

**LEGAL ISSUES PERTAINING TO DRAFTING DOCUMENTS TO CREATE A
CONDOMINIUM
IN ALABAMA**

By:
Sam W. Irby
Attorney at Law
Irby & Heard, P.C.
317 Magnolia Avenue
Fairhope, Alabama 36532
www.irbyandheard.com

This seminar attempts to give a general overview of some of the legal issues affecting the drafting of legal documents to create a Condominium in the State of Alabama. Issues pertaining to subdivision, planning and zoning are outside the scope of this seminar.

1. General Provisions (Selected Sections).

A. Alabama Condominium Statutes.

1. 1973 Condominium Act. §35-8-101, et seq., Ala. Code 1975, known as the “1973 Condominium Act”, applies to all Condominiums created in Alabama between the date the Act took effect in 1973 and January 1, 1991.
2. Uniform Condominium Act of 1991. §35-8A-101, et seq., Ala. Code 1975, known as the “Alabama Condominium Act of 1991” (Uniform Condominium Act of 1991) generally applies to all Condominiums created in Alabama after January 1, 1991, except for certain specific sections which apply to Condominiums created in Alabama prior to January 1, 1991.

§35-8A-102(d), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(d) This chapter does not apply if a condominium contains no more than four units and is not subject to any development rights, unless the declaration provides that the entire chapter is applicable.”

B. Key Statutory Definitions.

1. Condominium.

§35-8-2(5), Ala. Code 1975 (1973 Condominium Act) defines a Condominium as follows:

“(5) CONDOMINIUM. The form of ownership of real or personal property or a combination thereof under a declaration providing for ownership of

units of the property by one or more owners. Such units may consist of private elements together with an undivided interest in common and limited common elements.”

§35-8A-103(7), Ala. Code 1975 (Uniform Condominium Act of 1991) defines a Condominium as follows:

“(7) CONDOMINIUM. Real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.”

NOTE: An essential requirement of a Condominium under the 1973 Condominium Act and Uniform Condominium Act of 1991 is that the Condominium consists of Units together with an undivided share in the Common Elements. A purchaser of a Condominium Unit must obtain a separate and exclusive interest in a Unit and an undivided interest in the Common Elements. A Condominium is not created unless the Owners of the Units also have a vested interest in the Common Elements.

The Condominium concept is different from the ownership that is typical in a subdivision or planned unit development. In the typical subdivision or planned unit development, an Owner acquires fee simple title to a subdivided lot together with a membership in an association and does not obtain an undivided interest in the common area. Unlike a Condominium association that does not typically own any Common Elements in a Condominium, a subdivision or planned unit development association is the Owner of the common area and not the Lot Owner who is a member of the planned unit development property owners’ association.

2. Unit (Private Elements).

§35-8-2(13), Ala. Code 1975 (1973 Condominium Act) defines a Unit as follows:

“(13) UNIT. The private elements of the condominium property together with the undivided interest in the common elements and limited common elements which are assigned thereto in the declaration or any amendment thereof.”

§35-8-2(12), Ala. Code 1975 (1973 Condominium Act) defines Private Elements as follows:

“(12) PRIVATE ELEMENTS. A part or parts of the condominium property as set forth in the declaration and intended for exclusive ownership or possession by a unit owner.”

§35-8A-103(26), Ala. Code 1975 (Uniform Condominium Act of 1991)

defines a Unit as follows:

“(26) UNIT. A physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to section 35-8A-205(a)(5).”

§35-8A-205(a)(5), Ala. Code 1975 (Uniform Condominium Act of 1991) requires that the Declaration of Condominium must contain a description of the boundaries of each Unit.

NOTE: The Uniform Condominium Act of 1991 does not contain a definition for Private Elements.

3. Common Elements.

§35-8-2(2), Ala. Code 1975 (1973 Condominium Act) defines Common Elements as follows:

“(2) COMMON ELEMENTS. A part or parts of the condominium property as set forth in the declaration in which all of the unit owners have an undivided interest.”

§35-8A-103(4), Ala. Code 1975 (Uniform Condominium Act of 1991) defines Common Elements as follows:

“(4) COMMON ELEMENTS. All portions of a condominium other than the units.”

NOTE: The Common Elements cannot be partitioned or separated from the Unit and are not subject to partition [§35-8-6(c), Ala. Code 1975 (1973 Condominium Act); §35-8A-207(e), Ala. Code 1975 (Uniform Condominium Act of 1991)]. Each Unit Owner shall have the right to use the Common Elements in accordance with the Declaration and Bylaws so long as the uses are consistent with the lawful rights of other Unit Owners [§35-8-5(4), Ala. Code 1975 (1973 Condominium Act)]. §35-8A-302(a)(6) and (10), Ala. Code 1975 (Uniform Condominium Act of 1991) gives the Association the right to regulate the use and impose fees for the use and operation of the Common Elements.

4. Limited Common Elements.

§35-8-2(8), Ala. Code 1975 (1973 Condominium Act) defines Limited Common Elements as follows:

“(8) LIMITED COMMON ELEMENTS. A part or parts of the condominium property as set forth in the declaration in which more than one but not all unit owners have an undivided interest. ”

NOTE: Because of an error in the drafting of the definition of Limited Common Elements contained in §35-8-2(8), Ala. Code 1975 (1973 Condominium Act), as a practical

matter, there were not many, if any, Condominiums drafted under the 1973 Condominium Act which contained Limited Common Elements.

§35-8A-103(16), Ala. Code 1975 (Uniform Condominium Act of 1991) defines a Limited Common Element as follows:

“(16) LIMITED COMMON ELEMENT. A portion of the common elements allocated by the declaration or by operation of section 35-8A-202(2) or (4) for the exclusive use of one or more but fewer than all of the units.”

C. Miscellaneous General Provisions

1. Variation by Agreement.

§35-8-7, Ala. Code 1975 (1973 Condominium Act) provides that a Declaration may contain other provisions not inconsistent with the 1973 Condominium Act.

NOTE: Both the 1973 Condominium Act and the Uniform Condominium Act of 1991 give flexibility in the drafting of Condominium documents and allow the drafter to vary many of its provisions. However, §35-8A-104, Ala. Code 1975 (Uniform Condominium Act of 1991) prohibits the variation from the Uniform Condominium Act of 1991 by agreement except in those cases where it is expressly permitted by the terms of the Uniform Condominium Act of 1991.

2. Separate Titles and Taxation.

§35-8-15, Ala. Code 1975 (1973 Condominium Act) provides that all property taxes imposed by any taxing authority shall be separately assessed against each Unit as a single parcel and shall constitute a lien upon the Unit and not upon any other portion of the Condominium Property.

§35-8A-105, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that each Unit, together with its interest in the Common Elements, constitutes a separate parcel of real estate and must be separately taxed and assessed. No separate tax or assessment may be rendered against any Common Element other than the Common Elements for which the Declarant reserved the Development Rights. Any portion of any Common Elements for which the Declarant reserved any Development Rights must be separately taxed and assessed against the Declarant. §35-8A-105, Ala. Code 1975 (Uniform Condominium Act of 1991) applies to Condominiums created prior to 1991.

3. Applicability of Local Ordinances, Regulations, and Building Codes.

§35-8-21, Ala. Code 1975 (1973 Condominium Act) and §35-8A-106, Ala. Code 1975 (Uniform Condominium Act of 1991) prohibit discrimination

against Condominiums by local law making authorities.

§35-8A-106, Ala. Code 1975 (Uniform Condominium Act of 1991) prohibits discrimination against Condominiums by local law-making authorities and makes it clear that, except for the prohibition on discrimination against Condominiums, the Uniform Condominium Act of 1991 has no effect on real estate use laws. §35-8A-106, Ala. Code 1975 (Uniform Condominium Act of 1991) applies to Condominiums created prior to 1991.

