

FREQUENTLY ASKED QUESTIONS

BY

***Association Owners, Association Boards &
Association Community Managers***

Second Edition

Produced by

Colorado Legislative Action Committee

ROCKY MOUNTAIN CHAPTER
&
SOUTHERN COLORADO CHAPTER



August 2008

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FREQUENTLY ASKED QUESTIONS
By Associations

Produced by:
Colorado Legislative Action Committee of the Community Associations Institute
Assembled: September 2006 - August 2008

FOREWORD: The Legislative Action Committee of the Community Associations Institute has assembled some frequently asked questions along with responses in an attempt to assist CAI members, Community Managers, Owners and Association Boards in their understanding and adherence to operational issues in light of the effects of various recently enacted legislative measures. These answers are general guidelines and are not intended for specific Associations. These opinions are not legal opinions and should not be substituted for such. In the event of specific questions, an experienced Association attorney should be contacted. A listing of licensed, qualified attorneys experienced in Association law can be obtained from CAI on their website, www.hoa-colorado.org or the southern Colorado chapter's website at www.caisoco.org.

OVERVIEW: Associations govern and operate common interest communities and are generally nonprofit corporations comprised of the owners as the members. The owners have a right to know the business being transacted in *their* Association and the affairs of the Association should be as transparent as possible.

2006-08 CLAC members: Chris Pacetti, Chair; Jerry Boswell; Bill Buzbee; Jim Cowell; Gary Debus; Todd Fackler; Molly Folly-Healy; David Graf; Rita Guthrie; John Hammersmith; Chris Herron; Elina Hindley; Robert Hoehn; Rogene Howe; Beth Jones; Lynn Jordan; Cliff King; Kenton Krohlow; Suzanne Leff; Kevin Moore; Jerry Orten, Molly Ryan; Gary Tobey; Wesley Tull; Pat Wilderotter; Jesse Witt; and Ginny Zinth.

A. LEGAL ISSUES AND INTERPRETATIONS

1. What are the governing documents?

Governing documents refer to the Declaration, the map or plat, the articles of incorporation, the bylaws and any rules, regulations, policies or procedures, including any architectural guidelines or other documents that govern the operation of a common interest community or determine the rights and responsibilities of owners/members. The seller or seller's agent typically furnishes the governing documents to a buyer. The seller may obtain the governing documents and other documents of the community from the Association. Many Associations also have these documents on their websites or copies can usually be obtained at reasonable cost from the community manager.

It is important that the members of the Association Board and the owners understand the contents of the Association's governing documents. An Association's Declaration is at the top of the governing document 'pyramid' and delineates the basic powers of the Association. The Association's bylaws explain how the Association governs and operates, such as when meetings are to be held and what quorums are necessary. The articles of incorporation create and maintain the Association as an entity and separate legal person. The Rules and Regulations, architectural guidelines and Association policies are often adopted by the Board to clarify instances where the Declaration is silent or ambiguous. Rules, regulations, guidelines and policies may be the most flexible or easily changed of the governing documents.

2. What is the hierarchy of the governing documents?

In any situation where there is a disagreement or conflict between documents, the document that is the senior in the hierarchy of documents prevails. Generally the higher up the governing document is in the hierarchy the more difficult it is to change the provisions of the document. Provisions for amendment are generally contained in the document itself. The declaration is viewed as covenants, agreements or contracts between the owners and the Association and subject to the general provisions of law governing covenants. The owner agrees to the terms of the declaration by purchasing a unit in a common interest community.

- GENERAL HIERARCHY OF LAWS AND OF THE GOVERNING DOCUMENTS
 - Federal and State Laws—(Constitutions, Federal and State, and State and Federal statutes i.e., CCIOA)
 - Governing documents
 - The Declaration (Declaration of Covenants, Conditions and Restrictions or CCR's)
 - Map or plat of the Community
 - Articles of Incorporation
 - Bylaws
 - Rules and Regulations, Architectural Guidelines and Association Policies and Procedures

3. What State Laws primarily affect Associations in Colorado?

There is one primary state statute that affects Associations in Colorado: the Colorado Common Interest Ownership Act (CCIOA), which is found in CRS 38-33.3. There are also a broad variety

of State laws that affect the operation of Associations: State Insurance, labor, land use, foreclosure, debt collection, nonprofit corporation law, and many other laws. Generally, a properly qualified community manager and/or attorney know which laws apply to the Associations or know where and when to refer a question to a qualified attorney.

4. Is it important that Association Board members understand the various governing documents?

It is very important but not mandatory that Association Board members read and understand the various governing documents. Board members are elected to 'fiduciary' positions, *a position of trust*. If a Board member does not comprehend these documents, it may be difficult to make decisions in the best interest of the members (the owners), a position for which they have volunteered.

Frequently, the Declaration or other governing documents contain a 'duties' or 'powers and duties' section for Board members. A typical duty is to enforce and uphold the governing documents. In addition to the governing documents, it is important for Board members to read and understand the annual budget, reserve studies, management reports and legal opinions that affect the Association's operations, master plans and any other significant documents of the Association.

5. What Association records are accessible to the various owners?

a. Does it depend on where they are kept?

b. If individual Board members hold records, do personal privacy laws protect them?

