

Purchasing a Condominium or Townhome

Jordan I. Shifrin
Kovitz Shifrin Nesbit
750 West Lake Cook Road, Suite 350
Buffalo Grove, IL 60089
jshifrin@ksnlaw.com

I. [11.1] Identifying Forms of Ownership

- A. [11.2] Condominiums
- B. [11.3] Townhomes
- C. [11.4] Homeowners' Associations
- D. [11.5] Cooperatives
- E. [11.6] Master Associations

II. Legal Authority

- A. [11.7] State Statutes
- B. [11.8] Federal Statutes

III. [11.9] Legal Documents

- A. [11.10] Declaration
- B. [11.11] Articles of Incorporation
- C. [11.12] Bylaws
- D. [11.13] Rules and Regulations
- E. [11.14] Amending Documents

IV. Representing the Buyer

- A. [11.15] Contract Review
 - 1. [11.16] Regular Assessments
 - 2. [11.17] Special Assessments
 - 3. [11.18] Parking Spaces
 - 4. [11.19] Section 22.1 Disclosure
 - 5. [11.20] Right of First Refusal
 - 6. [11.21] Pets
 - 7. [11.22] Rental Restrictions
 - 8. [11.23] Architectural Restrictions
- B. [11.24] Closing the Deal
 - 1. [11.25] Document Review

2. [11.26] Certificates of Insurance
 3. [11.27] Right of First Refusal
 4. [11.28] Title Exceptions
 5. [11.29] Assessment Status and Liens
 6. [11.30] Location Notes
 7. [11.31] Survey
 8. [11.32] Encroachments
 9. [11.33] Mechanics Liens
 10. [11.34] Pending Litigation
 11. [11.35] Recorded Amendments
- C. [11.36] Transfer of Interest
- D. [11.37] Mortgages and Secured Transactions
- E. [11.38] Disclosure of Defects

V. Special Problems with New Construction and Conversion Condominiums

- A. [11.39] Warranties
- B. [11.40] Arbitration Clauses
- C. [11.41] Conversion Condominiums
- D. [11.42] Earnest Money
- E. [11.43] Real Estate Taxes
- F. [11.44] Assessments

VI. Appendix — Forms

- A. [11.45] Rider to Real Estate Contract
- B. [11.46] Attorney Letter to Client Regarding Buyer's Obligations and Required Documents
- C. [11.47] Certificate of Insurance
- D. [11.48] Waiver Letter from Association
- E. [11.49] Affidavit in Lieu of Survey/Affidavit of No New Improvements
- F. [11.50] Release of Lien
- G. [11.51] Hold-Harmless Agreement
- H. [11.52] Waiver of Implied Warranty of Habitability
- I. [11.53] Sale of Unit 12345

I. [11.1] IDENTIFYING FORMS OF OWNERSHIP

Representing a purchaser of a condominium or townhome requires a diligent investigation into what a prospective buyer is really getting. If the property is an apartment-style dwelling, it cannot be assumed that it is a condominium since it could be a cooperative. A townhome could be owned in fee simple, or it too could be a condominium. A single-family home could have an association, and it could even be a condominium.

It is important to recognize these distinct forms of ownership in order to properly represent your client. By overlooking a recorded set of covenants or by not conducting an inquiry into the restrictions established by a condominium association that may adversely affect a purchaser's interest, an attorney can potentially be exposed to a claim for malpractice.

A. [11.2] Condominiums

“Condominium” comes from the Latin words meaning a certain property or domain (dominium) owned jointly with (con) one or more other persons. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, p. 240 (10th ed. 1993).

The condominium form of ownership is purely a creature of a statute. Created in Illinois in 1963 by the Condominium Property Act, 765 ILCS 605/1, *et seq* (“Act”), it was originally modeled on Florida law, although numerous amendments have given the Illinois Act a distinct character of its own. A condominium is created by the recording of a declaration of condominium ownership and a plat designating the boundaries of the property and the location of the units. 765 ILCS 605/6 submitting the property to the Act.

“The condominium documents often specify the association's as well as the board of directors' role in condominium operations. . . . [C]ondominium associations always have certain powers and duties, subject to certain limitations, such as rule enactment, financial management and responsibility for the common condominium property.” 1 Gary A. Poliakoff, THE LAW OF CONDOMINIUM OPERATIONS §1.01, p. 4 (1988).

B. [11.3] Townhomes

The townhome or row house, a style of construction that has been popular for centuries, is a freestanding building of two or more attached dwellings that share a common wall and other amenities such as a roof, a yard, or a fence. A popular form of home ownership that expanded after World War II, they were frequently subject to recorded covenants and restrictions of limited scope. Since the advent of condominiums, though, townhomes now come with recorded declarations of covenants and bylaws, and often the townhome style of ownership is as developed as condominium ownership. However, not all townhomes are condominiums. Some may be owned in fee simple with recorded covenants, but some may be voluntary. Thus, it is important to remember that the architectural style does not dictate the type of entity, if any, that has jurisdiction over the dwelling.

C. [11.4] Homeowners' Associations

“Homeowners' association” is a generic term that can include townhome, single-family, or property owners' associations consisting of lots only. Covenants that run with the land are recorded to regulate the use and improvement of the property. These covenants are often called “CCRs” (covenants, conditions, and restrictions).

Initially, a uniform plan, which requires local government approval, is proposed for a parcel of land. When the property is improved with dwellings and density becomes an issue, it is necessary to request multiple variances. Then, the parcel will be developed as a planned unit development (PUD). This term is often a misnomer for an association.

Deeds and title reports typically refer to the restrictive covenants, although failure to note these covenants can result in a court construing an “implied restrictive covenant.” *Krueger v. Oberto*, 309 Ill.App.3d 358, 724 N.E.2d 21, 30, 243 Ill.Dec. 712 (2d Dist. 1999).

Homeowners’ associations are typically structured similarly to condominium associations and are often incorporated as general not-for-profit corporations under the General Not For Profit Corporation Act of 1986, 805 ILCS 105/101.01, *et seq.*

D. [11.5] Cooperatives

Prevalent throughout the first half of the Twentieth Century, cooperatives, or co-ops, began to fall out of favor with the advent of condominiums although there are many still in existence.

A resident-owner of a cooperative does not own an interest in real estate. The property is typically owned by a corporation (regular or not-for-profit) or a trust. A purchaser obtains an interest by purchasing shares in the corporation or a certificate of ownership in a trust. The size of ownership interests varies based on shares or points, which determine assessments. In conjunction with indices of ownership is also a right to lease an apartment or unit. A standard form of proprietary lease is required, which also sets forth the rights and obligations of the owner or owners.

Typically, there is a board of directors or trustees to administer the property, which is governed by an underlying document consisting of bylaws, house rules, a corporate charter, or a trust agreement.

E. [11.6] Master Associations

Master associations or umbrella associations exist when there are one or more residential associations and their members are subject to a declaration of covenants for an overlay-type association. Master associations typically own and control recreational facilities, roadways, green belts, and other amenities shared by all residents. Each resident belongs to two or more associations and pays assessments to cover the common expenses for all of the entities.

Governed by a master or umbrella declaration of covenants and bylaws, master associations are subject to §18.5 of the Condominium Property Act. Usually, one association collects assessments for both, but sometimes they operate independently and even have different management companies. A master association can also be established as a dual association, acting as a master association for other residential associations and as a homeowners’ association with direct responsibility for dwelling units.

NOTE: Sections 18.5(c) – 18.5(h) of the Condominium Property Act address master associations and “common interest communities” as defined by §9-102(c) of the Illinois Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.* There is considerable debate over whether §18.5 of the Condominium Property Act applies only to master associations or to all associations. For the purposes of this chapter, §18.5 is discussed in the context of master associations only.