NOTE: See Dyess v. Bay John Developers II, LLC, 2007 ALCIV 2050857-122107 (Alabama Court of Civil Appeals) which ruled that a Condominium must comply with the Baldwin County, Alabama Subdivision Regulations.

2. Creation, Alteration, and Termination of Condominiums (Selected Sections).

A. Creation of a Condominium

§35-8-7, Ala. Code 1975 (1973 Condominium Act) provides that a Condominium is established by the recording of a properly executed Declaration, executed with the formalities of a deed by all persons having title of record or lien interest of record, and sets out the provisions which must be contained in the Declaration.

§35-8-8(a), Ala. Code 1975 (1973 Condominium Act) provides in part as follows:

“(a) Prior to the conveyance of any unit, plans or other graphic description, certified by a licensed or registered engineer or architect, in sufficient detail to identify the common elements, limited common elements and private elements comprising such unit as built, shall be recorded as a part of the declaration or as an amendment thereto....”

§35-8A-201(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that a Condominium can be created only by complying with the Uniform Condominium Act of 1991 and only by filing a Declaration with the Judge of Probate of every county where any portion of the Condominium is located.

The Uniform Condominium Act of 1991 contemplates that before a Condominium can be created or a Unit may be conveyed, the Declaration must be recorded that complies with Uniform Condominium Act of 1991 and the Declarant must comply with Ala. Code 1975, §35-8A-417 (Uniform Condominium Act of 1991) requiring that the Unit is substantially completed as evidenced by a recorded certification of substantial completion executed by an independent registered architect or independent registered engineer or by issuance of a Certificate of Occupancy authorized by law. As a matter of practice when we draft Condominium Documents, we require both the certification by the independent registered architect or independent registered engineer and a certification by a licensed Alabama surveyor. We also obtain and record a Certificate of Occupancy issued by the appropriate governmental authority.

B. Unit Boundaries.

§35-8A-202, Ala. Code 1975 (Uniform Condominium Act of 1991) defines the boundaries of a Unit and applies when the Declaration does not clearly describe the Units.

The 1973 Condominium Act does not contain a provision which specifically defines the boundaries of a Unit.

NOTE: A drafter has broad discretion in drafting a description of Unit boundaries. However, it is very important that the drafter draft clear and specific provisions describing the Unit boundaries. As stated above, §35-8A-202, Ala. Code 1975 (Uniform Condominium Act of 1991) sets out a definition of Unit boundaries which apply when the Declaration does not clearly describe the boundaries.

Land may constitute a Condominium Unit even if there are no improvements on the land. This is commonly referred to as a land Condominium. See *Dyess v. Bay John Developers II, LLC*, 2007 ALCIV 2050857-122107 (Alabama Court of Civil Appeals) which ruled that a Condominium must comply with the Baldwin County, Alabama Subdivision Regulations.

C. Bylaws.

§35-8-8(b), Ala. Code 1975 (1973 Condominium Act) provides that prior to the conveyance of a Unit, the Bylaws must be recorded.

§35-8-10, Ala. Code 1975 (1973 Condominium Act) provides that the Bylaws govern the administration and management of the Condominium Property by the Association and sets out the requirements for the Bylaws of the Association.

§35-8A-203, Ala. Code 1975 (Uniform Condominium Act of 1991) sets out the rules of construction and validity of the Declaration and Bylaws. §35-8A-203, Ala. Code 1975 (Uniform Condominium Act of 1991) applies to Condominiums created prior to 1991.

§35-8A-306, Ala. Code 1975 (Uniform Condominium Act of 1991) provides a checklist for drafting Bylaws for the Association.

D. Contents of Declaration.

§35-8-7, Ala. Code 1975 (1973 Condominium Act) sets out the requirements for the contents of a Declaration.

§35-8A-205, Ala. Code 1975 (Uniform Condominium Act of 1991) sets out the requirements for the contents of a Declaration as follows:

“§35-8A-205. Contents of declaration.

(a) The declaration for a condominium must contain:

(1) The name of the condominium, which must include the word "condominium" or be followed by the words "a condominium," and the name of the association;

(2) The name of every county in which any part of the condominium is situated;

(3) A legally sufficient description of the real estate included in the condominium;

(4) A statement of the maximum number of units which the declarant reserves the right to create;

(5) A description of the boundaries of each unit created by the declaration, including the unit's identifying number;

(6) A description of any limited common elements, other than those specified in section 35-8A-202(2) and (4), as provided in section 35-8A-209(b)(10);

(7) A description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements, other than limited common elements specified in section 35-8A-202(2) and (4), together with a statement that they may be so allocated;

(8) A description of any development rights specified in section 35-8A-103(11) and other special declarant rights specified in section 35-8A-103(24) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(9) If any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

*29911 (10) Any other conditions or limitations under which the rights described in subdivision (8) may be exercised or will lapse;

(11) An allocation to each unit of the allocated interests in the manner described in section 35-8A-207;

(12) Any restrictions on (i) use, occupancy, leasing or alienation of the units, provided that reasonable rules and regulations related to conduct by unit owners or esthetic considerations which are adopted by the association from time to time need not be included in the declaration, and (ii) the amount for which a unit may be sold or the amount that may be received by a unit owner on sale, condemnation, casualty loss to the unit or to the condominium, or on the termination of the condominium;

(13) The recording data for recorded easements and licenses appurtenant to or included in the condominium or to which any portion of the condominium is or may become subject by virtue of a reservation in the declaration;

(14) A statement of the number and identity of units which the declarant reserves the right to dispose of in time shares; and

(15) All matters required by sections 35A-8A-206 through 35-8A-209, 35-8A-215, 35-8A-216, and 35-8A-303(d).

(b) The declaration may contain any other matters the declarant deems appropriate.”

NOTE: It is important under both the 1973 Condominium Act and the Uniform Condominium Act of 1991 that a drafter closely observe the requirements of the statutes. The content of the Declaration must comply with the statutory requirements. Remember, a Condominium is a creature of statute.

E. Allocation of Common Element Interest, Votes and Common Expense Liabilities.

§35-8-6, Ala. Code 1975 (1973 Condominium Act) provides that the Declaration shall set out the undivided interest in Common Elements and Limited Common Elements or the method for determining such interest; that said Common Elements and Limited Common Elements shall remain undivided on the Condominium Property and not subject to partition; and that said undivided interest of each Unit Owner in the Common Elements and Limited Common Elements shall not thereafter be changed unless the owners of record of the Units affected and the holders of record of any liens thereon shall have agreed (*emphasis added*).

§35-8A-207, Ala. Code 1975 (Uniform Condominium Act of 1991) permits a variety of methods for allocating ownership interest, voting rights and assessment obligations and requires that those allocations may not discriminate in favor of the Declarant.

§35-8A-217(d), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(d) Except to the extent expressly permitted or required by other provisions of this chapter, no amendment in the absence of unanimous consent of the unit owners may: create or increase special declarant rights, create or increase the number or identity of units that may be disposed of on a time share basis, increase the number of units; change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted.”

NOTE: There are many ways that a drafter may draft a Declaration allocating ownership interest, voting rights and assessment obligations. Allocations could be by value, size of each Unit, location of each Unit or on any other formula so long as the formulas are explained and the allocations do not discriminate in favor of Units owned by the Declarant.

F. Limited Common Elements.

See §35-8-6, Ala. Code 1975 (1973 Condominium Act) in Paragraph 2.E. above.

