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CCIOA 101 for HOA Boards

CCIOA 101 for HOA Boards: Open Meetings

For those of you who follow our blog, you know that I recently concluded a series of blog entries on the new HOA records bill ("HB 1237") which has been signed into law by Governor Hickenlooper and will go into effect on January 1, 2013. This is just a first step the Colorado legislature has taken to address "homeowner bill of rights" provisions in the Colorado Common Interest Ownership Act ("CCIOA").

As I have shared in recent blog entries and in articles I have written for the Rocky Mountain and Southern Colorado Chapters of Community Associations Institute, in 2013 legislators in Colorado have pledged to introduce legislation to provide an enforcement mechanism that homeowners can utilize to ensure their HOA boards are complying with CCIOA. This legislation could even institute penalties for failing to comply.

While some boards may purposefully not comply with provisions of CCIOA, I believe the ***vast majority*** of boards are acting in good faith and strive to do the right thing. Instead, they may not know about or fully understand important provisions of CCIOA that provide rights to homeowners/members of their associations. As a result, over the next several weeks, I am going to be posting a series of blog entries entitled *CCIOA 101 for HOA Boards* aimed at getting HOA board's up-to-speed on important provisions of CCIOA. The first few blog entries in this series will focus upon the rights of members relating to HOA meetings.

Open Meetings and CCIOA
The Colorado Common Interest Ownership Act ("CCIOA"), at C.R.S. 38-33.3-308, addresses a variety of issues relating to association meetings – including requirements for open meetings. Here's a synopsis of key provisions of the statute relating to open meetings:

● Board of directors *and* committee meetings must be open to members of the association or their designated representatives.

● Agendas for board meetings must be made reasonably available to members of the association or their designated representatives.

● While CCIOA does not require associations to provide *notice* of board or committee meetings, we recommend this information be posted on association websites or in other convenient locations when reasonably practical. In addition, you should check the bylaws of your HOA to determine whether that document requires notice of board or committee meetings be given to members. If such a provision exists in your HOA's bylaws –please make sure to comply with it.

Transparency and Open Meetings
In addition to open meetings being required under CCIOA, there's no question that open meetings promote transparent communications between homeowners and the volunteers who govern their associations. Frankly, there's no better way to prevent misunderstandings, mistrust and unrest from taking root in communities than by boards and committees openly discussing and taking action on issues.

CCIOA 101 for HOA Boards: Right of Members to Speak at Board Meetings

A common question we receive from boards of HOAs and homeowners is whether the owners have a right to speak at board meetings. The Colorado Common Interest Ownership Act ("CCIOA") at C.R.S. 38-33.3-308(2.5)(b), provides that owners have a right to speak prior to the board taking action on an issue. In particular, that provision of CCIOA provides as follows:

> "At an appropriate time determined by the board, but before the board votes on an issue under discussion, unit owners or their designated representatives shall be permitted to speak regarding that issue. The board may place reasonable time restrictions on persons speaking during the

meeting. If more than one person desires to address an issue and there are opposing views, the board shall provide for a reasonable number of persons to speak on each side of the issue."

The bottom line is that homeowners, or their designated representatives, have a right to speak before a vote is taken by the board on a particular issue - **not to interrupt the business of the board whenever they wish.** In addition, the ground rules associated with this right to speak are set by the board.

CCIOA 101 for HOA Boards: Use of Executive Sessions

On Monday, I began a series of blog entries entitled *CCIOA 101 for HOA Boards.* The purpose of this series is to provide basic information for directors on key provisions of the Colorado Common Interest Ownership Act ("CCIOA") they need to know about and comply with. In the first entry, I focused upon the requirement that board and committee meetings must be open to the members of the HOA – or their designated representatives.

While as a general rule board and committee meetings must be open, the Colorado Common Interest Ownership Act narrowly regulates the circumstances under which a board or committee of an HOA may convene in a closed executive session. CCIOA, at C.R.S. 38-33.3-308 (3) and (4), specifically provides as follows:

"(3) the members of the executive board or any committee thereof may hold an executive or closed door session and may restrict attendance to the executive board members and such other persons requested by the executive board during a regular or specially announced meeting or a part thereof. The matters to be discussed at such an executive session ***shall include only matters enumerated in paragraphs (a) to (f) of subsection 4 of this section.***

(4) *Matters for discussion by an executive or closed door session are limited to*:
(a) 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;
(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." (emphasis supplied)

CCIOA 101 for HOA Boards: Dissemination of Information to All Directors

A commonly missed provision of the Colorado Common Interest Ownership Act ("CCIOA") requires that virtually all information provided to or available to one director relating to the HOA– must be shared with all directors. The intent of this provision of CCIOA is to ensure that every director of an HOA has the information he/she needs to effectively participate in the governance of their communities. In addition, this provision is intended to make certain that directors do not leave one or more fellow directors out of the information loop.