II. LEGAL AUTHORITY

A. [11.7] State Statutes

There are extensive statutory provisions that govern the creation of associations as well as their administration and operation. The General Not For Profit Corporation Act of 1986, which covers all condominium associations (also under, in particular, the Condominium Property Act), most homeowners' associations, and some cooperatives, sets out the basic requirements for the operation of corporate boards. Numerous other statutes, such as the Human Rights Act, 775 ILCS 5/1-101, *et seq.* and the Property Tax Code, 35 ILCS 200/1-1, *et seq.*, have provisions that impact associations as well.

B. [11.8] Federal Statutes

A number of federal statutes and federal agencies impact associations. The Federal National Mortgage Association (FNMA), Federal Home Loan Mortgage Corporation (FHLMC), Federal Housing Administration (FHA), and Department of Veterans Affairs (VA) affect associations in the area of financing. The Internal Revenue Code, of course, applies to the income received by associations. Other regulatory laws such as the Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. §§3601 – 3616, and the Fair Housing Amendments Act of 1988, Pub.L. No. 100-430, 102 Stat. 1619, among others, also impact association policy.

III. [11.9] LEGAL DOCUMENTS

The legal authority (power) of associations is derived from legal documents that include (a) the declaration, (b) the articles of incorporation, (c) the bylaws, and (d) the rules and regulations. In addition, there may be amendments to any of these documents.

A. [11.10] Declaration

The declaration, which contains the basic legal structure for an association, defines its powers and sets forth the rights of its members at common law, this is a “covenant running with the land” as it is recorded in the Office of the County Recorder of Deeds. In other words, the declaration is a recorded set of rights and responsibilities of ownership that also establishes the purposes and limitations of the association's control over the property. The declaration of condominium must contain certain essential elements and in Illinois is supplemented and superseded by the Condominium Property Act.

B. [11.11] Articles of Incorporation

If the association or cooperative is a corporation, articles of incorporation (the corporate charter) must be executed and filed with the Secretary of State. In Illinois, a condominium association is deemed to be a not-for-profit corporation even if it has not filed articles with the Secretary of State. 765 ILCS 605/18.3. Some cooperatives are incorporated as regular corporations.

C. [11.12] Bylaws

The bylaws of an association contain the organizational structure of the association and the

basic rules for governing the board. To some extent, the bylaws may duplicate some provisions found in the declaration or are sometimes incorporated into the declaration. It is important to note that the board members can lose some of the statutory protections and indemnities if the association is not incorporated and in good standing.

D. [11.13] Rules and Regulations

The rules and regulations form the day-to-day operating manual for an association. Although last in the legal pecking order of authority, the rules are often given serious consideration and weight of authority by courts of law. It is most important for an association to have specific, updated rules in the hands of every owner and resident in order to regulate behavior and maintain the lifestyle of the association. Generally adopted by the board, the rules should be reviewed and revised annually to stay current with the law and with changes in the community.

E. [11.14] Amending Documents

The authority to amend a legal document is contained in the document itself. There may be certain restrictions on the amendment process, some of which may arise from state law or local ordinance. Generally, there will be a reference to such restrictions in the legal documents themselves, although not always. Frequently, amendment procedures require the approval of a supermajority, e.g. 2/3rd or 75% of the owners. For example, some towns require municipal approval as well as owner approval of any proposed amendment.

IV. REPRESENTING THE BUYER

A. [11.15] Contract Review

Most standard real estate contracts prepared by local realtor associations and bar associations contain either a paragraph or rider dealing with condominiums. See §11.45 below.

It is important to note that this type of contract language should be modified to include homeowners' associations as well. There are certain protections included in the Condominium Property Act that are applicable to other types of associations but not mandated by any statute. 765 ILCS 605/22.1.

1. [11.16] Regular Assessments

The typical contract provision for a used home provides, for example, "Seller represents that as of that date of acceptance, [homeowners' association] [condominium association] fees are \$_____ per [month] [year]." The regular monthly or annual assessments can be prorated similarly to any other prepaid fixed expense.

2. [11.17] Special Assessments

A special assessment or nonrecurring assessment is levied by the board of directors with or without owner approval. A special assessment is usually needed to cover the costs of a major repair or maintenance program. For condominiums, special assessment procedures are governed by the Condominium Property Act. 765 ILCS 605/18(a)(8) – 18.4(a). For other types of associations, the

special assessment procedure is generally contained in the declaration or bylaws.

When a contract is pending to sell a condominium or townhome, the debate over who should be financially responsible needs to be resolved. From the buyer's perspective, the seller had the benefit or use of these amenities and should pay for their previous wear and tear. From the seller's perspective, the seller is selling the unit and will not have the benefit of enjoying the newly repaired and refurbished amenities, so the buyer should pay for them. Special assessments can be levied as a single payment, multiple installments, and even multiyear obligations. Therefore, this issue needs to be resolved prior to closing.

For any transaction, it is important to inquire whether a special assessment is contemplated even though it has not yet been levied. A diligent inquiry requesting document review reveals all future obligations. See §11.19 below. The buyer and seller will need to negotiate who will be responsible since many associations require, as a condition contained in the close letter, the special assessment to be paid in full even if there are future installments.

Condominiums have a specific disclosure requirement under §22.1 of the Condominium Property Act. However, a conscientious practitioner representing a buyer will ask for the same type of disclosure information regardless of what type of association it is.

3. [11.18] Parking Spaces

Parking spaces come in a variety of legal forms, and it is important for a purchaser to understand exactly what he or she is getting. A parking space can be

- a. a unit designated with a number and including a percentage of ownership, a tax bill, assessment obligation, and voting rights;
- b. part of the common elements and available on a first-come basis to all residents (although boards often attempt to assign spaces, this procedure is proscribed by *Sawko v. Dominion Plaza One Condominium Association No. 1-A*, 218 Ill.App.3d 521, 578 N.E.2d 621, 161 Ill.Dec. 263 (2d Dist. 1991), in which the Illinois appellate court stated that no rule or regulation that diminishes an owner's interest in the common elements may be adopted without the unanimous consent of all association members);
- c. limited common elements assigned and appurtenant to a specific unit;
- d. deeded as part of the legal description for a unit (a/k/a "deeded parking");
- e. assigned by the original developer and part of the original plan of condominium ownership and site plan; or
- f. designated guest parking open to owners and guests and subject to the rules and regulations of the association (NOTE: While this category is often overlooked by even the diligent buyer and his or her counsel, a pickup truck parked overnight in a guest parking area will quickly reveal the power of rules and the wrath of an angry board.).

The practitioner should recommend his client inquire as to whether parking spaces can be conveyed separate and apart from the interest in the unit and whether it can be transferred or used by

a non-resident.

4. [11.19] Section 22.1 Disclosure

Section 22.1 of the Condominium Property Act is the linchpin of the disclosure process for an association purchaser. It provides in part:

(a) In the event of any resale of a condominium unit by a unit owner other than the developer such owner shall obtain from the Board of Managers and shall make available for inspection to the prospective purchaser, upon demand, the following:

(1) A copy of the Declaration, Bylaws, other condominium instruments and any rules and regulations.

(2) A statement of any liens, including a statement of the account of the unit setting forth the amounts of unpaid assessments and other charges due and owing as authorized and limited by the provisions of Section 9 of this Act or the condominium instruments.

(3) A statement of any capital expenditures anticipated by the unit owner's association within the current or succeeding two fiscal years.

(4) A statement of the status and amount of any reserve for replacement fund and any portion of such fund earmarked for any specified project by the Board of Managers.

(5) A copy of the statement of financial condition of the unit owner's association for the last fiscal year for which such statement is available.

(6) A statement of the status of any pending suits or judgments in which the unit owner's association is a party.

(7) A statement setting forth what insurance coverage is provided for all unit owners by the unit owner's association.

(8) A statement that any improvements or alterations made to the unit, or the limited common elements assigned thereto, by the prior unit owner are in good faith believed to be in compliance with the condominium instruments.

