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COMMON INTERESTS

THE 2023

Legal Issue

Community Myth Busters: Informal Board Meetings are as Real as a Unicorn

Participating in a Construction Defect Claim

A Practical Approach to Board Member 'Fiduciary Duties'

HB22-1137: Foreclosure Requirements

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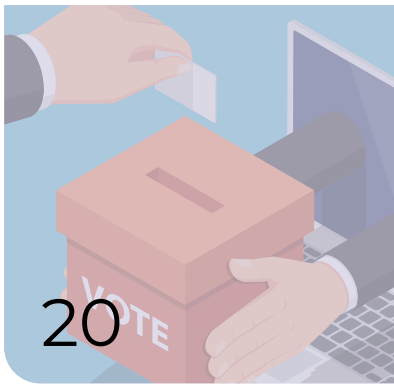

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President's Letter

Karli Phifer
Chapter President
CAI-RMC

I am honored to serve as your Chapter President for 2023. I take the role and the responsibility very seriously and look forward to maintaining engagement with chapter members and the community. It is a privilege to be part of this amazing organization as we connect, inform, and support those that live in, work for, or manage Community Associations.

Our mission, throughout the year, is to remind membership that we are all in this together. We are community. We will continue to lead and support the members of the organization through the promotion of mutual understanding and respect. It is important to me, and the Board, that together we create trust and respect amongst all of our members and that we move forward with the goal of showcasing the professionals that serve our communities.

CAI-RMC will continue to provide educational opportunities to benefit our members, including virtual programs, conferences, and networking events that cover the broad range of topics impacting our members today.

I am excited to serve the chapter with the rest of the Board and I would like to extend a warm welcome to our newly elected Board members, Devon Schad and Connie Van Dorn.

Thank you to Jeff Kutzer for being amazing at guiding the board to reach more individuals and lead them to success as Chapter President in 2022. Jeff, you have been deliberate about providing information and assistance to our members and creating a more inclusive and equal environment for everyone. With your guidance, the Board and the chapter have been deliberately focused on providing value to all our members, and I am proud this focus will continue in 2023.

Editorial Note: RBC Wealth Management was a Silver level sponsor in 2022. There was an error which excluded the company from being listed from certain printed issues. The Rocky Mountain Chapter staff apologize for this error and thank RBC Wealth Management for their Silver Level sponsorship throughout the years.

COMMON INTERESTS

Editorial Calendar

Issue	Topic	Article Due Date	Ad Due Date
April	Maintenance / Preventative / Upgrades	02/15/2023	03/01/2023
June	Insurance / Ethics	04/15/2023	05/01/2023
August	Finance	06/15/2023	07/01/2023
October	Tech / Modernization	07/15/2023	09/01/2023
December	Planning Ahead / Goals / Community Vision	10/15/2023	11/01/2023

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The 2023 Colorado legislative session is fast approaching, and the CAI Colorado Legislative Action Committee (LAC) team is already preparing to ensure that we are working with our membership to protect the interests of community associations in our state. To that end, the LAC has engaged a new lobbying team. Taylor Hickerson with Policy Matters Colorado will be our primary point of contact. She and her team have already hit the ground running.

One of the main priorities with the upcoming legislative session is to propose a cleanup bill for HB22-1137, the Homeowners' Association Board Accountability and Transparency bill. As you know, HB22-1137 added numerous burdens to community associations regarding collections, foreclosures, and covenant enforcement. We hope to beneficially modify certain sections of the bill that do more harm than good to Colorado communities and the owners within them and to have the legislature clarify other portions of the bill that passed with vague and confusing language.

We're looking for sponsors in the Senate and the House that would support working with the LAC to move toward the priorities we've heard from you, our members — the voices who matter the most. This includes, but is not limited to, the following: removing or modifying the certified mail requirements; addressing the necessity of posting notices; removing the distinction between public safety/health violations and those that are not deemed as such; and addressing the maximum cap on fines at $500 in a manner that is logical, practical, and equitable.

We expect the cleanup bill to need a significant amount of support from our membership. We will need managers and homeowner leaders at the ready to testify about the impacts that HB22-1137 has had on their communities. These impacts may include increased expenses, owner complaints, and process issues. We also will need testimony about how the proposed changes will impact communities while still providing protections for owners.

The LAC also is engaging with a coalition of aligned organizations and stakeholders to build support for these and other initiatives while advocating for healthy, responsible communities. We anticipate that having additional support and a unified voice will substantially increase the likelihood of success on issues of vital importance for the future of Colorado communities.

As the legislative session ramps up, we will continue to provide updates to our membership. Make sure to follow along on our **Facebook page (www.facebook.com/CAICLAC)**. As always, feel free to contact Danaly Howe, the LAC chair, at any time with any questions. She can be reached at **danalyclac@ccgcolorado.com** or **970-484-0101 x101**.

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WHEN BOARDS OVERSTEP

HOA Abuse of Power

ELIZABETH DYER
Sopra Communities, Inc.

It's tough to be a volunteer HOA board member in Colorado these days. Just last night, I was watching a PBS show called "The Trouble with HOAs", and depending on who was being interviewed, the board was doing too much or caring too little. It's no wonder that sometimes boards are accused of overstepping their duties and authorities, as most volunteers wish to be helpful and they may not know where to draw a line.

Here are some ways to avoid overstepping or abusing your power if you are a board member:

REASONABLE POLICIES AND RULES: It's important to have a working knowledge of your governing documents, and to have any new policies, rules, or handbook reviewed by the association's attorney to ensure they don't conflict with your governing documents, statutes, or case law. It's also prudent to take a step back when drafting anything new to ask whether the new policy or rule serves the entire community, builds community, or is geared towards solving one person or one group's behavior that isn't the majority? Also ask if the new rule or policy positively maintains or increases property values. Those are useful benchmarks to compare against when contemplating adding or removing anything in regards to the governing documents.

SELECTIVE ENFORCEMENT: The Golden Rule cannot be emphasized enough: treat others as you wish to be treated. There is a secondary Golden Rule for associations: treat everyone the same, or as close to the same as possible (as there will always be an exception to a rule). There is nothing inherently fair or equitable about living in an association. At the same time, consistent enforcement of reasonable rules and policies helps a community feel that their experience within the community is reasonable, fair, and equitable.

CONFLICTS OF INTEREST: Associations in Colorado should have a Conflict of Interest Policy in effect. It is important for board members to be familiar with the document and to take it seriously. If there is even a whiff of a Board member making money via their inside knowledge of the Association, such as an upcoming foreclosure, can quickly destroy a community. Just don't do it.

MISAPPROPRIATION OF AMENITIES: Unfortunately, there are not perks to the many hours of service required of board members. They should not have "first dibs" for reserving a clubhouse or pool, the best storage unit, or parking spot when it becomes available, etc. Actions such as these undermine the trust of the neighbors in the board, as these actions are self-serving over the fiduciary requirement to put the needs of the organization before one's own interests.

HOLD REGULAR MEETINGS WITH POSTED MINUTES: The healthiest communities share some basic traits: service on the board is not monopolized by a select few, and transparency. Having regularly scheduled board meetings with the minutes posted to a website or portal (with controlled access to it, of course), go a long way towards non-board members having organized access to the business of their community. This facilitates trust and for those who might be concerned about whether the board is conducting business appropriately, actions speak louder than words. A consistent practice of meetings and minutes is, to quote Martha Stewart, "a good thing".

