ assigned to each unit cannot “discriminate in favor of units owned by the declarant.” This differs from customary practice when drafting a non-condominium declaration with a mandatory association where the declaration often

⁷⁶ The common expense liability is the obligation of each unit to pay their proportionate share of common expenses and is usually expressed as a percentage in the condominium declaration. Though not discussed in this article, the common expense liability can be determined in a different manner than the undivided percentage ownership of common elements

assigned to each unit. See Tex. Prop. Code §82.057(a). For an in-depth discussion of allocations and different methodologies associated therewith, see Matthew Leeds, Edward Peterson, and David Van Atta, *Cost Allocations in Mixed Use, Mixed Ownership Developments* (October 2014), available at: <https://www.ali-cle.org>.

exempts the declarant from paying assessments, despite the fact that the developer will subsidize association expenses to ensure the marketability and success of the development. For the condominium project, the developer is legally required to either pay assessments attributable to the units owned by the developer or subsidize the difference between the operational expenses of the association and assessments paid by non-developer owners.⁷⁷ The subsidy requirement is often referred to as the “red ink” option, and will most often be the option of choice since the option limits the subsidy requirement to operational expenses of the association. Though not defined in TUCA, the commonly accepted meaning of operational expenses is expenses necessary to discharge the day-to-day activities of the association, as opposed to capital expenses (i.e., reserves).⁷⁸ However, the “red ink” option expires, and the developer must begin paying assessments for the units owned by the developer, on the earlier to occur of three years after the first conveyance of a unit or when the developer no longer controls the condominium association.⁷⁹

The three-year subsidy limitation can be a troublesome issue for the developer of a long-term project, especially where units are created and remain unsold three years after the first conveyance of a unit in the project. For example, assume the developer of a 20 building, 200 unit residential or commercial project elected to create all 200 units when the declaration was first recorded.⁸⁰ The developer intends to construct the buildings and units in phases over five to eight years, with the first unit being conveyed to a purchaser at the end of year two. At the beginning of year six, the developer has fifty units yet to be constructed. Since the three-year subsidy option has expired, the developer will be required to begin paying assessments on the

units, despite the fact that no physical improvements have been constructed and there are no expenses attributable to the maintenance or upkeep of these units. The better approach, when faced with multiple units constructed over a period of time that may exceed three years, is to utilize the development right to create units and common elements.⁸¹ If the developer properly reserves the development right to create units and common elements in the condominium declaration, then until those rights are exercised for the purpose of creating units, no assessments may be levied against the planned units since those units do not yet exist.⁸² Remember that development rights may only be exercised during the term of the Development Period set forth in the condominium declaration.

H. The Best for Last/Odds and Ends

What’s my favorite section of TUCA? It’s the one that allows the drafter to fit the document to the project, protect the developer, address strange and unusual circumstances, and set the project on the path to success. It’s the epitome of flexibility, the best of the best, it’s Section 82.055(17) of TUCA. Section 82.055 is the provision in TUCA that sets out the mandatory contents of a condominium declaration. Seventeen items with the best saved for last. Section 82.055(17) states that the condominium declaration may include “any other matters the declarant considers appropriate.” Section 82.055(17) does not mean that you can modify mandatory provisions of TUCA;⁸³ however, it does mean that you can use the condominium declaration to address circumstances or issues that affect the project, mitigate the risk of misrepresentation claims, and/or add certain easement rights and benefits accruing to the developer. For example, the drafter should consider adding disclosures to the condominium declaration as a

⁷⁷ Tex. Prop. Code §82.112(b).

⁷⁸ https://en.wikipedia.org/wiki/Operating_expense. It should be noted that §82.112(a) provides that the association’s reserves and any working capital contributions, which are customarily paid by purchasers upon acquisition of a unit, cannot be used to pay operational expenses of the association until the declarant no longer controls the association. One way to look at this requirement is an attempt to resolve the deficit in reserves during the initial sell-out of the project, which could occur since the declarant is only required to subsidize operational expenses.

⁷⁹ Tex. Prop. Code §82.112(c).

⁸⁰ It is fairly common to create so-called “phantom units”, that is, units that exist legally as a separate component of real estate but with no physical improvements defining the units. Frequently, this occurs for the high-rise project where the declaration is recorded and the units are created prior to construction at either the behest of the lender and/or due to Texas mechanic’s lien law issues.

⁸¹ Tex. Prop. Code §82.003(a)(12)(B). See also Section III.A.-C. of this article for a discussion of development rights.

⁸² There is a specific process to properly reserve these rights, in addition to reserving them expressly in the condominium declaration. The condominium plat should label areas where the developer wishes to reserve the right to create units as “development rights reserved” and otherwise indicate on the plat, or in the notes to the plat, that the developer has reserved the right to create units and common elements within such area. See Tex. Prop. Code §82.059(b)(2). To exercise the development right to create the units and associated common elements, an amendment to the condominium declaration must be recorded which describes the units and common elements. See Tex. Prop. Code §82.060 for the procedures associated with exercising reserved development rights.