(9) The identity and mailing address of the principal officer of the unit owner's association or of the other officer or agent as is specifically designated to receive notices.

(b) The principal officer of the unit owner's association or such other officer as is specifically designated shall furnish the above information when requested to do so in writing and within 30 days of the request. 765 ILCS 605/22-1.

The obligation to make an inquiry falls upon the buyer or buyer's counsel. Once the request is made, then it is up to the seller or seller's counsel to obtain the documents requested by the buyer, subject to three stipulations:

First, the association has the right to charge a "reasonable" fee for the documents, since it is usually the property manager that must produce them. 765 ILCS 605/22.1(c).

Second, most associations will honor the request regardless of whether it comes from the buyer or seller, but some will respond only to a seller.

Third, most associations require sufficient advance notice. The largest source of disputes with attorneys is making a request at the last minute. Disputes arise particularly when a request is made for an assessment status letter and it turns out the seller owes the association money that he or she claims not to be aware of or a lien has been recorded against the property. Thus, a conscientious practitioner will make these requests with plenty of time to spare. (Practice Tip: Have a tickler system similar to the mortgage approval date whereby you automatically send the standard document request letter. See §11.53 below.)

It is critical for the conscientious practitioner representing a purchaser to request the documents provided for in §22.1. The typical real estate association contract used by real estate brokers has either a rider or a recital requiring disclosure.

Many lawyers overlook this essential task when representing a buyer. Sometimes a well managed condominium association will routinely produce the information as a part of its closing packet, but more often than not, it must be requested from the seller, who must then tender the request to the association. Most associations charge a fee for producing the documents requested.

Section 22.1 disclosure is the only way for a buyer to become fully informed about the community he or she is buying into and what is expected of him or her.

The issue of disclosure arose in *Mikulecky v. Bart*, No. 1-03-0378, 2004 Ill.App. LEXIS 1476 (1st Dist. Dec. 10, 2004), in which a board of directors adopted a proposed budget and provided a copy to a prospective purchaser along with documentation for capital expenditures. The disclosure requested by the plaintiff's attorney stated that the defendants had not approved any special assessments to cover exterior repairs within the next two years. The plaintiff's attorney modified the contract to "anticipated" to mirror the statutory language. The plaintiff purchaser received the information and learned that the association planned numerous capital projects but was advised that no special assessments were anticipated. The plaintiff claimed that the defendants concealed knowledge of a window replacement project that required the plaintiff to pay over \$10,000. The plaintiff sued for intentional misrepresentation, fraudulent misrepresentation, fraudulent concealment, breach of contract, and violation of the Condominium Property Act.

The trial court granted the defendants' motion for summary judgment, but the appellate court reversed and remanded on the issue of fact as to the extent of the defendants' knowledge of the proposed expenditures. The record contained a question of fact as to whether the defendants provided the plaintiff all of the total information to make an informed decision.

5. [11.20] Right of First Refusal

Still contained in many older condominium association declarations and cooperative charters, the right of first refusal allows the association or cooperative to match a pending offer and purchase the unit at the same price. Often the documents require a specific percentage of owner approval before going forward. If a declaration allows a board of directors 30 days to decide whether it will exercise its preemptive rights, it is important that the contract be submitted for approval at the earliest possible opportunity. (Practice Tip: Some associations require interviews or attendance at an orientation meeting prior to move-in. It is important to verify these requirements and make sure all deadlines are complied with.)

6. [11.21] Pets

Many pet owners unknowingly submit an offer to purchase a condominium without inquiring whether their prized Persian, St. Bernard, or boa constrictor is permitted. Most pet restrictions are imposed by amendments to the declaration, which is why it is important to make the offer to purchase subject to obtaining the disclosure documents described in §22.1 of the Condominium Property Act. See §11.19 above. However, in *Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinjosa*, 287 Ill.App.3d 886, 679 N.E.2d 407, 223 Ill.Dec. 222 (1st Dist. 1997), the Illinois appellate court stated that pets could be restricted through the board's rule-making authority.

If in doubt, it is always best to get a letter authorizing the pet in question as a permitted species or type.

7. [11.22] Rental Restrictions

It is not uncommon for a condominium association to adopt an amendment or rule to restrict or even eliminate the leasing rights of owners, but there is no greater surprise to a potential investor than to find out after closing that the association does not permit rentals. Although it has always been a basic principle of unit ownership in an association that the documents can be amended to take away certain "vested" property rights, the right to prohibit leasing became law in Illinois in *Apple II Condominium Ass'n v. Worth Bank & Trust Co.*, 277 Ill.App.3d 345, 659 N.E.2d 93, 99, 213 Ill.Dec. 403 (1st Dist. 1995), in which the court went as far as to state that leasing could be restricted even via rule adoption. (Practice Tip: If the client is purchasing property in an association with the intent to rent, a cautious practitioner will verify that the rules permit leasing without significant restrictions.)

8. [11.23] Architectural Restrictions

Aspects over architectural restrictions arise more frequently in townhomes and single-family homes than condominiums because condominium exteriors are owned by all owners as tenants in common. Although associations universally require board approval for any exterior modifications, it is important to inquire in advance if a buyer intends to build a fence or install a swimming pool rather than find out after the fact that the buyer is severely limited in or even barred from doing so. There is quite an extensive number of cases on the authority of an association to enforce its covenants regarding exterior modifications. The following is a small selection:

- In *Garden Quarter I Ass'n v. Thoren*, 76 Ill.App.3d 99, 394 N.E.2d 878, 31 Ill.Dec. 676 (2d Dist. 1979), it was held that when restrictive covenants contain a specific deadline for filing suit to halt commencement of construction of an improvement or addition to the property, an

association's failure to abide by that time limit is deemed to be an acceptance of the proposed change. *See also Hawthorne Hills Ass'n v. Lawrence*, 85 Ill.App.3d 377, 406 N.E.2d 869, 40 Ill.Dec. 666 (5th Dist. 1980).

- In *Yorkshire Village Community Ass'n v. Sweasy*, 170 Ill.App.3d 155, 524 N.E.2d 237, 120 Ill.Dec. 472 (3d Dist. 1988), the court held that an association was entitled to recover its attorneys' fees and costs and to require an owner to remove a flower box because the fixture violated the declaration and the rules.

- An association's rules barring above-ground swimming pools were unreasonable and unenforceable because the covenants did not prohibit them under any circumstances. *Westfield Homes, Inc. v. Herrick*, 229 Ill.App.3d 445, 593 N.E.2d 97, 170 Ill.Dec. 555 (2d Dist. 1992).

B. [11.24] Closing the Deal

Every lawyer who represents buyers and sellers in real estate closings should have a checklist of required documents. A simple way to follow up is to inform the client via letter as to the nature of his or her obligation and what documents will be required for the transaction. See §11.46 below. Condominium and homeowners' associations should have their own lists, such as the list set forth in §22.1 of the Condominium Property Act.

For some reason, there is a tendency on the part of many practitioners to charge a smaller fee for closing a condominium transaction. There is actually more work involved because each step in the closing has its own peculiar requirements, so the fee should be higher. (Practice Tip: If you are representing a condominium purchaser and do not review the governing documents as part of your initial review, you are asking for trouble!)

1. [11.25] Document Review

To really understand the nature of what a prospective purchaser is buying into requires a careful reading of the association's governing documents. See §11.9 above. Although many declarations seem to be stamped from a cookie cutter, there are sometimes profound differences for issues such as pets, parking, and responsibility for maintenance, among other things, that a buyer should be familiar with before signing an offer to purchase.

2. [11.26] Certificates of Insurance

One of the significant differences between a condominium association and other types of associations is what is covered by the association's insurance. Condominium insurance is governed by §12 of the Condominium Property Act, which states all policies must cover the common elements, the units, and the limited common elements from loss and general liability and the board of directors for errors and omissions.

