



MARK K. PAYNE
mpayne@wlpplaw.com
www.cohoalaw.com

Responsible Governance and Dysfunctionality; How Do You Do One and Avoid the Other?

- 1) **Colorado Statutes That Apply.** As nonprofit corporations, Colorado owner associations are primarily subject to two different state statutes (in addition to the State and Federal Constitutions and other laws):
 - a. **Colorado Revised Nonprofit Corporation Act.** This statute, or Nonprofit Act, covers many areas dealing with Colorado nonprofit corporations.
 - b. **Colorado Common Interest Ownership Act.** This state statute, referred to and known by its acronym CCIOA, is not the focus of this outline.
 - c. **The Source of Law on Governance: Assessments.** If CCIOA applies, and if Nonprofit Act applies, governance issues are addressed in these statutes and in the Governing Documents for the community (the Declaration, Articles of Incorporation, Bylaws, rules, regulations, policies, procedures and guidelines of the Association).
 - d. **Exemptions.** Planned communities containing only nonresidential uses; small (no more than 20 units and no development rights); limited expense communities (annual assessments, exclusive of optional user fees and insurance premiums are \$400 per year or less, plus CPI adjustment after July 1, 1998) – NOTE: no exemption for commercial condominiums
 - e. **Pre-existing Common Interest Communities** – formed before July 1, 1992.
- 2) **Basic Nonprofit Governance – The Authority of the Board as Representatives of Owners.** As a nonprofit corporation, the owner associations are subject to or governed by CCIOA, Nonprofit Act and the governing documents.
 - a. Board members are representatives of all of the owners.



F o c u s e d o n C o m m u n i t i e s

8020 Shaffer Parkway
Suite 300
Littleton, Colorado 80127
303.863.1870
Fax 303.863.1872
www.cohoalaw.com

June 25, 2015
Page 2 of 9

- b. Officers - the executive board elects the officers.
 - c. The Board and/or officers contract with the Association's managing agent, the Association's attorney and other vendors, subject to rights reserved to the member in the documents.
 - d. How to effect change in an Association? Become a member of the Board.
3. **Effective Governance:**
- a. Noticing and running board Meetings.
 - b. Handling unruly participants.
 - c. Rule violations.
 - d. Fines.
 - e. Rule changes.
 - f. Use of committees.
4. **Effective-Owner Controlled Boards.**
- a. **Responsible boards understand their primary duty under Nonprofit Act: the duty of care (or the standard of conduct).**
 - i. The Duty of Care. Under Nonprofit Act, directors must discharge a duty of care, or act with a standard of conduct that includes three elements:
 - 1. Act in good faith;
 - 2. Act with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and
 - 3. Act in a manner the director reasonably believes to be in the best interests of the association.
 - ii. The Business Judgment Rule. A reviewing court will not second guess the decisions of the Board so long as the Board was acting within its authority and in the reasonable and honest exercise of its duties - good faith.

b. **Indicia of Responsible Boards.**

- i. Engage and maintain professional management.
- ii. Serve the owners and the Community.
- iii. Seek unanimity on actions of the Board.
- iv. Educate owners, while building consensus for decisions of the Board.
- v. Make decisions and act in a time efficient manner.
- vi. Inquire vs. demand.
- vii. Listen carefully and be aware of the concerns of owners, residents and occupants.

c. **Indicia of Great Boards.** A good board becomes great when it or the members of the board:

- i. are informed and knowledgeable about CIC's and HOA's and their community and documents, in particular;
- ii. exercise independent judgment;
- iii. obtain independent advice;
- iv. select and support good, professional management;
- v. dedicate the time required;
- vi. attend and participate in board meetings;
- vii. are alert to changes;
- viii. focus on the community;
- ix. connect with the community;
- x. organize or sponsor social events for the community;
- xi. recognize and value owners, community volunteers, task forces and committees;
- xii. apply the vision/basis of the community when making decisions;
- xiii. focus on policy;
- xiv. allow/require management to implement policy;
- xv. know their duties, their documents, and honor both;
- xvi. are thoughtful and careful;
- xvii. budget adequately and expend member monies prudently;
- xviii. apply risk management practices;
- xix. are adequately insured, without gaps in coverage and consistent with CCIOA and the governing documents;
- xx. guide management;