EMERGENCY MANAGEMENT: Another way that Boards unknowingly overstep is when something goes wrong. At 2am, nobody wants to be the person telling their neighbor that dealing with the gushing water is not the association's responsibility. A great way to proactively be ready for these unfortunate situations is to have the association's attorney draft what is called a Maintenance & Insurance Chart. To create the document, the association's attorney pours over the various sections of your governing documents, mostly the Declaration of Covenants, to define what the association must maintain, repair, or replace, and what is the responsibility of unit owners. This chart is beloved by insurance adjusters and it facilitates an easier claim for both owners and the associations. Not knowing where an association's responsibility begins and ends can lead to board members getting into unit repairs and costing the association needlessly. It's also important to keep in mind that whoever makes the call to a restoration company is effectively the one hiring them, so if you don't have what is affectionately called an "M&I Chart", be careful about making the calls yourself if you are a volunteer board member. It's easier for the association, or the association's insurance, to pick up all or part of a bill related to an emergency after the fact, versus an owner refusing to pay a bill because they did not technically hire the vendor.

At the end of the day, it's important for board members to be familiar with their governing documents, and to have good expert partners to help guide you through the ever-changing world of leading the multimillion dollar corporation that is your Association. Your circle of care is key to your success, and this includes your management team, your insurance agent, your tax accountant, and your attorney.

Elizabeth Caswell Dyer *is the CEO and founder of Sopra Communities, Inc., which is a local company dedicated to providing community management services in the Denver Central Business District and surrounding neighborhoods since 2010.*

AMALIA "MIA" GONZALEZ
3.0 Management

As the growing residential real estate market in Colorado continues to support new housing projects across the State, developer to owner transitions are becoming more common. It is essential for Community Association Managers to familiarize themselves with the process and legal requirements for these transitions as it is a critical step every developing homeowners association must take.

The biggest tool a Community Association Manager should have in their toolbox during a transition is the Colorado Common Interest Ownership Act (CCIOA), as this document prevails over the Declaration. The next tool every manager should utilize is homeowner engagement. Without willing homeowners, there is no Board of Directors. In order to acquire homeowner engagement there needs to be consistent communication. Communication is key for any successful and smooth transition from declarant to owner control. The purpose is to educate the owners on the role that the Board of Directors plays for the association and the function of an association.

Preparation for the transition meetings should occur before the first unit is sold to ensure that the timeframe and requirements are met. CCIOA requires that associations sequentially be turned over to the owners as units are sold. Typically, three special meetings are anticipated during the declarant control transition. There could be more meetings (and possibly fewer meetings although fewer meetings are not recommended).

Per Section 303 (6) and (7) of CCIOA:

1. **(First Meeting)** Not later than 60 days after conveyance of 25% of the units that may be created to unit owners other than a declarant, at least one member and not less than 1/4 of the members of the executive board must be elected by unit owners other than the declarant;
2. **(Second Meeting)** Not later than 60 days after conveyance of 50% of the units that may be created to unit owners other than a declarant, not less than 1/3 of the members of the executive board must be elected by unit owners other than the declarant;
3. **(Third Meeting)** Not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom must be unit owners other than the declarant or designated representatives of unit owners other than the declarant. The executive board shall elect the officers. The executive board members and officers shall take office upon election.

Amalia Gonzalez *also known as Mia is the Community Association Manager of Developer Relations at 3.0 Management. Mia has been in the industry for 5+ years and has a passion for making communities a better place to live for owners.*

DECLARANT CONTROL *Transitions*

Per Section 303(5)(a)(I) of CCIOA, the declarant control termination limits are as follows:

1. 60 days after conveyance of 75% of all units that may be created (defined in the declaration) to owners other than the declarant; or

2. 2-years after the last conveyance of a unit in the ordinary course of business; or

3. 2-years after the right to add new units was last exercised.

Within 60 days after the earliest of these three events occurs, the third meeting must commence, records must be turned over, and a transition audit performed.

Within 60 days after the owners have taken control of the association, the declarant must provide several required documents per CCIOA Section 303(9). A few worth mentioning are the governing documents (recorded declaration, articles of incorporation, bylaws, plots and maps, meeting minutes, etc.). Obtaining and understanding the governing documents will lay the foundation for the association's operation and maintenance needs. All financial information is another element that is essential to the transition. This should occur when the owners have the majority control of the Board. It's prudent to consider an owner board member serving as the board treasurer before the transfer of control to reduce owner concerns and reassure order for the association's bookkeeping. A transition audit should also be performed, accounting for the association's funds and financial statements from the date the association began receiving funds to the date when the declarant control period ended. It is highly recommended that this audit is performed by an experienced CPA.

Keep in mind that the best time to start the transition is six months prior to the official declarant to owner transition. Waiting until, during, or even after the transition, may make it more challenging to obtain important and necessary documents from the developer.

Once the owner controlled Board has taken over the association, the Board should consider the following:

- Retention of the managing agent, attorney, and accountant. The Board has the right to select and hire experts that will represent and act in the association's best interest;
- Engage with experts to inspect and review plans and specifications of the community; Experts are able to provide an unbiased opinion on the construction of the development, provide an opinion on defect repairs, and how much repairs will cost;
- Obtain and keep a record of the written report after the inspections;
- Ensure all required records per CCIOA have been obtained;
- Review current insurance policies. All associations formed after July 1, 1992 must carry property, liability, and fidelity insurance coverage at a minimum. Boards should also check the governing documents for any additional coverage the association may be required to carry, like directors and officers, umbrella, and workers' compensation insurance;
- Review financial information for completion and accuracy;
- Engage with an attorney for a legal document review to ensure the association is compliant with local, state, and federal laws;
- Engage with an expert to prepare a reserve study. A reserve study will help the association determine the useful life and cost of major replacement assets, allowing the Board to effectively plan for the future;
- Conveyance of Common Areas; and
- Review prior enforcement actions, if any.

In conclusion, the transition from developer to owner control is an important part of the life of an association. There is a lot to be done but ensuring the transition is smooth requires knowledge, preparation, and clear communication. Complying with legal requirements and working within the set timelines during the transition process will set the association up for success in the long run.

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Need to Know

What Board Members Should Know About Construction Defect

SEAN DAVIS, PMP, MBA
DHA Construction Management

Buying a new home is a milestone experience full of choices for your colors, flooring, and finishes. For months, you stop by and check on the progress. The anticipation builds until, finally, you close on the home and move in. As the months go by, you notice little flaws here and there but nothing that raises those little red flags. A couple of years go by, and you start seeing more prominent flaws in your home and neighborhood. The builder is long gone and so is the warranty. You begin to fear the problems are systemic and will only continue to worsen.

I know what it feels like; I've been through this both as a homeowner and board member. It can be very emotional; after all, it's your home. It's where you create so many incredible memories. Buying a lemon should not be one of them.

Is there anything the HOA board of directors can do? The answer is yes. The most likely option is to consult a construction defect attorney, but when should you call one? Here are a few questions to help guide you.

