LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

September 15, 2023

Friday, September 15, 2023

Persons Present:

Braun, Jessica G.
Breard, L. Kent
Castle, Marilyn
Crigler, James C., Jr.
Curry, Kevin C.
Davrados, Nick
Doody, Kathleen
Doguet, Andre'
Drury, Trey
Freel, Angelique D.
Gregorie, Isaac M. "Mack"
Hall, Senae D.
Hamilton, Leo C.
Hampton, Bruce
Hawthorne, George "Trippe"
Hayes, Thomas M., III
Holdridge, Guy
Holthaus, C. Frank
Lonegrass, Melissa T.
Lovett, John A.
Maldonado, Hailey K.
Maloney, Marilyn C.
Manning, C. Wendell
Norman, Rick J.
Price, Donald W.
Ramsey, Regina
Richardson, Sally Brown
Saloom, Douglas J.
Sossamon, Meera U.
Swinburn, Chastity R.
Talley, Susan G.
Thibeaux, Robert P.
Title, Peter S.
Tucker, Zelda W.
Viator, James E.
Waller, Mallory C.
Weems, Charles S., III
Ziober, John David

President Thomas M. Hayes, III called the September Council meeting to order at 10:00 a.m. on Friday, September 15, 2023 at the Louisiana Supreme Court in New Orleans. After asking the Council members to briefly introduce themselves, the President called on Professor Sally Brown Richardson, Reporter of the Property Committee, to begin her presentation of materials.

Property Committee

Professor Richardson began her presentation by introducing House Concurrent Resolution No. 102 of the 2018 Regular Session, which urges and requests the Law Institute to study provisions of law on property in order to make recommendations regarding the classification of modular homes as movable or immovable property and to develop the legal procedure for attaching them to land and securing them as loan collateral. She provided background information to further the Council's understanding of the differences between the existing definitions of manufactured, modular, mobile, and factory-built homes and their classification for sales tax versus other purposes. The Reporter explained that the immediate concerns prompting the passage of the resolution are whether modular homes are covered under the Manufactured Home Property Act and the need for consistent classification for title, insurance, and financing purposes.

Moving to the materials, the Reporter noted the terminology changes in lines 6 through 10 of page 7, which the Council quickly approved as follows:

PART IV. ~~MANUFACTURED~~ FACTORY-BUILT HOME PROPERTY ACT

§1149.1. Short title

This Part shall be known and may be cited as the "~~Manufactured~~ Factory-Built Home Property Act."

In the definitions section, the Reporter specifically noted the addition of the all-encompassing term "factory-built home" and the use of the federal definition for

"manufactured home." Professor Richardson also reiterated the application of the Act only to residential dwellings. The Council questioned why the manufacturer's certificate of origin should include all subsequent transfers in perpetuity and noted that in practice, the certificate usually only shows the transfer from the manufacturer to the original purchaser, who is often a wholesaler, and then the title shows each subsequent transfer. For clarity and title purposes, the Reporter agreed to amend the proposal to restore the existing law, which requires the certificate of origin to only include transfers up to the title applicant. Next, one Council member was concerned that the definition of "mobile home" leaves a gap as to dwelling units constructed to voluntary standards after 1974. The Reporter suggested adding language to eliminate the two-fold requirement and to ensure that any mobile home built to voluntary standards is covered regardless of the year in which it was constructed. After discussion, all of the following were approved:

§1149.2. Definitions

In this ~~Chapter~~ Part, the following ~~words and phrases shall~~ terms have the following ~~meaning ascribed to them~~ meanings unless the ~~content or subject matter~~ context clearly indicates otherwise:

(1) "Certificate of title" means a vehicle certificate of title as provided for in R.S. 32:701 et seq.

(2) "Commissioner" means the director of public safety or ~~his~~ any duly assigned assistants, as provided for in R.S. 40:1301, who, in addition to all other powers, shall have all powers granted and perform ~~such~~ the duties ~~as are~~ imposed on the commissioner by this ~~Chapter~~ Part.

(3) "Dealer" means any person engaged in the business of buying, selling, or exchanging ~~manufactured~~ factory-built homes ~~which~~ that are subject to license ~~under~~ in accordance with Chapter 4 of ~~the~~ Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950.

(4) "Factory-built home" means a manufactured home, mobile home, or modular home as defined in this Part.

(5) "Manufactured home" means a ~~mobile home or residential mobile home~~ residential dwelling unit that is factory-built and is constructed to standards and codes as promulgated by the United States Department of Housing and Urban Development (HUD), under the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 5401 et seq., as amended, and that bears the permanently affixed seal of the United States Department of Housing and Urban Development.

(6) "Manufacturer" means any person regularly engaged in the business of ~~assembling manufactured~~ building or constructing factory-built homes, ~~either within or without~~ whether in or outside of this state.

