HOA GOVERNANCE, DOCUMENTS, RECORDS
SUMMIT HOA SERVICES, INC. FRISCO, CO

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HOMEOWNER OR COMMUNITY ASSOCIATIONS:

What does "membership in a Homeowners Association" really mean?
Membership in an Association consists exclusively of all unit owners. A unit owner cannot refuse or reject membership, nor can mandated members be refused or rejected. By the mere purchase of a property governed by a homeowner's association, an owner is obligated to adhere to the policies, rules, regulations and covenants of the association, whether pre-established or subsequently instituted by the Board.

DOCUMENTS AND RECORDS:

What is CCIOA?

The Colorado Common Interest Ownership Act (CCIOA) governs the establishment and practices of a Homeowner Association ("association") in Colorado.

What are the typical principal governing documents of an association?

Articles of Incorporation: The legal instrument which sets forth the name and object of the organization, and any other information required by state law. It is usually drafted by an attorney and *supersedes* all other rules of an organization. It establishes the authority for the organization to create the classes, eligibility, composition and rights of membership, as well as creating the committees (such as the Executive Board), and affords the power to adopt the parliamentary authority and bylaws.

Declaration of Covenants, Conditions, Restrictions (and Easements): A recorded instrument that creates a common interest community, including its amendments, plats and maps. CCIOA provides the criteria by which the Declarant, usually the project's Developer under legal guidance, establishes the Declaration. The Declaration mandates the policies of the association that each member must abide by. Once recorded, it is difficult to amend.

Organizational Meeting: The very first meeting of an "association" establishes the initial Board and usually delegates the authority and responsibility to establish the necessary framework and infrastructure for the common area management and services.

Bylaws: A document adopted by an organization which contains the basic rules for governing itself; its primary objectives and function. They should serve to strengthen and protect the group. They must be consistent with the law. They may be **amended** or **revised**, usually by two-thirds majority vote. They should be periodically reviewed to ensure consistency and current needs of the group.

Policies, Rules and Regulations: The Declaration affords the Board the powers to establish rules and regulations, and their enforcement, to provide for the comfort and safety of the residents, the equitable use and enjoyment of the facilities, and the equitable burden of responsibilities in a community. The rules should have a solid legal basis, must be clear, concise and easy to understand. A good rule requires "reasonable and decent people to do what they would have done naturally without the rule, after merely thinking about it." Thus, rules need only be enforced against the few who aren't reasonable and decent.

BOARD OF DIRECTORS:

How much power does the Board actually have?

By Colorado State Statute, the Board of Directors ("Executive Board", "Board") is charged with the ultimate responsibility and authority for governing the association on behalf of the members. It can delegate its authority, such as to a managing agent for administering its affairs, but it *cannot* delegate its responsibility. The Board's powers are broad; it can set the policies, standards, procedures, programs and budgets for the association. The Board *cannot* amend the Declaration, terminate the common interest community, elect members to the Board, determine Board qualifications, powers, duties, or terms of office.
The principal responsibility of the Board is to maintain, protect, preserve and enhance the value of the community's assets. It cannot effectively accomplish this without a *fiduciary duty* to the association, a legal obligation, comprised of two components – the *duty of care* and the *duty of loyalty*. The duty of care means that the Board must act as reasonable people in managing the association's affairs. It must exercise reasonable business judgment (the "business judgment rule") in making a decision to avoid being negligent in its actions. The duty of loyalty requires the directors to act in the best interests of the association; that is to avoid conflicts of interest and acting out of self-interest.

MEETINGS:

What are "Roberts Rules"?

Parliamentary procedure, or "Robert's Rules", refers to the rules that have evolved over time to facilitate the democratic transactions of decision making in an organized group. The presiding officer needs to know how to plan a meeting and how to run one in an efficient and democratic manner. The procedure should be used to *help*, not *hinder*, decision making. In 1876, Henry Martyn Robert wrote his small book of rules designed for the non-legislative organization. They are based on common sense and logic. Associations are customarily required to conduct meeting practices according to Roberts Rules. The ***management company*** should have extensive knowledge of meeting protocol and be prepared to offer advice and assistance where and when needed.

My meetings sometimes get out of hand. Who should control the meeting?

The presiding officer has the duty to ensure the democratic and orderly flow of meetings. Perhaps due to the infrequency of meetings, a presiding officer may have little experience in such matters. The ***management company's representative*** should assist in counseling the presiding officer and therefore bringing the meeting to order.

Our Board Secretary prepares the minutes of all our meetings, however, they are often not very accurate or clear. Is there a formal procedure for minute taking?