CCIOA, at C.R.S. 38-33.3-303(1)(b), provides as follows:

"Notwithstanding any provision of the declaration or bylaws to the contrary, ***all members of the executive board shall have available to them all information related to the responsibilities and operation of the association obtained by any other member of the executive board.*** This information shall include, but is not necessarily limited to, reports of detailed monthly expenditures, contracts to which the association is a party, and copies of communications, reports and opinions to and from any member of the executive board or managing agent, attorney, or accountant employed or engaged by the executives board to whom the executive board delegates responsibilities under this article." (emphasis supplied)

If you as a director receive any information which relates to the "responsibilities and operation of the association," you must take steps to ensure that every member of the board of directors is provided with that information.

CCIOA 101 for HOA Boards: Political Signs

On Saturday morning, I was honored to serve as the spokesperson for the Rocky Mountain Chapter of Community Associations Institute (CAI) in an interview with Tyler Lopez on 7News. During the interview, we discussed flying the American flag and displaying political signs in HOAs.

While I recently blogged on provisions of the Colorado Common Interest Ownership Act ("CCIOA") which relate to flying the American flag and service emblems in HOAs, I haven't yet addressed the issue of political signs. Since the

political season is already upon us, here's what boards of HOAs need to know about the provisions of CCIOA (C.R.S. 38-33.3-106.5 (1)(c)) relating to political signs:

● HOAs *cannot prohibit* the placement of political signs on property which is owned by a resident of the HOA or in the window of a unit.

● HOAs may regulate the timeframe for the display of political signs, by prohibiting the display of these signs ***earlier than 45 days before*** an election and ***more than 7 days after*** an election.

● HOAs may regulate the size of political signs which may be displayed on an owner's property or in the window of a unit. CCIOA provides that HOAs may limit the maximum size of political signs *to the lesser of*: (1) the maximum size allowed by any applicable city, town, or county ordinance that regulates the size of political signs on residential property; *or* (2) thirty-six inches by forty-eight inches.

● HOAs may limit the number of political signs which may be displayed to 1 sign per political office or ballot issue that is contested in an upcoming election.

● CCIOA defines a *political sign* as ". . . a sign that carries a message intended to influence the outcome of an election, including supporting or opposing the election of a candidate, the recall of a public official, or the passage of a ballot issue."

CCIOA 101 for HOA Boards: Energy Efficiency Measures

As I continue with my series of blog entries relating to provisions of the Colorado Common Interest Ownership Act ("CCIOA") members of HOA boards need to know about, I thought this was the perfect time of year to address the ability of homeowners to install *energy efficiency measures* on property they own. Here's what you need to know:

CCIOA, at C.R.S. 38-33.3-106.7, defines an *energy efficiency measure* as "a device or structure that reduces the amount of energy derived by fossil fuels that is consumed by a residence or business located on real property." CCIOA specifically limits "energy efficiency measures" to include only the following items and devices:

● 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, including without limitation a light fixture containing a coiled or straight florescent light bulb, and any solar recharging panel, motion detector, or other equipment connected to the lighting device; and
● A retractable clothesline.

Regardless of what the governing documents say**, HOAs are not permitted to "effectively prohibit the installation or use" of these items and devices**. However, associations **are permitted** to adopt *reasonable aesthetic provisions* (more commonly known as "architectural guidelines") that govern "the dimensions, placement or external appearance of an energy efficiency measure."

In determining whether the aesthetic provisions are *reasonable*, an association must take into consideration: "(I) the impact on the purchase price and operating costs of the energy efficiency measure; (II) the impact on the performance of the energy efficiency measure; and (III) The criteria contained in the governing documents of the common interest community."

HOAs are also permitted to adopt and enforce "bona fide safety requirements, consistent with an applicable building code or recognized safety standard, for the protection of persons and property."

HOAs should be aware that owners ***do not have the right*** to place an energy efficiency measure on property that is:

● Owned by another person;
● Leased, except with the permission of the lessor;
● Collateral for a commercial loan – except with permission of the secured party; or
● *A limited common element or general common element of an association*. That means owners in condominium associations will have a difficult time installing energy efficiency measures without first obtaining permission from the association.