1. **Does the community still look relatively new?** A five-year-old community should not look like its twenty.
2. **Is there a significant amount of concrete around the community that is heaving or has cracks wider than a pencil?** Concrete stairs should not look like this after three years.
3. **Is the asphalt wavy, or do you have several areas that collect water?**
4. **Are there cracks in the drywall at the corners of the windows?**
5. **Are there signs of water on the interior walls or whitish staining on the exterior?**

If you answered yes to two or three of these, you should call an attorney and get their opinion.

Once you start down the path of a construction defect claim, there are a couple of things to expect. First, it is a slow process and your board must be committed to staying the course. The board and community manager must keep excellent records to ensure continuity as board members and managers change over time. We had three different community managers and four different board members by the time the entire litigation process, preconstruction, and construction had concluded.

Once an attorney accepts your case, they will gather evidence and conduct destructive or intrusive testing. A team of construction experts will most likely remove relatively small sections of the buildings in the community. Then a forensic engineer will inspect the openings and other observable defects. They will note their observations, take pictures, and then the construction team will return to repair the test sections. The legal teams will generate and exchange many reports to prepare for a trial or negotiated settlement. This process can take several months to complete.

Once the legal process has run its course and nears completion, the board will be given copies of all the files from the claim, including pictures, reports, engineered drawings, and emails. In our case, there were more than 140 GB of files. To give you a sense of the enormity of information, it's about 15,000 volumes of the Encyclopedia Brittanica!

You will also receive an essential document called the Rough Order of Magnitude, also known as the ROM. It is the detailed list of defects, associated measurements, and costs for the entire claim. There are a couple of critical points to keep in mind. The list of defects may be lengthy, and some will be more serious than others. It would be beneficial to ask your attorney to provide a matrix that details what defects were noted at each home and for the forensic engineer to give a qualitative rating based on their observations. It will help the upcoming preconstruction team prioritize the defects.

Finally, it is possible that the financial outcome will not be enough to cover the repair cost for every defect. The board may need to prioritize the most severe defects to be addressed first. Ask to meet with the legal team and their forensic engineer to review the ROM and the settlement together. They will have the most insight into the depth and breadth of defects and help build the foundation moving forward in the reconstruction phase.

Sean Davis, PMP, MBA, *is the President of DHA Construction Management. He has served on his HOA Board of Directors for more than seven years and led their effort for a successful construction defect claim. His company provides advice and construction consultation to Colorado community associations. With more than thirty years of construction experience, his mission is to help HOAs by eliminating construction risk, increasing the quality of construction, and maximizing the construction budget for them and the community managers who care for them.*

Understanding Owners' Rights to Access Association Records

ALYSSA CHIRLIN, Smith Jadin Johnson, PLLC

It is an issue that every community association faces, homeowner requests for association documents. But what are homeowners entitled to, and what documents, if any, can an association withhold?

Colorado law establishes some requirements which an association's governing documents may supplement. Colorado community association law is focused on increasing the transparency of associations' operations and, along these lines, requires that specific documents be maintained as association records and that those records be available for inspection to all owners.

The list of documents to be maintained as records by an association is extensive and includes meeting minutes, an association's most recent reserve study, ballots, proxies, and written communications among board members related to any action taken without a meeting, among other documents. These documents must be made available for inspection to owners upon request. An association does not have to compile or synthesize information; it can require that owners submit their requests in writing and describe the documents requested with reasonable particularity. However, the association can never require owners to provide a purpose for their request. Their membership in the association alone entitles them to this information.

There is certain information that the association must withhold from inspection for privacy reasons. This information includes personnel, salary, or medical records of individuals and any personal identification and account information of members and residents. Personal identification information consists of obvious bank account information, social security numbers, and driver's license numbers, but it also includes telephone numbers and email addresses, which may only be disclosed with the owners' prior written consent.

The association may withhold any document that is not specifically required by Colorado law to be maintained as a record. This includes specific documents listed in Colorado law as able to be withheld, including architectural drawings, contracts under negotiation, and records relating to individual owners other than the requesting owner. It also includes documents that an association maintains pursuant to requirements in its governing documents if those documents are not also specifically required to be held as an association record by Colorado law. While this allows associations some discretion in its productions to homeowners, it also allows for inconsistent handling of homeowner records requests.

In order to combat these potential inconsistencies, associations should draft comprehensive inspection and copying of records policies. Not only are such policies required by Colorado law, but they provide necessary guidance to associations. Colorado law does not dictate the contents of an inspection and copying of records policy, but an effective one should

Alyssa Chirlin *is an attorney at Smith Jadin Johnson, PLLC, a law firm that handles all an association's legal needs, from daily governance issues such as collections and drafting governing documents to insurance claims and construction defect matters.*

not only address what discretionary documents will and will not be produced but should also contain provisions regarding the submission of owner requests, timelines for responding to such requests, the ability of the association to charge for fulfilling the requests, and how the association will fulfill the requests. A thorough policy can act as a quick- reference guide and eliminate the need to analyze the statute every time the association receives a records inspection request.

Once adopted, consistent compliance with the policy can minimize the risks of discrimination allegations against the association and of financial consequences for an association's failure to allow inspection of requested documents in a timely manner. If an association receives a written request from an owner via certified mail with a return receipt requested, and does not allow inspection within thirty days, the association may be liable for fines of fifty dollars a day. An association's inspection and copying of records policy should therefore provide a turnaround time of fewer than thirty days for inspection of records upon receipt of an owner request.

In these ways, a comprehensive records inspection policy will meet legal requirements and increase owners' transparency while protecting the association from liability. While it may seem inconsequential, the inspection and copying of records policy is an important tool in an association's arsenal that should not be overlooked.

PCAM Q&A

Evelyn Saavedra

CMCA®, AMS®, PCAM®

WHAT LED YOU TO THE MANAGEMENT INDUSTRY?

I worked in accounting in rental management while I was in college and eventually moved into the management side, from single family rentals into HOAs. The very first HOA I managed was working directly for a Board on site in New Mexico, which motivated me to get a job with a management company and I worked my way up from there.

WHAT IS YOUR FAVORITE PART OF THE JOB?

Definitely the people! I made a point early on in my career to seek out mentors and my career has undeniably benefitted from the generous mentorship of some important people in the industry. That supportive spirit actually extends to the entire industry. Many of us work for competing companies, but instead of a cut-throat environment, there is instead a pervasive feeling of being on common ground and an understanding that there is enough work to go around. It hasn't always been this way and I, along with others in the industry who cared enough to break down barriers, have worked hard to foster this type of environment and it is now my favorite part of the job.

WHAT IS SOMETHING YOU WISH PEOPLE UNDERSTOOD ABOUT COMMUNITY MANAGERS?

Everyone has an issue that is important to them. But everyone has neighbors and they have issues that are important to them, too. As a community manager, you have to address life and safety issues first, then property values, and only then can you get down to addressing the various desires that people have. Community managers have hundreds of bosses all demanding something from them and it's a constant balancing act to manage. Be kind to your managers!

WHAT MADE YOU DECIDE TO GET YOUR PCAM AND HOW DID YOU MANAGE THE WORK/LIFE BALANCE WITH STUDYING?