- Accurate minutes are vital as a legal and permanent record of proposals, decisions and reports of meetings.
- The content of the minutes should closely follow the Agenda.
- Resolutions should be clearly stated by the maker, repeated by the chairperson prior to vote, and recorded precisely.
- All adopted and defeated motions should be recorded, along with the maker of the motion and the number of votes on each side of a ballot or counted vote.
- There is no need to record discussion or personal opinion, the name of the motion second, withdrawn motions, or entire reports as presented. The latter can be references as "attached" to the final minutes.
- Minutes should be written up as soon as possible. They should be signed and dated by the secretary as an "accurate record of the meeting of the (association) members, held at (place), as of the date and time (above)". If requested by the association, or by contract, the association manager may take the minutes, submitting the final copy to the secretary for signing.
- The minutes may be corrected at the time of reading at the next meeting. Corrections should always be made to the original minutes in *red*, and thus filed in the minute book.
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INSURANCE AND ASSURANCE:

I am on our Executive Board of Directors, but am concerned that I could be held accountable in the event of a grave error or misjudgment that the Board as a whole makes. What protection are the officers afforded?

All associations are encouraged to insure their Board with "Directors and Officers Insurance". This is a very inexpensive liability insurance that insures the Board in the event legal action is brought against them. As a practical matter, all Board correspondence and decisions should be appropriately recorded, whether by email, in the minutes or otherwise. Any actions a Board takes outside a formal meeting should be subsequently ratified by the Board members at the next meeting. Your ***management company*** should ensure that these items are appropriately addressed at the time the agenda is being prepared.

Our Board of Directors is considering adopting a policy that passes the deductible, or any uninsurable cost of a repair, onto the owner where the cause of the damage originated. Although this seems fair, how do I ensure I have adequate insurance for this?

Many Declarations state that the association is not responsible for insurance coverage on owner installed fixtures and improvements, as well as upgrades to the unit, such as floor coverings, wall coverings, appliances and other personal property. The Declarations are often silent on who might pay a deductible in the event of a claim where more than one unit plus the common area is involved. The Board will often establish a policy on this, whereby a negligent owner, or perhaps the owner of the unit from which the event originated, will bear the cost of the deductible. With today's deductibles usually from $5000 and upwards, the expense can be difficult for the owner to bear, let alone the association.
All condominium owners should consider an HO-6 policy, including an adequate loss assessment endorsement to cover damages to other condominium units or the common elements, as well as cover the deductible which may be assessed the owner. There are four parts of coverage in the HO-6 policy: dwelling, personal property, loss of use, liability and medical expenses. An HO-6 policy is very inexpensive; there is no reason not to have one.

MAINTENANCE:

Recently, I was reading our Declaration to see whether an interior wall, and its pipes and wires, were my responsibility or the associations should any repairs be necessary. it seems rather vague. As a Board member, how can I clarify this for our other owners?

Generally, if the interior wall is a support wall, the association has responsibility for its maintenance and insurance; although, from the drywall in is usually the unit owner's responsibility. A non-support wall is always the unit owner's responsibility. The responsibility for the utility lines running through such a wall will depend on whether they are servicing only your unit, or more than your unit, as well as the specific wording in the Declaration. There are many confusing, and some conflicting, areas of responsibility in the governing documents. Many owners, unaware of the exact language, expect that, if they purchase a condominium, all maintenance should be taken care of at the association's expense. Unfortunately, reality sets in when a problem occurs and the manager has indicated that you are responsible for the repair.
The responsibility for repairs and insurance on the dividers between units, and the utilities therein, is frequently the cause of the most heated discussions amongst owners. When the language in the governing documents is not clear enough, the Board does have the power to be more specific and assign responsibility in a reasonable manner. The best way to accomplish this and try to cover all possible scenarios, is (for the Board) to create a Maintenance and Insurance Responsibility Chart, and an associated policy resolution to adopt it, usually no more than a two-page concise grid summary of these responsibilities
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RESERVE OR REPLACEMENT FUNDS:

What is a reserve study?

Perhaps the most important function of an association's fiscal responsibility is to ensure that sufficient funds are *reserved* for *replacement* of the community's common property – such as roofs, siding, asphalt paving, central heating, pools, elevators etc. A reserve study, schedule or plan, attempts to identify these needs and estimate, as thoroughly as possible, the specific required improvement(s), when they are likely to be needed, how much will the cost be and how it be paid for.

The study may often include added facilities or upgrades to the community. Many studies will also include deferred maintenance items, such as periodic painting of a building's exterior or asphalt paving resealing. Although the funding for these high expenditure items should be reserved for, there are tax implications that need to be considered and should be discussed with the community's accountant.

An experienced ***reserve study provider*** will be able to provide such a study. It should be considered a "guide" to what is needed and the costs associated. It should be updated (at least) annually in consultation with the Board of Directors. The plan should capture **all** the necessary major components – even if your association has 40-year shingles on its roof(s), the eventual replacement of these should be included.
Finally, the study should be relatively easy to follow, perhaps uncomplicated by "the time value of money", and should be amortized to indicate an amount each individual owner must pay each month into the reserves to satisfy the particular plan the Board has adopted.

How should our reserves be accounted for?