Generally, all records of the Association are accessible to owners. A few exceptions to this broad right of inspection exist such as for legally privileged information. A fundamental principle surrounding Association records is that the Association is a conduit of and to the members (the owners). Provisions in the law and also in most governing documents detail how an owner may access Association records.

If the record was created for the use of, or by the Association, it is likely an Association record and in most cases will be available to all owners. In many Associations, the records are in the custody of the manager. In some Associations, the records may be scattered among several custodians and an individual Board member cannot shield an owner's access to Association records by claiming that the record sought is in the custody of another, thus prohibiting the owner from access to the document(s).

6. Are the records of delinquent assessments owed the Association accessible to owners?

With few restrictions, owners have a right to inspect the records of an Association. Generally, owners may examine the detailed records of accounts receivable and assessments receivable (including delinquencies) due to the Association. Some Associations have adopted records inspection policies that limit the inspection of records relating to delinquent accounts (and other generally private matters) so that the rights of owners to inspect these records are balanced with the Association's and individual owner's need and desire to keep confidential information confidential (i.e., social security numbers, banking information, etc.). Furthermore, owners are not generally entitled to examine otherwise legally privileged information and records (such as legally privileged correspondence from the Board's attorney to the Board) involving opinions of the Association's attorney or delinquent assessments receivable to the Association.

7. Is it really true that we now only need 67% affirmative votes to amend our Association's declaration, especially if our declaration states 100%? Does this mean that our declaration no longer indicates the final owner approval needed to amend it? Can state law really change our declaration?

Amending a Declaration is generally complex, can be costly, frequently involves a lengthy process, and should include the involvement of a qualified Association attorney. With certain defined limited exceptions, the Colorado Legislature has determined that the consent of 67% of the owners is the maximum amount needed to amend the Declaration and adopt a proposed Declaration amendment. The Declaration may still have the final answer to the issue of the approval required by the owners (and in fact may allow for a lower consent requirement down to a simple majority of owners), but the maximum percentage of owners needed to change the Declaration has been changed to 67%, with some exceptions. Depending on the Declaration, approval of changes by entities other than the owners, such as first mortgagees or the declarant (the developer), may also be necessary. There is also a court process by which the Declaration may be amended pursuant to section 217(7) of CCIOA.

8. Does SB-100 really supersede certain items in our Declaration? We've abided by this declaration for 25+/- years and we can't believe that the Declaration can just change like that.

SB 05-100 may or may not supersede various items contained in the Declaration of a common interest community. Some Associations, depending on when the Association was created and their particular characteristics, do not fall within the jurisdiction of all of SB 05-100 as well as parts of CCIOA or CCIOA in its entirety. This is because CCIOA has two primary applications -- one to common interest communities formed/created before July 1, 1992, and the other to those created after July 1, 1992. If the laws (SB 05-100 and SB 06-89 are now parts of CCIOA) apply, they would in fact supersede the Declarations. A qualified attorney should be consulted to determine if parts of the law supersede the Declaration in specific areas.

If the Declarations were 25 years of age or more, the operative date would be approximately 1992. This is an important date since different provisions of CCIOA apply to 'pre-1992' and 'post-1992' communities.

9. Is there a responsibility of the Association to notify renters of various issues?

The responsibility of the Association is to its membership, the owners. The owner is ultimately responsible for informing the renters of the applicable rules (found in a variety of the governing documents). Some Associations will facilitate an owner informing a renter of material business by newsletters, bulletin boards, web posting and other means. Frequently the governing documents of the Association require owners to furnish a copy of their lease or rental agreement to the Association. Renter compliance with the rules or governing documents is the responsibility of the owner.

B. EXPENSES AND FINANCES

1. Can you outline the process for the expenditure of Association funds?

The Association typically has two funds, a **GENERAL (or OPERATING)** fund and a **RESERVE** fund.

The community manager usually prepares checks for review and signature by the Board of Directors. Good business practice dictates that all checks be signed by two officers of the

Board of Directors of the Association to assure expenses have been approved by the Board of Directors.

The annual budget is for the **GENERAL or OPERATING FUND** of the Association, and the **RESERVE FUND**, and typically includes the amount set for the assessments for that year. Generally, these anticipated expenses are for current operations (water, lights, landscaping, snow removal, insurance, etc.) and for reserves. In some Associations, the single largest expense of the **GENERAL FUND** is the annual contribution to the **RESERVE FUND**.

Boards frequently transfer excess operating funds annually to the reserve fund, with the approval of the members (by vote at the annual meeting) to comply with IRS Revenue Ruling 70-604.

The long-term well-being of the buildings and grounds (or capital) portion of a common interest community or of the Association, is designed to be provided and accounted for by the **RESERVE FUND**, which fund can be supplemented by assessments (regular or special) and by any loans obtained by the Association. Generally, funds to replace common elements such as siding, concrete, roofs, asphalt, etc., may be saved in the reserve fund. It is a good management practice and many Associations are required by their governing documents to maintain a reserve fund, which is designed to maintain the integrity of the property for resale value.

A reserve study analyzes the projected costs the Association may incur and is a professional assessment of the condition of the various components of the property and their useful life. A reserve study is useful in determining what expenses should likely be made in a particular year and what contributions could be made to the **RESERVE FUND**.

When the Board approves reserve studies, the Association is in essence projecting a long-term capital budget for a number of years. The typical 'reserve study' is not done every year but should be updated every few years.