I got a job offer that included fast-tracking my M-200 level classes and getting my PCAM to help the company obtain its AAMC accreditation. The support of my employer was crucial in helping me finish the program in one year, from hosting the classes on-site (this was before the classes could be taken virtually!) to allowing me time off to finish my case study. For thirty days, I basically shut my life down. Every single day, I would sit on the patio at the Flying Star in Albuquerque for breakfast, lunch, and unlimited iced tea, and I would just write for hours.

WHAT WAS YOUR BIGGEST TAKEAWAY FROM THE PROGRAM?

Managers should not expect to have all the answers. A manager's best asset is knowing who to call with an issue, rather than always knowing what course of action to take. This is my advice to anyone starting out in the industry: consult your experts. Know enough to know that you don't know enough. Forge relationships with experts and business partners so that you have resources to reach out to when you encounter a problem you don't know the answer to.

WHAT IS SOMETHING YOU WOULD LIKE PEOPLE WORKING ON THEIR PCAM TO KNOW?

My advice used to be to record everything and take notes about the different topics discussed at different times so that you could easily access a topic when you needed to. Today, the program actually gives you the recording! While participants no longer need to record the audio, I would still recommend taking pictures of anything and everything.

I would also say that the case study is not a dissertation. Be kind to the facilitator, who has to read every participant's submission, and be succinct. And because the top three papers are sent to the Board, give yourself an advantage and write as if you are writing to the Board, not the facilitator.

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BUJAR AHMETI, ESQ. & TIMOTHY MOELLER, ESQ
Moeller Graf, P.C.

What many community association members in Colorado believed would be temporary measures to accommodate social distancing guidelines due to the COVID-19 pandemic have since become standard operating procedures for those same community associations. Even as the emergency orders were lifted and the restrictions on in-person gatherings expired, the ease and convenience of conducting meetings virtually has been one byproduct of the COVID-19 pandemic that is here to stay.

Administering a Virtual Meeting

The Colorado Common Interest Ownership Act ("CCIOA") does not have any specific provision that addresses electronic or virtual meetings. The Colorado Revised Nonprofit Corporation Act ("Nonprofit Act"), in C.R.S. § 7-127-108, provides that:

> *"Unless otherwise provided in the bylaws, any member may participate in an annual, regular, or special meeting of the members by, or the meeting may be conducted through the use of, any means of communication by which all persons participating in the meeting may hear each other during the meeting. A member participating in a meeting by this means is deemed to be present in person at the meeting."*

The Nonprofit Act, unlike CCIOA, expressly allows for virtual or electronic meetings as long as there is not any prohibitive language in the community association's bylaws. The first step is to check the governing documents, especially the bylaws, to determine if there is any language that would prohibit the community association from conducting a virtual or electronic meeting. If not, then any platform chosen (e.g., Zoom, Microsoft Teams, etc.) must allow all persons attending the meeting to hear each other during the meeting.

While CCIOA does not address electronic or virtual meetings, it does require that certain information be included in any meeting notice for a valid meeting to be held. C.R.S. § 38-33.3-308(1), states that any member meeting notice include "the time and place of the meeting and items on the agenda." This requirement of a "place" for the annual meeting does not completely align with the idea of everyone attending a meeting from the comfort of their own home. Whether "online" is considered a place for purposes of the statute has not been tested in court. Thus, some Associations try to satisfy this requirement by holding a "hybrid" meeting that consists of the Association naming a "place" in the meeting notice (e.g., the clubhouse for the Association, the address for the management company, etc.) where a board member or the community manager is physically present and all other owners attend virtually.

Voting at an Electronic or Virtual Meeting

While conducting and attending electronic or virtual meetings can be quite convenient for the membership, conducting a vote during an electronic or virtual meeting may sometimes be anything but convenient. In some instances, an actual vote may not be necessary if the meeting is to ratify a budget and the number of attendees does not reach the voting threshold to veto the budget or it is a board election where the number of candidates equals the number of vacant positions.

However, if the need to hold a vote is required, then the community association will want to ensure that it has implemented a system to accept and verify proxies prior to the commencement of the meeting. C.R.S. § 38-33.3-310(2)(a) provides that "votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner." The

Moeller Graf, P.C. is a law firm whose practice is dedicated exclusively to providing legal services to Colorado's community associations. **Tim Moeller, Esq.** *has practiced community association law since 1999 and co-founded Moeller Graf, P.C. with David Graf, Esq. in 2005.* **Bujar Ahmeti, Esq.** *is an associate attorney at Moeller Graf, P.C. and has practiced community association law since 2010.*

VIRTUAL MEETINGS AND ELECTRONIC VOTING: COVID-19 PANDEMIC FAD OR HERE TO STAY?

Nonprofit Act, in C.R.S. § 7-127-203(2), provides broad authority for a member to designate a proxy. Prior to the date of the electronic or virtual meeting, the association will want to ensure there is an internal procedure in place to accept and validate any submitted proxies.

Prior to the rise in popularity of electronic and virtual meetings, many associations conducted any necessary vote(s) that occurred outside of a physical meeting by utilizing a mail-in ballot. To that end, C.R.S. § 7-127-109 provides that "unless otherwise provided by the bylaws, any action that may be taken at any annual…meeting of the members may be taken without a meeting if the nonprofit corporation delivers a written ballot to every member entitled to vote on the matter." Similar to the section of the Nonprofit Act that permits electronic and virtual meetings, the first step for an association is to determine if the association's governing documents permit the use of a mail-in ballot. If so, then the mail-in ballot must contain the following information pursuant to C.R.S. § 7-127-109(4):

1. The ballot must indicate the number of responses needed to meet the quorum requirements;
2. The ballot must state the percentage of approvals necessary to approve each matter other than the election of directors;
3. The ballot must state the time by which a ballot must be received by the nonprofit corporation in order to be counted (typically 60 days or less); and
4. The ballot must be accompanied by written information sufficient to permit each person casting such ballot to reach an informed decision on the matter.

During the height of the COVID-19 pandemic, many associations conducted electronic or virtual meetings (without a vote being held at the virtual meeting) in conjunction with a mail-in ballot to complete an election of directors that was contested (raise your hand if you ever had to utilize the "two-envelope" system for board member elections). However, this process is costly and time consuming. Inevitably, it also led to ancillary issues such as whether or not nominations from the floor would be allowed. These issues, in part, have caused many associations to explore the option of using an on-line voting platform such as VoteHOAnow.com or The Inspector of Elections to name a few.

Initially, it is important to note that neither CCIOA nor the Nonprofit Act contain any statutes that address using an on-line voting platform. The Nonprofit Act permits three (3) different voting procedures:

1. Voting at an annual or special meeting in-person or by proxy;
2. Action by Written Ballot (C.R.S. § 7-127-109); or
3. Action Without Meeting (C.R.S. § 7-127-107).

When a community association's bylaws do not expressly authorize electronic voting, the association may still be permitted to use an online electronic voting platform if it also complies with C.R.S. § 7-127-109. Under C.R.S. § 7-127-109, the Association would be required to deliver a ballot to each Owner. However, the statute does not address how the delivery must occur. Typically, community associations will meet this requirement by mailing a copy of the ballot to each owner, especially when there are owners without email addresses registered with the association. It will be important for the selected service provider (or the association's legal counsel) to ensure that their ballot meets the requirements of C.R.S. § 7-127-109 and can be legally delivered to each owner.