Homeowners' association insurance policies, on the other hand, generally cover only losses for the common areas and the directors' and officers' liability. Owners must have their own dwelling coverage for single-family and townhome owners' associations when there is fee simple ownership. Thus, each owner needs to obtain his or her own insurance for property and casualty liability. Condominium associations can require owners to purchase an HO-6 owners policy to cover the contents, unit interior, additions and improvements.

For condominiums, and homeowners' associations that have master insurance policies similar to condominiums, a certificate of insurance naming the owner and lender is required for closing. The certificate is usually obtained from the property manager or directly from the insurance company. See §11.47 below. (Practice Tip: For condominiums the certificate of insurance can be ordered as soon as mortgage approval has been secured. For homeowners the owner must come to closing with a policy, just like any other house closing.)

3. [11.27] Right of First Refusal

Since *Gale v. York Center Community Cooperative, Inc.*, 21 Ill.2d 86, 171 N.E.2d 30 (1960), cooperatives, and subsequently condominium and homeowners' associations, have periodically enforced the preemptive right established by their governing documents. Although more prevalent in documents drafted before the mid-1980s, there are innumerable condominium associations and cooperatives that have a right of first refusal provision in their operating documents, although only a small minority actually enforce these provisions. See also Jordan I. Shifrin, *First Right of Refusal—Protection or Illusion?*, 74 Ill.B.J. 398 (1986).

Typically, a seller is required to submit an offer to purchase or proposed lease of the unit to the board. The board has 30 days in which to decide whether to exercise the right of first refusal and purchase or lease the unit on the same terms or to waive the right.

A large number of potential problems may arise pertaining to the right of first refusal, such as alleged discrimination or the difficulty of the association in financing such a purchase. Also, some declarations require two thirds of the owners to approve the purchase. In order to clear title exceptions, a buyer must obtain a waiver letter from the association if it is required by the declaration or a note stating that the association does not have a right of first refusal. See §11.48 below.

For leases, §18(n)(i) of the Act requires an owner of a condominium to submit a copy of the lease no later than the date of occupancy or 10 days after the lease is signed, "whichever occurs first."

4. [11.28] Title Exceptions

A title company issuing a commitment for title insurance will raise as a title exception a letter from the association waiving its right of first refusal, including a statement from the association showing that all assessments are paid in full and that there are no liens or encumbrances against the unit.

Although the declaration is recorded and appears on a title report showing the recording date and number, amendments are usually not disclosed. This raises a problem for buyers who are not aware of the "no dogs," "no fences," or other general leasing provisions and rely solely on the title report without conducting a diligent inquiry. Some associations disclose these policies in their closing letter but by then "the train has already left the station."

A title exception can be cleared only by proper documentation. Typically, a condominium rider for a real estate transaction exempts the seller from providing a plat of survey since changes are rare, but an uninformed lender may require a buyer to obtain a copy. See §11.31 below. Obviously,

in the instance of a homeowners', townhome owners', or single-family owners' association, a current spotted plat of survey is necessary.

Last, when a unit in a residential association is also subject to a master or umbrella association declaration, this fact frequently appears on the title report, *but not always*. Again, it is a matter of doing a diligent inquiry into the nature of the governance of the association or associations that a purchaser is buying into. (Practice Tip: Sometimes master associations prepare their own disclosure information and a separate letter.)

5. [11.29] Assessment Status and Liens

By virtue of the express language of the recorded declaration of covenants and §9 of the Condominium Property Act, any unpaid assessments or charges constitute a lien against the unit commencing from the first date they are due. However, unless a notice of lien is recorded, there is no public notice, and an association may not be able to protect its rights in a dispute with later-dated creditors in the event of a bankruptcy or foreclosure. As a result, a lien is recorded as a cloud on title and can be released only by recording a release of lien executed by the association. See §11.50 below.

It should be noted that even if a notice of lien is not recorded, the association may still show an unpaid balance, which is similar to an unsecured lien, due and payable to the association. An assessment status letter either discloses a lien or waives any rights to claim unpaid assessments. (Practice Tip: A title company will not close a transaction without a clean assessment status letter.)

An association must issue an assessment status letter even if there is a claim for lien for any unpaid fines, assessments or other charges. Unpaid assessments can always be paid out of funds set aside from the proceeds of a sale or refinancing. In *Miller v. St. Charles Condominium Ass'n*, 141 Ill.App.3d 834, 491 N.E.2d 125, 96 Ill.Dec. 311 (2d Dist. 1986), the Illinois appellate court held that the failure of an association, through its attorneys, to issue an assessment status letter because undocumented fees had not been paid by an owner who had prevailed in previous litigation appeared to be malicious. Obviously, any charges assessed to an owner need to be documented, and when a letter is requested for a real estate closing, it must be issued even if there are charges owed to the association. These charges or amounts owed can be disclosed in the letter. If the seller disputes the charges, the seller can still be required to escrow that amount and close the transaction and argue about it later. Sometimes through a glitch, the lien is not released or the association is not paid what is owed. Technically, the association can initiate collection proceedings against the new buyer if the charges are not paid and/or the lien is not released.

6. [11.30] Location Notes

A title insurance endorsement, often requested by a lender, for a mortgagee policy insures the lot dimensions and common street of the property. This endorsement always constitutes an additional charge on the title company's bill.

7. [11.31] Survey

In order to create a condominium, a plat prepared by a registered Illinois land surveyor must be recorded showing the exterior boundaries of the parcel and the buildings, the elevations of the interior ceilings, walls, and floors, and the defined boundaries of the unit or units. 765 ILCS 605/5.

Upon the recording of the declaration and plats, the property is submitted to the Act.

This document is recorded with the declaration, and a copy is often, but not always, given to the new purchaser. Although standard contract language usually excuses the seller from producing a copy, it is often requested. A copy of the plat can be obtained from the recorder of the county the association is located in, sometimes for hundreds of dollars. Therefore, it is best to negotiate this issue at the time of contract because most title companies will accept an affidavit in lieu of survey. See §11.49 below. Most, but not all, lenders are sophisticated enough to understand this point.

Townhomes and single-family homes consist of platted individually owned lots; therefore, it is customary to produce a current survey at the time of sale.

8. [11.32] Encroachments

Declarations of condominium and covenants generally contain a provision exempting encroachments, such as building shifting, in the manner of an indemnification. However, individual lot owners in townhome and homeowners' associations that have individually platted lots have the same issues with encroachments, such as fences, driveways, utility easements, and so on, as any lot owner when there is no association.

9. [11.33] Mechanics Liens

Section 9.1(a) of the Condominium Property Act addresses mechanics liens. Frequently, a dispute will arise between an association and a contractor, and a lien will be recorded by the contractor to protect the contractor's interest. It is a very complex matter to record a proper lien against association property; therefore, more often than not, the lien cannot be perfected because it is legally incorrect. 765 ILCS 605/9.1(a) states, "If the performance of the labor or furnishing of the materials is expressly authorized by the board of managers, each unit owner shall be deemed to have expressly authorized it and consented thereto, and shall be liable for the payment of his unit's proportionate share of any due and payable indebtedness as set forth in this Section."

The contractor almost always records the lien against the association and lists various addresses, but a strict reading of the statute implies that (a) separate recordings are necessary and (b) the unit owner is liable only for his or her proportionate share, which is usually a nominal amount of money. A title indemnity can be established for these liens, or the association can issue an indemnification or hold-harmless agreement, which is accepted by most title companies. See §11.51 below.

For townhome and homeowners' associations and in the case of all other types of liens, the owners are liable for an association's obligations on a per capita or equal basis. However, the same concepts still apply.

Last, a poorly executed title search often shows very old liens that are invalid, such as the developer's original construction loans even though the obligations were paid, or the exceptions waived by previous title insurers. A cautious practitioner should point this out to the agency issuing title early enough so that the buyer's ability to obtain a mortgage or close the deal is not affected.