§35-8A-208, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that, except for the Limited Common Elements described in §35-8A-202(2) and (4), Ala. Code 1975 (Uniform Condominium Act of 1991), which describes certain Limited Common Elements if not otherwise provided for in the Declaration, the Declaration must specify to which Unit or Units each Limited Common Element is allocated and said allocation may not be altered without the consent of the Unit Owners whose Units are affected; except as the Declaration otherwise provides, Limited Common Elements may be reallocated by an amendment to the Declaration; and that a Common Element not previously allocated as a Limited Common Element may not be allocated as a Limited Common Element except in the case where the Declaration describes any real estate which may be subsequently allocated as a Limited Common Element in accordance with §35-8A-205(a)(7), Ala. Code 1975 (Uniform Condominium Act of 1991) which requires that the Declaration contain a description of any real estate, other than real estate subject to Development Rights, which may be allocated subsequently as a Limited Common Element together with a statement that they may be so allocated.

NOTE: See comments above about §35-8A-103(16), Ala. Code 1975 (Uniform Condominium Act of 1991) pertaining to the definition of a Limited Common Element. Again, a Limited Common Element is a portion of a Common Element allocated by the Declaration for the exclusive use of one or more, but fewer than all, of the Units.

See Dorsett v. Singla, Alabama Court of Civil Appeals, October Term 2015-2016, 195 So. 3rd 299.

Under the Uniform Condominium Act of 1991, Limited Common Elements are owned in common by all Unit Owners which use is reserved to less than all of the Unit Owners. Unless the Declaration provides otherwise, the Association is responsible for the upkeep and maintenance of a Limited Common Element and the cost of such upkeep and maintenance is assessed against all of the Units. [See Ala. Code 1975, §35-8A-307(a) and §35-8A-315(c)(1) (Uniform Condominium Act of 1991)]. If the Declaration provides that the maintenance of a Limited Common Element is the responsibility of the Unit Owner to which said Limited Common Element is appurtenant, the Declaration should clearly define the boundary lines of the Limited Common Elements in order to determine maintenance responsibilities.

Remember, because of an error in the drafting of the definition of Limited Common Elements contained in §35-8-2(8), Ala. Code 1975 (1973 Condominium Act), as a practical matter, there were not many, if any, Condominiums drafted under the 1973 Condominium Act which contained Limited Common Elements.

G. Plats and Plans.

§35-8-8, Ala. Code 1975 (1973 Condominium Act) requires that prior to the conveyance of any Unit, plans, certified by a licensed or registered engineer or

architect, identifying the Common Elements, Limited Common Elements and Private Elements comprising such Units as built, be recorded as part of the Declaration.

§35-8A-209, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that plats and plans are part of the Declaration; provides what each plat and plan must show; requires that plats or plans be certified by an independent registered engineer or registered architect; and that the plat or plan must be recorded as provided for in §35-8A-201(b), Ala. Code 1975 (Uniform Condominium Act of 1991).

§35-8A-201(c), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(c) 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 containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent registered engineer or registered architect.”

NOTE: It is important that the reviewer or drafter insure that the plats and plans required by §35-8-8, Ala. Code 1975 (1973 Condominium Act) and §35-8A-209, Ala. Code 1975 (Uniform Condominium Act of 1991) are properly prepared, certified and recorded as required by the 1973 Condominium Act or Uniform Condominium Act of 1991 as they apply.

H. Development Rights and Special Declarant Rights.

§35-8A-103(11), Ala. Code 1975 (Uniform Condominium Act of 1991) defines Development Rights as follows:

“(11) DEVELOPMENT RIGHTS. Any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a condominium; (ii) to create units, common elements, or limited common elements within a condominium; (iii) to subdivide units or convert units into common elements; or (iv) to withdraw real estate from a condominium.”

§35-8A-103(24), Ala. Code 1975 (Uniform Condominium Act of 1991) defines Special Declarant Rights as follows:

“(24) SPECIAL DECLARANT RIGHTS. Rights reserved for the benefit of a declarant (i) to complete improvements indicated on plats and plans filed with the declaration (section 35-8A-209); (ii) to exercise any development right (section 35-8A-210); (iii) to maintain sales offices, management offices, signs advertising the condominium, and models (section 35-8A-215); (iv) to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (section 35-8A-216); (v) to make the condominium subject to a master

association (section 35-8A-220); (vi) or to appoint or remove any officer of the association or any master association or any board member during any period of declarant control (section 35-8A-303(d)).”

§35-8A-205(a)(8), Ala. Code 1975 (Uniform Condominium Act of 1991) requires that the Declaration contain a description of any Development Rights or Special Declarant Rights reserved by the Declarant together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised.

NOTE: The concepts of Development Rights and Special Declarant Rights are very detailed and complex concepts contained in the Uniform Condominium Act of 1991. It is very important that the drafter become familiar with the Development Rights and Special Declarant Rights provisions of the Uniform Condominium Act of 1991.

As stated above, the 1973 Condominium Act does not contain concepts the same or equivalent to “Development Rights” or “Special Declarant Rights” as defined in the Uniform Condominium Act of 1991.

I. Relocation of Boundaries between Adjoining Units.

§35-8-6(d) Ala. Code 1975 (1973 Condominium Act) provides that the undivided interest of each Unit in the Common Elements and Limited Common Elements shall not be changed unless the Owners of record of the Units affected thereby and the holders of record of any liens thereon shall have agreed to an amendment.

§35-8-7(14), Ala. Code 1975 (1973 Condominium Act) provides that no amendment shall change a Unit unless the Owner of record and holders of record of any liens thereon shall have agreed to such amendment.

§35-8A-212, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that unless the Declaration prohibits it, adjoining Unit Owners may relocate their common boundary if they comply with the requirements of this Section.

J. Subdivision of Units.

§35-8A-213, Ala. Code 1975 (Uniform Condominium Act of 1991) provides for the subdivision of Units by Unit Owners if the Declaration expressly permits. A subdivision is accomplished by an amendment to the Declaration.

NOTE: The drafter must consider how the subdivision regulations and zoning ordinances affect the right of a Unit Owner to subdivide a Unit. For example, the Declarant must comply with the appropriate subdivision regulations or PUD zoning approval which may limit the number of Units and therefore a subdivision of Units may violate the subdivision regulations or PUD zoning ordinance.

The 1973 Condominium Act does not contain any specific provisions pertaining

to subdivision of a Unit.

K. Use for Sales Purposes.

§35-8A-215, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that a Declarant may maintain sales offices, management offices and models in Units or on Common Elements if the Declaration specifies these rights, with regard to the number, size, location and relocation thereof. In addition, this section permits, subject to the provisions of the Declaration, that a Declarant may maintain signs on the Common Elements advertising the Condominium.

NOTE: It is important that the Declaration clearly describe the right of the Declarant to maintain such offices and signs. These Units may be owned by the Declarant or other persons. This section requires the Declaration to describe the Declarant Right to maintain sales offices in the Condominium.

The 1973 Condominium Act does not contain a similar provision pertaining to use for sales purposes.

L. Easement Rights.

§35-8-5(5), (6) and (7), Ala. Code 1975 (1973 Condominium Act) provide that there shall be included with each Unit certain easement rights.

§35-8A-216, Ala. Code 1975 (Uniform Condominium Act of 1991) grants to the Declarant an easement across the Common Elements necessary for the purpose of discharging the obligations of a Declarant or exercising Special Declarant Rights subject to any restrictions contained in the Declaration.

M. Amendment of Declaration.

§35-8-7(14), Ala. Code 1975 (1973 Condominium Act) provides that the Declaration must provide the method of amending the Declaration, but in no case shall any amendment change a Unit (*emphasis added*) unless the Owner of record and the holders of any liens agree.

§35-8A-217, Ala. Code 1975 (Uniform Condominium Act of 1991) sets out the cases when the Declaration may be amended by the Declarant alone without Association approval, or by the Association acting through its Board of Directors, and provides, except as provided in §35-8A-217(d) Ala. Code 1975 (Uniform Condominium Act of 1991), that a Declaration, including the plats and plans, may be amended by a vote of at least two-thirds (2/3) of the Unit Owners. However, the Declaration may specify any larger majority, and in the case of a non-residential Condominium, the Declaration may specify a smaller number.