2. What is the role of budgets and reserve studies in the expenditure of Association funds?

Operating budgets provide an estimate of the upcoming year's income and expenses. In some common interest communities these operating budgets are subject to veto by a percentage of the membership at the annual meeting. In other common interest communities, approval is only required by the Board of Directors of the Association.

Estimated expenses in an approved budget allow the Association to establish the annual assessments necessary to operate the community. Depending on the governing documents, the Board may have the right to increase the assessments by any amount to meet the budget requirements; other documents limit the increase of the assessments to a certain annual percentage, or require the budget be proposed to the members and are subject to possible veto by the members.

3. Do owners have the "right" not to pay assessments (sometimes called "dues") if they don't like what is happening on the property or in the Community?

The governing documents require the payment of the Association assessments and are an independent part of the covenants or contract entered into upon purchasing the property.

If an owner is displeased with the conduct of the affairs of the Association, an often recommended solution is to become involved with the Association, including serving on the Board of Directors or committees, or pursue the many other remedies available under law.

4. May the Association Board automatically suspend the voting rights of an owner if the owner is delinquent in his or her assessments?

The Board may only suspend voting rights for an owner who is delinquent in assessments and, in some cases, for violation of the covenants or rules and regulations, if the authority to do so is set forth in the governing documents. In such cases, it is generally advisable to have current information at the meeting.

C. INSURANCE

1. Can an owner file a claim against an insurance policy purchased by the Association without going through the Community Manager or Board of Directors?

SB 06-89 clarified that an owner must first file a claim in writing with the community manager and/or the Association Board requesting that a claim be filed against the master insurance policy for the Association. The community manager and/or Board then has 15 days to respond in writing if they are not going to submit a claim, including the reason(s) why. The owner also has to grant reasonable access to their unit to the Association's insurance representative to inspect the damage. Obviously, if there is an immediate issue like a fire, a sewer backup or water break, the community manager would typically handle the problem, with or without initiating a claim. The intent of Senate Bill 06-89 was to allow the Association the right to screen any claims that may not be covered under the Association's insurance policy and to allow the Association to respond to a claim without filing a claim with the insurer. For example, claims below the Association's deductible or claims that do not fall under an insured peril under the master policy are all examples of why the community manager or board members may not want to submit the claim. If the owner still believes they have a claim after the response they receive from the Association, and the subject matter of the claim falls within the Association's insurance responsibilities, they can then submit it directly to the insurance agent/company.

2. Won't owner claims against insurance purchased by the Association impact insurance premiums of the Association?

They may. SB 06-89 attempted to address this problem in CCIOA and insurance statutes of the State by indicating "the Association's insurer, when determining premiums to be charged to the Association, shall not take into account any request by a unit owner for clarification of coverage".

3. Generally, how does insurance operate in an Association? What does the Association insure and what does the owner insure?

The Board of Directors purchases insurance annually for the Association that covers items required under the governing documents. This may include the buildings (if required) in a condominium or townhome community, personal property of the Association, general liability for the common areas, fidelity coverage for the monies of the Association, directors and officers or professional liability coverage, and whatever additional coverage the governing documents require. The governing documents will typically dictate what coverage the Board should purchase and for what coverage the individual unit owner is responsible.

It is important for owners to maintain their own insurance to cover items that are the owner's responsibility, such as general liability within the owner's property, and this is typically detailed in the Declaration. Insurance companies generally issue policies based on the Declaration and then adjust claims based on the policy issued. (Maintenance requirements and insurance requirements can be treated differently under the governing documents. For example, if your stove breaks down, it is probably your responsibility to replace it; but if the building burns down, and the Declarations allow, the insurance company may replace the stove when rebuilding the structure.) Typically, an owner should obtain and maintain at least an 'HO6' policy. The 'HO6' should include at least these basic coverages:

- Unit coverage
- Personal property
- Liability coverage
- Loss assessment

The unit coverage should be for the limit necessary to cover items specified in the Declaration as the responsibility of an owner (i.e., owner installed improvements or betterments). Sometimes this limit needs to include improvements, carpeting, appliances, etc. Personal property coverage should include all furnishings, kitchenware, linens, clothing, etc. This coverage should be written on a replacement cost basis. The unit owner needs to purchase liability insurance for anything that occurs within their unit/lot. Finally, loss assessment coverage applies if the Association assesses an owner when the property remains uninhabitable while being repaired, for any uninsured portion of a claim, or for the deductible portion of the claim. Many HO6 policies include \$1,000 loss assessment coverage but often have a sub-limit if the coverage is going toward paying the Association's deductible. Each unit owner should review their personal assets and consider purchasing a personal umbrella policy.

The above are just basic coverages; loss of use and other coverages are also available. If renting the unit, an owner should also consider purchasing a rental condominium policy (landlord's policy). Owners should always seek the help of a qualified insurance professional when determining what coverage and limits are needed or recommended.