Although there are numerous ways the reserve fund fiscal activity may be documented, it is now required by Colorado State law that the Reserve (or Replacement) Fund maintain its own income and expense activity, separate from the operating income and expenses, with net flow recognized in an equity account. This equity fund should balance with the reserve cash fund. Additionally, any reserve activity anticipated in the coming year should be included in the operating budget, which of course is approved by the Board and ratified by the membership. Failure to do so, might render an impediment to collection should an owner seriously default on his or her assessments. Check with your bookkeeper to ensure the reserves are clearly identified and not commingled with the operating funds.
How do we know if our Reserves are adequate for our future needs?

Currently, there is no specific minimum level of funding as required by Colorado State Statute, only that the association maintains and funds reserves for capital project replacements and improvements. The best approach is to fully fund the expected needs by collecting such periodic interval payments (that portion of the regular assessments) as necessary to completely pay for the component repair or replacement when it becomes due without the need for a special assessment. Many associations will, however, adopt a funding plan that is less than 100% of being fully funded. Note, anything less than fully funding the anticipated requirements is likely to result in special assessing the then current owners, or compromising in some other way so as to reduce the impact of the expense on those owners.

However, new Fannie-Mae guidelines (2009) require that capital reserves must represent at least 10% of the budget; a minimum threshold for reserve funding has now been vicariously established. Why care about Fannie-Mae? Most traditional loans are underwritten by Fannie-Mae; their guidelines are considered the standard throughout the industry. Without meeting their reserve requirement, a prospective purchaser of a condo unit would not be able to qualify for a traditional loan.

Our Board is considering repainting our siding next year, but is concerned we do not have enough reserves to pay for it. They are discussing a Special Assessment. Can thy impose a special assessment now for a repainting task required next year?

Your Declaration should identify the criteria by which regular and special assessments are levied. Usually, special assessments can only be levied in the year the improvement is to be undertaken, or to retire a deficit remaining from a previous period. By this, you cannot fund a future year's expense, especially an un-budgeted one, by a special assessment. Additionally, if a special assessment is created for a task later this year, it should be specified and communicated to the membership as such, with all funds collected placed in the reserve cash account and accounted for separately in the replacement operating fund. Your ***management company*** should be adept at providing the necessary information and procedures for creating, communicating and accounting for a special assessment.

ASSESSMENTS AND DELINQUENCIES:

One member of our community has not paid their Dues in 5 months. What should we do as we all feel we are "financing" his membership?

Regular Assessments (Dues) not only provide the support structure for your Association's continued existence, as required by law, but also contribute to the future maintenance of the property as a whole, a burden no single owner should want to face later when major routine maintenance becomes necessary. Although your governing documents indicate the process by which Dues collection is to be addressed, it is our experience that to initiate such a formal approach, in the absence of any demand thus far, will likely antagonize the situation and render further collection difficult. Although it is certainly their legal right, it does not usually behoove an association to threaten severe collection remedies, such as foreclosure, for an owner in several month's debt cannot often pay immediately and will resist attempts at foreclosure, regardless of its reality. Taking a property to foreclosure is extremely time-consuming and can be very expensive. Unless, your real estate market is strong, the association will likely end up with a property they cannot sell, a lot of ill-will amongst other owners, and the now "insurmountable" debt still on the books.
A more practical, and often successful, application is for the ***management company*** to make the initial contact in person (by phone or in appearance) to discuss the owner's predicament, present options and hopefully agree on a resolution that keeps the owner in residence and the association in financial strength. Any agreement naturally requires written formality and strict adherence. Any failure to conduct such reasonable negotiations, or any breach of the agreed terms, should render the immediate pursuit of more serious options, such as those permitted by the Declaration.

Notwithstanding, a prudent ***management company*** should never permit an owner to fall in such serious arrears. Although Dues are usually required by the 1st of each and every month, frequently an owner's payment is received

late. An in-house policy should be enforced to ensure a process of penalizing late payments and proceeding with notification and collection process for those in serious arrears of 3 months or more. Automatic transactions are now commonplace and prevent any late payments. Check to see if your manager can offer this service.

MANAGEMENT:

In what capacity does our association manager work for me?

Your ***association manager*** is part of the team, not a subordinate. He works for the association. He is hired by the Board as a professional to operate and maintain your million-dollar real estate asset. He should be treated as a professional, not as an order taker, minute taker or clerk. Correspondingly, he should act like a professional, with all due diligence, conscientiousness, and should, above all, be proactive in his management. He should guide and lead the Board, imparting his knowledge and experience with sound advice to benefit the Board in making their decisions. The Board should benefit from this – they have the final say.

Recognize that no one in life is perfect and some minor item may have been forgotten. Follow the advice from the bestseller "*Don't Sweat the Small Stuff*". Work with your fellow Board members and the ***association manager*** to ensure things get done as efficiently as possible, without causing yourself a lot of heartburn. Hold your manager accountable for his actions or inactions, but be reasonable and constructive. Developing a camaraderie with your fellow Board members and the ***association manager*** will assist your team to move your community forward, permitting the quiet and peaceful enjoyment its members should expect, in addition to ensuring the value of their investment continues to increase.

Does your ***management company*** act on instinct and faith, rather than fact and information? This makes the team resolute but not judicious, bold but not wise – a dangerous combination charged with ensuring the protection of your asset.