(7) "Manufacturer's certificate of origin" means a certificate on a form to be prescribed by the commissioner, and furnished by the manufacturer, showing the original transfer of a ~~new vehicle~~ factory-built home from the manufacturer to the original purchaser, and each subsequent transfer ~~between distributor and dealer, dealer and dealer, and dealer to owner,~~ through and including the transfer to the title applicant.

(8) "Mobile home" means a ~~factory assembled structure or structures transportable in one or more sections, with or without a permanent foundation, and includes the plumbing, heating, air conditioning, and electrical systems contained therein~~ residential dwelling unit that is factory-built and is constructed to voluntary standards or constructed prior to the passage of the National Manufactured Housing Construction and Safety Standards Act of 1974.

(9) "Modular home" means a residential dwelling unit that is factory-built and is constructed to the International Residential Code standards as adopted by the Louisiana State Uniform Construction Code Council.

~~(10) "Mortgage" shall include a chattel mortgage, a security agreement under Chapter 9 of the Louisiana Commercial Laws (R.S. 10:9-101, et seq.), and mortgages upon immovable property.~~

~~(11) "Person" means any individual, firm, corporation, partnership or association.~~

~~(12) "Residential mobile home" means a manufactured home designed to be used as a dwelling, and may include a mobile home or a residential mobile home that has been declared to be a part of the realty as provided in R.S. 9:1149.4.~~

~~(13) "Retail installment contract" means an agreement entered into pursuant to Chapter 10 of Title 6 of the Louisiana Revised Statutes of 1950~~.

~~(14) "Vehicle" means mobile homes and residential mobile homes.~~

In reviewing the Revision Comments to the definitions, the Council was concerned that Comment (b) could be interpreted in two ways. The Reporter explained the intent to address situations in which a factory-built piece is added to a building that is not covered by this Act by tracking the language in Civil Code Article 466. One Council member suggested substituting the term "structure" for "building," and another suggested that the word "complete" could be troublesome. After further discussion, the following Comments were approved:

Revision Comments – 2024

(a) This provision does not change the law but clarifies that the statute applies to all forms of factory-built housing and aligns the definitions of factory-built housing with the Uniform Standards Code for Manufactured and Modular Housing, *see* R.S. 51:911.21 *et seq.*

(b) A factory-built addition, such as an individual room, incorporated into a building may be a component part of that building pursuant to C.C. Art. 466.

(c) The terms "manufactured home", "mobile home", and "modular home" refer to any home that is built in a factory even though the factory-built components of that home may be assembled on the land where the factory-built home is located.

Professor Richarson next introduced R.S. 9:1149.3, which is the default rule that factory-built homes are classified as movables. With a few changes to the Comments, all of the following were approved:

§1149.3. Classification

~~Except as otherwise provided in R.S. 9:1149.4, when any manufactured home shall be is moved to and located in or upon any immovable property, or installed therein or thereon in a manner which, under any law, might make the manufactured home an immovable or component part thereof, the manufactured home shall be and will remain a movable subject to the provisions of Chapter 4 of Title 32 of the Louisiana Revised Statutes of 1950 governing its mortgage or sale and subject to the provisions of Chapter 9 of Title 10 of the Louisiana Revised Statutes and Chapter 10 of Title 6 of the Louisiana Revised Statutes of 1950 and Code Book III, Code Title XII, Chapter 2 of Title 9 of the Louisiana Revised Statutes of 1950 governing its financing. Title to the vehicle shall not pass~~

~~by the sale of the immovable property to which it has been actually or fictitiously attached, whether such sale be conventional or judicial. No sale or mortgage of or lien upon the immovable property shall in any manner affect or impair the rank or privilege of a chattel mortgage or security interest under Chapter 9 of the Louisiana Commercial Laws on such manufactured home, or the remedies of the holder thereof for its enforcement.~~

Except as otherwise provided in R.S. 9:1149.6, when any factory-built home is moved to and located upon immovable property, the factory-built home shall remain classified as a movable.

Revision Comments – 2024

(a) This provision does not change the law. Prior to the passage of the Manufactured Home Property Act, a factory-built home was considered a building under general provisions in the Civil Code and accordingly was classified as immovable. *See* C.C. Arts. 463, 464; Ellis v. Dillon, 345 So. 2d 1241, 1243 (La. App. 1st Cir. 1977). The Manufactured Home Property Act altered the default classification of manufactured homes to movable. This provision retains the classification of manufactured homes as movables and clarifies that all factory-built homes, including modular homes, are classified as movables.

(b) This provision maintains the movable classification for a factory-built home placed on land or another foundational structure such as a concrete slab. This provision does not alter the default classification provided in the Civil Code for factory-built components added to an existing building. Such factory-built components that are incorporated into a building may be component parts of that building pursuant to C.C. Art. 466.