10. [11.34] Pending Litigation

Suits filed by or against an association will generally appear as a cloud on title even if a notice of lis pendens is not recorded. Usually, a letter of explanation can be obtained from the association to satisfy the most particular lender. As long as the lawsuit does not appear to attack the viability or financial stability of the association, the lender should not hesitate to make the loan since the exception should be easily waived. (Practice Tip: If the buyer's mortgagee insists on a letter of explanation, the association will generally charge back the legal fees incurred.)

11. [11.35] Recorded Amendments

Amendments to declarations and bylaws are recorded in the office of the recorder of the county where the property is located. A title search will disclose recorded covenants but will not state with specificity the nature of an amendment unless a specific inquiry is made. In order to avoid a problem after the fact, an inquiry should be made to the association during the document disclosure phase of the pre-closing process so the buyer and seller are aware of any material changes to the covenants. An attorney should not only ask for the declaration, but all amendments as well.

C. [11.36] Transfer of Interest

In preparing and reviewing deeds for property that is part of any type of community association, it is important to verify certain characteristics that are not present in other types of deeds:

1. Is the name of the association referenced in the legal description?
2. Is there an umbrella association as well as a residential association to which the property is subject?
3. Is a parking space being deeded? Is it a separate unit, or is it subject to some other right of use not referenced in the deed?

When parking spaces are sold or exchanged and/or when units are merged, combined, or significantly modified, §31 of the Illinois Condominium Property Act may be applicable:

Unless the condominium instruments expressly prohibit the subdivision or combination of any units, . . . the owner or owners may, at their own expense, subdivide or combine and locate or relocate common elements affected or required thereby, . . . [upon making] written application to the board of managers, requesting an amendment to the condominium instruments, setting forth in the application a proposed reallocation to the new units of the percentage interest in the common elements. . . . [I]t shall be effective upon (1) recording of an amendment to condominium instruments in accordance with the provisions of Sections 5 and 6 of this Act, and (2) execution by the owners of the units involved. 765 ILCS 605/31.

The owners are responsible for all of the costs involved, which should be disclosed and, preferably, resolved prior to closing.

Sometimes owners have exchanged parking spaces or storage sheds without notifying the board. A special amendment needs to be approved by the board of directors in such instances. See

§11.53 below.

D. [11.37] Mortgages and Secured Transactions

Most recorded covenants, as well as §9(g)(3) of the Condominium Property Act, establish priorities of lienholders that grant preferential treatment to mortgagees over other lienholders, including an association. A purchaser at a judicial sale or a mortgagee who obtains title via a deed in lieu of foreclosure or judgment or otherwise takes possession pursuant to court order has a duty to pay assessments from the first day of the month following the foreclosure sale or delivery of the deed or possession. Payment extinguishes any lien asserted by the association prior to that time. However, a condominium association does not have a superior right of possession over a mortgagee once the mortgagee forecloses an owner's interest and obtains title, free and clear. *Damen Savings & Loan Ass'n v. Johnson*, 126 Ill.App.3d 940, 467 N.E.2d 1139, 82 Ill.Dec. 66 (2d Dist. 1984).

However, recent changes to §9(g)(4) requires a purchaser who takes title from a mortgagee after a sheriff's sale to pay an additional six months unpaid assessments incurred prior to the collection action. (Practice Tip: Interpretation of this section is in dispute as to whether all purchasers are required to pay this or only those who purchase the property from the mortgagee at the sheriff's sale.)

After a judicial sale and subsequent conveyance, the seller needs to obtain an additional assessment status letter from the association. See §11.48 below. The amount claimed should include regular and special assessments owed from the aforementioned point in time, late charges, legal fees, and any bona fide repair costs.

Other secured or judgment creditors should be prioritized in reverse chronological order of perfection of the lien and in most instances should take subject to the association's lien for unpaid assessments. 765 ILCS 605/9.

In the event of a mortgage foreclosure, there is sometimes a surplus of proceeds. If there is no other bidder at the sheriff's sale other than the mortgagee, the association may assert a claim for proceeds from the surplus if there was a preexisting lien for unpaid assessments. Second mortgagees and judgment and/or other secured creditors may also assert a claim against the surplus. In representing a purchaser or seller in these instances, counsel may be required to negotiate a proportionate distribution of proceeds to resolve the claims. (Practice Tip: Representing a seller whose property is in foreclosure may require an investigation of the foreclosure proceedings to see if the seller is entitled to surplus proceeds.)

E. [11.38] Disclosure of Defects

Section 35 of the Residential Real Property Disclosure Act, 765 ILCS 77/1, *et seq.*, requires the execution of an affidavit by a seller to "provide prospective buyers with information about material defects" and the condition of residential real property. See §6.16 of this handbook for a copy of the Residential Real Property Disclosure Report. This requirement applies to all dwellings governed by homeowners' and condominium associations. However, it has become complicated when the exception stated in the note on the §35 affidavit applies: "These disclosures are not intended to cover the common elements of a condominium; but only the actual residential real property including limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit."

Since an owner's potential exposure for paying a large special assessment arises out of a defect in the common elements, such as a leaking roof, this disclosure and exception make it particularly crucial that disclosure of documents and material facts, as required under §22.1 of the Condominium Property Act, be obtained from the association and an inquiry be conducted into the condition of the building. See §11.19 above. The identical inquiry should be made of a homeowner's association even without a statutory mandate.

Although §22.1(a)(3) of the Condominium Property Act requires "[a] statement of any capital expenditures anticipated by the unit owner's association within the current or succeeding two fiscal years," this disclosure advises a prospective buyer only about a planned special assessment. If an association either consciously or even negligently ignores a defect in the common elements, the only method of obtaining a full disclosure of the condition of the common elements is to conduct a diligent inquiry or physically inspect the building. Otherwise, a casual buyer could wind up buying a unit in a building with a leaky roof and a future special assessment. In a recent case, *Hogan v. Adams*, 333 Ill.App.3d 141, 775 N.E.2d 217, 266 Ill.Dec. 655 (4th Dist. 2002), the Illinois appellate court held that full and complete disclosure is necessary and consulting with an attorney is appropriate to protect a seller's interests regarding a flooding problem.

V. SPECIAL PROBLEMS WITH NEW CONSTRUCTION AND CONVERSION CONDOMINIUMS

A. [11.39] Warranties

Two types of warranties cover condominiums for the purchaser:

Express warranties. Each purchaser of a new condominium or home governed by a homeowners' association typically receives a warranty for materials and workmanship for the dwelling itself. The warranty generally runs for a period of one year between the purchaser or purchasers and the developer, is nontransferable, and has a long list of limitations or exclusions.

Implied warranties. Since *Petersen v. Hubschman Construction Co.*, 76 Ill.2d 31, 389 N.E.2d 1154, 1159, 27 Ill.Dec. 746 (1979), the Illinois courts have also applied an implied warranty of habitability to a home so that it shall be free from latent defects in design, materials, and workmanship. However, in the context of a condominium or homeowners' association, an implied warranty can also be applied to common property such as roads, roofs, and other areas that impact the dwelling. *Herlihy v. Dunbar Builders Corp.*, 92 Ill.App.3d 310, 415 N.E.2d 1224, 47 Ill.Dec. 911 (1st Dist. 1980).

Typically, a knowledgeable builder will require a purchaser to sign a waiver of the implied warranty of habitability. See §11.52 below. Although frequently nonnegotiable, there are instances when the waiver is not valid and a purchaser's rights are preserved to pursue a claim for latent defects even after the express warranty has expired.

"The burden is on the seller to prove that the buyer knew the implied warranty did not attach to the sale of the residence. . . . A disclaimer does not negate an implied warranty unless it is brought to the attention of the buyer and agreed to by him." [Citations omitted.] *Briarcliffe West Townhouse Owners Ass'n v. Wiseman Construction Co.*, 134 Ill.App.3d 402, 480 N.E.2d 833, 838, 89 Ill.Dec.