§35-8A-217(d), Ala. Code 1975 (Uniform Condominium Act of 1991) requires a unanimous vote by the Unit Owners to amend the Declaration to create or increase Special Declarant Rights, create or increase the number or identity of Units that may be disposed of on a timeshare basis, increase the number of

Units, change the boundary of any Unit, the allocated interest of any Unit or the uses to which any Unit is restricted.

N. Termination of Condominium.

§35-8-20(a), Ala. Code 1975 (1973 Condominium Act) requires that in order to terminate a Condominium, all Unit Owners and holders of record of liens affecting the Units must agree.

§35-8-20(b), Ala. Code 1975 (1973 Condominium Act) provides that a circuit court may grant a petition to terminate the Condominium: (1) in the event of total destruction, and (2) in the event of substantial destruction, deterioration or obsolescence if at least a majority of votes of Unit Owners vote to terminate.

§35-8-20(c), Ala. Code 1975 (1973 Condominium Act) provides in part as follows:

“(c) Upon removal of the condominium property from the provisions of this chapter, the property shall be deemed to be owned in common by those who were unit owners at the time of such removal...”

§35-8A-218(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that a Condominium may be terminated only by agreement of Unit Owners of Units to which at least eighty percent (80%) of the votes in the Association are allocated or any larger percentage the Declaration specifies.

§35-8A-218(e), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the Association may contract for the sale of the Condominium but the contract is not binding on the Unit Owners until approved by at least eighty percent (80%) of the votes of the Association. If any real estate in the Condominium is to be sold, title to the real estate upon termination vests in the Association as trustee for the holders of all interest in the Units. The proceeds of the sale must be distributed to the Unit Owners and lien holders as their interests appear and unless otherwise specified in the termination agreement, as long as the Association holds title, each Unit Owner has an exclusive right to occupy his Unit but shall remain liable for all assessments and other obligations.

NOTE: The 1973 Condominium Act provides that the proceeds of the sale of the Condominium are distributed upon termination to each Unit Owner in accordance with the Common Element interest which was allocated in the Declaration.

O. Rights of Secured Lenders.

§35-8-7(14) and §35-8-20(a), Ala. Code 1975 (1973 Condominium Act) require approval of all lien holders of record for amendments to the Declaration adding to, or removing, Units from the Condominium or its termination.

§35-8A-219, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the Declaration may require mortgagee approval of specified actions, but that no

requirement for approval may: (1) prohibit control over the general administrative affairs of the Association; (2) place restrictions on control over the powers of the Association during litigation; and (3) prohibit the receipt or distribution of insurance proceeds prior to the application of those proceeds for rebuilding.

3. Management of Condominiums (Selected Sections).

A. Organization of Unit Owners' Association.

§35-8-2(1), Ala. Code 1975 (1973 Condominium Act) defines an Association as follows:

“(1) ASSOCIATION. The entity responsible for the administration and management of the condominium property.”

§35-8A-301, Ala. Code 1975 (Uniform Condominium Act of 1991) requires that an Association be organized as a profit or nonprofit corporation prior to the date the first Unit in the Condominium is conveyed and membership shall consist exclusively of all Unit Owners.

B. Powers of Unit Owners' Association.

§35-8-9, Ala. Code 1975 (1973 Condominium Act) provides that the Association shall be responsible for the administration and management of the Condominium, the Association may be incorporated or unincorporated, and all Unit Owners will be stockholders or members.

§35-8A-302, Ala. Code 1975 (Uniform Condominium Act of 1991) sets out broad powers of the Association.

NOTE: The powers of the Association set out in §35-8A-302, Ala. Code 1975 (Uniform Condominium Act of 1991) are much broader and more concise than the powers set out in §35-8-9, Ala. Code 1975 (1973 Condominium Act). The powers set out in §35-8A-302, Ala. Code 1975 (Uniform Condominium Act of 1991) (a)(1) through (a)(6) and (a)(11) through (a)(16) apply to Condominiums created under the 1973 Condominium Act. §35-8A-302, Ala. Code 1975 (Uniform Condominium Act of 1991) (a)(7) through (a)(10) and (a)(17) do not apply to the 1973 Condominium Act unless the Declaration is amended to include such powers.

C. Board Members and Officers.

§35-8-9, Ala. Code 1975 (1973 Condominium Act) provides that the Association shall act through its officers and governing board.

§35-8-9, Ala. Code 1975 (1973 Condominium Act) provides that the Bylaws shall specify the powers, duties and manner of selection, removal and compensation, if any, of officers and board members.

§35-8A-303, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the Board may act on behalf of the Association; sets out the duty of care of the members of the Board; and places limitations on the Board to amend the Declaration, to terminate the Condominium, elect members, determine qualifications, powers and duties, or terms of office of Board members.

§35-8A-303(c), (d), (e), (f) and (g), Ala. Code 1975 (Uniform Condominium Act of 1991) provide as follows:

“(c) Within 30 days after adoption of any proposed budget for the condominium, the board shall provide a copy of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after delivery or mailing of the budget to the unit owners. Unless at that meeting a majority of all the unit owners present in person or by proxy or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the board.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by him, may appoint and remove the officers and members of the board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earliest of (i) 60 days after conveyance of 75 percent of the units which may be created to unit owners other than a declarant; (ii) two years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) two years after any development right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the board before termination of that period, but in that event he may require, for the duration of the period of declarant control, that specified actions of the association or board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

*29968 (e) Not later than 90 days after conveyance of 25 percent of the units which may be created to unit owners other than a declarant, at least one member and not less than 25 percent of the members of the board must be elected by unit owners other than the declarant. Not later than 90 days after conveyance of 50 percent of the units which may be created to unit owners other than a declarant, not less than 33 1/3 percent of the members of the board must be elected by unit owners other than the declarant.

(f) Except as otherwise provided in section 35-8A-220(e), not later than the termination of any period of declarant control, the unit owners shall elect a board of at least three members, at least a majority of whom must be unit owners other than declarant. The board shall elect the officers. The board members and officers shall take office upon election.

(g) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons present in person and entitled to vote at any meeting of the unit owners at which a quorum in person is present, may remove any member of the board with or without cause, other than a member appointed by the declarant.”

D. Transfer of Special Declarant Rights.

§35-8A-304, Ala. Code 1975 (Uniform Condominium Act of 1991) deals with the extent to which obligations and liabilities imposed upon a Declarant by the Uniform Condominium Act of 1991 are transferred to a third party.

NOTE: The 1973 Condominium Act does not contain concepts the same or equivalent to Special Declarant Rights and the transfer of such rights as provided for in the Uniform Condominium Act of 1991.

E. Termination of Contracts and Leases of Declarant.

§35-8A-305, Ala. Code 1975 (Uniform Condominium Act of 1991) provides for the termination of certain contracts and leases made during a period of Declarant control and as follows:

“§35-8A-305. Termination of contracts and leases of declarant.

If entered into before the board elected by the unit owners pursuant to section 35-8A-303(f) takes office, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or(iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the board elected by the unit owners pursuant to section 35-8A-303(f) takes office upon not less than 90 days' notice to the other party. This section does not apply to any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section.”

NOTE: The 1973 Condominium Act does not contain concepts the same or equivalent to §35-8A-305, Ala. Code 1975 (Uniform Condominium Act of 1991). §35-8A-305, Ala. Code 1975 (Uniform Condominium Act of 1991) is not retroactive and applies only to contracts and leases pertaining to Condominiums formed after January 1, 1991.

F. Quorums.

§35-8-10(3), Ala. Code 1975 (1973 Condominium Act) requires that the Bylaws contain a provision as to what constitutes a quorum.