⁸³ §82.004 provides that unless otherwise permitted by TUCA, the condominium declaration cannot vary the requirements of TUCA or remove rights granted by TUCA. Tex. Prop. Code §82.004. See Footnote 42 of this article for a listing of TUCA provisions that can be modified by the condominium declaration.

means to put the prospective purchaser, and their future transferee, on notice as to unique or unusual features of the project or the surrounding area. A few examples of typical disclosures are attached to this article as **Exhibit C**. The condominium declaration can also be used to reserve easements in favor of the developer for the purpose of correcting or repairing project improvements, or to add specialized provisions related to architectural control, leasing, regulatory requirements (e.g., a mandatory recycling program or pest management program), or maintenance procedures for certain project components.

Similar to special declarant rights, which must be reserved in the condominium declaration, there are a few other important rights that must be reserved to be exercised. Section 82.063(a) of TUCA permits resubdivision of a unit, but only if the condominium declaration expressly allows resubdivision. While probably not as important for the residential for-sale condominium project, permitting a unit owner the right to resubdivide a large commercial unit may be appropriate for the project or needed to preserve marketability of the units in the project. Note, however, that if the condominium declaration allows resubdivision, the declaration should include a maximum number of units that can comfortably accommodate reconfiguration.⁸⁴ Section 82.058 of TUCA allows general common elements to be reallocated as limited common elements, provided the declaration includes a description of the general common elements that may later be reallocated as limited common elements.⁸⁵ This requirement does not apply to the declarant's development right to create limited common elements, but would apply to the condominium association that sought to allocate general common elements as limited common elements. Reserving this right may be appropriate where there will be excess and unassigned parking after the developer completes the project, or if there are areas that may later be established as storage. If the right is not reserved, and if the association elected to allocate these areas for the exclusive use of a unit, the assignment would take the form of an easement or license from the association rather than an assignment to the unit as limited common element.⁸⁶ Finally, Section 82.067(f) of TUCA allows the board of the association, or the declarant if a unit has not yet been occupied, to unilaterally amend the declaration to the extent necessary to conform to the requirements of FHA, Fannie Mae, FHLMC, or VA.⁸⁷ However, this right must be expressly permitted by the

condominium declaration. Mortgage lending underwriting requirements change frequently...and unexpectedly. This right should be reserved without exception if the project includes residential for-sale or for-rent dwellings.

IV. CONCLUSION

Those of us who work with condominiums on a daily basis are mighty glad, and properly proud, to have TUCA. Within the four corners of TUCA, and with a healthy dose of creativity, the experienced practitioner can create separately conveyable real estate interests out of almost any project envisioned by your client. Having worked on condominium projects in states other than Texas, I can attest that Texas has a statute which strikes a rare balance between its requirements and its inherent flexibility. The requirements of TUCA provide certainty and predictability to lenders, developers, and unit owners. Flexibility allows the practitioner to structure the project and documents in a manner that reflects the design and the market. Make no mistake, TUCA takes time to master and there are traps for the unwary. However, the more you work with TUCA, the more you will come to appreciate the wisdom of its overall design. Of course, there are a few glitches here and there which you will uncover as you work with the statute, but none of those glitches have proven to be significant, at least in the author's experience. I am sure we will see additional changes to TUCA before its golden anniversary, but on its silver anniversary, it has served Texas and those who develop, create, and own condominiums in a manner befitting our great state.

⁸⁴ The condominium declaration must include the maximum number of units the declarant reserves the right to create. Though this right, on its face, appears only to affect units created by the declarant, condominium declarations often include a maximum number of units without qualification.

⁸⁵ Tex. Prop. Code §82.058(c).

⁸⁶ Unless the right is removed by the declaration, which should very rarely be the case, the association, acting by and through the board, may grant easements, licenses, or leases over the common elements. Tex. Prop. Code §82.102(a)(10).

⁸⁷ Tex. Prop. Code §82.067(f).