CCIOA 101 for HOA Boards: Secret Ballots

We often receive inquiries from HOA board members on whether they are required to utilize a secret ballot when members/owners vote on any particular issue brought before them. The Colorado Common Interest Ownership Act ("CCIOA") addresses voting at C.R.S. 38-33.3-310 and requires secret ballots to be utilized by members under the following circumstances:

● Secret ballots *must* be utilized when votes are cast for contested positions on the board of directors of an HOA. However, this does not apply if the governing documents of an association provide for the election of members to the board of directors by delegates on behalf of the owners.

● Secret ballots may be utilized at the discretion of the board of directors.

● Secret ballots *must* be utilized on any given issue when 20% of the owners, present in person or by proxy at a meeting in which quorum is present, request the use of a secret ballot on an issue.

CCIOA 101 for HOA Boards: Counting Secret Ballots

Last week in a CCIOA 101 for HOA Boards posting, I talked about the circumstances under which the Colorado Common Interest Ownership Act ("CCIOA"), at C.R.S. 38-33.3-310, requires the use of secret ballots when members are voting in a contested election for directors or on other issues. When counting these secret ballots, here's what you need to know:

● The ballots should be counted by a neutral 3rd party *or* a committee of volunteers;

● If a committee of volunteers is utilized, the president of the board (or the individual presiding over the membership meeting) during the meeting shall select owners/members of the HOA to serve on the committee of volunteers. The volunteers cannot be members of the board *or* a candidate in a contested election for a position on the board.

When the results of a vote by secret ballot are announced, the results must be reported without referencing the names, addresses or any other identifying information of the owners casting their votes.

CCIOA 101 for HOA Boards: Reserve Study Policy

As Mark Payne noted in his May 21st blog posting entitled *Those Pesky Policies*, the Colorado Common Interest Ownership Act ("CCIOA") requires HOAs in Colorado to adopt and comply with nine Responsible Governance Policies – commonly referred to SB 100 Policies.

One of the nine policies addresses the issue of reserve studies. Here's what CCIOA, at C.R.S. 38-33.3-209.5(IX), requires a Reserve Study Policy to include:

(1) When the association has a reserve study prepared for the portions of the community maintained, repaired, replaced and improved by the association;
(2) Whether there is a funding plan for any work recommended by the reserve study;
(3) If there is a funding plan, the projected sources of funding for the work; and
(4) Whether the reserve study is based on a physical analysis and financial analysis.

This provision of CCIOA also provides that "For purposes of this subparagraph (IX), an internally conducted reserve study shall be sufficient." While HOAs are permitted under this provision to conduct their own reserve study, this is not a recommended course of action unless the association has qualified staff or volunteers to handle this important work.

CCIOA 101 for HOA Boards: Conflicts of Interest Policy

In my *CCIOA 101 for HOA Boards* blog posting yesterday, I addressed the Reserve Study Policy – which is one of the 9 Responsible Governance Policies (commonly referred to as "SB 100 Policies") that HOAs are required to adopt and comply with under the Colorado Common Interest Ownership Act ("CCIOA"). In May of 2011, Governor Hickenlooper signed into law House Bill 11-1124 which amended C.R.S. 38-33.3-209.5 and outlines the following items which must be included in the Conflicts of Interest Policy for an HOA:

● A definition or description of the circumstances under which a conflict of interest exists;

● The procedures to follow when a conflict of interest is identified, including:

○ How the conflict of interest must be disclosed;

○ To whom the conflict of interest must be disclosed; and

○ Whether the board member with the conflict of interest must recuse him or herself from discussing or voting on the issue.

● A provisions that requires the Conflicts of Interest Policy to be periodically reviewed.

We recommend that you consult with legal counsel to obtain advice on the best practices and options for dealing with conflicts of interest and drafting the Conflicts of Interest Policy. In the meantime, stayed tuned for more information on the Responsible Governance Policies your association must adopt and comply with!

CCIOA 101 for HOA Boards: Covenants and Rules Enforcement Policy

Earlier this week, I blogged on the requirements in the Colorado Common Interest Ownership Act ("CCIOA"), that HOAs must adopt as a Reserve Study Policy and Conflicts of Interest Policy and what those policies must contain. As one of the Nine Responsible Governance Policies, C.R.S. 38-33.3-209.5 also requires HOAs to adopt a Covenants and Rules Enforcement Policy which should contain, at a minimum, provisions which address the following items:

● Notice and hearing procedures which must be followed prior to the association imposing fines for covenants and rules violations

● A schedule of fines which may be assessed

● A fair and impartial fact finding process concerning whether the alleged violation actually occurred and whether the owner is the one who should be held responsible for the violation. While this process may be informal, at a minimum it must guarantee that the owner has notice and an opportunity to be heard before an impartial decision maker.

