# JOINT EDITORIAL BOARD
# *for*
# UNIFORM REAL PROPERTY ACTS

March 31, 2019

Dawn Bauman
Community Associations Institute
6402 Arlington Blvd., Suite 500
Falls Church, VA 22042

Re: Montana SB 300 and Its Comparison to Uniform Condominium Act and Uniform Common Interest Ownership Act

Dear Dawn:

Thank you for your inquiry regarding the provisions of Montana Senate Bill 300, and whether its provisions are consistent with the provisions of the Uniform Condominium Act (UCA) and the Uniform Common Interest Ownership Act (UCIOA), which are the primary uniform laws promulgated by the Uniform Law Commission regarding common interest community governance.

SB 300 provides, in pertinent part:

> **Section 1. Homeowners' association restrictions—property rights.** (1) A homeowners' association may not enter into, amend, or enforce a covenant or condition in such a way that imposes more onerous restrictions on a member's basic rights to use the member's real property than those restrictions that existed when the member acquired the member's interest in the real property, unless the member who owns the affected property expressly agrees to the restriction in writing at the time of the adoption or amendment of the covenant or condition.

A homeowners association ("HOA") can only enforce covenants that are created by virtue of a properly recorded declaration of restrictive covenants ("declaration"). If the declaration does not permit amendments to the covenants, then as a general rule, an HOA could not modify the covenants to impose a new covenant or amend an existing covenant—either to make it more or less restrictive—unless that covenant was approved by 100% of the affected homeowners. However, nearly all declarations that govern modern common interest communities contain an amendment provision. An amendment provision permits the modification or amendment of any of the existing covenants in the declaration, as long as the modification or amendment is approved by the required percentage of the homeowners within the community. Some declarations require that modifications be approved by a majority of the homeowners, while other declarations may require supermajority approval.

Section 1 of SB 300 would preclude an HOA from enforcing certain covenant amendments, even though such amendments were approved by the requisite percentage of owners specified in the declaration. For example, suppose that an

existing declaration contained a covenant that permitted an owner to rent the owner's unit only with the prior written approval of the HOA. Suppose further that 85% of the owners in the HOA voted to amend the covenant to prohibit any leases of less than three months in duration (and that the declaration's amendment provision required only a 2/3 supermajority for amendments). Section 1 of SB 300 would preclude the HOA from enforcing the amendment against the nonconsenting owners, even though the declaration provided clear notice to any buyer that it (a) limited an owner's right to lease any unit and (b) could be amended to make it even more restrictive.

You advised that testimony offered in support of SB 300 represented to Montana legislators that SB 300 was consistent with the provisions of the UCA and UCIOA. This representation is incorrect. Neither the UCA nor UCIOA is consistent with SB 300. Under UCIOA § 2-117(f):

> An amendment to the declaration may prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons who may occupy units only by vote or agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, unless the declaration specifies that a larger percentage of unit owners must vote or agree to that amendment or that such an amendment may be approved by unit owners of units having at least 80 percent of the votes of a specified group of units that would be affected by the amendment.

The UCA provision is comparable. UCA § 2-117(f). In the leasing hypothetical set forth above, the UCA or UCIOA would permit the HOA to enforce the amended covenant against nonconsenting owners, because the amendment was approved by more than 80% of the owners. By contrast, Section 1 of SB 300 would preclude the HOA from enforcing the covenant against nonconsenting owners. As such, any representation that SB 300 is consistent with UCA and UCIOA is inaccurate.

Sincerely,

*R. Wilson Freyermuth*

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Executive Director, JEBURPA

*The JEBURPA is comprised of representatives from the American Bar Association's Real Property, Trust and Estate Law Section, the American College of Real Estate Lawyers, and the Uniform Law Commission, as well as liaison members from the American College of Mortgage Attorneys, the American Land Title Association, and the Community Associations Institute. The JEBURPA advises the Uniform Law Commission as to prospective uniform law projects relating to real estate, and seeks to promote law reform by encouraging states to adopt existing uniform and model real estate laws. In judicial opinions involving the interpretation of provisions of UCIOA, courts have credited JEBURPA interpretations of UCIOA provisions as authoritative. See, e.g., SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014); Chase Plaza Condo. Ass'n, Inc. v JPMorgan Chase Bank, N.A., 98 A.3d 166 (D.C. 2014).*