EXHIBIT ATUCA'S KEY REVISIONS AND ADDITIONS TO THE 1980 MODEL UCA

<u>SECTION OF TUCA</u>	<u>SECTION OF 1980 MODEL UCA</u>	<u>SUMMARY</u>
§82.002	§1-102	<u>Applicability.</u> This provision makes thirteen sections of TUCA retroactive and applies them to every condominium in Texas, including condominiums created prior to January 1, 1994.
§82.051	§2-101	<u>Creation of Condominiums.</u> TUCA deletes the requirement that a declaration or an amendment to a declaration adding units to a condominium may not be recorded unless all structural components and mechanical systems of all buildings with any units thereby created are substantially complete. TUCA adds that a declarant may not convey an interest in a unit until each holder of a mortgage on the unit immediately before conveyance has executed and recorded a consent to the declaration. TUCA also adds that the county clerk does not need approval from any other authority to record declarations and amendments to declarations in the real property records.
§82.065	§2-115	<u>Use for Sales Purposes.</u> TUCA adds that if the declaration fails to expressly permit an office or model, a declarant may still maintain one unit as a model and one unit as an office for sales, leasing, and management purposes. TUCA also allows a declarant to modify the exterior of a sales, leasing, or management office to conform to the aesthetic exterior plan of the condominium.
§82.067	§2-117	<u>Amendment of Declaration.</u> TUCA adds the following methods for amending a declaration: (1) by written ballot, (2) at a meeting, or (3) by any method permitted by the declaration. TUCA requires declarant approval of any amendment that modifies declarant's rights or obligations. TUCA allows a declaration to permit amendment by the board or declarant to meet requirements of FNMA, FHLMC, FHA, or VA. TUCA expressly permits amendment of a declaration to authorize the board's eviction of tenants who violate the condominium's governing documents or fail to pay for repairs for damaging the common elements, and authorizes the board's collection of rents from a tenant of a unit owner when the owner is at least sixty days delinquent in the payment of any amount to the association.
§82.068	§2-118	<u>Termination of Condominium.</u> TUCA requires that in order to terminate the condominium regime, there must be <u>unanimous consent by owners and lienholders, unless the declaration provides otherwise.</u> Although the declaration may not allow a termination by less than 80 percent of the votes in the association if any unit is restricted exclusively to residential uses. TUCA adds that if, pursuant to a termination agreement, the real property constituting the condominium is to be sold, the termination agreement must state the terms of sale and be recorded. TUCA states that foreclosure of a lien against withdrawable real estate or property on which a lien was recorded before the condominium was recorded (and the mortgagee did not consent to the recording of the declaration) has the effect of withdrawing that property from the condominium without the requirement of an

		<p>amendment. TUCA authorizes unit owners to rescind a termination agreement and reinstate the declaration by agreement of the same percentage of unit owners required to terminate.</p>
<p>§82.070</p>	<p>N/A</p>	<p><u>Meeting at Which Amendments May Be Adopted.</u></p> <p>(a) TUCA prohibits an association or a board from meeting to adopt an amendment or change to the declaration, articles of incorporation, bylaws, or the association’s rules unless the association or board provides each owner with a document showing the specific amendment or change proposed.</p> <p>(b) TUCA states that the information described by Subsection (a) must be given to each unit owner after the 20th day but before the 10th day preceding the date of the meeting. The information is considered to have been given to a unit owner on the date the information is personally delivered to the unit owner, as shown by a receipt signed by the unit owner, or on the date shown by the postmark on the information after it is deposited in the United States mail with a proper address and postage paid.</p>
<p>§82.102</p>	<p>§3-102</p>	<p><u>Powers of Unit Owners Association.</u></p> <p>TUCA limits the association’s powers to adopt and amend rules and regulations for the following reasons: (1) regulating the use, occupancy, leasing or sale, maintenance, repair, modification, and appearance of units and common elements, to the extent the regulated actions affect common elements or other units; (2) regulating the collection of delinquent assessments and the application of payments; and (3) regulating the termination of utility service to a unit, the owner of which is delinquent in the payment of an assessment that is used, in whole or in part, to pay the cost of that utility. The provisions listed in the previous sentence are retroactive and apply to all condominiums in Texas. TUCA also adds the following retroactive provisions: (1) permits the association to regulate the use, maintenance, repair, replacement, modification, and appearance of the entire condominium, and not just of the common elements; (2) permits the association’s purchase of appropriate or necessary insurance and fidelity bonds; (3) authorizes the association to enter a unit for bona fide emergency purposes; and (4) authorizes the association to suspend voting privileges of or use of certain general common elements by an owner that is more than thirty days delinquent on assessment payments. TUCA adds that to be enforceable, bylaws and rules must not be arbitrary or capricious. TUCA also provides steps the association must take before it may charge a unit owner for property damage or levy a fine for violation of the governing documents. TUCA further authorizes an association to use its future income and lien rights as collateral to borrow money. If the dedicatory instrument requires a vote of the owners to approve a loan, then 67 percent of the owners must approve unless the dedicatory instrument specified a lower percentage.</p>
<p>§82.103</p>	<p>§3-103</p>	<p><u>Executive Board Members and Officers.</u></p> <p>TUCA states, except as provided in the governing documents, the board shall act in all instances on behalf of the association if in the good faith judgment of the board, the action is reasonable. TUCA alters the standard of care for board members and officers by making them fiduciaries of the unit owners. TUCA revises the time period upon which declarant control terminates to not later than 120 days after conveyance of 75 percent of the units that may be created to unit owners other than a declarant. TUCA further revises the time at which the first non-declarant member of the board will be elected – not later than the 120th day after conveyance of 50 percent of the units that may be created to unit owners other than declarant, not less than one-third of the members of the board must be elected by unit owners other than declarant. TUCA states that the members of the board need not be unit owners. TUCA limits the liability of the officers and</p>