4. How much insurance does an owner need against special assessments?

The answer depends on a number of factors including the age of the community, the condition of the community, the funding and adequacy of the capital reserves, and other variables. How much of the risk has the Association been able to transfer, or chosen to transfer, onto an insurance company? For example, does the Association maintain, repair, replace and improve roofs and also have a wind and hail deductible? If so, what is the condition of the roof? Does the Association have law and ordinance coverage that will pay for code upgrades in the event of a fire? Remember, the basic HO6 policy usually includes a limit for loss assessment coverage to \$1,000. The unit owner can purchase higher limits, but it is important to realize that most HO6 policies have a sub-limit of a \$1,000 to \$1,500 if the assessment is going to cover a deductible or a claim that could have been covered by insurance. Owners should check with the Association or their personal professional insurance agent to determine risk and vulnerabilities of owners. Owners should be aware that the consultations recommended are 'fee based' or based on premiums that may be charged to the Owner.

D. KNOWLEDGE OF THE LAWS

1. Generally speaking, what are the responsibilities of the community manager?

The guiding document on the responsibilities of the community manager is the contract between the Association and the community manager.

The community manager generally fulfills the role of agent to the Association and Board, and administrative support to the Association and the Board of Directors. The manager is frequently responsible for keeping the records of the Association (minutes, corporate report, financial statements, owners' files, contracts, maps, etc.). The manager is likely responsible for inspecting the community for maintenance needs and compliance with community standards (rules) or other legal requirements. The manager may also be responsible for supervision of maintenance activities (planned, regular, routine, preventive, emergency) and may be responsible for communicating with the Board so that the Board can fulfill its duties to the owners. The community manager typically provides advice to the Board as to when to seek legal counsel regarding applicable statutes and laws or interpretations of the governing documents.

2. If the governing documents contain a 'duties' or 'powers and duties' section for Board members, what is the impact?

Governing documents frequently contain such a section. Additional sections may prescribe the specific duties of various officers of the Association. Similarly, when an owner purchases property in a common interest community (a *voluntary* action), they become contractually bound to the provisions of the governing documents. When a person *volunteers* to serve on an Association Board or to serve as one of its officers, the provisions of the governing documents bind their actions and conduct. Failure of individuals to adhere to the governing documents can result in losses to the community and/or the Association.

3. What happens if we don't offer some form of education to owners?

The Association may be held liable in a lawsuit brought by an owner. SB 05-100 requires education be offered annually by the Association to its members. CAI, some law firms that represent Associations and other organizations offer free or low cost education to owners and/or Board members. The education offered typically concerns a variety of topics related to the operation, laws, and regulations surrounding common interest communities and the Associations that govern and operate these communities. SB 05-100 also addressed some of these educational issues including educational cost reimbursement allowed to Board members if approved by the Board.

There is currently no governmental/regulatory agency in Colorado to enforce the education required to be offered to owners, or to enforce any of the other provisions of CCIOA or other state statutes. Thus, there are no regulatory penalties should an Association choose not to provide education to its members.

Associations should be aware that properly educated and informed Board members and owners make the operation of the community and the Association more efficient and effective. If all parties understand their rights and responsibilities, the general health of the Association will be improved.

E. FORECLOSURE LAW ISSUES

1. What are the changes to the foreclosure law beginning January 1, 2008 that may affect HOA's? Can you briefly describe those changes?

House Bill 2007-1157, effective January 1, 2008, contains numerous revisions to Colorado's foreclosure law (C.R.S. § 38-38-101, *et seq.*). The overall intent of the revisions to the law is to modernize and simplify the foreclosure process in Colorado while providing owners with a better opportunity to retain ownership of their property. The most significant changes relating to owners and homeowners are:

- i. Expansion of time in which an owner may cure the default prior to the foreclosure sale; and
- ii. Elimination of the owner's right to redeem their property following a foreclosure sale.

2. How long does a homeowner have to pay or 'cure' a lender's public trustee foreclosure before sale?

The "cure period" or the timeframe in which a homeowner may "cure" delinquencies is up to the date of a public trustee's sale. This period was increased as of January 1, 2008.

3. What notice is required to be provided to the HOA in the event that a first lien lender is commencing foreclosure proceedings? What rights does the HOA have in the event the lender is foreclosing?

Unless a proper address is recorded with the County Clerk as described herein, the association will receive no notice of the impending foreclosure and the association's interest in the property may be extinguished, perhaps forever. However, in the event proper notice of address is recorded in the public records at the appropriate County Clerk and Recorder's office, notice will be provided of the foreclosure. The HOA has the right to cure the default or the right to redeem the property should it go to foreclosure sale.

4. In general, does the HOA have any rights to recover assessments owing the HOA in the event of foreclosure on a property in the common interest community?

Yes, the Colorado Common Interest Ownership Act (CCIOA) provides an association a lien right on a unit or lot in the event of unpaid assessments (regular or special). In the event of a foreclosure, under the law, the HOA has the right to recover six months of assessments. This is known as the 'super lien' and was established for the protection of owners who are members of HOA's.

5. What sort of "address notice" should the HOA maintain on file with the appropriate County authorities so that other creditors notify the association of foreclosure action?

In order to ensure your community association receives notices of foreclosures on homes located in your association, the association should take the following steps:

- i. Seek the assistance of qualified legal counsel.
- ii. A notice of address should be recorded in the public records at the County Clerk and Recorder's Office of the County where your association is located that provides notice of the address where your association will receive notices of foreclosure per the Declarations.
- iii. Your association should determine where the association would like to receive notices of foreclosure. (Associations may prefer the community manager and/or legal counsel to receive such notices.)
- iv. Upon the first indication of an owner's problem in paying assessments on

a timely basis, and consistent with the association's collection policy, a Notice of Assessment Lien that includes the association's address should be recorded.