§35-8A-309, Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“s 35-8A-309. Quorums.

(a) Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast 20 percent of the votes which may be cast for election of the board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the board if persons entitled to cast 50 percent of the votes on that board are present at the beginning of the meeting.”

G. Voting; Proxies.

§35-8-7(6) and (7), Ala. Code 1975 (1973 Condominium Act) provide that the Declaration shall contain:

“(6) The voting rights, or the method of determining such rights, of the unit owners, with respect to matters arising out of ownership of the common elements which rights must correspond approximately with each unit owner's undivided interest in such common elements;

(7) The voting rights, or the method of determining such rights, of the unit owners with respect to matters arising out of ownership of the limited common elements, which rights must correspond approximately with each unit owner's undivided interest in such limited common elements;”

§35-8-10(3), Ala. Code 1975 (1973 Condominium Act) provides that the Bylaws shall contain:

“(3) The method of calling meetings of unit owners, the percentage of unit owners or voting rights required to make decisions regarding administration and management of the condominium property and to constitute a quorum, but such bylaws may nevertheless provide that unit owners may waive notice of meetings or may act by written agreement without meetings.”

§35-8A-310, Ala. Code 1975 (Uniform Condominium Act of 1991) addresses the issues of: (a) who has the right to vote when there are multiple Owners of a Unit; (b) voting by proxy; (c) voting by lessees; and (d) no votes allocated to a Unit owned by the Association may be cast.

H. Conveyance or Encumbrance of Common Elements.

The 1973 Condominium Act does not provide for the conveyance or encumbrance of Common Elements separately from the rest of the Condominium.

§35-8A-312(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides

that parts of the Common Elements may be sold or encumbered with the agreement of Unit Owners holding eighty percent (80%) of the votes allocated to Units not owned by the Declarant; but all Owners of Units to which any Limited Common Element is allocated must agree to convey that Limited Common Element. Proceeds of the sale are an asset of the Association.

I. Insurance.

§35-8-9(4), Ala. Code 1975 (1973 Condominium Act) provides that the Association may (*emphasis added*) maintain all forms of insurance for the benefit of the Unit Owners. This benefit of the Unit Owners shall be a Common Expense. The Association shall inform each Unit Owner whether or not insurance coverage is maintained by the Association and the type and amount of any insurance.

§35-8A-313, Ala. Code 1975 (Uniform Condominium Act of 1991) sets out in detail the requirements imposed on the Association to maintain insurance, to the extent reasonably available. If insurance is not reasonably available, Unit Owners must be notified. The Association must obtain and maintain property insurance on both the Common Elements and the Units within the buildings containing Units having horizontal boundaries. The Uniform Condominium Act of 1991 does not require the Association to insure Units in which there are no horizontal boundaries.

J. Assessments for Common Expenses.

§35-8-13, Ala. Code 1975 (1973 Condominium Act) provides that Common Expenses and Limited Common Expenses shall be charged to Unit Owners corresponding approximately to their respective undivided interest in Common Elements and Limited Common Elements; such expenses shall be a lien against such Unit; no Unit Owner may exempt himself from liability for the share of the Common Element and Limited Common Element expenses. Such expenses shall bear interest from the date set by the Association, but the interest rate can not exceed the legal interest rate.

§35-8A-315(a), Ala. Code 1975 (Uniform Condominium Act of 1991) requires that the Declarant pay all Common Expenses until the Association makes a Common Expense Assessment and that Assessments must be made at least annually based on a budget.

§35-8A-315(b), Ala. Code 1975 (Uniform Condominium Act of 1991) requires that, except for Assessments described in §35-8A-315(c), (d) and (e), all Common Expenses must be assessed against all Units and any past due amounts bear interest at the rate established by the Association not exceeding eighteen percent (18%) per year, in accordance with the allocations set forth in the Declaration.

§35-8A-315(c), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that to the extent required by the Declaration, any Common Expense associated

with a Limited Common Element must be assessed against the Unit to which that Limited Common Element is assigned; any Common Expense benefiting fewer than all of the Units must be assessed exclusively against the Units benefited; and the cost of insurance must be assessed in proportion to risk and the cost of utilities must be assessed in proportion to usage.

§35-8A-315(d), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that Assessments to pay a judgment against the Association may be made only against the Units in the Condominium at the time the judgment was entered in proportion to their Common Expense liabilities.

§35-8A-315(e), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that if a Common Expense is caused by the misconduct of any Unit Owner or his invitee, the Association may assess the expense exclusively against that Unit Owner after notice and opportunity to be heard.

§35-8A-315(g), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that all Assessments constitute the personal obligation of the Unit Owner.

§35-8A-315(h), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that no Unit Owner shall be exempt from any liability for the payment of Assessments.

K. Lien for Assessments.

§35-8-16, Ala. Code 1975 (1973 Condominium Act) provides that after the recording of the Declaration, any lien or encumbrances can only be created against each Unit.

§35-8-17, Ala. Code 1975 (1973 Condominium Act) provides that the Association shall have a lien on each Unit for any unpaid Assessments; such lien shall be effective from and after the time of recording in the public records; such claim of lien shall include only sums which are due and payable when the claim of lien is recorded; all such liens shall be subordinate to any lien for taxes, the lien for any mortgage of record, and any other lien recorded prior to the time of recording of the claim of the lien by the Association; upon voluntary conveyance of a Unit, the grantor and grantee of such Unit shall be jointly and severally liable for all unpaid Assessments; the Association is required to give a certificate showing the amount of unpaid Assessments within ten (10) days after request from a Unit Owner or purchaser of a Unit prior to sale or a mortgagee and that a person or other Unit Owner who relies on said certificate shall be entitled to rely thereon; if a holder of a first lien of record or purchaser obtains title to a Unit as a result of foreclosure of the first lien, his successors and assigns shall not be fully liable for the share of Common Expenses, Limited Common Expenses or other Assessments which became due prior to acquisition of title as a result of the foreclosure. Such unpaid share of Common Expenses, Limited Common Expenses or other Assessments shall be collectible from all of the remaining Unit Owners including the acquirer of title; liens for unpaid Assessments may be foreclosed by an action brought in the name of the Association.

§35-8A-316(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the Association has a lien on a Unit for any Assessment or fine imposed which lien may be foreclosed in like manner as a mortgage on real estate; the Association must give reasonable advanced notice of its proposed action; and unless the Declaration otherwise provides, fees, charges, late fees, fines and interest charged are enforceable as Assessments. If an Assessment is payable in installments, the full amount of the Assessment is a lien from the time that the first payment becomes due.

§35-8A-316(b), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. The lien is also prior to the mortgages and deeds of trust described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 35-8A-315(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. The lien under this section is not subject to the provisions of homestead or other exemptions.”

§35-8A-316(d), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the recording of the Declaration constitutes record notice and perfection of the lien.

§35-8A-316(e), Ala. Code 1975 (Uniform Condominium Act of 1991) provides for a three (3) year statute of limitations within which the Association must enforce the lien.

§35-8A-316(g), Ala. Code 1975 (Uniform Condominium Act of 1991) provides for cost and reasonable attorney's fees.

§35-8A-316(h), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that any Owner, mortgagee of a Unit, person having executed a contract for the purchase of a Condominium Unit, or lender shall be entitled, upon request, to a statement from the Association providing the amount of Assessments past due and unpaid, together with late charges, and provides that the Association may require a payment of a fee not exceeding Ten Dollars (\$10.00) if the Condominium instruments so provide.

§35-8A-316, Ala. Code 1975 (Uniform Condominium Act of 1991) applies to Condominiums created prior to 1991.

L. Association Records.

§35-8-10(4), Ala. Code 1975 (1973 Condominium Act) provides that the Bylaws of the Association shall contain a provision for maintenance of accounting records in accordance with generally accepted accounting principles.