		directors of the association unless they (1) breach a fiduciary duty, (2) receive an improper benefit, or (3) perform an act or omission for which liability is expressly provided by statute, in bad faith, or with intentional misconduct.
§82.107	§3-107	<p><u>Upkeep of Condominium.</u></p> <p>TUCA adds that, unless otherwise provided by the declaration, (1) each unit owner is responsible for the cost of maintenance, repair, and replacement of any utility installation or equipment and any windows and doors serving only the owner's unit, and (2) the association may enter a unit after giving notice to the owner or occupant of the unit in order to prevent or terminate waste of water or perform repairs required to prevent any further water damage.</p>
§82.111	§3-113	<p><u>Insurance.</u></p> <p>TUCA makes the insurance requirements applicable to all condominiums in Texas. Therefore, this provision is retroactive and also applies to condominiums created prior to January 1, 1994.</p> <p>(c) Authorizes insurance policies obtained by the board that are required to be maintained by the association in accordance with §82.111(a) to provide for commercially reasonable deductibles as the board determines appropriate or necessary.</p> <p>(j) Provides that if the cost to repair the damage caused to the units and common elements is less than the association's insurance deductible, the party that would be responsible for such repair if the damaged property was not insured is responsible for the repair costs.</p> <p>(k) Provides that if the cost to repair the damage caused to the units and common elements is greater than the association's insurance deductible, the dedicatory instruments determine payment for costs incurred prior to payment of insurance proceeds. If the dedicatory instruments are silent, unless the board, by resolution, determines the payment it is a common expense.</p> <p>(l) If damage to the unit or common elements is due to an act or omission by an owner or its guests, the association may assess the costs against the owner's unit.</p>
§82.112	§3-115	<p><u>Assessments for Common Expenses.</u></p> <p>TUCA adds that the association's reserves and the unit owners' working capital contributions may not be used to pay operational expenses until the declarant control terminates. TUCA revises this section to state that from the date of the initial assessment until declarant control terminates, or for not more than three years from declarant's first conveyance of a unit, the declarant has the option to periodically pay (1) the amount of operational expenses not covered by the current unit owners other than declarant, or (2) the common expense liability allocated to each unit owned by declarant. TUCA requires that all common expenses shall be assessed against all units conveyed, rented, or used as models or offices by the declarant and against all units owned by declarant after the earlier of termination of declarant's control or three years after declarant's first conveyance of a unit. TUCA states that past due assessments or installments of assessments may (rather than shall) bear interest. Except as otherwise provided for in the declaration or 82.107, TUCA states that a common expense for maintenance, repair, or replacement of limited common elements shall be assessed against all units as if it were a general common element. TUCA allows for accumulation of reserve funds for an unspecified period of time. TUCA further authorizes declarant to collect prorated prepaid expenses from purchaser at closing of a unit.</p>