- xxi. avoid special treatment;
- xxii. facilitate process (lead the owners/members to consensus);
- xxiii. emphasize reasonableness;
- xxiv. solve problems;
- xxv. survey the owners;
- xxvi. measure the success of the community;
- xxvii. support final decisions of the board;
- xxviii. critique in private;
- xxix. reach out to the owners/members;
- xxx. lead to or create a new vision for the community.
- xxxi. engage knowledgeable and competent vendors;
- xxxii. have a plan for the community and engage in strategic planning; and
- xxxiii. set and follow policies and procedures.

d. **Common Board Responsibilities.**

- i. Maintain property values in community
- ii. Obtain reserve studies
- iii. Properly insure
- iv. Maintain, repair and replace common elements
- v. Properly budget and assess
- vi. Pursue delinquent assessments
- vii. Adopt responsible governance policies
- viii. Enforce covenants and rules

5. **The Nine Required Responsible Governance Policies**

- a. **Application:** Applies to all common interest communities and owner associations subject to CCIOA, including timeshare owner associations and club associations.
- b. **The Policies:** Owner Associations are required to have nine written responsible governance policies and procedures on the following topics:
 - i. collections
 - ii. conflicts of interest
 - iii. conduct of meetings
 - iv. enforcement of covenants and rules

- v. records, inspection and copying
 - vi. investment of reserves
 - vii. adoption of policies
 - viii. Disputes between the association and unit owners.
 - ix. Reserve study policy
- c. **How to comply?** Adopt and maintain the required policies. Update, revise and simplify these policies as needed, and as the governing documents are amended by the members and/or the board.

6. **Other Recommended Policies**

- a. Insurance guidelines – particularly condominium communities
- b. Pets
- c. Parking
- d. Political signs
- e. Flags
- f. Records retention

7. **Practice Pointers on the Drafting and Revisions of Policies and Rules and Regulations.**

- a. **Case Law Limitations/Criteria for Valid and Enforceable Policies/Rules.** In general, the courts recognize the following as characteristics of a valid rule or policy. Owners, residents and occupants are more likely to accept and cooperate with policies with these characteristics.
- i. The policy or rule should not violate a fundamental constitutional right (e.g., freedom of speech)
 - ii. The policy or rule must be consistent with applicable federal, state and local statutes.
 - iii. The policy or rule must be consistent with the association's governing documents (i.e., a policy or rule cannot prohibit what the Declaration or

June 25, 2015
Page 6 of 9

- covenants permit and vice versa).
- iv. The policy or rule must reasonably relate to the operation and purpose of the association.
 - v. The policy or rule must be reasonable.
 - A reasonable policy or rule is just, sensible, and not excessive (i.e., a policy or rule should be necessary and not more punitive than necessary).
 - Reasonable policies or rules promote legitimate goals.
 - Unreasonable policies or rules promote illegitimate goals. Unreasonable policies or rules are illogical or unfair; too broad or too severe.
 - vi. The policy or rule must be fair. It should not create a separate class or group of owners, residents or occupants.
 - vii. The policy or rule should be clear and unambiguous.
 - viii. The policy or rule must be uniformly/fairly enforced - this means there must be no selective enforcement or exceptions.

b. **Steps in Developing Reasonable Policies/Rules.**

- i. Determine the need for the policy or rule in the specific area.
 - Answer the question, “Why?”
 - Also, ask whether the rule is designed to meet the purposes of the association/community (to maintain, preserve, enhance and protect the property value of the Community, promote harmonious community living and preserve the common scheme and harmonious design of the Community).
 - Determine whether the problem identified is of sufficient consequence to justify creating a policy or rule – what are the trade offs?
 - Check to be sure that the existing policies, rules and governing documents are inadequate to address the issue.
 - Consider both the immediate impact of a policy or rule and its long term implications.
- ii. How is the policy or rule likely to be received?
 - Will the policy or rule meet the requirements of Colorado law, or solve