§35-8A-318, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the Association shall keep sufficient financial records to enable the Association to comply with §35-8A-409, Ala. Code 1975 (Uniform Condominium Act of 1991). All records shall be made reasonably available for examination by any Unit Owner. §35-8A-318, Ala. Code 1975 (Uniform Condominium Act of 1991) applies to Condominiums created prior to 1991.

4. Protection of Condominium Purchasers (Selected Sections).

A. Applicability; Waiver.

§35-8A-401(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that Article 4 applies to all Units except as provided in §35-8A-401(b) or modified by agreement of purchasers of Units in a Condominium in which all Units are restricted to non-residential use.

§35-8A-401(b), Ala. Code 1975 (Uniform Condominium Act of 1991) sets out the cases in which an Offering Statement or a resale certificate does not need to be prepared or delivered.

NOTE: The 1973 Condominium Act does not contain concepts the same or equivalent to the concepts set out in §35-8A-401 through §35-8A-417, Ala. Code 1975 (Uniform Condominium Act of 1991) pertaining to protection of Condominium purchasers and the requirement for an Offering Statement. An Offering Statement is not required by the 1973 Condominium Act.

The Offering Statement provisions of the Uniform Condominium Act of 1991 do not apply to Condominiums located outside of the State of Alabama but the Offering Statement provisions apply to all contracts for the sale of Units signed in Alabama unless exempted by §35-8A-401(b), Ala. Code 1975 (Uniform Condominium Act of 1991), [§35-8A-102(c), Ala. Code 1975]. Also, please note that if the Declarant is marketing for sale Units in other States that the Declarant must comply with the laws of the State in which the Unit is marketed.

B. Liability for Offering Statement Requirements.

§35-8A-402(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that except as provided in §35-8A-402(b), a Declarant, prior to the offering of any interest in a Unit, shall prepare an Offering Statement conforming to the requirements of the Uniform Condominium Act of 1991.

§35-8A-402(b), Ala. Code 1975 (Uniform Condominium Act of 1991) provides

that a Declarant may transfer responsibility for preparation of the Offering Statement.

§35-8A-402(c), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that any Declarant or other person in the business of selling real estate who offers a Unit for his own account to a purchaser shall deliver an Offering Statement.

C. Offering Statement – General Provision.

§35-8A-403, Ala. Code 1975 (Uniform Condominium Act of 1991) sets out a lengthy list of information that must be included in an Offering Statement and provided to each purchaser before the purchaser contracts for the purchase of a Unit.

D. Offering Statement – Condominium Subject to Development Rights.

§35-8A-404, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that if the Condominium is subject to any Development Rights, the Offering Statement must disclose additional information.

E. Offering Statement – Condominiums Containing Conversion Buildings.

§35-8A-406, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the Offering Statement for Condominiums containing any conversion buildings with Units that may be occupied for residential use must contain additional information as set out in this Code Section.

F. Purchaser's Right to Cancel.

§35-8A-408(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that an Offering Statement shall be provided to a purchaser of a Unit before conveyance of the Unit and no later than the date of any contract of sale. Unless the purchaser is given the Offering Statement more than seven (7) days before the execution of a contract of sale, the purchaser may cancel the contract or rescind the conveyance within seven (7) days of first receiving the Offering Statement.

§35-8A-408(b), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the purchaser may cancel a contract or conveyance by hand-delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail. Cancellation is without penalty and all payments must be refunded promptly.

§35-8A-408(c), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that if an Offering Statement is not delivered the purchaser, at the option of the purchaser in lieu of any rights to damages or other relief, is entitled to receive an amount equal to five percent (5%) of the sales price of the Unit at any time prior to the expiration of six (6) months from the date of conveyance of the Unit plus

five percent (5%) of the share proportionate to his Common Expense liability, of any indebtedness of the Association secured by security interest encumbering the Condominium.

G. Resale of Units.

§35-8A-409(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that each Unit Owner not required to furnish an Offering Statement and not exempt under §35-8A-401(b), Ala. Code 1975 (Uniform Condominium Act of 1991) is required upon request to furnish to a resale purchaser, before conveyance, a copy of the Declaration, Bylaws, Rules and Regulations of the Association and a certificate containing the information set out in this Code Section. §35-8A-409, Ala. Code 1975 (Uniform Condominium Act of 1991) applies to Condominiums created prior to 1991.

§35-8A-409(b), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the Association, within ten days after request, shall furnish a certificate containing the information necessary to enable the Unit Owner to comply with this section.

§35-8A-409(c), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that if a purchaser receives a resale certificate which does not state the proper amount of the unpaid Assessments due, the purchaser is not liable for any amount greater than that disclosed in the resale certificate.

H. Escrow Deposits.

§35-8A-410, Ala. Code 1975 (Uniform Condominium Act of 1991) was amended to be effective August 1, 2016.

§35-8A-410(a), Ala. Code 1975 (Uniform Condominium Act of 1991) sets out defined terms such as the defined term for Hard Cost, Qualified Purchaser and Substantially Completed.

§35-8A-410(b), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(b) Except as provided in subsection (c), any deposit made in connection with the purchase or reservation of a unit from a person required to deliver an offering statement pursuant to Section 35-8A-402(c) shall be placed in escrow and held in this state by a licensed title insurance company, a licensed title agent, an attorney, a licensed real estate broker, or an institution whose accounts are insured by a governmental agency or instrumentality until (i) delivered to the declarant at closing; (ii) delivered to the declarant because of purchaser's default under a contract to purchase the unit; or (iii) refunded to the purchaser. Declarant shall be permitted to accept a letter of credit in lieu of a portion or all of the deposit. Notwithstanding the foregoing, the escrow agent shall not be located outside of the state. Except as provided in subsection (c) and as otherwise provided herein, the funds representing the deposit shall be held in an interest

bearing account and the interest shall belong to the party entitled to the principal deposit. Notwithstanding anything in this subsection to the contrary, funds deposited pursuant to a reservation agreement that provides the prospective purchaser is not bound to purchase a unit and that the prospective purchaser may choose to have the deposit returned to him or her, need not bear interest unless the reservation agreement specifically states that the deposit will bear interest.”

§35-8A-410(c), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that under certain conditions which are specified in this Code section, the Declarant shall be permitted to:

“(i) withdraw deposited funds in excess of 10 percent of the purchase price from the escrow account for use in paying the hard costs incurred in the actual building and construction of the condominium project provided that at least 10 percent of the purchase price remains on deposit after any such withdrawals and provided that the purchaser whose funds are being withdrawn is a qualified purchaser; or

(ii) after the declarant has caused a bond to be issued by a surety insurer licensed in this state in favor of a qualified purchaser for the full amount of the escrow deposit to be withdrawn, withdraw deposited funds from the escrow account up to the amount in the escrow account for use in paying the hard costs incurred in the actual building and construction of the condominium project.”

§35-8A-410(d), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that the Declarant may not withdraw more than the face amount of the bond and provides for other requirements for the bond.

§35-8A-410(e), Ala. Code 1975 (Uniform Condominium Act of 1991) provides that in the event of withdrawal pursuant to §35-8A-410, the funds need not bear interest.

§35-8A-410(f), Ala. Code 1975 (Uniform Condominium Act of 1991) requires that a purchase contract that permits use of deposits pursuant to this code section shall include the following legend conspicuously printed or stamped in bold face type on the first page of the contract and immediately above the place of the signature for the purchaser “DEPOSITS MAY BE USED BY DECLARANT FOR HARD COSTS INCURRED IN THE ACTUAL BUILDING AND CONSTRUCTION OF THE CONDOMINIUM PROJECT PURSUANT TO SECTION 35-8A-410, CODE OF ALABAMA 1975”. In addition the Offering Statement must contain the same legend in its body. This Code Section also provides as follows:

“...The funds deposited into escrow pursuant to subsection (b) and subsection (c) may be held in one or more escrow accounts by the escrow agent. If only one escrow account is used, then the escrow agent must maintain separate accounting records for each purchaser and the amounts separately covered under subsections (b) and (c). For the purposes of item (c)(i), in determining whether more than 10 percent of the purchase price has been deposited, the

face amount of any letter of credit accepted by declarant as part of the deposit shall be considered.”