The board should be mindful that C.R.S. § 7-127-109(5) provides that, "[u]nless otherwise provided by the bylaws, a written ballot may not be revoked." In a situation where a ballot is only mailed to the owners, any returned-and-voted ballot cannot not be revoked, and the vote marked on the ballot will be final. If owners are given two methods to cast their ballot, and an owner returns a paper ballot and votes on-line, the association will need to ensure that only the ballot that is received first is counted to ensure compliance with C.R.S. § 7-127-109(5). The instruction on the ballot should be clear that the choice is either electronic or paper, not both.

As community associations continue to utilize technology and electronic platforms to conduct meetings and complete association business, community associations will need to be mindful of the statutes that address meetings. These statutes are in need of an upgrade to keep pace with the changing times. What we can say, with experience, is that the rise of video meetings has dramatically increased owner participation and inclusiveness, and that has been a large step forward in transparency in community association operations.

Community Myth Busters

Informal Board Meetings are as REAL as a UNICORN

KERRY H. WALLACE
Goodman and Wallace, P.C.

There is little difference between a unicorn and the right of a Colorado Common Interest Community ("CIC") to hold an "informal board meeting." While most people have heard of them, they do not really exist. A legally cringeworthy response to whether minutes were taken at a Board meeting is: "But that was just an informal work session and not a Board meeting." The Colorado Common Interest Ownership Act ("CCIOA") requires all regular and special meetings of a CIC Board, including committees, to be open to attendance by Owners (see C.R.S. 38-33.3-308). Minutes documenting all such meetings must be maintained as an Association record. See C.R.S. 38-33.3-317 (1) (c) which requires a CIC to maintain, "Minutes of all meetings of its unit owners and executive board, a record of all actions taken by the unit owners or executive board without a meeting, and a record of all actions taken by any committee of the executive board." Additionally, a CIC's Bylaws will address Board meetings including how Board meetings are noticed and held. CCIOA requires the adoption of a policy regarding conduct of meetings. See C.R.S. 38-33.3-209.5. These requirements cannot be circumvented by calling a Board meeting "informal" or a "work session."

Kerry H. Wallace *grew up in Denver, Colorado and after leaving Colorado to attend the University of Notre Dame du Lac (BA 1987), she returned to Colorado for her law degree from the University of Colorado School of Law (JD 1991). Kerry is a Partner in the law firm Goodman and Wallace, P.C. located in Edwards – 15 miles west of Vail. A perfect location to enjoy favorite past times of skiing, hiking, and biking. Kerry's practice focuses upon resort based common interest communities guiding communities through the ever-changing legal landscape. Her work has included the first reported case interpreting community record keeping and disclosure obligations under the Colorado Common Interest Ownership Act. Kerry served on the Eagle County Planning and Zoning Committee from 2003-2007, is a current Business Partner of CAI-RMC, and has been a speaker and panel member at numerous CAI Colorado - Rocky Mountain conferences. Kerry can be reached at 970-926-4447 or Kerry@goodmanwallace.com.*

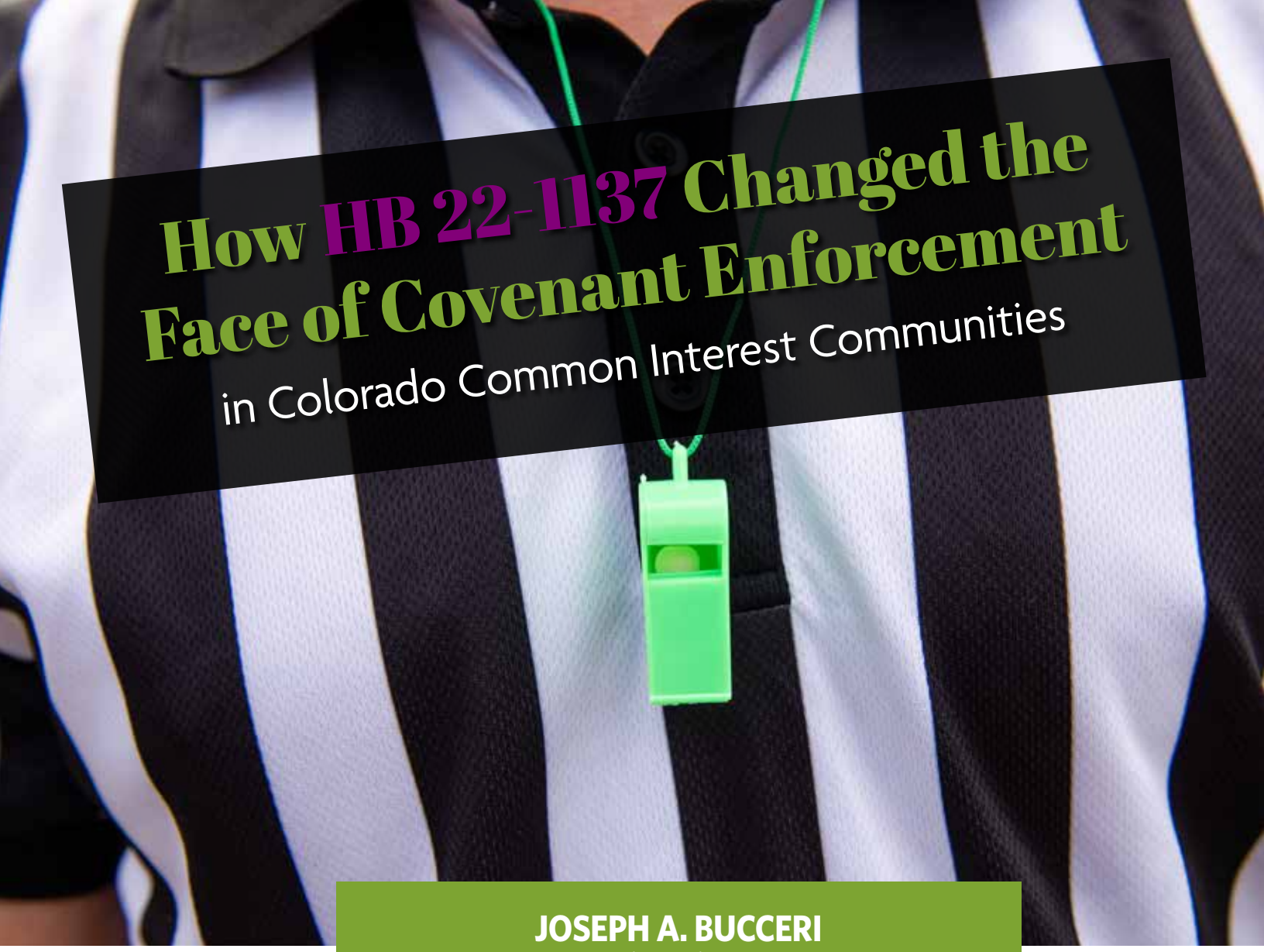
When a CIC Board acts without a meeting pursuant to the CIC's Bylaws or the Colorado Revised Not for Profit Corporation Act ("CRNPCA") at C.R.S. 7-128-202, all written communications must be maintained by the CIC such as emails among, and the votes cast by, board members. See C.R.S. 38-33.3-317 (d). Board members should always use diligence and caution when communicating with fellow Board members or management regarding Board matters as those writings could be subject to record retention requirements. Often it is preferable to call a meeting versus permanent retention of email stream communications.