● The definition of *impartial decision maker* which "means a person or group of persons who have the authority to make a decision regarding the enforcement of the association's covenants, conditions, and restrictions, including its architectural requirements, and other rules and regulations of the association and do not have any direct personal or financial interest in the outcome. A decision make shall not be deemed to have a direct personal or financial interest in the outcome if the decision maker will not, as a result of the outcome, receive any greater benefit or detriment than will the general membership of the association."

● If as result of the fact finding process it is determined that an owner should not be held responsible for the alleged violation, the association shall not allocate to the unit owner's account any of the association's costs and attorney fees incurred in asserting and hearing the claim. Regardless of any provision in the association's governing documents, the unit owner shall not be deemed to have consented to pay such costs and fees.

As you can tell, the enforcement of covenants and rules is a procedural process that can result in complications and unintended consequences. As a result, it is highly recommended that HOAs work with their legal counsel to effectively draft and comply with the Covenants and Rules Enforcement Policy.

CCIOA 101 for HOA Boards: Notices for Board Meetings

One of the routine questions I receive from boards of HOAs and homeowners, is whether notice is required to be given to owners for regular and special meetings of the board. While CCIOA requires that meetings of boards be open to owners and provides owners with a right to speak before the board takes formal action on an issue - interestingly CCIOA *does not require* that owners be provided with notice of regular and special board meetings.

While CCIOA doesn't specifically require notice, you should check the Bylaws of your HOA to determine whether the Bylaws require notice of these meetings be provided to owners.

CCIOA, at C.R.S. 38-33.3-308, does *require* that agendas for board meetings be made reasonably available for owners or their representatives. In addition, CCIOA *encourages* associations to provide notices and agendas for board meetings electronically by posting on a website if available. In addition, if the email communication is available, associations are required to provide email notice of regular and special meetings to all owners who request email notice and who provide their email address to the association. For owners who request email notices, notices of special meetings must be given as soon as possible - but at least 24 hours before the special meeting.

CCIOA 101 for HOA Boards: Annual Owner Education

With annual meeting season upon us, it's a great time for the boards of HOAs to provide owner education as required by the Colorado Common Ownership Act. CCIOA, at C.R.S. 38-33.3-209.7, requires associations to provide free education at least yearly to owners on ". . . the general operations of the association and the rights and responsibilities of owners, the association and its executive board under Colorado law." This provision of the statute permits the boards of HOAs to determine how to comply with the requirements for owner education. In addition, owner education is not required for time-share communities.

HOAs have wide latitude to decide how to deliver the education. Some associations provide education at their annual meetings while others utilize newsletter articles, their HOA website and other methods of communication to provide the required information. Some HOAs will bring in experts and guest speakers to educate the members and others will have members of the board or management provide the instruction.

Even if CCIOA did not require HOAs to provide yearly education to their owners, it's always a great idea to keep owners in the loop on the operations of their association and the rights and responsibilities of all of the folks involved in their community.

CCIOA 101 for HOA Boards: Reimbursement for Board Member Education

Governing and overseeing the operations of an HOA is a significant responsibility for board members which can sometimes seem a bit overwhelming. In addition, some board members have never served on the board of a nonprofit corporation or have little experience overseeing the business aspects of an association. As a result, attending educational sessions can be an extremely helpful resource for directors.

The Rocky Mountain and Southern Colorado Chapters of Community Associations Institute, management companies and law firms like WLPP routinely provide education for boards. While for the most part these educational sessions are provided free of charge, sometimes there is a small fee for attendance. The Colorado Common Interest Ownership Act ("CCIOA") addresses the ability of associations to reimburse board members for educational expenses.

CCIOA, at C.R.S. 38-33.3-209.6, provides that the board of an HOA may authorize " . . . reimbursement of board members for their actual and necessary expenses incurred in attending educational meetings and seminars on responsible governance of unit owners' associations. The course content of educational meetings and seminars shall be specific to Colorado . . ." In addition, the classes are required to reference applicable provisions of CCIOA.

Here are a few important things for boards to consider when reimbursing directors:

1. Boards should adopt a policy addressing the procedures for requesting reimbursement and requiring that reimbursements be pre-authorized by the board.

2. Boards should budget each year for reimbursement for educational expenses. In addition, boards are permitted to account for these costs as a common expense.