§35-8A-410(g), Ala. Code 1975 (Uniform Condominium Act of 1991) protects the escrow agent from liability arising if a disbursement is pursuant to a draw request by the Declarant and the Declarant certifies to the escrow agent that the Declarant is entitled to such disbursement pursuant to this code section.

I. Release of Liens.

§35-8A-411(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(a) In the case of a sale of a unit where delivery of an offering statement is required pursuant to section 35-8A-402(c), a seller shall before conveying a unit, (i) record or furnish to the purchaser releases of all liens, except liens on real estate that a declarant has the right to withdraw from the condominium, that the purchaser does not expressly agree in a written contract of sale which specifically identifies such lien and its amount to take subject to or assume and that encumber a condominium, that unit and its common element interest, or (ii) provide a surety bond or substitute collateral for or insurance against the lien in the manner provided for liens on real estate in section 35-11-233(b).”

§35-8A-411(b), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(b) Before conveying real estate to the association the declarant shall have that real estate released from: (i) all liens the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and (ii) all other liens on that real estate unless the offering statement describes certain real estate which may be conveyed subject to liens in specified amounts.”

J. Effect of Violations on Rights of Action; Attorney's Fees.

§35-8A-414, Ala. Code 1975 (Uniform Condominium Act of 1991) provides that if the Declarant fails to comply with the provisions of the Uniform Condominium Act of 1991 or any provision of the Declaration or By-laws, any person or persons adversely affected has a claim for actual damages or appropriate equitable relief and the Court may award reasonable attorneys' fees.

K. Labeling of Promotional Material.

§35-8A-415, Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“No promotional material may be displayed or delivered to prospective purchasers which describes or portrays an improvement unless the description or portrayal of the improvement that is not in existence in the promotional material is conspicuously labeled or identified as, "NEED NOT BE BUILT.”

L. Declarant's Obligation to Complete and Restore.

§35-8A-416(a), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(a) Except for improvements labeled, "NEED NOT BE BUILT" the declarant shall complete all improvements depicted on any site plan or graphic representation including plats or plans prepared pursuant to section 35-8A-209, whether or not that site plan or other graphic representation is contained in the offering statement or any promotional material distributed by or for the declarant.”

§35-8A-416(b), Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the condominium, of any portion of the condominium affected by the declarant's exercise of rights reserved pursuant to or created by sections 35-8A-210 through 35-8A-213, 35-8A-215, and 35-8A-216.”

M. Substantial Completion of Units.

§35-8A-417, Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“In the case of a sale of a unit where delivery of an offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed, or voted until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an independent registered architect, or independent registered engineer, or by issuance of a certificate of occupancy authorized by law.”

§35-8A-417, Ala. Code 1975 (Uniform Condominium Act of 1991) applies to Condominiums created prior to 1991.

5. Federal Regulation of Condominiums, Subdivisions and Planned Unit Developments.

A. General.

There are numerous federal statutes and federal regulations affecting the Subdivision of land. A detailed listing of those federal statutes and regulations is outside of the scope of this outline.

In general, the federal statutes and federal regulations affecting a real estate transaction are the Interstate Land Sales Full Disclosure Act (15 U.S.C. §1701, et seq.), the Federal Trade Commission Act (15 U.S.C. §41, et seq.), the Fair Housing Act (42 U.S.C. §301, et seq.), the Condominium and Cooperative Abuse Relief Act (15 U.S.C. §§3601 through 3616) and the Real Estate Settlement

Procedures Act (prohibits the seller of property that will be purchased with the assistance of a federally related mortgage loan to require directly and indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company) (12 U.S.C. §2601, et seq.). There are also other federal statutes and regulations pertaining to loan transactions, loan guaranty and mortgage insurance programs provided through the Department of Housing and Urban Development (HUD) and the Veterans Administration (VA).

The Dodd-Frank Act, 12 U.S.C. §1503, et seq. and the CFPB require supervised banks and non-banks to oversee their business relationships with service providers in a manner that ensures compliance with the federal law which is designated to protect the interest of consumers and avoid consumer harm. Each of you who are acting as closing agents should have prepared a policies and procedures manual setting out your Best Practices. A discussion of the Dodd-Frank Act, CFPB and Best Practices is outside of the scope of this seminar.

B. Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701, et seq. (the "Land Sales Act").

The regulations pertaining to the Land Sales Act are found in 24 C.F.R. §1700, et seq.

1. General.

The purpose of the Land Sales Act is to prevent false and deceptive practices in the sale and leasing of real estate. In general, the Land Sales Act prohibits a Declarant from selling or leasing in interstate commerce a lot in a Subdivision unless the Declarant has complied with the provisions of the Land Sales Act.

2. Exemptions. 15 U.S.C. §1702 sets out certain exemptions to the Land Sales Act. There are eight (8) full exemptions and eight (8) partial exemptions from the Land Sales Act.

Full exemptions to the Land Sales Act. 15 U.S.C. §1702 (a); 24 C.F.R. §1710.5. The full exemptions exempt sales from both anti-fraud and the registration provisions of the Land Sales Act.

- (a) The sale or lease of lots in a Subdivision containing less than twenty-five (25) lots;
- (b) The sale or lease of any improved land on which there is a residential, commercial, Condominium or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two (2) years;
- (c) The sale of evidences of indebtedness secured by a mortgage or

deed of trust on real estate;

- (d) The sale of securities issued by real estate investment trusts;
- (e) The sale or lease of real estate by any government or government agency;
- (f) The sale or lease of cemetery lots;
- (g) The sale or lease of lots to any person who acquires such lots for the purpose of engaging in the business of constructing residential, commercial or industrial buildings or for the purpose of resale or lease of such lots to persons engaged in such business; or
- (h) The sale or lease of real estate which is zoned by the appropriate governmental authority for industrial or commercial development or which is restricted to such use by a declaration of covenants, conditions and restrictions which has been recorded in the official records of the city or county in which such real estate is located, when certain specific fact situations exist.

Partial exemptions to the Land Sales Act. 15 U.S.C. §1702(b); 24 C.F.R. §1710.6 through §1710.13. The Declarant must comply with the anti-fraud provisions (15 U.S.C. §1703(a)(2)).