Even executive sessions require documentation. While a CIC Board may hold an executive session at which attendance may be restricted to the Board and persons requested by the Board, matters for discussion are limited and minutes indicating that an executive session was held, and the general subject matter of the session are required to be maintained as a CIC record. See C.R.S. 38-33.3-308 (3-7). The only matters that may be discussed at an executive session are the following (Note: Section (5) was recently expanded by HB 22-1237):

1. 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;
2. Matters pertaining to employees of the Association or the managing agent's contract, or involving the employment, promotion, discipline, or dismissal of an Officer, agent, or employee of the Association;
3. Investigative proceedings concerning possible or actual criminal misconduct;
4. Matters subject to specific constitutional, statutory or judicially imposed requirements protecting particular proceedings or matters from public disclosure;
5. Any matter the disclosure of which could constitute an unwarranted invasion of individual privacy including a disciplinary hearing regarding an Owner and any referral of delinquency; except that an Owner who is the subject of a disciplinary hearing or a referral of delinquency may request and receive the results of any vote taken at the relevant meeting; or
6. Review of or discussion relating to any written or oral communication from legal counsel.

In summary, every Board meeting must be called, noticed, and held in accordance with the CIC's Bylaws and CCIOA. Per CCIOA, a CIC must have and maintain as an association record minutes for all Board meetings. Truncated minutes are even required for executive sessions. If a Board decides to act without a meeting, the requirements for action without a meeting found in the Bylaws, CCIOA, and the CRNCPA must be adhered to with written communications among Board members, including votes, being maintained as the "minutes."

Do not get busted by a myth and treat all Board meetings the same with notice, agenda, and minutes.



How HB 22-1137 Changed the Face of Covenant Enforcement

in Colorado Common Interest Communities

JOSEPH A. BUCCERI
Orten Cavanagh Holmes & Hunt, LLC

Anyone who works in the community association industry in Colorado knows by now that the legislature imposed major changes to the Colorado Common Interest Ownership Act ("CCIOA") during the 2022 session which significantly affects the operation and governance of common interest communities. HB22-1137 became effective on August 10, 2022. While the final version was less draconian and onerous than the initial drafts, it still represents an overreaction to a small number of bad actors. Unfortunately, for the vast majority of associations, the new requirements force associations into a one-size fits all system which seems to assume that most covenant violations are insignificant, and which fails to take into account the wide variety of building types and living arrangements that make up owner associations in Colorado.

How has the new law changed the face of covenant enforcement in Colorado, and what are some of the unintended consequences?

Joseph A. Bucceri *is an attorney at Orten Cavanagh Holmes & Hunt, LLC. He provides covenant enforcement services to community associations throughout Colorado.*

Major Changes and Challenges

HB22-1137 represents a major overhaul for association covenant enforcement and assessment collections. For covenant enforcement, there are several major changes to the way associations are now required to operate:

First, there is the bifurcation of violations into two distinct categories: violations that "threaten the public safety and health" and those that do not. This poses several questions and challenges: What is considered a threat to public safety and health? How significant must the threat be? What is meant by the term "public" in the context of private communities and enforcement of private covenants? The new law contains no guidance to clarify these issues or assist associations in making these determinations.

Another challenge with health and safety violations is that associations can't take legal action until at least 72 hours after the owner has received written notice of the violation. Will associations be forced to prove the owner received notice, or can they rely upon a "deemed received" standard?

HB22-1137 also imposes additional violation notice requirements. While CCIOA has had a requirement for some time that owners be given notice and an opportunity to request a hearing before fines could be imposed, the new (additional) notice requirements are significantly more cumbersome, requiring a minimum of two 30-day notices before legal action can be taken. This requirement does not take into account the nature, severity or impact of particular violations. While the 30-60 day "cure period" approach might be appropriate for certain types of violations such as failing to adequately maintain your lawn, it does not lend itself to others that may have a more direct and consequential impact (e.g., noise, shooting fireworks, property damage, parking, short term leasing, harassment, etc.).

What Didn't Change?

Some enforcement remedies other than fining or filing a lawsuit are still (ostensibly) permitted under the new law. While an association is required to give an owner at least 60 days to cure a violation on their own, there are no express legislative constraints on associations exercising self-help remedies (if authorized by the governing documents). Additionally, default or individual assessments can arguably still be assessed against the property as long as they represent actual costs to the Association.

Unintended Consequences

As with any type of legislation, HB22-1137 has a number of unintended consequences that could, paradoxically, result in increased costs and assessments to owners. Because of the specificity of the notice requirements and capping fines at $500, the new law may lead to more lawsuits being filed by associations. An Airbnb generating $100 per night is not going to close from a $500 fine. If the matter is referred to an attorney, associations and/or owners may incur substantial attorney fees.

Another example of unintended consequences is an association choosing to tow for parking violations in lieu of imposing nominal fines. Before HB22-1137, if an owner parked in an authorized parking space, the association could impose substantial fines without a mandatory cure period. Now, associations must (1) send a violation, (2) wait at least 30 days, and (3) after 30 days, conduct an inspection to determine if the violation still exists before the association can impose an initial fine. Consequently, some associations may elect tow vehicles instead of levying fines.

Remaining Questions

In addition to the challenges identified above, there are many other questions raised by HB22-1137 that will need to be addressed in order for an association to proceed with enforcement with confidence. The new law states that "the total amount of fines imposed for the violation may not exceed five hundred dollars." But what is "the violation?" If an owner gets a notice for weeds, and pulls them all but they grow back, is that the same violation or a new one?

Another major uncertainty is how a violation may be "cured" if it is not an ongoing condition. For an excessive noise violation, if an owner has 29 days straight of raucous parties, but doesn't have one on day 30, has the violation been cured? What if there is another party on day 35 - can the association send the second violation notice?

While there is always hope that a future bill could clean up some of these issues, or remove some of the more cumbersome requirements, it is likely that many of these are here to stay and homeowner associations in Colorado will have to get used to these new requirements moving forward.

Participating in a Construction Defect Claim

30,000 Foot View

SHANE FLEENER
Hearn & Fleener, LLC

What is a "construction defect"?

A construction defect is any condition or improvement that was designed, installed or constructed in a manner that falls below the applicable standard of care. Generally speaking, this encompasses any construction that does not comply with the building code requirements and/or the applicable plans, specifications, soil reports, geotechnical reports and/or the manufacturer installation instructions for the products used.

What are the legal ramifications and remedies if construction defects exist?

Under Colorado law, construction professionals owe a legal duty to homeowners (and homeowner associations) to construct homes and common interest communities in a non-defective manner. If this duty is breached, and assuming legal defenses do not apply, construction professionals are required to pay affected homeowners or associations the "reasonable cost to repair" the defects, as well as the reasonable cost to repair damages resulting from such defects.

This is the single largest benefit to asserting a defect claim: ensuring that the builders (or their insurance carriers) provide the funds necessary to repair the construction defects that they caused. Absent the assertion of a claim, homeowners or associations may be required to pay the significant cost for such repairs through increased dues or large special assessments.