- iii. Identify the source(s) of authority for the policy or rule.
 - Review the governing documents and CCIOA.
 - CCIOA and/or the governing documents may provide authority for policies/rules.
 - CCIOA and/or the governing documents will allow for a determination on whether the proposed policy or rule must be an amendment to the governing documents or can simply be a new board adopted policy/rule.
- iv. Define the scope of the Policy/rule. Specify "who" and "what" will be covered by the rule.
- v. Check the proposed policy/rule against the criteria of a valid and enforceable policy/rule listed above.
- vi. Use clear, concise and unambiguous language.
- vii. The proposed policy or rule should be drafted in such a manner as to be concise and simple, yet clear and understandable. Avoid words or phrases that are vague or ambiguous. Have the draft policy or rule reviewed or prepared by the association's attorney.
- viii. Before adopted, consider giving notice of the proposed policy or rule to the owners with an opportunity for them to provide input.
 - With notice of the proposed action, the association can build consensus and support for the policies/rules before they are adopted, and will gain acceptance and compliance.
 - Invite written comments.
 - Consider a meeting on the proposed policy/rule if there are significant concerns within the Community.
 - Consensus and compliance is possible when policies/rules are viewed as fair and reasonable by owners, residents and occupants.
- ix. Before the policies are adopted, and if not drafted by the association's attorney, have them reviewed by association's attorney.
- x. Once adopted, notify owners, residents and occupants of the new policies/rules.
- xi. Once adopted, act on and use the policies/rules.

8. **Owner Rights to Participate at Board Meetings.**

- a. **Application:** Applies to all common interest communities and owner associations

subject to CCIOA, except those associations/communities that include time share units.

- b. **Colorado Law:** Owners continue to have the right to speak at board meetings before the board takes formal action on any item under discussion. If more than one person desires to speak, and there are opposing views, the board is to allow a reasonable number of persons to speak on each side of the issue.
- c. **How to Comply?** Adopt and maintain an owner participation or conduct of meetings policy that defines the owner's right to participate in board and member meetings. The policy should cover when owners may speak and what procedures need to be followed to participate in board and member meetings.

9. **Required Owner Education/Orientation by Associations – Knowledgeable Owners as an Aspect of Effective Association Governance.**

- a. **Once a Year.** At least once a year, and at no individual cost to unit owners, associations must provide education to their owners.
- b. **Content of the Education.** The content of the provided education must relate to the general operations of the association and the rights and responsibilities of owners, the association and its board members.
- c. **Discretion.** An association's board has the discretion to determine how to comply with this provision. The board must decide how and when it wishes to comply with the requirement that its owners have an opportunity, annually, to receive education on association-related topics. This may include presentations at the annual owners meeting, educational articles in the association newsletter or other flyers, offering a class, having a new homeowner orientation program, posting information on the association website, etc. The association should adopt and maintain an education policy that covers when and how education will be offered to owners. While associations must offer owner education, there is no liability to the association if the owners do not choose to take advantage of the education offered.

10. **Board Decision Making by E-mail**

- a. **Nonprofit Act Compliance.** Nonprofit Act specifies how this can be done in the absence of a provision in the Association's Bylaws. The Nonprofit Act is very detailed, specific and somewhat confusing.

b. Exercise Discretion – be Judicious.

- i. Should only be used in circumstances where action cannot wait until the next regularly scheduled meeting.
- ii. Ratify actions taken without a meeting at the next regularly scheduled meeting
- iii. Too frequent use gives an impression of lack of transparency, and an attempt to circumvent members' rights to attend Board meetings.

11. **Dysfunctionality – How to Deal With it**

- a. Follow the governing documents
- b. Invite participation
- c. Try to reach consensus
- d. Explain rationale for actions
- e. Put dissenting members on the Board or on committees
- f. Publish and post a newsletter
- g. Be transparent and provide information
- h. Be consistent – enforcement; regular meetings
- i. Be realistic
- j. Create a vision for the community; adopt a plan and follow the plan
- k. Use committees – finance, covenant enforcement, architectural review, social
- l. Look at whether you need to amend your governing documents – do they contain provisions that are not consistent with current law, or do not reflect current attitudes in the community, or could provide for better governance?