- v. Liens in your association records for past due assessments should include the address or addresses where your association would like to receive notices of foreclosure. You may also want to include your attorney's address, even if the lien also references your community manager's address.

6. Has the period of time it takes a lender to foreclose been shorter?

No, the time it takes, from start to finish is still approximately 4-1/2 months.

7. May the HOA itself commence foreclosure proceedings for dues or assessments due to the HOA?

Yes, the owners association itself may commence foreclosure proceedings, if funds are due the association. Foreclosure proceedings should not be commenced lightly and should always be done with the assistance of a qualified attorney.

8. How does an HOA initiate foreclosure proceedings for assessments owing it? When should the HOA take action?

An owners association contemplating initiating foreclosure proceedings should retain the services of a qualified attorney to assist the association. As with the management of all assessments or dues receivable due to the HOA, it is important that consistency and uniformity be practiced and policies in this area should be reduced to writing, for all owners to access, consistent with state statutes that require a collection policy.

9. Are associations always junior to lender public trustee foreclosures?

No, only the first lien holder is superior to the association, and the first lien lender is also subject to the super lien.

F. DISPUTE RESOLUTION

1. What are the processes surrounding disputes, legal proceedings and alternative dispute resolution?

Disputes arising in an Association may be handled formally or informally. If a dispute arises, it is generally wise to contact the community manager or the Association's Board to obtain a copy of any policies and procedures that may be applicable (as of January 1, 2007 a policy of this nature is required). Once obtained, or even if not available, attempts should then be made to handle the matter informally (which is generally less costly).

SB 06-89 requires that an Association must have a written policy regarding any policies and procedures governing disputes between the Association and its members, or between members and the Association. There is no requirement for the Association or any member to participate in alternative dispute resolution under SB 06-89.

Associations are required by statute to allow an owner the *opportunity* for a hearing before the Board prior to the implementation of any fine. Once disputes are within the judicial system, procedures are generally set by court rule and statute.

2. Are there means to resolve issues and disputes within HOA's or between owners and HOA's short of litigation?

Yes, in SB-06-089 (CRS 38-33.3-124) the Colorado legislature addressed the issue of costly and complex litigation and beginning 1/1/07 required HOA's to adopt a policy on the use of alternative dispute resolution techniques. The Colorado Council of Mediators supported this specific portion of the legislation. Copies of this policy should be available from your HOA or your community manager.

3. What is mediation?

Mediation is a structured process of negotiation, which uses an impartial third party, the mediator, to facilitate communication among the people who are involved in the conflict or dispute. The mediator establishes the ground rules for the process, assists the people involved in determining what is important to each of them and what needs the persons have in resolving the problem. The mediator will typically assess each party's legal basis for their position and estimate the costs in time and money to litigate the case. The mediator guides the people in identifying all of the issues, prioritizing their needs and desires, and determining what type of resolution will work best for them. The mediator does not tell people how to solve their dispute but often assists them in generating their own possible solutions, some of which may be quite creative.

4. What resources are available to homeowners and Associations for mediation and arbitration?

In addition to private mediators, some cities and counties also have mediation services; you should contact the city or county in which the parties to the dispute are located. In the metro Denver area, the University of Denver-conflict resolution institute (303-871-7685) also has resources available. Additionally the CO Council of Mediators (CCMO) works closely with CAI on these homeowner association issues. CCMO may be contacted through the website: www.coloradomediation.org. Resources are also available through the Colorado State Judicial Branch-Office of Dispute Resolution through their web site, www.courts.state.co.us.

5. Our community manager told us we needed to put a process in place for violations and assessment of fines, yet he/she won't do anything to enforce the rules. What do we do?

The community manager is correct. According to Senate Bill 05-100, Associations are required to have a Covenant Enforcement Policy in place. The Board should set clear written guidelines to include:

- a. Reporting of violations
- b. Handling of violation once reported to the Association representative
- c. Consequences if the violation is not corrected or recurs
- d. Provisions of a fine schedule

If such a formal policy for enforcing covenant violations has not been established, the community manager may be concerned with the legal ramifications of not having written

guidelines to follow and this should be discussed openly with the community manager. If a community manager does not enforce the Association covenants and/or rules *as provided in their contract* with the Association, normal contractual sanctions would apply.

G. ASSOCIATION BOARD MEETINGS

1. What may be discussed in Executive sessions of Association Boards?

Colorado Laws allow for only limited items to be discussed in executive session and the topics to be discussed must be clearly announced in advance. No decisions may be made in executive session and all decisions of the Board must be in regular session and recorded in the minutes. Pursuant to CCIOA (CRS 38-33.3-308) the following items, *after announcement to the members present at the meeting*, may be discussed in executive session:

- (a) Matters pertaining to employees of the Association, the managing agent's contract, or items involving the employment, promotion, discipline, or dismissal of an officer, agent, or employee of the Association;
- (b) Consultation with legal counsel concerning disputes that are the subject of pending or imminent court proceedings or matters that are privileged or confidential between attorney and client;
- (c) Investigative proceedings concerning possible or actual criminal misconduct;
- (d) Matters subject to specific constitutional, statutory, or judicially imposed requirements protecting particular proceedings or matters from public disclosure;
- (e) Any matter the disclosure of which would constitute an unwarranted invasion of individual privacy;
- (f) Review of or discussion relating to any written or oral communication from legal counsel.