Shane Fleener *is the managing partner of Hearn & Fleener, LLC, a law firm specializing in the representation of homeowners and homeowner associations in construction defect disputes. Having practiced in the field since 2006, Shane is actively involved with legislative efforts aimed at protecting homeowner rights and has been recognized as a leader in the industry by* ***Super Lawyers***, ***Law Week Colorado***, ***Lawyers of Distinction*** *and* ***Best Lawyers***.

Who Can Assert a Construction Defect Claim?

Residential homeowners in Colorado have standing to assert a construction defect claim with respect to problems impacting their own home and lot. This is true regardless of whether the homeowner is a first purchaser or purchased from another homeowner.

Generally speaking, homeowner associations also have standing to assert a construction defect claim both on the association's own behalf, and on behalf of two or more of the association's homeowner members. Importantly, this standing extends to all portions of the common interest community, including common elements and individual lots and units, and regardless of whether the community is comprised of multi-family units or single-family homes. Moreover, an association's standing generally exists regardless of any division of ownership or repair/maintenance responsibilities that exist between the association and the homeowners.

What is the Process and Timeline for a Construction Defect Claim?

A construction defect claim can be divided into three steps: (1) Completion of all pre-claim requirements under Colorado law; (2) the assertion of a formal legal claim or arbitration; and (3) the post-litigation repair process.

Colorado law contains two pre-claim requirements. The first is the 75-day Notice of Claim Process contained in CDARA. This requirement applies to homeowners and associations alike. The second pre-claim requirement is the "builder meeting" and homeowner vote process contained in CCIOA. This requirement, which generally lasts around 90-days, only applies to homeowner associations. While these two processes are statutorily required, they are also important. First, they provide valuable transparency to homeowners and give everyone in the community the right to vote on the issue of whether a claim should be asserted. They also give the builder an opportunity to resolve the problems before any formal legal claim is asserted.

Only if the Notice of Claim process is unsuccessful and the homeowners vote to approve the association's course of action should a formal legal claim be asserted. If a formal claim is asserted, homeowners can generally expect the process claim to last between twelve and eighteen months.

After the claim is resolved through settlement or judgment, the post-litigation repair process begins. While every case is different, that process can last anywhere between six months and three years. While the goal is always to recover sufficient funds to perform all repairs, practical and legal considerations sometimes result in a lesser recovery. In that case, the homeowner or association should prioritize repairs with the assistance of counsel or a construction manager. For obvious reasons, life safety and water intrusion issues are almost always addressed first.

Time Limitations for the Assertion of a Construction Defect Claim

There is a limited amount of time to assert a defect claim under Colorado law. Colorado's statute of repose prohibits the assertion of a construction defect claim six (6) years after "substantial completion" of the defective improvement. "Substantial completion" is traditionally linked to the Certificate of Occupancy date for the improvement alleged to contain the defect. On the other hand, the statute of limitations prohibits the assertion of a construction defect claim two (2) years after the discovery of the defect or a "physical manifestation" of the defect. Importantly, this two-year period can begin to run as soon as a homeowner, or a homeowner association, observes any condition related to a defect, regardless of whether a defect is known to exist at that time.

There is a strong argument that neither the statute of repose nor the statute of limitations can begin to run until Declarant turnover of an association's board has occurred. For that reason, diligent homeowner associations and community managers should have their communities evaluated within the first six years after Declarant turnover.

2023 EVENTS

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January
27 Speaker Spotlight
31 CEO Management Co Forum

February
07 Peak 1 - Legal
10 Board Leader Certificate Workshop
24 Annual Bowling Tournament
28 Community Association Workshop

March
07 Business Partner Forum
09 Spring Conference and Trade Show

April
25 Community Association Workshop
27 Top Golf Event
28 CEO Management Co Forum

May
05 Membership Appreciation Event
17-20 National Conference

June
16 Annual Golf Tournament
27 Community Association Workshop

August
01 Peak 2 - Financials
08 Business Partner Forum
25 Board Leader Certificate Workshop
29 Community Association Workshop

September
18 Mountain Conference & Annual Meeting

October
20 Annual Clay Shoot
24 CEO Management Co Forum
31 Community Association Workshop

November
07 Peak 3 - Insurance
14 2024 Sponsorship Sales Q&A

December
01 Annual Celebration & Board Installation

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A Practical Approach to Board Member 'Fiduciary Duties'

STEPHANE DUPONT
The Dupont Law Firm

The words "fiduciary duty" are ones that many of us in the community association industry come across frequently. It is especially common to hear these words thrown around loosely when one or more members of a community association board of directors are "misbehaving". In legal terms, it can be simply defined as owing a duty of good faith and loyalty to the association with an obligation to act in its best interests. But what does this mean in practice and layperson terms?

Pretend for a moment that you are one of three owners of a small culinary business that prepares meals for residents of a small group of assisted living facilities. Let's assume that you are also a single parent of ten (10) young children, so it is critical that the business succeeds to make ends meet. Would you show up every day and give it your best? What would you do to ensure that your business flourished and stood out from others? Would you ensure the financial stability of your business by providing a high quality of service to your customers? How would you deal with customers, especially difficult ones? In the event of a dispute between business owners, would you make sure to respect the majority decision of the owners to ensure that the business can move on to 'bigger and better' things and convey an image of stability and productivity to your customers? As a board member, embodying that same passion for success and order is critical towards ensuring that fiduciary obligations are met. So how can members of the board minimize their liability against claims that they violated their fiduciary responsibilities? Here are suggestions that may help board members stay on track and out of legal trouble:

1. Be Present and Informed. Attend meetings and come prepared to discuss and resolve agenda items. If you received a 'board packet' prior to the meeting, make certain to read through it prior to the start of the meeting.

2. Act professionally and transparently. Respect your fellow owners in the community even if you disagree with them. NEVER hide or fail to disclose information to owners unless the law requires that certain information remain confidential.

3. Avoid 'personal agendas' that control your decision making. If you or someone that you are close to have something individually to gain from a board decision, make sure to disclose that conflict of interest to fellow board members and owners and, to the extent possible, abstain from voting.

4. Follow the law and covenants. Doing what 'feels right' is not enough. Become knowledgeable about Colorado law and your governing documents and make decisions accordingly. If you are not certain or need clarification, hire the proper professionals to assist.

5. Ensure that the Association has sufficient income to meet its expenses. Prepare budgets with a realistic assessment of anticipated expenses and reserve contributions. If assessments are unpaid, at a minimum, follow the terms of the association's Collection Policy and ensure that delinquent notices are sent on a timely basis.

Stephane Dupont *is the owner and an attorney with The Dupont Law Firm that provides comprehensive legal services to common interest communities throughout Colorado.*

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HB22-1137: Foreclosure Requirements

AMANDA ASHLEY
Altitude Community Law

HB22-1137 revises the "pre-turnover" steps that the association must take before it may proceed with a foreclosure action. Most importantly, and perhaps the biggest point of contention giving rise to this portion of the bill, is that an association may not foreclose on a unit if the lien consists only of one or both of the following: (i) fines; or (ii) collections costs or attorney fees that the Association has incurred and that are only associated with assessed fines.