351 (2d Dist. 1985). (Practice Tip: Note that there is a sharp distinction between the warranties for the dwelling unit and the common elements areas. The common area defects should be addressed by the condominium association, however, unit defects are the responsibility of the unit owner and they must personally assert their rights under any warranty claim.)

B. [11.40] Arbitration Clauses

More and more contracts for the purchase of newly constructed residences provide for mandatory arbitration or mediation of all unresolved claims for construction defects between the buyer and the developer. In some instances, these arbitration clauses appear in the declaration of condominium ownership pertaining to the common elements.

In *Board of Managers of Chestnut Hills Condominium Ass'n v. Pasquinelli, Inc.*, 354 Ill.App.3d 749, 822 N.E.2d 12, 290 Ill.Dec. 730 (1st Dist. 2004), a condominium association sued the developer alleging breach of implied warranty of habitability and good workmanship, breach of express warranty, and breach of contract regarding defects. The standard purchase agreement used by this developer required binding arbitration of all unresolved warranty issues. This arbitration clause was contained in a separate warranty and not in the purchase agreement.

The developer moved to dismiss and stay the proceedings pending arbitration, and the trial court entered a stay order. The appellate court reversed, stating that the association's claims were not subject to arbitration, the alleged defects in the common elements were not covered by the limited warranty, and the disclaimer of the implied warranty of habitability was ineffective. The developer argued that the obligation to guarantee the work was limited to the standard one-year express warranty offered to each purchaser and that this coverage should not extend beyond the four walls of the unit as the common elements were not completed until the last unit was sold and were subject to a much broader area of law. See REAL ESTATE LITIGATION (IICLE 2002, Supp. 2004).

C. [11.41] Conversion Condominiums

Conversion condominiums are governed by §30 of the Condominium Property Act and by local conversion ordinances. An attorney representing a purchaser in a building being converted must be mindful of the answers to the following questions:

1. Is the buyer a former tenant, and was he or she given adequate notice of the conversion?
2. Is there a decorating allowance or construction credit to be applied?
3. Was the buyer given access to the building for inspection purposes, notwithstanding the fact that he or she was already residing there?

If the building has more than six units, there must be a property report created by an engineer disclosing the physical condition of the premises. 765 ILCS 605/22(e)(4). If all of the information is not available at the time of execution of the contract, then the contract is voidable at the purchaser's option at any time until five days after the last item has been furnished or until closing, whichever is earlier. 765 ILCS 605/22(e)(5).

D. [11.42] Earnest Money

Section 24 of the Condominium Property Act requires that the earnest money deposit be held in escrow in an interest-bearing segregated account. No interest is required, however, if closing is to take place in 45 days or less. This requirement does not apply to payment made for extra work or upgrades ordered in writing by the purchaser.

E. [11.43] Real Estate Taxes

For new construction or conversions, the division of the real estate tax bill is often a complex calculation. A single tax bill is initially issued on the entire parcel, and the developer offers buyers a formula for re-proration after the closing. However, the bill is sometimes not divided into separate permanent index numbers (PINs) until over a year after closing. This makes reconciliation with the developer difficult, especially if it is the developer that owes money to the buyer.

If a property had a lengthy build-out and sales were slow, the entire bill will be sent to an association. It will then have to be divided by the board. Most property management companies are familiar with this process. The association often pays the bill, divides the total by the respective percentage of ownership and then sends a letter to all owners and their mortgage-holders seeking reimbursement. What often gets overlooked during these transition periods are homestead and senior citizen exemptions. A purchaser who receives a letter from the association requesting that the purchaser pay his or her share of an undivided bill should consult with the township assessor's office to apply for the appropriate exemptions even if the tax division of an undivided bill has not yet taken place. (Practice Tip: Individual re-proration agreements are between the buyer and seller and the association is not involved.)

F. [11.44] Assessments

Monthly assessments for a new association are estimated based on an initial pro forma budget adopted by the developer. The assessment may or may not be based on accurate data. Usually, it is based on a "bare-bones" budget without a significant contribution to reserves.

Most new properties require each initial purchaser to fund the start-up reserve account by depositing several months of assessments at closing. CAVEAT: The declaration sometimes allows the developer to use these initial "reserve contributions" to make the property more marketable by funding operating account shortfalls created by under-assessing.

Also, in most instances, the one-time contribution is not refundable by the association. The only way for a unit owner to recover this money is to contract with a future purchaser for reimbursement.

Most older associations do not have a reserve contribution requirement for new purchasers, although some do require a damage or security deposit.

VI. APPENDIX — FORMS

A. [11.45] Rider to Real Estate Contract

RIDER TO REAL ESTATE SALES CONTRACT (Contract)

BY AND BETWEEN _____ (Buyer)
and _____ (Seller)

The parties agree that the terms contained in this Rider, which may be contrary to other terms of the Contract, shall supersede any conflicting terms.

1. Title when conveyed shall be good and merchantable, subject to terms, provisions, covenants, and conditions of the Declaration of Condominium and all amendments; public and utility easements, including any easements established by or implied from the Declaration of Condominium or amendments thereto; party wall rights and agreements; limitations and conditions imposed by the Condominium Property Act, 765 ILCS 605/1, *et seq.*; and installments due after the date of closing of general assessments established pursuant to the Declaration of Condominium.

2. Seller is responsible for all assessments, regular or special, due or levied prior to closing. Accumulated reserves of the Association are not proratable.

3. Buyer has, within five business days from the date of acceptance of the Contract, the right to demand from Seller items as stipulated by §22.1 of the Condominium Property Act as shown below in paragraph 7. The Contract is subject to the condition that Seller be able to procure and provide to Buyer a release or waiver of any option of first refusal or other preemptive rights of purchase created by the Declaration of Condominium within the time established by the Declaration. In the event the Condominium Association requires personal appearance of Buyer and/or additional documentation, Buyer agrees to comply with same.

4. In the event the documents and information provided by Seller disclose that the existing improvements are in violation of existing rules, regulations, or other restrictions or that the terms and conditions contained within the documents would restrict Buyer's reasonable use of the premises or would increase the financial considerations that Buyer would have to extend in connection with the owning of the Condominium, then Buyer may declare the Contract null and void by giving Seller written notice within seven calendar days of the receipt of the documents and information required in paragraph 3 above listing those deficiencies that are unacceptable to Buyer, and thereupon all earnest money deposited by Buyer shall be returned to Buyer upon written direction of all Parties to Escrowee.

IF WRITTEN NOTICE IS NOT SERVED WITHIN THE TIME SPECIFIED, BUYER SHALL FOR ALL PURPOSES BE DEEMED TO HAVE WAIVED THIS CONTINGENCY, AND THE CONTRACT SHALL REMAIN IN FULL FORCE AND EFFECT.

5. Seller shall not be obligated to provide a condominium survey.

6. Seller shall provide a certificate of insurance showing Buyer (and Buyer's mortgagee) as insured.

7. For informational purposes, §22.1 of the Condominium Property Act provides, in pertinent part:

(a) In the event of any resale of a condominium unit by a unit owner other than the developer such owner shall obtain from the Board of Managers and

shall make available for inspection to the prospective purchaser, upon demand, the following:

(1) A copy of the Declaration, Bylaws, other condominium instruments and any rules and regulations.

(2) A statement of any liens, including a statement of the account of the unit setting forth the amounts of unpaid assessments and other charges due and owing as authorized and limited by the provisions of Section 9 of this Act or the condominium instruments.

(3) A statement of any capital expenditures anticipated by the unit owner's association within the current or succeeding two fiscal years.

(4) A statement of the status and amount of any reserve for replacement fund and any portion of such fund earmarked for any specified project by the Board of Managers.

(5) A copy of the statement of financial condition of the unit owner's association for the last fiscal year for which such statement is available.

(6) A statement of the status of any pending suits or judgments in which the unit owner's association is a party.

