Senate Bill 05-100 & 06-89: *What They Say and How to Comply*

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SENATE BILL 05-100 and Senate Bill 06-89: WHAT THEY SAY AND HOW TO COMPLY

Passed in June 2005, SB 100 affected almost all aspects of the operation and governance of Colorado's common interest communities from how board members are elected to the policies associations are required to adopt. SB 100 not only amended several existing provisions of CCIOA, but it also added entirely new sections for board members and managers to master. Additionally, several sections of the statute are subject to an association's existing governing documents. By the time managers and board members felt like they understood the changes brought by SB 100, SB 89 (the SB 100 'Clean Up Bill') was passed. SB 89 was written to address the portions of SB 100 that proved to be impracticable for associations to implement, needed clarification, or had unintended consequences. Although most of SB 89's amendments are welcome, board members and managers need to know how this most recent law affects their communities and do what is necessary to comply.

Here is a guide to what SB 100 and SB 89 say and what steps community association board members and managers must take to comply with these laws. (The changes brought by SB 89 are indicated with italics.)

I. RESTRICTIONS ON COVENANTS AND BYLAWS

1.1 XERISCAPING (37-60-126)

Effective Date:	June 6, 2005
Applicability:	Applies to all pre and post-CCIOA common interest communities.
New or Amended:	Not a part of CCIOA, but amends 37-60-126(11) by broadening its existing prohibition on association restrictions on xeriscaping.
Amended By SB 89:	No

What It States:

- Any association covenant either restricting or limiting xeriscaping or requiring the primary or exclusive use of turf grass is declared contrary to public policy. This declaration renders *any* such covenant unenforceable, regardless of how long the covenant has existed. [37-60-126(11)(a)]
- Associations may not place more procedural requirements on unit owners who seek approval for xeriscaping than already exist in the association's governing documents. The types of procedural requirements within the statute's scope include 1) an architect's stamp; 2) preapproval by an architect or a landscape architect hired by the board; 3) an analysis of water usage under the new landscape plan or a history of water usage under the unit owner's existing landscape plan; and 4) the adoption of a landscaping change fee. [37-60-126(11)(b)(I)]

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- Associations still may take enforcement action against unit owners who let their landscaping die UNLESS water use restrictions have been declared by local authorities. [37-60-126(11)(c)]
- During a period of water use restrictions, associations must suspend any enforcement actions against owners whose landscaping dies as a result of complying with the imposed watering restrictions. [37-60-126(11)(c)]
- Associations must allow unit owners a "reasonable and practical" opportunity to revive dead grass before requiring a unit owner to re-sod. [37-60-126(11)(c)(III)]

Comments:

1) Educate unit owners on their statutory responsibility to maintain some type of landscaping, regardless of whether or not they chose to xeriscape. Make it clear that "xeriscape" does NOT mean "let all your grass die and cover it with rocks" or "let your weeds run rampant."
2) An association should consider amending its covenants to contain a clear requirement for unit owners to maintain their landscaping – whether xeriscaping or not – on unit owners' property.
3) Be aware that the statute explicitly states that unit owners cannot be forced to disobey watering restrictions imposed by the local water authorities.
4) This section uses both the phrases "water use restrictions" [37-60-126(11)(c)(I)] and "drought emergency." [37-60-126(11)(c)(II)] when discussing a homeowner's responsibility to follow watering restrictions imposed by local authorities. The reference to a "drought emergency" was a drafting error, and the phrase should read "water use restriction" instead. This error should be amended in the 2006 Legislative Session.
5) An association should identify any restrictions in its governing documents that may no longer be enforced.
6) An association should make sure that the statutory definitions of xeriscaping and turf grass are understood. The statute defines "turf grass" to mean "continuous plant coverage consisting of hybridized grasses that, when regularly mowed, form a dense growth of leaf blades and roots." "Xeriscape" is defined as "the application of the principles of landscape planning and design, soil analysis and improvement, appropriate plant selection, limitation of turf area, use of mulches, irrigation efficiency, and appropriate maintenance that results in water use efficiency and water-saving practices."
7) When enforcing landscaping regulations, special districts must comply with the requirements of this provision.
8) This provision applies to an association's restrictive covenants. Therefore, local ordinances addressing landscaping and xeriscaping remain unaffected by this section. Furthermore, each municipality has the authority to impose water use restrictions as it determines they are needed as well as the ability to regulate xeriscaping. For more information on either local watering restrictions or xeriscaping in general, please visit our website at www.hindmansanchez.com on which links to this information are provided.

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Steps For Compliance:

1) Examine governing documents to determine whether they contain any unenforceable covenants that restrict or limit xeriscaping or require an extensive use of turf grass.
2) Do not attempt to enforce any such provisions – it is illegal.
3) Educate all incoming board members on the inability to enforce certain restrictions, if applicable.
4) Make sure that the procedure for approving proposed landscaping plans that does not place any additional requirements on unit owners who wish to use xeriscaping.
5) Amend any existing landscaping approval procedures to include a statement that states that no additional burdens or requirements may be imposed on proposed xeriscaping plans.
6) Do not deviate from this procedure on the basis of what type of landscaping is proposed.
7) Develop a policy that defines a "reasonable and practical" time for unit owners to attempt to revive their grass after water restrictions are lifted. This policy must:
   a) Provide that the time period for reviving grass does not begin running until after the water restrictions are lifted
   b) Take in account local growing seasons and other practical restrictions
8) Do not take or pursue enforcement action if there are watering restrictions in place.