(c) As a movable, a factory-built home is subject to all provisions of law relating to movable property, such as but not limited to provisions pertaining to sales, security interests, and taxes. Accordingly, ownership of the factory-built home does not automatically transfer by the sale of the immovable on which the factory-built home is located. Similarly, a sale or mortgage of the immovable on which the factory-built home is located shall not affect any security interest attached to the factory-built home.

Moving to R.S. 9:1149.4, the Reporter drew attention to the fact that this proposal is new and attempts to correct one of the biggest issues surrounding factory-built homes. She explained that many people buy factory-built homes and place them upon immovable property but never file an act of immobilization - a declaration of the intention for the home to remain permanently attached to the immovable property. Thereafter, when the immovable property is sold, the act of sale does not include a description of the factory-built home, but the home is automatically included in the sale and transferred without a clear juridical act because it is a movable. Professor Richardson noted that the proposal creates a legal remedy through a presumption that the seller's interest in the movable factory-built home is transferred with the sale of the immovable property, subject to the rights of third persons. One Council member clarified that this presumption is not a classification of the home, and the Reporter agreed. The Council also discussed whether issues with the land, such as redhibition, are covered if the intent of the presumption is to simply transfer ownership. The Reporter explained that the presumption will eventually merge with acquisitive prescription law, but it is not addressing other encumbrances such as usufructs or servitudes. The following was approved:

§1149.4. Presumption of grant of interest

It shall be presumed that any transfer of an immovable on which a non-immobilized factory-built home is located includes all of the transferor's interests in the factory-built home subject to the rights of a third person in the factory-built home.

Revision Comments – 2024

(a) This provision is new. It is modeled after R.S. 9:2971 and 2981 that provide the transfer of land presumptively includes any interest the transferor has in any water bodies or roads located on the land. The presumption herein, like the presumptions in the aforementioned statutes, applies only to the transferor's interest in the factory-built home.

(b) This provision applies subject to the rights of third persons. *See* C.C. Art. 3343 (defining third persons). When a third party, such as a lender, has an interest in a factory-built home, and the land on which the factory-built home is transferred, the presumption that the transferor's interests in the factory-built home have also been transferred applies, but any rights the transferee acquires in that factory-built home remain subject to the rights of the third party.

(c) The law on acquisitive prescription of movables applies to factory-built homes given their classification as movables. *See* C.C. Arts. 3489, 3490, 3491. The presumption provided in this section does not alter the classification of the factory-built home as movable.

(d) The presumption provided in this section applies only to non-immobilized homes. Immobilized homes that have become component parts of an immovable transfer with the immovable pursuant to general provisions of the Civil Code such that no presumption is required. *See* C.C. Arts. 469 and 493.1.

Professor Richardson then ceded the podium, and after breaking for lunch, the President called on Professor Lloyd "Trey" Drury, III, Reporter of the Corporations Committee, to begin his presentation of materials.

Corporations Committee

Professor Drury began his presentation by providing the Council with a brief history of the Committee's work revising Louisiana law on limited liability companies based on the Uniform Limited Liability Company Act (ULLCA), the Louisiana Business Corporations Act (LBCA), and other relevant provisions. The Reporter asked the Council to turn to the "Part I" materials to consider R.S. 12:22-105, on page 22 of the materials, and specifically Subsection F which had been recommitted during the Committee's last presentation. Professor Drury reminded the Council that under ULLCA, operating agreements can be written but also oral or tacit, and he noted that the proposed revision adopts this rule but also explained that existing Louisiana law requires certain things to be done in a written operating agreement. Thus, to continue to protect sophisticated parties who want to ensure that the written agreement is the only agreement and that no changes can be made orally or tacitly, the Committee's previous Reporter had proposed the concept of an exclusive operating agreement similar to unanimous governance agreements under corporate law. The Council had rejected the idea of exclusive operating agreements and the formalities surrounding them after discussing general provisions of the Civil Code and the parol evidence rule concerning oral amendments to written contracts. During the Council's most recent discussion of this issue, however, it had recommitted the provision with instructions to draft language that would allow members of an LLC to enter into a written operating agreement with an integration clause specifying that the agreement is the sole agreement and that any amendments to the agreement must be made in writing; in such cases, the parol evidence rule will not apply and no oral or tacit amendments will be honored. Professor Drury explained that the Committee's attempt to do so appeared in Subsection F on page 22, and a motion was made and seconded to adopt the provision as presented with the inclusion of the bracketed "expressly" language on line 12. The motion passed with no objection, and the adopted proposal reads as follows:

R.S. 12:22-105. Operating agreement; scope, function, and limitations~~; exclusive operating agreement~~

* * *

F. Members of a limited liability company may enter into a written operating agreement that expressly limits or prohibits oral or tacit amendments. In that case, no evidence may be admitted in a proceeding to establish that the written operating agreement was modified by a subsequent oral or tacit amendment.