(7) A statement setting forth what insurance coverage is provided for all unit owners by the unit owner's association.

(8) A statement that any improvements or alterations made to the unit, or the limited common elements assigned thereto, by the prior unit owner are in good faith believed to be in compliance with the condominium instruments.

(9) The identity and mailing address of the principal officer of the unit owner's association or of the other officer or agent as is specifically designated to receive notices.

(b) The principal officer of the unit owner's association or such other officer as is specifically designated shall furnish the above information when requested to do so in writing and within 30 days of the request.

(c) A reasonable fee covering the direct out-of-pocket cost of providing such information and copying may be charged by the association or its Board of Managers to the unit seller for providing such information.

B. [11.46] Attorney Letter to Client Regarding Buyer's Obligations and Required Documents

To: [client]

Re: [seller name] to [buyer name] Real Estate Transaction

Dear _____:

This will confirm that you have retained the law firm of _____ to represent you in connection with your purchase of _____, _____, Illinois. We have inspected the contract and find it to be satisfactory [but do] [and do not] find it necessary to make changes. We are pleased to advise you that in representing you in this transaction, you will be working with attorney _____, whose practice is concentrated solely in handling real estate transactions.

As your attorneys, we will review the evidence of title to be provided to you, all documents submitted by the seller relating to the transfer of the property, and the mortgage documents you will sign. We will clear normal title objections, reconcile all financial aspects of the transaction, and provide you with information concerning the treatment of the purchase from a federal income tax standpoint. An experienced real estate attorney from our firm will also attend the closing with you.

At your earliest convenience, please supply our office with the name, address, and telephone number of the lending institution with which you will be placing a loan application, as well as the name of your loan officer and processor. Also, please send a copy of the good-faith estimate of closing costs you will receive at the time you apply for the loan.

Please note that paragraph _____ of the contract allows you until _____, 20__, in which to secure your mortgage approval. If you do not have confirmation of approval of your loan without conditions by _____, 20__, you should contact me, and I will attempt to secure an extension of time for you. If you let the deadline date pass without proper notification to the seller and if you are subsequently denied financing, you will jeopardize your earnest money deposit. If we are not able to reach you as the deadline approaches, we will automatically send a written request for an extension.

In order to help speed the approval process, it is imperative that you maintain contact with your lender periodically to check on the status of your loan approval. It is important that you send me a copy of the approval or commitment letter issued by your lender once your loan has been approved.

Upon receipt of loan approval, we will be in a position to actually schedule the closing date and time. A few days prior to the closing date, you should call the electric, gas, and water utility companies to provide them with your name, the address of the property, and the possession date. Service will then be properly transferred to your name on that date without interruption.

[You should be advised that the (City) (Village) of _____ has in effect a Real Estate Transfer Tax on property purchased in the (City) (Village), the payment of which is the obligation of the buyer. The tax rate is \$_____ per \$1,000, and this tax must be paid prior to closing. You should forward your check in the amount of \$_____ to my office by _____, 20__. The check should be made payable to the (City) (Village) of _____. Upon receipt of your check, we will take care of payment of the transfer tax for you.]

At the closing, you will be required to provide your lender with a homeowner's insurance policy in the amount of the replacement value of the premises or the amount of your mortgage, whichever is greater. If you are purchasing a condominium, the Association will provide proof of insurance of the structure; however, you should also purchase owner's insurance. Your insurance representative should be given the name and address of your lender so the policy will reflect coverage for the loan. You should contact your loan officer to ascertain the exact name and address of the lender to be used on the policy since that information may not be the same as that of the local office of your lender. The insurance policy should be obtained well enough in advance of closing to allow the insurance company sufficient time to prepare the policy itself since your lender will not accept a binder as evidence of coverage. You will need to bring the insurance policy as well as a paid receipt for the first year's premium to the closing.

The seller is under obligation to surrender possession of the premises to you in the same condition as it was in on the date you signed the contract. In addition, paragraph _____ of the contract requires that all systems, equipment, and appliances be in operating condition at closing. You have the right to inspect the premises just prior to closing to ascertain that the obligations of the seller have been met. Arrangements for your inspection can be made directly with your realtor.

At the closing, you will be required to pay the balance of your purchase price, your loan charges and fees, and other closing costs, which must be by cashier's or certified check made payable to you. Personal checks, company checks, and money market fund checks are not acceptable. [However, the proceeds check from the sale of the prior residence may suffice. Please check with us on this point prior to closing.] I will provide you with the figure for the funds necessary for closing one day prior to the closing date. In the meantime, if an estimate of the funds required for closing would be helpful to you, you may feel free to call, and we will arrive at an estimated figure together. It is a good idea for you also to bring your personal checkbook to the closing so that you can cover any unanticipated expenses.

Our usual fee for work of this type is \$_____, plus disbursements for out-of-pocket expenses, if any. In the event unusual matters arise and I am called on to perform additional services, any extra time will be billed at my regular hourly rate. Payment of your attorneys' fees will be expected at the time of closing.

Please feel free to contact me or _____ directly at any time you have questions regarding your purchase. Thank you for the opportunity to be of service to you.

Sincerely,

C. [11.47] Certificate of Insurance

CONDOMINIUM CERTIFICATE OF INSURANCE

[name and address of insurance company]

[agent's name, address, and phone] **This Certificate of Insurance is issued as a**

matter of information only and confers no rights on the Certificate Holder.

Effective Date: _____, 20__ __ **New Ownership/Occupancy**
____ **Change of Ownership/Occupancy**

CERTIFICATE HOLDER(S):

Unit Owner's name and address or unit designation number:

Unit Owner's mortgagee name and address Loan No.

Unit Owner's contract of sales name and address

(This is to certify that the Unit Owner is insured under a policy issued to the Insured named below that is in force at this time.)

INSURED:

[condominium association's name and address]

[mortgagee's name and address]

[kind of insurance]

Policy Number: _____

Policy Effective Date: _____, 20__

Policy Expiration Date: _____, 20__

SECTION I — BUSINESS PROPERTY:

___ **Special Form** ___ **Named Perils Form** \$ _____ **Deductible**

Property Covered Valuation of Covered Property Limits of Insurance*

Building(s) ___ **Replacement Cost** \$ _____

 ___ **Actual Cash Value** \$ _____

Business Personal

Property ___ **Replacement Cost** \$ _____

 ___ **Actual Cash Value** \$ _____

* **Condominium Association's limits. (The Unit Owner is covered as a percentage of the**

total, as the Owner's interest may appear.)

SECTION II — BUSINESS LIABILITY AND MEDICAL PAYMENTS:

Coverage Limits of Insurance

Bodily Injury & Property Damage \$ _____ each occurrence** \$ _____ aggregate**

Medical Payments \$ _____ each person

Consult the Condominium Association's policy for insurance afforded Unit Owners.

****Products — Completed Operations aggregate is equal to each occurrence limit and is included in policy aggregate.**

UNIFORM CONDOMINIUM ACT STATES:

Subject to the provisions of the Mortgage Clause, all proceeds covering any loss of property collectively owned shall be payable to Insurance Trustee, named below:

[insurance trustee's name and address]

Date Issued: _____, 20__

Authorized _____ **Representative:**

D. [11.48] Waiver Letter from Association

Date: _____, 20__

Re: [property address]
[owner]

TO WHOM IT MAY CONCERN:

Please be advised that the _____ Association does not have a right of first refusal and does hereby waive same.

The above captioned owner, as a member of the Association, is obligated to pay the sum of \$ _____, representing all assessments, charges, fees, and costs owed to the Association. Owner currently owes the Association \$ _____.

It is the Seller's responsibility to provide the Buyer with copies of the Declaration, Bylaws, and rules and regulations. Additional copies can be obtained for \$ _____ per set.

If you have any questions, you can contact _____ at _____.