<p>§82.113</p>	<p>§3-116</p>	<p><u>Association’s Lien for Assessments.</u></p> <p>TUCA almost completely revises this section.</p> <p>(a) An assessment is a personal obligation of the unit owner and is secured by a continuing lien on the unit, rents, and insurance proceeds from the unit. Assessments means regular and special assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorney’s fees, and any other amount due to or levied by the association against the unit owner, all of which are enforceable as assessments unless the declaration provides otherwise.</p> <p>(b) The association’s lien for assessments has priority over all other liens except (1) taxes or other government assessments or charges, (2) a lien or encumbrance recorded before the declaration, (3) a first vendor’s lien/deed of trust recorded before the assessment became delinquent, and 4) unless provided otherwise in the declaration, a construction lien for improvements or assignment of right to insurance proceeds if either are recorded/perfected before the assessment becomes delinquent.</p> <p>(c) The association’s lien for assessments is perfected upon recordation of the declaration unless otherwise stated in the declaration.</p> <p>(d) By acquiring a unit, the unit owner grants to the association a power of sale to nonjudicially foreclose their assessment lien on the unit under 51.002.</p> <p>(e) The association has the right to foreclose judicially or nonjudicially, but not for assessment consisting solely of fines.</p> <p>(f) The association may bid for and purchase the unit at the foreclosure sale as a common expense.</p> <p>(g) The owner of a unit purchased at a foreclosure sale of the association’s lien for assessments may redeem the unit not later than the 90th day after the date of the foreclosure sale. In order to redeem a unit the owner must: pay to the association all assessments that are due as of the date of the redemption and reasonable attorney's fees and costs incurred by the association in foreclosing the lien; and (i) if the association is the purchaser, the redeeming unit owner must pay the association all amounts owed by such owner to the association at the time of the foreclosure sale, interest from the date of the foreclosure, any assessment levied against the unit by the association after the foreclosure sale, and any reasonable cost incurred by the association as the owner of the unit; or (ii) if a party other than the association is the purchaser, the redeeming unit owner must pay to the third party purchaser an amount equal to the bid paid for the unit at the foreclosure sale, interest on the bid amount, any assessment paid by the third party purchaser after the date of foreclosure, and any reasonable costs incurred by the third party purchaser as the owner of the unit.</p> <p>(h) If a unit owner defaults in the owner’s monetary obligations to the association, the association, in certain circumstances, either may or shall notify other lienholders of the default and the association’s intent to foreclose the lien.</p> <p>(i) The association may take a deed in lieu of foreclosure or file suit to recover a money judgment for sums secured by the association’s lien on the unit.</p> <p>(j) At any time before a nonjudicial foreclosure sale, a unit owner may avoid foreclosure by paying all amounts due to the association.</p> <p>(k) If, on January 1, 1994, a unit is the homestead of a unit owner and the declaration does not contain a valid assessment lien against the unit, then the lien provided under this Section does not attach against the unit until the unit is no longer the homestead of the person owning the unit on January 1, 1994.</p> <p>(l) Foreclosure of a tax lien attached against a unit does not discharge the association’s lien for assessments or amounts due to the association after the foreclosure of the tax lien.</p> <p>(m) If a unit owner is delinquent in a payment of assessments to an association, the association can ask lienholders to provide information about the unit owner’s other debts secured by the unit and other relevant information. The lienholders can also ask the association information about the condominium and</p>
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		the unit owner's obligations.
§82.117	N/A	<p><u>Obligations of Unit Owners.</u></p> <p>TUCA requires the following affirmative duties from unit owners: (1) payment of assessments, (2) compliance with governing documents, (3) reimbursement for damage to common elements, and 4) liability for violations of the governing documents.</p>
§82.119	N/A	<p><u>Procedures for Filing Suit or Initiating Arbitration Proceedings for Defect or Design Claims for Certain Associations.</u></p> <p>TUCA adds this Section, which applies to construction or design defect claims of units or common elements brought by associations. TUCA requires the association obtain an inspection report, allows the parties to the claim an opportunity to cure, and owners holding a majority of the voting interests in the association must approve to pursue the claim.</p>
§82.120	N/A	<p><u>Binding Arbitration for Certain Claims.</u></p> <p>TUCA expressly authorizes a declaration to require a design or construction defect claim be resolved by binding arbitration and may set forth the process for resolution. TUCA prohibits an amendment to the declaration that removes the arbitration requirement or the process outlines for resolving a claim from applying retroactively to an alleged act or omission that occurred prior to the amendment.</p>
§82.153	§4-103	<p><u>Condominium Information Statement.</u></p> <p>TUCA changes the name of the document from "public offering statement" to "condominium information statement" and eliminates approximately half of the 1980 Model UCA's requirements. TUCA states that only if a material or substantial change in the CIS may adversely affect a prospective purchaser who has already received the CIS shall the declarant be required to furnish a copy of the amended CIS to the purchaser before closing.</p>
§82.156	§4-108	<p><u>Purchaser's Right to Cancel.</u></p> <p><u>Selling Unit Owner Other than Declarant</u> If purchaser has not received certain governing documents before the purchaser executed a contract of sale for a unit or if the contract does not contain certain print acknowledging purchaser's receipt of the governing documents and that purchaser should read said documents before executing the contract, then purchaser has five days (instead of fifteen) after the date that purchaser receives the governing documents to cancel the contract. The same five-day right to cancellation applies for either receipt or waiver of receipt of a resale certificate. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded. TUCA states that a selling unit owner may not require purchaser to close until the purchaser has been given the governing documents.</p> <p><u>Declarant</u> If purchaser has not received the condominium information statement before the purchaser executed a contract of sale for a unit or if the contract does not contain certain print acknowledging purchaser's receipt of the condominium information statement and that purchaser should read it before executing the contract, then purchaser has five days (instead of fifteen) after the date that purchaser receives the condominium information statement to cancel the contract. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded (previously declarant had to pay purchaser a penalty of 10 percent of the purchase price). TUCA states that the declarant may not require a purchaser to close until the purchaser has been given</p>

		the condominium information statement.
§82.157	§4-109	<p><u>Resale of Units.</u></p> <p>TUCA requires that the resale certificate must be prepared no earlier than three months before the date that it is delivered to purchaser. TUCA eliminates any liability of a selling unit owner or owner’s agent for erroneous information in the resale certificate provided by the association. The association is not liable for delay or failure to furnish a resale certificate. Selling unit owner may provide an affidavit and purchaser may provide a waiver in order to waive the requirement of a resale certificate.</p>
§82.160	§4-112	<p><u>Conversion Buildings.</u></p> <p>TUCA (1) eliminates the tenant’s right to repurchase the unit from the Declarant/Seller upon conversion of the building to a condominium, (2) reduces the notice Declarant/Seller is required to give the tenant regarding vacation of the property from 120 days to 60 days, and (3) prevents the Declarant/Seller from substantially altering the interior of the premises for purposes of a conversion.</p>