Next, the Reporter directed the Council's attention to the "Part II" materials, specifically to R.S. 12:22-205 on page 18. Professor Drury explained that this provision had previously been approved by the Council, but since that time, the Committee had agreed to change "secretary" to "certifying official" in conformity with the Council's policy discussion and expressed preference of retaining the concept of certifying officials. A motion was made and seconded to adopt the provision as presented, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 12:22-205. Annual report for secretary of state

A. Each ~~corporation~~ limited liability company shall deliver to the secretary of state for filing an annual report that sets forth all of the following information:

* * *

(6) ~~The total number of issued shares, itemized by class and series, if any, within each class.~~ The name of the certifying official of the company, if any.

* * *

The Council then turned to the "Part III" materials to consider these provisions for the first time, and the Reporter explained that §301 of ULLCA on page 2 had been eliminated by the Committee as confusing because it appears to say that members and managers are not agents or mandataries of the LLC, when really the intent is to ensure that members and managers are not provided apparent authority that grossly exceeds their actual authority to act on behalf of the LLC. Nevertheless, the powers, duties, and responsibilities of members and managers are provided in greater detail in Part IV of the revision, and provisions of mandate law generally will address any gaps that may arise. As a result, the Committee determined that this provision was unnecessary, and the Council agreed with the recommendation to exclude it.

Professor Drury next asked the Council to turn to R.S. 12:22-302, on page 16 of the materials, which provides for the appointment of a certifying official to authenticate the records of the company. The Reporter explained that under existing Louisiana law, this can be done in the public records in the articles of organization for purposes of reliance on the designation by third parties, but the Committee also recommends permitting this to be done in the annual report as well. Additionally, the Committee recommends retaining the provision that allows third parties to rely on certifications made by members of member-managed LLCs or managers of manager-managed LLCs in the absence of a certifying official. A motion was made and seconded to adopt Subsection A as presented, and after a brief question about the convention of using the full "limited liability company" vs. the shorter "company," the motion passed with no objection. A motion was also made and seconded to adopt Subsection B, and after discussion about the bracketed "or annual report" language on line 11 of page 16, including the fact that the certifying official's information will be added to the secretary of state's form, the Council agreed to adopt Subsection B with the inclusion of the bracketed language. A motion was then made and seconded to adopt Subsection C as presented, and after a brief discussion concerning the fact that the list included on lines 16 through 19 is illustrative, the motion passed with no objection. R.S. 12:22-302 as adopted by the Council reads as follows:

R.S. 12:22-302. Appointment, responsibility, and authority of certifying official

A. A limited liability company may appoint one or more natural persons to be its certifying official. The certifying official of a company shall have the authority and responsibility for authenticating the records of the company.

B. Any certifying official of a limited liability company shall be appointed by the members in a member-managed company or by the managers in a manager-managed company and may be named in the articles of organization or annual report.

C. Persons dealing with a limited liability company may rely upon a certificate of the certifying official of the company, or, if the company has no certifying official, upon a certificate of one or more managers in a manager-managed company or members in a member-managed company, authenticating records of the company, including those that establish that a person is a member or manager of the company, the percentages of ownership held by each member, and that the members or managers of the company have taken the actions to authorize an act or transaction of the company as described in the certificate.

The Council then considered §303, on page 24 of the materials, and Professor Drury explained that this is another provision of ULLCA that the Committee recommends excluding from the revision, since we do not currently have statements of denial in Louisiana nor did the Committee adopt the very detailed list concerning statements of authority found in ULLCA. The Council approved the exclusion of this provision before turning to R.S. 12:22-304, on page 25 of the materials, concerning member liability.

The Reporter explained that Subsection A provides that a member is not personally liable for the acts or obligations of the LLC and that this provision was based on the corresponding Section of the LBCA, R.S. 12:1-622(B) on page 32 of the materials. One Council member questioned why the "solely by reason of being or acting as a member" language on lines 7 and 8 of page 25 was being excluded, and Professor Drury explained that the liability shield under existing law, which contains similar language, is not working well, and that the focus is on *personal* liability. The Director questioned why "acts or" was included as opposed to "obligations" being sufficient, since "act" is very broad, is not defined, and is likely to create an obligation anyway. After additional discussion, a motion was made and seconded to delete "acts or" from line 7 of page 25, and the motion passed over a few objections. Another Council member questioned why managers were being excluded from this provision, and Professor Drury responded that the duties and responsibilities of managers are covered in greater detail elsewhere in the revision, particularly in Part IV. After discussion concerning notions of corporate veil-piercing and the similar treatment of members and corporate shareholders and managers and corporate directors or officers, the Reporter agreed to ask the Committee to review Part IV to ensure that the liability of managers does not need to be addressed in this provision. The Council then returned to its previous discussion of restoring the "solely by reason of being or acting as a member" language on lines 7 and 8 or including "in such capacity" from line 34 of page 30 in existing law. Ultimately, a motion was made and seconded to adopt Subsection A as previously amended with the removal of "acts or," and the motion passed with no objection. The Council also asked that the Committee review these changes to determine if a corresponding amendment to the relevant provision of the LBCA is needed, and Professor Drury agreed.