- (a) Subdivisions containing less than one hundred (100) lots;
- (b) Sale or lease of not more than twelve (12) lots within a twelve (12) month period;
- (c) Scattered site Subdivisions each containing not more than twenty (20) lots;
- (d) Subdivision in which each lot contains at least twenty (20) acres;
- (e) The sale or lease of a lot which is located within a municipality or county where a unit of local government specifies minimum standards for the development of Subdivision lots taking place within its boundaries, when:

(1) The Subdivision meets all local codes and standards and each lot is either zoned for single family residences or in the absence of a zoning ordinance is limited exclusively to single family residences;

(2) The lot is situated on a paved street which has been built to standards applicable to streets maintained by the local government in which the subdivision is located and is

acceptable to the local government or where the street is not complete, a bond or other surety acceptable to the municipality or county in the full amount of the cost of completing the street has been posted to assure completion to such standards, and the unit of local government or homeowner's association has accepted or is obligated to accept the responsibility of maintaining the street except that in any case in which a homeowner's association has accepted the obligation to maintain the street, a good faith written estimate of the cost of carrying out such responsibility over the first ten (10) years of ownership or lease is provided to the purchaser or lessee prior to the signing of the contract to purchase or lease;

(3) At the time of closing, potable water, sanitary sewage disposal, and electricity have been extended to the lot or the unit of local government is obligated to install such facilities within one hundred eighty (180) days and for subdivisions which do not have a central water or sewage disposal system, rather than installation of water or sewer facilities, there must be assurances that an adequate potable water supply is available year-round and that the lot is approved for the installation of a septic tank;

(4) The contract for sale requires delivery of a warranty deed to the purchaser within one hundred eighty (180) days after the signing of the sales contract;

(5) At the time of closing, a title insurance binder or a title opinion reflecting the condition of the title shall be in existence and issued or presented to the purchaser or lessee showing that subject only to the exceptions as may be approved in writing by the purchaser or lessee at the time of closing, marketable title to the lot is vested in the seller or lessor;

(6) The purchaser or lessee (or spouse thereof) has made a personal, on-the-lot inspection of the lot prior to signing the contract; and

(7) There are no offers, by direct mail or telephone solicitation, of gifts, trips, dinners or other such promotional techniques to induce prospective purchasers or lessees to visit the subdivision or to purchase or lease a lot.

- (f) Sale of lots where a manufactured home is to be erected as a residence;
- (g) Subdivisions that are intrastate in nature when certain requirements of the Land Sales Act are met; or

- (h) Subdivisions with less than three hundred (300) lots in a "standard metropolitan statistical area", as defined by the Office of Management and Budget.
- (i) The sale or lease of a Condominium unit that is not exempt (*emphasis added*) from the full exemption provisions of the Land Sales Act.
- (j) The Land Sales Act defines a Condominium as follows:

“(d) ‘Condominium unit’ defined

For purposes of subsection (b), the term ‘condominium unit’ means a unit of residential or commercial property to be designated for separate ownership pursuant to a condominium plan or declaration provided that upon conveyance—

(1) the owner of such unit will have sole ownership of the unit and an undivided interest in the common elements appurtenant to the unit; and

(2) the unit will be an improved lot.”

3. Anti-Fraud Provisions.

The Anti-Fraud provisions of the Land Sales Act make it unlawful for a seller or lessor to make certain representations or to engage in certain practices as described in the Land Sales Act. 15 U.S.C. §1703(a), 24 C.F.R. §§1715.10, et seq.

The Anti-Fraud provisions of the Land Sales Act prohibit, in connection with a sale or lease or an offer to sell or lease a lot in a Subdivision:

- (a) Employing any device, scheme or artifice to defraud;
- (b) Obtaining money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary to make the statements made (in light of the circumstances in which they are made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision.
- (c) Engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon a purchaser.
- (d) Fail to furnish the purchaser with a printed property report (when required) in advance of the purchaser signing a contract or agreement.

- (e) Use a statement of record or property report (when required) which contains an untrue statement of material fact or omits to state a material fact to be stated therein.
 - (f) Represent in any manner that roads, sewers, water, gas or electric service, or recreational amenities will be provided or completed by the Declarant unless there is a contractual provision expressly obligating the Declarant to provide or complete such services or amenities.
 - (g) Display or deliver to purchasers advertising and promotional material which is inconsistent with information required to be disclosed in the property report (when required).
- 6. Reservation. A reservation is a non-binding agreement used to gauge market feasibility for a developer through which a potential purchaser expresses an interest to buy or lease a lot or Unit at some time in the future (Supplemental information to Part 1710: Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act). A deposit may be accepted from the interested person provided that the money is placed in an escrow account pursuant to the provisions of the Uniform Condominium Act of 1991. A reservation may be executed prior to complying with the requirements of the Uniform Condominium Act of 1991 as discussed above as long as it is a non-binding agreement and the purchaser be entitled to a refund of the earnest money deposit if no binding purchase agreement is executed.
- 7. Purchase Agreement. A binding Purchase Agreement may not be executed until the Declarant complies with the provisions of the Uniform Condominium Act of 1991 as discussed above. The typical provisions in a Purchase Agreement are as follows:
 - A. Recitals describing the project.
 - B. Agreement of purchase and sale.
 - C. Price and terms of payment.
 - D. Provisions pertaining to loan, delivery of comfort letter or funds letter.
 - E. Escrow agent and deposits provisions complying with the Uniform Condominium Act of 1991.
 - F. Acknowledgment of receipt of documents and disclosures.
 - G. Right to cancel provisions as required by the Uniform Condominium Act of 1991 as discussed above.
 - H. Description of the development and obligation to complete construction which will include paragraphs addressing: obligation to construct and complete construction; reasonable efforts to start construction; approval of upgrades; unavailability of upgrades; upgrade deposits; not custom Units; assumption of

risk and responsibility; insulation provisions required by 16 C.F.R 460, Labeling and Advertising of Home Insulation Regulations, imposed by the Federal Trade Commission.

- I. Provision providing the Unit dimensions are approximate.
 - J. Inspection prior to closing provisions.
 - K. Liability for assessments and other obligations.
 - L. Provisions for closing including date and place of closing; title to be conveyed and permitted exceptions; expenses, closing costs, credits and proration provisions; obligations of the Seller and Purchaser at closing; limitation of warranties including provision of no implied warranties; specific disclaimers; environmental notice; and specific provisions setting out the limited warranties provisions.
 - M. Right of the Seller to cure alleged defects.
 - N. Maintenance; prevention of moisture related conditions.
 - O. Warranties by the Purchaser; acknowledgment by Purchaser that the Unit is for residential purposes only; no rental pool provisions or offering of rental; no advice or representations.
 - P. Default provisions.
8. Deed to Condominium Unit. Deeds to Condominium Units must comply with conveyancing statutes. These Deeds should contain a reference to the Unit as described in the Declaration and to the recorded Declaration. All exceptions to title and covenants, restrictions and regulations and similar matters contained in the Declaration may be incorporated by reference in the Deed. Real estate may constitute a Condominium Unit whether or not the real estate contains improvements ("Land Condominium"). There are special issues pertaining to subdivision regulations when dealing with Land Condominiums.

§38-8-8(c), Ala. Code 1975 (1973 Condominium Act) provides that a Deed to a Condominium Unit shall contain the following:

"(c) A deed, mortgage, lease or other instrument pertaining to a unit shall have the same force and effect in regard to such unit as would be given to a like instrument pertaining to other real property which has been similarly made, executed, acknowledged and recorded. In addition to such other matters as may be desired, not inconsistent with this chapter or the declaration, a unit deed shall contain the following:

- (1) The name of the condominium property as set forth in the declaration.
- (2) The name of the county or counties in which the condominium property is located.
- (3) The distinctive unit identification required by subsection (a) of this section,

together with a reference to the recording office and the book and page where the declaration and bylaws and amendments thereto are recorded.

(4) A statement of the proportionate undivided interests in the common elements and limited common elements assigned to such unit or the method for determining such interests as set forth in the declaration or any amendments thereto.”

§35-8-6(b), Ala. Code 1975 (1973 Condominium Act) provides as follows:

“(b) Any conveyance, lease, devise or other disposition or mortgage or encumbrance of any unit shall extend to and include such undivided interest in the common and limited common elements, whether or not expressly referred to in the instrument effecting the same.”

§35-8A-204, Ala. Code 1975 (Uniform Condominium Act of 1991) provides as follows:

“Sec. 35-8A-204. Legal description of condominium unit

A description of a unit which sets forth the name of the condominium, the recording data for the declaration, the county in which the condominium is located, and the identifying number of the unit, is a sufficient legal description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws.”

§35-8A-204, Ala. Code 1975 (Uniform Condominium Act of 1991) applies to Condominiums created prior to 1991.

******* END OF SEMINAR *******