EXHIBIT B**SUMMARY OF AMENDMENTS TO TUCA SINCE ENACTMENT**

<u>SECTION OF TUCA AFFECTED</u>	<u>BILL</u>	<u>SUMMARY</u>
Amended §82.003(11) and added §82.003(11-a)	HB 2075 (2013)	<p><u>Definitions.</u></p> <p><u>Declaration:</u> Removes the requirement that the declaration be a “recorded” instrument, which conforms it to the definition of declaration in the Uniform Condominium Act.</p> <p><u>Dedicator Instrument:</u> Adds the definition of a "Dedicator instrument", which are the documents governing the establishment, maintenance, or operation of the condominium regime and is broadly defined to include restrictive covenants, bylaws, rules and regulations of the association, and other similar instruments.</p>
Amended §82.051(d) and added §82.051(f)	HB 989 (2007)	<p><u>Recording Condominium Plats.</u></p> <p>(d) Requires that if a county clerk maintains a book for condominium plat records that the book must be the same size and type as the book for recording subdivision plats.</p> <p>(f) Mandates that a condominium plat, amended plats or replats cannot be recorded without specific information regarding the payment of ad valorem taxes attached to it, e.g., tax certificate, tax receipt, and/or a statement that the ad valorem taxes have not yet been calculated for the year. A condominium acquired by a taxing unit for public use through eminent domain proceedings or voluntary sale is exempted from this provision.</p>
Added §82.051(g)	HB 3232 (2007)	<p><u>Golf Course Platting.</u></p> <p>Expressly provides that creation of a condominium under TUCA does not permit development of a subdivision golf course, as defined by Section 212.0155(b), Local Government Code, without a plat if the plat is otherwise required by applicable law. A municipality may require as a condition to the development of a previously platted or unplatted subdivision golf course that the subdivision golf course be platted or replatted.</p>
Added §82.0675	HB 2200 (2003)	<p><u>Mandatory Club Membership.</u></p> <p>Provides that a provision in a declaration that requires owners to maintain a membership in a specified private club is not valid after the 10th anniversary of the date the declaration is recorded unless renewed after the 9th anniversary.</p>
Added §82.070(a) and (b)	HB 1285 (1997)	<p><u>Meeting at Which Amendments May Be Adopted.</u></p> <p>(a) Prohibits an association or a board from meeting to adopt an amendment or change to the declaration, articles of incorporation, bylaws, or the association’s rules unless the association or board provides each owner with a document showing the specific amendment or change proposed.</p>

		(b) The information described by Subsection (a) must be given to each unit owner after the 20th day but before the 10th day preceding the date of the meeting. The information is considered to have been given to a unit owner on the date the information is personally delivered to the unit owner, as shown by a receipt signed by the unit owner, or on the date shown by the postmark on the information after it is deposited in the United States mail with a proper address and postage paid.
Added §82.102(f) & (g)	HB 2075 (2013)	<u>Association's Ability to Borrow.</u> Authorizes an association to use its future income and lien rights as collateral to borrow money. If the dedicatory instrument requires a vote of the owners to approve a loan, then 67 percent of the owners must approve <i>unless</i> the dedicatory instrument specified a lower percentage.
Amended §82.108(c)(2)	HB 1285 (1997)	<u>Board Meeting or Consent Regarding Fines Against an Owner.</u> Restricts the means by which a condominium association board may hold a meeting or act by unanimous consent if such meeting or consent involves the voting on a fine, damage assessment, appeal from a denial of architectural control approval, or suspension of a right of a particular association member before the member has an opportunity to attend a board meeting and be heard <i>unless</i> the declaration, bylaws, or articles of incorporation provide otherwise.
Amended §82.111(c)	HB 2075 (2013)	<u>Insurance Deductibles.</u> Authorizes insurance policies obtained by the board that are required to be maintained by the association in accordance with §82.111(a) to provide for <i>commercially reasonable deductibles</i> as the board determines appropriate or necessary.
Amended §82.111(i)	HB 2075 (2013)	<u>Repair/Reconstruction.</u> Clarifies that to block the repair or reconstruction of a damaged condominium regime requires the affirmative vote of at least 80 percent of all owners—regardless of whether such owner's unit was damaged or destroyed.
Added §82.111(j), (k), and (l)	HB 2075 (2013)	<u>Responsible Party.</u> (j) Provides that if the cost to repair the damage caused to the units and common elements is less than the association's insurance deductible, the party that would be responsible for such repair if the damaged property was not insured is responsible for the repair costs. (k) Provides that if the cost to repair the damage caused to the units and common elements is greater than the association's insurance deductible, the dedicatory instruments determine payment for costs incurred prior to payment of insurance proceeds. If the dedicatory instruments are silent, unless the board, by resolution, determines the payment it is a common expense. (l) If damage to the unit or common elements is due to an act or omission by an owner or its guests, the association may assess the costs against the owner's unit.
Amended §82.113(g)	HB 2075 (2013)	<u>Redemption Rights.</u> Removes the requirement that only an owner of a foreclosed <i>residential</i> unit has a right to redeem the unit not later than the 90 th day after the foreclosure sale of the association's lien for assessments. Allows the owner to redeem the unit purchased by anyone at the foreclosure sale (as opposed to just if purchased by the association).