Turning to Subsection B of R.S. 12:22-304, on page 25 of the materials, the Reporter explained that this provision on veil-piercing is modeled after corporate veil-piercing principles. After the Council agreed to delete "act or" on line 13 for purposes of consistency with Subsection A, a motion was made and seconded to adopt Subsection B as amended, and the motion passed with no objection. R.S. 12:22-304 as adopted by the Council reads as follows:

R.S. 12:22-304. Liability of members ~~and managers~~

~~(a)~~ A. ~~A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company.~~ A member ~~or manager~~ of a limited liability company is not personally liable~~, directly or indirectly, by way of contribution or otherwise,~~ for ~~a debt, obligation, or other liability~~ the obligations of the company ~~solely by reason of being or acting as a member or manager~~. ~~This subsection applies regardless of the dissolution of the company.~~

~~(b)~~ B. The failure of a limited liability company to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a member ~~or manager~~ for a ~~debt,~~ an obligation~~, or other liability~~ of the company.

Professor Drury then asked the Council to consider the "Part IV" materials, beginning with R.S. 12:22-401 on page 2. With respect to Subsection A, the Reporter explained that the Committee had engaged in a thorough discussion concerning the formation of an LLC by a single member and whether that person can "agree" with himself, ultimately deciding to use "intended" on line 8 of page 2 instead. The Council discussed whether "formation" or "organization" was more appropriate with respect to the creation of the LLC and agreed to use "organization" throughout. Motions were then made and seconded to adopt Subsections A and B as amended, and these motions passed without objection. Turning to Subsection C, the Reporter explained that this provision sets forth the manner in which a person can become a member of an LLC after it has been created, and he noted that the reference to Part 10 on line 30 is to the provisions on merger and the reference to R.S. 12:22-703 on line 34 is to the provisions on dissolution. One Council member questioned whether someone could inherit a deceased member's interest in the LLC, and Professor Drury responded that the heir would become a transferee with economic rights but would not be a full-fledged member of the LLC unless admitted by the remaining members. After agreeing to change "each" to "any" on line 26, a motion was made and seconded to adopt Subsection C as amended, and the motion passed with no objection. With respect to Subsection D, the Reporter explained that no monetary contribution or economic rights are required in order for a person to become a member of an LLC, and after discussion, the Council agreed to delete the bracketed "nonequity" language on line 36. One Council member then suggested deleting "either of" on the same line, and after debate, a motion was made and seconded to this effect and passed by a narrow margin. A motion was then made and seconded to adopt Subsection D as amended, and the motion passed over one objection. R.S. 12:22-401 as adopted by the Council reads as follows:

R.S. 12:22-401. Becoming a member

~~(a)~~ A. If a limited liability company is to have only one member upon ~~formation~~ organization, the person becomes a member as ~~agreed~~ intended by that person ~~and the organizer of the company~~. That person ~~and the organizer may be, but need not be, different persons. If different, the organizer acts on behalf of the initial member~~ may act as the organizer of the company or may cause another person to act as organizer.

~~(b)~~ B. If a limited liability company is to have more than one member upon ~~formation~~ organization, those persons become members as agreed by the persons before the ~~formation~~ organization of the company. ~~The organizer acts on behalf of the persons in forming the company and may be, but need not be, one of the persons.~~ One or more of the parties to the agreement may act as the organizer of the company or may cause another person to act as organizer.

~~(c)~~ C. After ~~formation~~ organization of a limited liability company, a person becomes a member in any of the following manners:

(1) ~~as~~ As provided in the operating agreement~~;~~.

(2) ~~as~~ As the result of a transaction effective under ~~[Article]~~ Part 10 of this Chapter.~~;~~

(3) ~~with~~ With the affirmative vote or consent of all of the members~~;~~ ~~or~~.

(4) ~~As~~ As provided in ~~Section 701(a)(3)~~ R.S. 12:22-703(A)(3).

~~(d)~~ D. A person may become a member without doing the following:

(1) ~~acquiring~~ Acquiring a transferable interest~~; or~~.

(2) ~~making~~ Making or being obligated to make a contribution to the limited liability company.