Respectfully submitted,

_____ Association

By: _____

Title: _____

E. [11.49] Affidavit in Lieu of Survey/Affidavit of No New Improvements

AFFIDAVIT IN LIEU OF SURVEY/AFFIDAVIT OF NO NEW IMPROVEMENTS

The undersigned owners of record and sellers as described in [name of title company] file No. _____, being first duly sworn, depose and say:

___ PLEASE CHECK FOR AFFIDAVIT IN LIEU OF SURVEY

That we did not receive any survey at the time we purchased the property, nor have we subsequently obtained a survey, or if we did receive a survey, we are now unable to locate it. In addition, we have been advised by our lender that they do not have a survey in their files; OR

___ PLEASE CHECK FOR AFFIDAVIT OF NO NEW IMPROVEMENTS

That there have been no new improvements made to the property commonly known as _____ since the survey of said property dated _____, 20__, and issued by _____, which is attached hereto, was made;

AND, to the best of our knowledge, we certify that the improvements (house, garage, outbuildings, fences, etc.) on the subject property are within the boundary lines, if any, of said property; that there are no encroachments (house, garage, outbuildings, fences, walkways, driveways, eaves, drains, etc.) of improvements on adjoining property onto the subject property; and that we know of no assertion being made by any adjoining property owner nor by us against any adjoining property owner or property. (Use space below to explain any disputes.)

This affidavit is given to [name of title company] as an inducement to issue extended coverage on the proposed Owner's and Loan Policies over questions of survey, encroachments, and easements not shown of record.

Subscribed and sworn to before me
this _____ day of _____, 20__

Date: _____, 20__

Notary Public

F. [11.50] Release of Lien

**RELEASE OF LIEN
IN THE OFFICE OF THE RECORDER
OF THE COUNTY OF _____, ILLINOIS**

The _____ Condominium Association,) **Release of Lien**
an Illinois not-for-profit corporation,)
 Claimant,) Document No. _____
 v.)
_____,)
 Debtor.)

The _____ Condominium Association, an Illinois not-for-profit corporation,
hereby files a Release of Lien on Document No. _____.

Said Lien was filed in the office of the Recorder of the County of _____,
Illinois, on _____, 20__, in the amount of \$_____, and said Lien has
been fully and completely satisfied, and any right, title, interest, claim, or demand whatsoever
Claimant may have acquired in, through, or by said Lien of the following described property,
to wit:

[legal description of property]

and commonly known as [complete address]

Permanent Index Number: _____

IS HEREBY RELEASED.

_____ Condominium Association

By its attorney: _____.

STATE OF ILLINOIS)
)
 ss.
COUNTY OF _____)

[Name of attorney], being first duly sworn on oath, deposes and says [he] [she] is the attorney
for the _____ Condominium Association, an Illinois not-for-profit
corporation, the above named Claimant, that [he] [she] has read the foregoing Release of Lien
and knows the contents thereof, and that all statements therein contained are true to the best
of [his] [her] knowledge.

Attorney

Subscribed and sworn to before me
this _____ day of _____, 20__.

Notary Public

This instrument prepared by:
[attorney information]

G. [11.51] Hold-Harmless Agreement

HOLD-HARMLESS AGREEMENT

**HOLD-HARMLESS AGREEMENT by and between _____
Association, an Illinois not-for-profit corporation (Indemnitor), and _____
Title Company (Company);**

WITNESSETH:

**WHEREAS, [name of owner] has contracted to sell Unit No. _____, [street address, town],
Illinois, in the _____ Association to [name of buyer]; and**

**WHEREAS, in order to induce the Company to issue its owner's and mortgagee policy
and insure over the title exceptions relative to the lien filed by _____ as
Document No. _____ in the office of the Recorder of the County of
_____, Illinois, the Indemnitor has offered to indemnify the Company and
hold the Company harmless from any and all liability for the aforestated lien.**

**NOW, THEREFORE, Indemnitor agrees to indemnify the Company against loss that
may result from the aforesaid title exception, and the Indemnitor hereby indemnifies and
agrees to hold the Company harmless from all liability, loss, or damage of any nature,
including attorneys' fees and expenses incurred in enforcing this agreement, either now or in
the future, and against loss that may result from the lien.**

**IN WITNESS WHEREOF, the parties have executed this Agreement and affixed their
respective seals, either in person or by their duly authorized officers or agents, this _____
day of _____, 20__.**

COMPANY: INDEMNITOR:

_____ Association

By: _____ **By:** _____

Title: _____ **Title:** _____

H. [11.52] Waiver of Implied Warranty of Habitability

WAIVER AND DISCLAIMER OF IMPLIED WARRANTY OF HABITABILITY

**This Waiver-Disclaimer is attached to and made a part of a certain Contract dated
_____, 20__, by and between _____ (Seller-Builder) and _____**

(Purchaser) for the sale of the property commonly known as _____ and the construction of a single-family home on the property (Contract).

1. **IMPLIED WARRANTY OF HABITABILITY:** Illinois law provides that every contract for the construction of a new home, as here, carries with it a warranty that when completed the home will be free of defects and will be fit for its intended use as a home. This law further provides that this Implied Warranty does not have to be in writing to be a part of the contract and it covers not only structural and mechanical defects, such as may be found in the foundation, roof, masonry, heating, electrical, and plumbing systems but also covers any defect in workmanship that may not easily be seen by the purchaser. However, the law also provides that a seller-builder and purchaser may agree in writing, as here, that this Implied Warranty is not included as a part of their particular contract.

2. **WAIVER-DISCLAIMER:** Seller-Builder, _____, hereby disclaims and Purchaser, _____, hereby waives the Implied Warranty of Habitability described in paragraph 1 above and they acknowledge, understand, and agree that it is not a part of the Contract.

3. **EXPRESS WARRANTIES:** Included in the Contract are express written warranties, which are contained in paragraph(s) _____ on page(s) _____. Seller-Builder agrees to comply with the provisions of the express warranties, and Purchaser accepts the express warranties as a substitute for the Implied Warranty of Habitability described in paragraph 1 above.

4. **EFFECT AND CONSEQUENCES OF THIS WAIVER-DISCLAIMER:** Purchaser acknowledges and understands that if a dispute arises with Seller-Builder and the dispute results in a lawsuit, Purchaser will not be able to rely on the Implied Warranty of Habitability, described in paragraph 1 above, as a basis for suing Seller-Builder or as the basis of a defense if Seller-Builder sues Purchaser. Purchaser may, however, rely on the express written warranties referred to in paragraph 3 above.

Date: _____, 20__

[I] [We], as Purchaser, have read and do understand this document and [I] [we] have had an opportunity to seek professional advice concerning its contents.

Purchaser: Seller-Builder:

Date: _____, 20__ Date: _____, 20__

I. [11.53] Sale of Unit 12345

Dear Condominium/Townhome Association:

Please be advised that I represent the seller of the above-captioned unit. A contract for sale has been consummated and a tentative date for closing has been scheduled for January 1, 20__.

We will be needing the following documents for closing:

- 1. A copy of the Declaration, Bylaws and rules and regulations. (Some associations charge ridiculous fees for duplicating these documents. Have your client make sure they do not already have copies to avoid paying these costs.)**
- 2. A letter waiving any right of first refusal with a statement of assessments owed and any outstanding liens, fees or charges owed.**
- 3. Disclosure of any anticipated capital expenditures or special assessments contemplated within the next two fiscal years.**
- 4. The most recent statement of financial condition of the association.**
- 5. A certificate of insurance naming _____ as the purchaser and _____ as a mortgagee.**
- 6. A statement that all additions and improvements to the unit are in compliance with the condominium documents.**

If the buyer is required to attend an interview or orientation session, please let this letter serve as authorization to schedule an appointment as soon as possible.

Please forward same to the undersigned with a bill for all charges no later than December 1, 20__, so they can be paid directly to the association from the proceeds of the closing.

Thank you for your prompt attention to this matter.

Sincerely,

Attorney at Law