		Requires that in order to redeem a unit the owner must: pay to the association all assessments that are due as of the date of the redemption and reasonable attorney's fees and costs incurred by the association in foreclosing the lien; and (i) if the association is the purchaser, the redeeming unit owner must pay the association all amounts owed by such owner to the association at the time of the foreclosure sale, interest from the date of the foreclosure, any assessment levied against the unit by the association after the foreclosure sale, and any reasonable cost incurred by the association as the owner of the unit; or (ii) if a party other than the association is the purchaser, the redeeming unit owner must pay to the third party purchaser an amount equal to the bid paid for the unit at the foreclosure sale, interest on the bid amount, any assessment paid by the third party purchaser after the date of foreclosure, and any reasonable costs incurred by the third party purchaser as the owner of the unit.
Added §82.116(a-1)	HB 2075 (2013)	<u>Recordation of Management Certificate.</u> Requires the county clerks to record an association's management certificate in the real property records of the county in which the condominium is located.
Added §82.118(c)	HB 364 (2011)	<u>Abandoned Condominiums: Eminent Domain.</u> Requires the owner of a condominium located wholly or partly in a municipality with a population of more than 1.9 million to provide written notice of a new address to the local appraisal district and authorizes such a city to exercise strictly limited eminent domain authority to acquire a condominium complex not lawfully occupied for at least one year.
Added §82.119 and §82.120	HB 1455 (2015)	<u>Construction Defect Claims.</u> Applies to construction or design defect claims of units or common elements brought by associations. It requires the association obtain an inspection report, allows the parties to the claim an opportunity to cure, and owners holding a majority of the voting interests in the association must approve to pursue the claim. Also expressly authorizes a declaration to require a design or construction defect claim be resolved by binding arbitration and may set forth the process for resolution. Prohibits an amendment to the declaration removing the arbitration requirement or the process outlines for resolving a claim from applying retroactively to an alleged act or omission that occurred prior to the amendment.
Added §82.157(a)(13) and (14)	SB 1168 (2015)	<u>Resale Certificate Information.</u> Requires the association's current operating budget and balance sheet and all fees associated with the transfer of ownership be included in a resale certificate issued by the association for a unit owner other than a declarant intending to sell a unit.

EXHIBIT C**DISCLOSURES AND DISCLAIMERS**

A few of examples of typical disclosures for an urban mid-rise residential condominium project are as follows:

1.1. **Urban Environment.** The Property is located in an urban environment. Sound and vibrations may be audible and felt from such things as sirens, whistles, horns, the playing of music, people speaking loudly, trash being picked up, deliveries being made, equipment being operated, dogs barking, construction activity, building and grounds maintenance being performed, automobiles, buses, trucks, ambulances, airplanes, trains and other generators of sound and vibrations typically found in an urban area. In addition to sound and vibration, there may be odors (from restaurants, food being prepared and dumpsters) and light (from signs, streetlights, other buildings, car headlights and other similar items) in urban areas and these things are part of the reality and vibrancy of urban living.

1.2. **Light Emission.** Light may emit from structures located on adjacent properties. THIS DECLARATION DOES NOT MAKE ANY REPRESENTATION OR WARRANTY AS TO THE LEVEL OF GLARE THAT MAY AFFECT PORTIONS OF THE REGIME, AND EACH OWNER HEREBY WAIVES AND EXPRESSLY RELEASES ANY SUCH WARRANTY AND CLAIM FOR LOSS OR DAMAGES RESULTING FROM ANY SUCH GLARE. Additionally, sunlight will penetrate through the windows into the Units and such sunlight could lead to the deterioration or fading of items contained in the Units and an increase in the temperature of the Unit and the Common Elements. THIS DECLARATION DOES NOT MAKE ANY REPRESENTATION OR WARRANTY AS TO THE LEVEL OF SUNLIGHT THAT MAY PENETRATE THE WINDOWS OF THE UNITS, AND EACH OWNER HEREBY WAIVES AND EXPRESSLY RELEASES ANY SUCH WARRANTY AND CLAIM FOR LOSS OR DAMAGES RESULTING FROM ANY SUCH PENETRATION AND SHALL BE SOLELY RESPONSIBLE FOR PROTECTING SUCH OWNER'S UNIT AND THE ITEMS CONTAINED THEREIN FROM SUNLIGHT AND FOR MAINTAINING A PROPER TEMPERATURE IN SUCH OWNER'S UNIT.

1.3. **Wood Variation.** Natural wood has considerable variation due to its organic nature. There may be shades of white, red, black or even green in areas. In addition, mineral streaks may also be visible. Grain pattern or texture will vary from consistent to completely irregular; wood from different areas of the same tree can also have variations in pattern or texture. It is these variations in wood that add to its aesthetic appeal. These variations in grain will in turn accept stain in varying amounts, which will show throughout the wood products from one door to the next, one panel to the next or one piece of wood to the next. Also, cabinet finishes (including gloss and/or matte finishes) will not be entirely consistent and some minor irregularities will be apparent. Additionally, wood and wood products may be subject to warping, splitting, swelling and/or delamination.