Turning to R.S. 12:22-402, on page 10 of the materials, concerning the form of contributions made to the LLC, a motion was quickly made and seconded to adopt the provision as presented. The motion passed with no objection, and the adopted proposal reads as follows:

R.S. 12:22-402. Form of contribution

A contribution of a member to a limited liability company may consist of ~~property transferred to, services performed for, or another benefit provided to the limited liability company or an agreement to transfer property to, perform services for, or provide another benefit to the company~~ cash, property, services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

Finally, the Council considered R.S. 12:22-403, on page 12 of the materials. With respect to Subsection A, one Council member questioned the use of "excused" rather than "extinguished" on line 5 of page 12, and Professor Drury responded that this provision was based on ULLCA but that he had no issue with using the civil law terminology. A motion was made and seconded to replace "excused" with "extinguished," and the motion passed with no objection. The Council then adopted Subsection A as amended with all in favor. Turning to Subsection B, one Council member suggested that the Committee and Reporter should consider including a Comment explaining that this provision is not intended to limit the company's right to require specific performance of the contribution. The Reporter agreed, and the Council subsequently adopted this provision as presented. With respect to Subsection C, one Council member questioned why this provision was not simply included in Subsection D, and the Reporter responded that Subsection C was ULLCA language whereas Subsection D was taken from Delaware, and the Committee attempted to mirror the uniform structure to the extent possible; additionally, Subsection D provides for consequences that are negative as to the member, whereas the compromise of a contribution would be a more positive result. After additional discussion concerning whether the unanimity requirement in Subsection C can be varied, which is addressed in the ULLCA Comment on lines 33 through 39 of page 13 that should perhaps be included in the Louisiana revision, a motion was made and seconded to delete "only" on line 11 of page 12. The motion ultimately failed to pass with only a handful in favor, and a motion was then made and seconded to adopt Subsection D after deleting the second instance of "agreement" on line 16 of page 12. That motion passed with all in favor, and the adopted proposal reads as follows:

R.S. 12:22-403. Liability for contributions

~~(a)~~ A. A person's obligation to make a contribution to a limited liability company is not ~~excused~~ extinguished by the person's death, disability, termination, or other inability to perform personally.

~~(b)~~ B. If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited liability company to contribute money equal to the value of the part of the contribution ~~which~~ that has not been made.

~~(c)~~ C. The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all of the members. ~~If a creditor of a limited liability company extends credit or otherwise acts in reliance on an obligation described in subsection (a) without knowledge or notice of a compromise under this subsection, the creditor may enforce the obligation.~~

D. The operating agreement of a limited liability company may specify consequences for a member's failure to fulfill an obligation to make a contribution to the company. The consequences may include any of the following measures:

(1) Reduction of the defaulting member's proportionate interest in the company.

(2) Subordination of the defaulting member's interest.

(3) The forced sale of the defaulting member's interest.

(4) Forfeiture of the defaulting member's interest.

(5) The lending by other members of the amount necessary to meet the defaulting member's commitment, and the imposition on the defaulting member of a repayment obligation to the lending members on terms specified or authorized in the operating agreement.

(6) The redemption or sale of the defaulting member's interest at a stated price or at a price set by appraisal or formula.

(7) Any other consequence.

At this time, Professor Drury concluded his presentation, and the President called on Professor Sally Brown Richardson to resume her presentation of materials on behalf of the Property Committee.

Property Committee

Returning to the materials on factory-built homes, Professor Richardson introduced R.S. 9:1149.5, which was approved as presented with little discussion. The Reporter then began examining R.S. 9:1149.6 relative to the process for immobilization. She noted that classification becomes important to secure a mortgage and noted changes from present law to only require filing in the conveyance records and elimination of the authentic act requirement. The Council then discussed the change in terminology from "recording" and "recordation" to "filing" and found that the owner files and the clerk records. Next, one Council member questioned why immobilization cannot occur if a third person has rights in the factory-built home, and the Reporter listed the seizure of movables and the ranking of creditors as two examples. Members of the Council also wondered about the consequences of filing a declaration when third-party rights do exist, such as in the case of a lessee, and discussed invalidity, nullity, enforceability, and after-acquired rights. The Council then recommitted the proposal with instructions that the Committee further discuss third-party rights that are not recorded and the extinguishment of third-party rights as barriers to immobilization. Professor Richardson noted the same issues relative to third parties will arise with respect to R.S. 9:1149.7, so that proposal was recommitted as well.

At this time, Professor Richardson concluded her presentation, and the Friday session of the September 2023 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

September 16, 2023

Saturday, September 16, 2023

Persons Present:

Blunt, Shelton D.
Braun, Jessica G.
Breard, L. Kent
Doody, Kathleen
Gregorie, Isaac M. "Mack"
Hall, Senae D.
Hampton, Bruce
Hawthorne, George "Trippe"
Hayes, Thomas M., III
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Norman, Rick J.
Roussel, Randy
Saloom, Douglas J.
Sossamon, Meera U.
Talley, Susan G.
Tucker, Zelda W.
Waller, Mallory C.
Ziober, John David

President Thomas M. Hayes, III called the Saturday session of the September Council meeting to order at 9:00 a.m. on Saturday, September 16, 2023 at the Louisiana Supreme Court in New Orleans. The President quickly called on Mr. Randy Roussel, Reporter of the Common Interest Ownership Regimes Committee, to begin his presentation of materials.