2. What may be decided in Executive sessions of Association Boards?

Nothing--issues may only be discussed. All decisions of an Association Board must be made in regular 'public sessions' and disclosed in the minutes.

The proper procedure for calling an executive session to be recorded in the minutes is:

- That the topic to be discussed is announced
- The time the Board goes into executive session is noted
- The time and fact that the executive session is ended is noted
- The time the Board comes back into 'regular' session
- Any action to be taken or decision is noted in the minutes.
 - (a) Example: Motion Seconded and Carried that counsel is retained to proceed with legal action against the owner in violation of the covenants/Declaration.

3. Who may attend Executive sessions of Association Boards?

Any invited parties to the allowable discussion in the session may attend, i.e., professional service providers, involved owner, and manager.

4. Who may attend what portions of Association Board meetings?

All owners, and/or their legal representative, are allowed to attend any portion of the board meeting except when they are excluded due to a properly called executive session (from which they can be appropriately excluded—see above). Boards may allow non-owners to attend subject to the governing documents. Owners and their *legal* representatives and allowed guests may attend, but there is no right to participate in the board process except for the portions of the meeting so dedicated as delineated by Colorado statute.

5. Can the Association Board take action at times other than at a Board meeting?

Unless otherwise provided in the governing documents, CRS 7-128-202(1) provides that the Board may take action without a meeting, provided each and every director signs the consent and either: (a) votes in favor of the action; (b) votes against the action; or, abstains and waives the right to demand that a meeting be held.

6. Can proxies be given to individuals other than owners?

Unless the governing documents specify otherwise, Colorado law (CRS 7127-203(2) (b)) provides that anyone with legal capacity may be a proxy holder. In addition, the proxy holder may assign the proxy to another person but only if the proxy expressly grants this authority.

7. Can Directors vote by proxy at Board meetings?

Directors may vote by proxy only if the governing documents provide the authority for such voting. The Colorado Nonprofit Corporation Act (at CRS 7-128-2-5) allows directors to vote by directed proxy (specific questions) only, not general proxy. In other words, the proxy giver must direct the proxy holder to vote a specific way on a specific matter rather than giving the proxy holder the right to vote however the proxy holder sees fit.

8. Can Association Boards discuss delinquent assessments in Executive sessions?

Such discussions are not generally within the items contemplated by the Statute and should be held during the 'public' portion of the meeting, if only members are present. However, depending on the particular issue needing to be discussed, such as the course of action to be taken in litigation, to discuss strategy, or other sensitive or potentially privileged information, an Executive session might be properly called. The point of an executive session is to balance the need of the Association to keep certain matters private with the need for owners to have access to Association information. To protect against violations of fair debt collection and credit laws and the invasion of personal privacy that may occur when discussing delinquencies in an open meeting, delinquent owners should not be identified by their name. It is also the practice of some Association Boards when discussing delinquent accounts during the public portion of a board meeting to use the unit number of the owner as opposed to the name of the owner to maintain confidentiality. Caution should be used when discussing delinquent assessments receivable in front of non-members (non-owners), which could raise concerns under the Fair Debt Collection law and Fair Credit reporting laws. Caution should be used in discussions or disclosure of any identifying information such as social security numbers, banking, employment information, etc.

9. Association procedural questions and issues:

a. How do I get on the Board?

Many governing documents speak to a nominating committee. Contact the community manager or a current Board member for information. Owners may (and should be encouraged to) also attend the annual meeting where nominations are typically open and, if properly nominated, owners may be nominated from the floor

and stand for election at that meeting. Secret ballots may only be required for contested Board elections.

Individuals may also be appointed to the Board under specific circumstances (such as vacancies) as outlined in the governing documents.

b. When is the next Board meeting?

Owner attendance at Board meetings is another good way to establish a sense of community and should be encouraged. Contact the community manager, a current Board member; check the community newsletter, community website, or community bulletin board for that information. Some Boards meet monthly, quarterly and/or annually.

Boards are not generally *required* to announce regular or special Board or committee meetings, other than member meetings (i.e., the annual meeting or any special member meeting). Regardless of whether an owner becomes aware of a board or committee meeting, the owner has a right to attend board meetings.

c. Who are my neighbors and how can I contact them?

Owners have a right to review a roster of current members (owners) of *their* Association, which is to be provided by the Association upon request through the community manager or a board member, provided that the list is not to be used for commercial or improper purposes. The Association has a right to restrict certain information (telephone numbers, for instance) due to certain specific privacy statutes. Owners should be made aware that with modern technology, telephone numbers and other data might be readily accessible via other means. County records are public records and are available to anyone.

H. MAINTENANCE & OPERATIONAL ISSUES

1. What are the owner responsibilities for exterior maintenance?

This depends on the type of community and what is contained in the governing documents. In all cases, the owner should refer to the maintenance sections of the governing documents. The following is a general summary of the different maintenance responsibilities based on the types of ownership:

Single-family homes: Generally, owners are responsible for all maintenance of the exterior of the home and landscaping on their lot.

Townhomes: Generally, owners are responsible for the windows, doors and garage doors as well as all portions of the unit except the roof and exterior siding.

Condominiums: Generally, owners are responsible for the windows and doors of their unit and the interior of the air space from the drywall inward, together with all fixtures and utilities existing within the boundary of the unit or servicing the unit exclusively.