1.4. **Unit Plans and Dimensions.** Any advertising materials, brochures, renderings, drawings, and the like, furnished by Declarant to Owner which purport to depict the Improvements to be constructed within the Property are merely approximations and do not necessarily reflect the actual as-built conditions of the same. Room dimensions, Unit and Building sizes, and elevations may vary due to the nature of the construction process and site conditions. If the Owner is concerned about any representations regarding room dimensions, Unit or Building sizes, or elevations, the Owner should conduct its own investigation of such matters prior to contracting for the purchase of a Unit.

1.5. **Schools.** No representations are being made regarding which schools may now or in the future serve the Unit.

1.6. **Street Names.** Declarant may change, in its sole discretion, the Property name and street names and addresses in or within the Property, including the street address of the Unit before or after closing if required by Applicable Law.

1.7. **Construction Activities.** Declarant will be constructing portions of the Regime and engaging in other construction activities related to the construction of Units and Common Elements. Such construction activities may, from time to time, produce certain conditions within the Regime, including, without limitation: (i) noise or sound that is objectionable because of its volume, duration, frequency or shrillness; (ii) smoke; (iii) noxious, toxic or corrosive fumes or gases; (iv) obnoxious odors; (v) dust, dirt or flying ash; (vi) unusual fire or explosion hazards;

(vii) temporary interruption of utilities; and/or (viii) other conditions that may threaten the security or safety of Persons on the Regime. Notwithstanding the foregoing, all Owners and Occupants agree that such conditions on the Regime resulting from construction activities shall not be deemed a nuisance and shall not cause Declarant and its agents to be deemed in violation of any provision of this Declaration.

1.8 **Location of Utilities.** Declarant makes no representation as to the location of mailboxes, utility boxes, street lights, fire hydrants or storm drain inlets or basins.

1.9 **Advertising Materials.** Any advertising materials, brochures, renderings, drawings, and the like, furnished by Declarant to an Owner which purport to depict the Regime, or any portion thereof, are merely approximations and do not necessarily reflect the actual as-built conditions of the same

1.10 **Elevators.** Elevators serving the Building may malfunction from time to time and become stuck between levels for temporary periods. Neither Declarant nor the Association will be liable for any such malfunctions.

1.11 **Sprinklers.** If the Building is equipped with a sprinkler system the system may include sprinkler heads that intrude into the Units. All such pipes, heads and other parts of the sprinkler system shall be a part of the General Common Elements (whether located within or outside of Unit boundaries) and shall be maintained, repaired and replaced, as necessary, by the Association. Sprinkler heads, caps, and assemblies may not be painted or caulked over or otherwise covered in any manner. If an Owner or Resident causes the sprinkler system to be activated (except in the case of a fire) or damages or destroys any part of the sprinkler system, the Owner of the Unit shall be responsible for any costs the Association incurs in repairing the system and for all other losses or damages resulting from such actions, including, without limitation, damages to any portion of the Common Elements or other Units.

1.12 **Neighborhood Conditions.** Since in every neighborhood there are conditions that different people may find objectionable, it is acknowledged that there may be conditions outside of the Property that an Owner or Resident may find objectionable, and it shall be the sole responsibility of an Owner or Resident to become acquainted with neighborhood conditions that could affect the Property.

1.13 **Large Vehicles.** Trucks, sports utility vehicles, vans, minivans, large sedans, or any other vehicles other than compact passenger vehicles may not fit into parking spaces. The height clearance for vehicles in the parking garage is limited and certain vehicles may be too large to enter. Declarant makes no representations or warranties that any trucks, sports utility vehicles, vans, minivans, large sedans, or any other vehicles other than compact passenger vehicles will actually fit into any parking spaces, including any parking space(s) to be assigned to the Unit.

1.14 **Trash and Laundry Chutes.** The use of the trash and laundry chutes may create noise and vibration, and such noise and vibration shall not constitute an interference or disruption to the use and quiet enjoyment of the Unit. The trash and laundry chutes and related facilities may also emanate undesirable odors.

1.15 **Media Equipment.** Declarant makes no representations or warranties regarding any electronic media equipment located in the Common Elements (including, but not limited to plasma televisions). Such equipment may need repairs or replacement in the future, and Declarant shall not be responsible for such repairs or replacement under any circumstances.

1.16 **Moisture in Parking Facilities.** Water may drip onto any vehicle parked within the parking garage. The water could include mineral deposits that cause damage to the vehicle. Damage to a vehicle may be limited if the owner of the vehicle immediately washes off any mineral deposits. Declarant shall not be held liable for any loss or damage resulting from water damage or spotting.

1.17 **Compliance with Recycling Ordinance.** Compliance with the City of Austin's multi-family recycling ordinance is mandatory for multi-family complexes with 100 or more units, and for businesses with 100 or more employees. As such, each Owner is advised to consult with the City of Austin regarding the applicability of such ordinance to their property. Owners are advised to see <http://www.ci.austin.tx.us/sws/recyclerules.htm> for more information.