Common Interest Ownership Regimes Committee

Mr. Roussel began his presentation with a brief review of the history of the resolution that prompted this project and reminded the Council of the recommended Planned Community Act bill that was submitted to the legislature during the 2022 Regular Session. At the encouragement of the author of the bill, the Reporter met with various trade associations and national public interest groups to further review the recommendations and offer compromises. The presentation today includes proposed changes to accommodate the various interests as noted in the provided memorandum.

Directing the Council to pages 6 and 9, the Reporter noted the addition of "invitees of lot owners" to clarify that invitees may also use the common elements and limited common elements. After noting that the addition does not impair the association's ability to establish rules regarding the conduct of invitees, the provisions were approved as presented. With little discussion, the Council also quickly approved the new definition of "electronic means," on page 8 of the materials, as follows:

§1141.2. Definitions

* * *

(15) "Electronic means" means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient of the communication. A meeting conducted by electronic means includes a meeting conducted via teleconference, videoconference, internet exchange, or other electronic methods. Any term used in this definition that is defined in R.S. 9:2601, the Louisiana Uniform Electronic Transactions Act, shall have the meaning set forth in that act.

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Moving to the provision on applicability, R.S. 9:1141.3, the Reporter explained the interest groups' request for clarification that the proposal will not apply to associations

that are not planned communities. For example, neighborhoods that exist and have associations and restrictions are not planned communities unless they have the authority to impose assessments. Subsection E is existing law and included in the new proposal for further clarification. Mr. Roussel noted that Subsection F was added to ensure that existing associations that are not nonprofit corporations, as required by this proposal, will not be required to change their legal identity. Likewise, Subsections G and H make explicit that amendments, assessments, and the ownership of common areas and limited common areas are not altered by the passage of this Act. The following were approved:

§1141.3. Applicability

* * *

E. The existence, validity, or extent of a building restriction affecting any association property shall be liberally construed to give effect to its purpose and intent.

F. This Part shall not affect the ownership of common areas and limited common areas in a planned community in existence prior to the effective date of this Act.

G. This Part shall not require an association existing prior to the effective date of this Act to amend or change its organizational structure or its community documents.

H. Nothing in this Part shall require a planned community in existence prior to the effective date of this Act to alter its previously established method of amending community documents or calculating and voting on assessments.

* * *

Revision Comments – 2024

This Act applies to newly formed planned communities. This Act is not intended to require existing planned communities to alter their community documents, their method of preparing budgets, or the method of allocating assessments. This Act applies to existing planned communities only if, and to the extent that, their community documents fail to address matters covered by this Act. Existing planned communities may amend their community documents to conform with the provisions of this Act.

The Reporter then explained that on page 18, the Committee recommends requiring the recorder to index terminations in the same manner as amendments and plats. The Council approved this proposal without discussion and moved to R.S. 9:1141.6(F). This proposal again reiterates that existing planned communities are not required to amend their methods of calculating or allocating assessments to comply with the passage of the proposed Act. The Council approved the following:

§1141.6. Allocation of common expense liabilities, common surpluses, and voting interest in the association

* * *

F. Nothing in this Section shall require a planned community in existence prior to the effective date of this Act to amend its method of calculating or allocating assessments.

Mr. Roussel next moved to R.S. 9:1141.14 relative to amending the declaration and other community documents and use restrictions. Subsection A adds a default rule for amending the declaration by majority vote if voting requirements are not otherwise provided. For certain actions, however, such as creating special declarant rights and

altering the allocation of expenses and surpluses, a supermajority or other vote may be required. The Council questioned the difference in the voting requirements, and the Reporter explained that the threshold depends upon if the vote is taken at a meeting and as a member of the association versus a vote of all lot owners. The following were approved:

§1141.14. Amendment to declaration; community documents; use restrictions

A. Except as otherwise provided in this Section or R.S. 9:1141.7, the declaration may be amended only by the vote requirement provided in the declaration. If a voting requirement is not provided in the declaration, and except as required in Subsection B or C of this Section, the declaration may be amended by a majority vote. ~~If any lots in the planned community are used for residential purposes, the declaration may not provide for amendment by less than a two-thirds vote.~~

B. ~~No amendment to the declaration may create or increase special declarant rights; increase the number of lots, change the allocation of common expense liabilities, common surpluses, or voting interest in the association for a lot; extend the time limitations specified in R.S. 9:1141.7(C); or create additional development rights without the approval of the association by a supermajority vote.~~ Approval of the association by a supermajority vote is required to amend the declaration to create or increase special declarant rights; increase the number of lots not otherwise reserved or permitted by the community documents; change the allocation of common expense liabilities, common surpluses, or voting interest in the association for a lot; extend the time limitations specified in R.S. 9:1141.7(C); or create additional development rights.