2. What are the Association responsibilities for exterior maintenance?

This depends on the type of community and what is contained in the governing documents. In all cases, the owner should refer to the maintenance sections of the governing documents.

Single-family homes: Generally, the Association is not responsible for any exterior maintenance on a single family home.

Townhomes: Generally, the Association is responsible for the maintenance of the exterior of the building including the roof and siding. The governing documents should set forth any general or specific exclusion.

Condominiums: Generally, the Association is responsible for all exterior maintenance with the exception of the windows and doors that service the unit. If the condominium complex has inside lobbies, corridors, elevators, etc., those are generally also the responsibility of the Association.

3. What do assessments pay for? (water, sewer, trash, etc)

The specific items contained in the governing documents of the Association provide the precise answer to this question in each community. Generally, it depends on the type of community and what the specific governing documents state. The following is intended to serve as a guideline and not any definitive answer for any community:

- Single-family homes: Generally speaking, assessments cover trash; maintenance of streets/sidewalks (if private); street sweeping and striping (if private); common lighting; common sewer lines (if private); pool or other recreational amenities (if any); landscaping of common areas; maintenance of mailboxes; snow removal from private streets and sidewalks that include city sidewalks that border the property; insurance for common area; perimeter fencing; entry signage; and, the clubhouse (if any). Other items covered may include the management and other fees of a community management company; a bookkeeper and/or accountant to prepare the annual tax return; and, attorney fees of the Association.
- Townhomes: Generally included in the assessments is the insurance on the exterior of the buildings and the common area; maintenance of the common areas including the common lights; swimming pools; tennis courts; exterior of the buildings, i.e. the siding, roof and garage doors; maintenance and cleaning of the sewer pipes in the common area (owners are usually responsible for the cleaning of the sewer line that serves only their unit); maintenance and replacement of the private streets and striping and sweeping of these streets; water and sewer; maintenance of the grounds, including mowing, sprinkler system, landscaping replacement, tree trimming, spraying of trees and lawns, etc.; removal of pet feces; trash and snow removal; maintenance of mailboxes; perimeter fencing; entry signage; clubhouse; the management and other fees of a community management company; bookkeeper; and, an accountant to prepare the annual tax return; and, attorney fees of the Association.
- Condominiums: The insurance on the exterior of the buildings and the common area; maintenance of the common areas including the common lights; swimming pools; tennis courts; exterior of the buildings, i.e., siding, roof maintenance and cleaning of the sewer lines in the common area (owners are usually responsible for the cleaning of the sewer line that serves only their unit); maintenance and replacement of the private streets (striping and sweeping of these streets is usually included along with the water and sewer); maintenance of the grounds including mowing, sprinkler system, landscaping replacement, tree trimming, spraying of trees and lawns, etc.; maintenance of the perimeter fence; removal of pet feces; trash and snow removal; maintenance of mailboxes; entry signage; and, clubhouse (including inside corridors, elevators and lobbies); the management and other fees of a community manager; bookkeeper; and, an accountant to prepare the annual tax return; and, attorney fees of the Association.

4. We want to sell our unit. Where does our real estate sales person or we get the information needed and required for the sale of our unit?

The community manager can usually provide or direct you to the area where you can obtain the necessary documents and disclosures. Many Associations now have Internet websites and potential sellers or owners can be directed there to obtain the documents or information they need. Most qualified real estate sales persons are generally already aware of these areas.

Providing a well maintained website has many benefits. It serves as an effective communication tool with the owners in the community; it allows prospective buyers to get a glimpse of the community and its workings; it reduces the number of telephone calls and mailings; and, it helps enable compliance with disclosure requirements of the law.

5. What is the extent of Association contracts for landscape maintenance, snow removal and the swimming pool?

Most Associations will contract for the services for which they are responsible under the governing documents. These frequently include: landscape maintenance, snow removal, swimming pool maintenance or other items. These contracts generally are bid or renewed annually by the Association's Board of Directors. Some contractors will offer a two-year or multi-year contract, and maintain their prices through the contract period to gain the benefit of the multiple year commitment of the Association as well as provide cost savings to the Association.

a. Who should shovel the walk in a snowstorm?

This would depend on governing documents and the type of community. Generally, in townhomes and condominiums, it is the Association's responsibility. In single-family homes, the responsibility may reside with the Association or the owner, as provided for in the governing documents.

b. Who should weed the flowerbed outside of the unit?

This responsibility is defined in the governing documents. Generally, in single-family homes it is the owner; in townhome and condominium communities it is usually the Association's responsibility.

6. Are community newsletters important to the operation and effectiveness of an Association?

One of the most important tasks of an Association Board or community manager is to establish a sense of community among the owners. A regular community newsletter informs owners and residents concerning:

- On-going maintenance issues;
- Community standards (rules and regulations);
- Upcoming events (meetings, social gatherings);
- The general state of the community;
- Other community issues;
- Requests for volunteers.

Communication within the community is very important and will frequently prevent confrontation and anger about board decisions on sensitive issues.