And of course, the association must follow all required steps of the statute, including the new requirements set forth by HB22-1137, before it can turn the matter over to an attorney to proceed with foreclosure including a board vote on whether to turn the matter over for foreclosure.

Prior to initiating foreclosure, the association must first contact the owner at least one time and send the required delinquency notice just as it would need to if it were turning the action over to an attorney for collection.

However, one of the primary differences here is the information that must be in the delinquency notice if the Association intends to proceed with foreclosure. While the owner must be offered the repayment plan as s/he would have been for the collection action, the owner is allowed to choose the monthly repayment amount, as long as the monthly repayment amount is at least $25.00 per month. What does this mean for balances that will not be paid off over 18 months at $25.00 per month? HB22-1137 remains unclear, but theoretically, it means there will likely be a large balloon payment in month 18 to cover the remaining balance due at that time.

Once the above Notice of Delinquency has been sent to the owner, the association must wait 30 days to see if the owner declines the repayment plan. If declined, then the Association may proceed with turning over the file to an attorney to initiate foreclosure proceedings. HB22-1137 is silent as to what happens if the owner simply fails to respond to the payment plan notice rather than expressly declining the repayment plan. At this time, the general school of thought seems to be that the failure to respond is, in effect, the same as declining the repayment plan.

However, if the owner does accept the repayment plan, then the association may not proceed with a foreclosure proceeding unless and until the owner defaults on the repayment plan at least three times during the 18-month plan. The owner has up to 15 days after the due date to make each monthly installment, so the owner is not in default unless the monthly installments have not been remitted by the 15th day after the installment is due.

Keep in mind that if an association has violated any foreclosure laws (whether discussed above or any other applicable foreclosure laws), the owner may file a lawsuit against the association to seek damages for the violation. The owner must file the lawsuit within 5 years after the violation occurred and, the association may face up to $25,000.00 in damages, plus costs and attorney fees, if the Court finds that the foreclosure violation occurred. Lastly, if the association does foreclose, the law now prohibits board members, an employee of a management company that represents the association, or an immediate family of board member or employee, from purchasing the property at the foreclosure sale.

Amanda Ashley *began her career working as a criminal defense attorney. She then advocated for persons with HIV and AIDS at Vivent Health, a non-profit organization, where she practiced in a variety of areas including employment discrimination, social security, disability benefits, bankruptcy, and estate planning. Amazingly enough, she discovered she loved debtor-side bankruptcy law and continued working in that area until moving back home to Colorado, where she then opted to use her experience to assist community associations.*

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NAME	ORGANIZATION	DESIGNATION	AWARD DATE
Jason William Helzer, CMCA, AMS	RealManage, LLC	AMS	01/10/2023
Steven Walz, CMCA, AMS	RealManage, LLC	AMS	01/10/2023
Eric Andrews, CMCA, AMS		AMS	12/22/2022
Jessica Alice Davis, CMCA, AMS	East West Resorts, LLC	AMS	11/18/2022
Jennifer Tirado, CIRMS	CondoLogic	CIRMS	12/19/2022
Aileen McGinnis, CMCA		CMCA	12/22/2022

If you are a manager, insurance and risk management consultant, reserve provider, or business partner wishing to enhance your career, the information at www.caionline.org can help you. CAI awards qualified professionals and companies with credentials to improve the quality and effectiveness of community management.

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Charles Eggleton–Genesee Foundation
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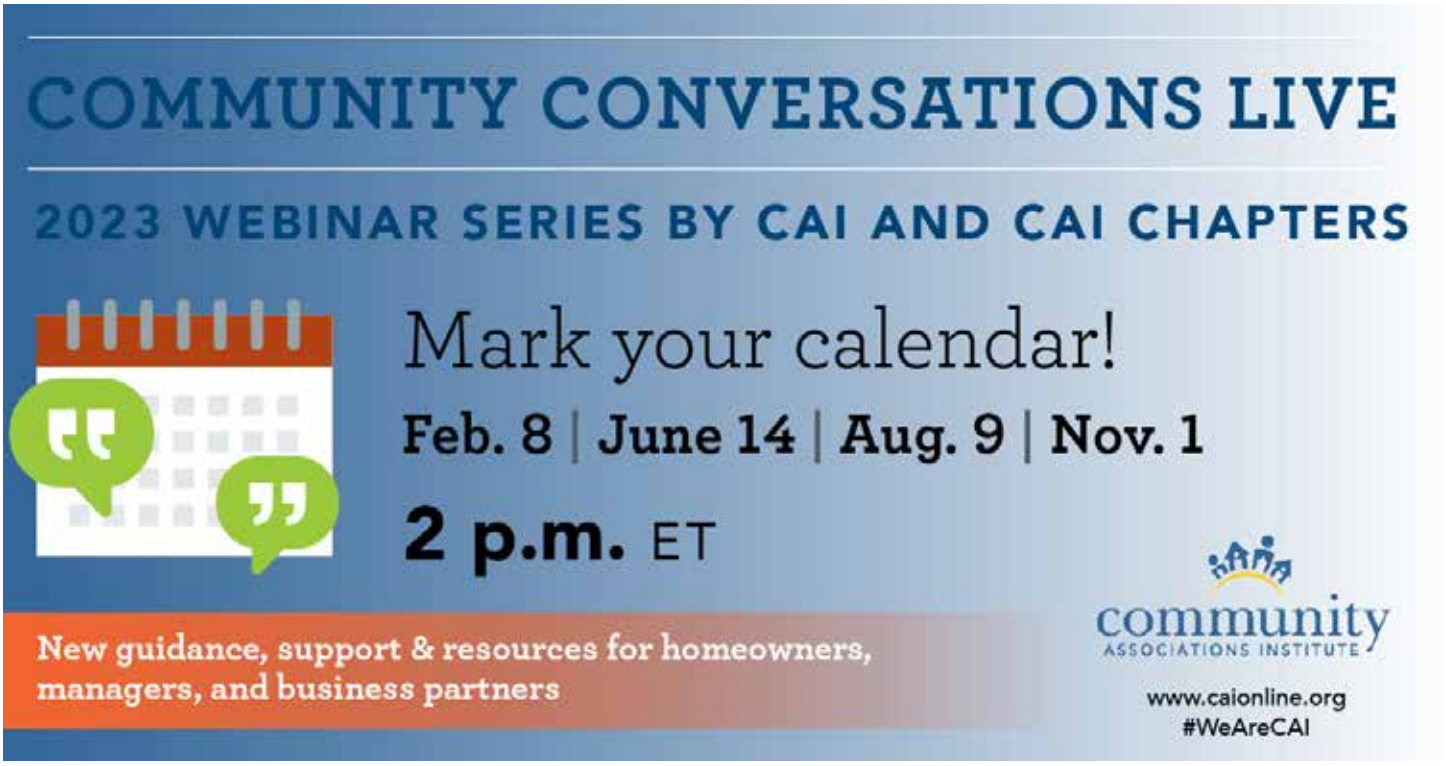

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24	Fri	Annual Bowling Tournament
28	Tue	Community Association Workshop

March		
7	Tue	Business Partner Forum
9	Thur	Spring Conference and Trade Show

April		
25	Tue	Community Association Workshop
27	Thur	Top Golf Event
28	Fri	CEO Management Co Forum

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