* * *

The Reporter then explained that in Paragraph (C)(6), the intent is to require a two-thirds vote to adopt more burdensome construction and design restrictions for new renovations, repairs, or construction, but not to require existing lots to remove or renovate existing structures. The Council questioned how Subparagraphs (a) and (b) will work together and emphasized the need for clarity. The Reporter agreed to redraft for review by the Committee and presentation at a future Council meeting. However, the Council did approve the deletion of Paragraph (C)(7) as unnecessary because the default rule is by majority vote.

Mr. Roussel next drew attention to another changed voting requirement, in R.S. 9:1141.15 and the Comment, for the termination of a planned community. Subsection A and the Comment were approved as follows:

§1141.15. Termination of the planned community

A. A planned community may be terminated only by a ~~supermajority~~ two-thirds vote, or any greater percentage that the declaration specifies, and with any other approvals required by the declaration. ~~The declaration may provide for termination with less than a supermajority vote if all of the lots are restricted exclusively to nonresidential uses.~~

* * *

Revision Comments – 2024

(a) Termination of a planned community requires the support of two-thirds of the votes in the association, or such greater percentage as the community documents may require.

Moving to page 35 and R.S. 9:1141.19, the Reporter noted the need to change line 14 from discretionary to mandatory to further the definition of planned communities and the application of the Act. The following was adopted:

§1141.19. Organization of lot owners association

A lot owners association shall be organized as a nonprofit corporation authorized to do business in Louisiana and shall have the authority to impose assessments on its members. The membership of the association at all times consists exclusively of all lot owners or, following termination of the planned community, of all former lot owners entitled to distributions of proceeds in accordance with R.S. 9:1141.15 or their heirs, successors, or assigns. The association shall have a board of directors. The association shall be formed prior to filing the declaration for registry.

Next, the Reporter asked the Council to review R.S. 9:1141.20(A)(1)(c) and explained its inclusion in this proposal due to the passage of other legislation during the 2022 Regular Session. Although the proposal requires associations to establish procedures to address lot owner complaints, it does not mandate what the procedures must include or any timeframes for action. The following was adopted:

§1141.20. Powers and duties of the lot owners association

A.(1) Except as otherwise provided in this Part, the association shall do the following:

* * *

(c) Establish reasonable procedures for addressing and resolving written complaints from lot owners. The procedures may include any of the following:

(i) A sample form for lodging the written complaint.

(ii) How complaints are delivered to the association.

(iii) Written acknowledgement of receipt of the complaint.

(iv) The inclusion of specific related documentation including the law or regulation applicable.

(v) The requested action or resolution.

(vi) How to request additional information.

(vii) The time period for responding.

(viii) Disposition of the complaint for lack of information.

(ix) Notice of the date, time, and location the complaint will be considered.

(x) Written notice of the final determination.

(xi) Contents of the final determination including date of issuance and any applicable citations, laws, or regulations.

* * *

In R.S. 9:1141.20(A)(2) and (D), the Reporter explained that the proposal adds a cross-reference to Part III of this Chapter which encompasses the 2022 legislation relative to the imposition of fines and the enforcement thereof for either the failure to pay

assessments or a violation of a regulation. These changes were approved by the Council as presented. On page 38, the Reporter simply added a clarification to ensure that lessors, by not including certain provisions in the lease, may not avoid the enforcement of rules and regulations against occupants. This change was also approved as presented. In Subsection E, Mr. Roussel explained that the proposal attempts to provide the association with flexibility in granting waivers under certain circumstances, such as a disability or other special need, without resulting in a blanket waiver of a rule or regulation for every lot owner. The Council was concerned that the proposed language will cause increased litigation and possibly subject members of the board of directors to liability under nonprofit corporation law for actions determined to be arbitrary or capricious. After further discussion, the Reporter agreed to redraft this Subsection for reconsideration by the Council at a future meeting.

Moving to R.S. 9:1141.23(B), Mr. Roussel explained that the Committee added language regarding the fact that collateral assignments are not transfers of special declarant rights. The Council adopted the following language:

§1141.23. Transfer of special declarant rights

* * *

B. In the event of partial transfer of special declarant rights, except in the event of a collateral assignment pursuant to the granting of a security interest, those special declarant rights not transferred terminate on the effective date of the transfer. The transferee of partial rights is only responsible for those obligations related to the special declarant rights that are transferred. A collateral assignment with the granting of a security interest is not a transfer until the secured party exercises its right to seize the rights in accordance with law.

* * *

The last section reviewed was R.S. 9:1141.26, and the Reporter informed the Council of the request to increase the notice period from ten days to thirty days for annual meetings and meetings of the board of directors, as well as the use of "electronic means" as the defined term. With little discussion, the changes were approved by the Council as presented.

At this time, Mr. Roussel concluded his presentation, and the September 2023 Council meeting was adjourned.

Jessica G. Braun

Mallory C. Waller