I. ARCHITECTURAL ISSUES

1. What is the ability of the owner to make exterior changes?

It is imperative that owners, prior to purchase, have a clear understanding of what they have purchased. In the case of condominiums, buyers typically purchase and are responsible for what is *inside* of the four walls. In a condominium community or townhome (or planned) community, the *general common area* consists of all property, land, buildings and amenities that are owned by *all of the members* of the Association (either directly or as members of the Association), including parking lots, greenbelts, driveways and recreational amenities. The *general common area* may not be divided and no person may attempt to partition or separate it from the ownership of a unit in the community. The *limited common area*, the exterior area appurtenant to a unit, is also typically owned by all members of the Association or the Association itself, but is reserved for use by fewer than all owners. Examples are carports, attic and backyard/patio areas. This fenced-in back yard/patio of each unit may belong to the Association and not the owner of each unit to which it is appurtenant. The Association often maintains those areas and if an owner has any desire to make any changes, they are to take written requests to the Association, typically in care of the management company, who will then present the request to the Board or to an Architectural Control Committee for review and/or approval **prior** to commencing any alteration. Any change without approval would place them in violation of their Declaration.

One frequent exception might be the maintenance of doors and windows of a unit. In most communities, the owner is responsible for repair/replacement of those items; however, when a resident desires to replace those, written requests must be reviewed by either the Board of Directors or the Architectural Control Committee (some communities do not have an Architectural Control Committee) to ensure any alterations are in compliance and consistent with existing plans. Owners should note that additions or construction regarding structural items might require local building permits.

2. How does an Association handle the architectural controls issue?

In a great number of common interest communities, the Board of Directors or the Declaration itself establishes an Architectural Control Committee. Owners with matters that pertain or might pertain to architectural issues should contact their community manager or review their governing documents for information regarding such items. In smaller communities that do not have a community manager, owners should take their written requests/plans directly to the Board of Directors to ensure compliance with the Declaration and/or rules and regulations established for the community.

3. What if someone affixes a flagpole to the siding of our building? Our rules and regulations state that nothing can be affixed to the siding? Does SB-100 overrule our rules and regulations?

Senate Bill 05-100 mandated that Associations must allow the display of the American flag on a unit owner's property, window, or balcony, *subject to reasonable regulations* on size and location as long as those regulations do not prohibit the installation of a flag or a flagpole.

Owner Associations have over time adopted rules and regulations that do not necessarily prohibit the display of the flag but indicate that owners should refrain from making penetrations in the siding of the buildings as the siding is a part of the building which constitutes the *general common area* of the community and can cause Associations undue expense for repair of the siding. Some Associations have rules governing the height or location of flagpoles and/or lighting. Associations have also encouraged owners to be cognizant of their neighbors if they attempt to drape the flag over balconies since they could obscure the view of their neighbors.

4. What are the Association’s responsibilities with respect to handicapped persons and the ADA or Amendments to the Fair Housing Act?

The Americans with Disabilities Act (the “ADA”) applies to “places of public accommodation.” Whether this would be the common area or homes within a community will be determined on a case-by-case basis. If the ADA is applicable to your community, then common areas of the community, e.g., clubhouse, mailboxes, general walkways, must be made accessible to handicapped individuals. Consult the Association’s legal counsel to determine your community’s obligation, if any, to retrofit portions of the common areas.

Handicapped accessibility into an individual unit or within that unit is the responsibility of the individual owner and at the individual owner’s expense under the governing documents and fair housing law. Fair housing law requires the Association to permit reasonable accommodations by an owner to facilitate the accessibility to their home, at their expense, but subject to Association approval for changes to common area, or subject to Association approval if there is a covenant requiring architectural review and approval first.

ENERGY CONSERVATION DEVICES:

5. I heard that the law now allows me to install a clothesline, solar panels and a windmill on my home in an HOA. Is this correct? Can the Association regulate these in any way?

HB 2008-1270 bars restrictions that effectively prohibit or unreasonably restrict the installation or use of a solar energy device, a wind-electric generator, an awning, shutter, trellis, ramada or other shade structure that is marketed for the purpose of reducing energy consumption, a garage or attic fan and any associated vents or louvers, an evaporative cooler, an energy efficient outdoor lighting device, or a retractable clothesline. These installations are only allowed on property that is wholly owned by the person making the installation.

However, the law does allow an association to adopt reasonable aesthetic provisions that govern the dimensions, placement or external appearance of these installations. Whether an association’s restriction is “reasonable” will depend on several factors, including whether the restriction significantly increases the cost or significantly decreases the effectiveness of the installation.

6. Are there other sorts of energy saving devices I can install on the exterior of my unit? What are the regulations?

The installations of other devices are regulated by the Association’s governing documents. In most cases, Associations have guidelines to govern the dimensions, placement or external appearance of any such exterior installation to assure the quality of the neighborhood appearance for the protection of all residents.

7. Can Associations regulate the installation of energy saving devices or is that illegal?

Associations can continue to regulate the installation of energy devices as to their dimensions, placement and external appearance. These regulations, generally known as architectural guidelines exist for the protection of all owners to assure a proper appearance of the neighborhood.

Homeowners should consider the potential impact of their installation on their neighbors during the design phase of their project. Plans should be submitted to the association with appropriate

time allowed for the association to review. Homeowners should be prepared to work in cooperation with the association to make modifications of the plans to make an aesthetically pleasing installation. Associations must be reasonable in their expectations of the homeowner and the cost of the modifications they might expect and be prepared to work in cooperation with the homeowner on modifications that will make for an efficient installation.