1.2 PATRIOTIC AND POLITICAL EXPRESSION (38-33.3-106.5)

Effective Date:	June 6, 2005
Applicability:	Applies to all pre and post-CCIOA common interest communities.
New or Amended:	This is a new section to CCIOA
Amended By SB 89:	Yes.
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- Associations may not prohibit *owners or unit occupants* from displaying the American flag on their property, in the windows of their units, or on their balconies if the display complies with the Federal Flag Code, 4 U.S.C. Secs. 4 to 10. [Copy of Flag Code available on the HindmanSanchez website.] Associations may regulate the location and size of flags and flagpoles, but may not ban the installation of flags and flagpoles all together. [Section 38-33.3-106.5(1)(a)]
- Associations may not prohibit *owners or unit occupants* from displaying a service flag with a star denoting the service of the unit owner *or occupant* or a member of the unit owner or *occupant's* immediate family in the active or reserve military service during a time of war or armed conflict. Associations must allow these flags to be displayed on the inside of a unit window or door. Associations may make reasonable rules to regulate the size and method of the display of service flags, but must at least allow flags that measure nine inches by sixteen inches. Associations have the discretion to allow for flags larger than nine by sixteen inches. [38-33.3-106.5(1)(b)]

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- Associations may not completely prohibit the display of political signs *by an owner or occupant of a unit within the boundaries of the unit* or in their windows. Associations may ban the display of such signs earlier than 45 days before election day and later than 7 days after an election. [38-33.3-106.5(1)(c)(I)(A)]
- *Associations may regulate the number of political signs, but must allow at least one political sign per political office or ballot issue.* [38-33.3-106.5(1)(c)(II)]
- Associations may regulate the size of political signs. *This regulation may limit the size of signs to the maximum size allowed by an applicable local ordinance or thirty-six inches by forty-eight inches, which ever is smaller.* [38-33.3-106.5(1)(c)(I)(A),(B)]

Comments:

1) This section states a strong legislative intent to allow political signs and American and military service flags regardless of what an association's documents say. *SB 89 clarifies that this right extends to occupants like renters, as well as unit owners.*
2) Although this section is new to CCIOA, another Colorado law [§ 27-2-108.5] passed in 2003 already had granted – and continues to grant – unit owners the right to display the American flag subject to an association's reasonable rules and regulations.
3) This section specifically states that an association must allow homeowners *and occupants like renters* to display the American flag on their balconies. However, the provision dealing with the display of political signs specifies only that homeowners *and occupants* must be allowed to display such signs on their property or in a window of their residence. Based on statutory construction, the legislature's choice not to include balconies in the political sign provision means that associations may prohibit the display of political signs on balconies that are not the property of the homeowner (i.e. balconies that are limited common elements.)
4) While an association may regulate the size of military flags, such regulation must allow for a service flag with the maximum dimensions of at least nine inches by sixteen inches.
5) *SB 100 stated that an association's restrictions on the number of political signs allowed to be displayed could not be more restrictive than any applicable local ordinances addressing the question. SB 89 removes this requirement and states that an association must allow at least one political sign, regardless of any local ordinance on the subject.*
6) *SB 89 allows associations to limit signs to thirty-six inches by forty-eight inches even if the applicable local ordinance allows larger signs.*
7) A copy of the Flag Code can be accessed on HindmanSanchez's website at www.hindmansanchez.com.

Steps For Compliance:

1) Review association governing documents to see if there are any provisions that no longer may be enforced as they unlawfully restrict patriotic or political expression.

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2) Before the next election (including elections for local, state, and national government, as well as votes on ballot issues), review applicable local ordinances, if any, to determine whether the size allowed is smaller than 3 x 4 feet *as an association may limit the size of signs to the smaller of 3 x 4 feet or the size allowed by the local ordinance*.
3) Adopt a political sign policy. This policy should address the size, the location of where signs may be displayed, the dates the displays may began and must end, and number of signs allowed. Adopt a political sign policy that complies with the new law by allowing at least one political sign per political office or ballot issue. This policy should specify the exact number of signs allowed, the size of signs allowed, where they may be displayed, and the time period during which they may be displayed. Define the term "political sign" – the statute defines it 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." *If such a policy has already been adopted, revise the policy to reflect that occupants of units, in addition to homeowners, also, have the right to display political signs.*
4) Adopt a written flag displaying policy that sets out the reasonable rules and regulations concerning the display of the American flag, service flags, as well as the installation of flagpoles. This policy should define the size of allowable flags and where and how they may be displayed, including the allowable lengths and locations of flag poles. *If such a policy has already been adopted, revise the policy to reflect that occupants of units, in addition to homeowners, also, have the right to display to American and military service flags.*

1.3 EMERGENCY VEHICLES (38-33.-106.5(1)(d))

Effective Date:	June 6, 2005
Applicability:	Applies to all pre and post-CCIOA common interest communities.
New or Amended:	This is a new provision to CCIOA
Amended by SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- Associations may not prohibit the parking of a motor vehicle on a street, driveway, or guest parking area in the community if the unit owner *or occupant* is required by his or her employer to have the vehicle at his or her residence during designated times AND
  - the vehicle weighs ten thousand pounds or less;
  - the unit owner is a member of a volunteer fire department or an emergency service provider;
  - the vehicle has an official emblem or other visible markings of an emergency service provider; and
  - parking the vehicle will not obstruct emergency access or interfere with the reasonable needs of the other residents to use the community's streets, driveways, *and guest parking spaces*. [38-33.3-106.5(1)(d)]

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Comments:

1) *SB 100 included "other emergency services" in its definition of "emergency service provider," which led to confusion as to whether emergency plumbing, electricity, and cable services were included in the section. The statute now defines "emergency service provider" as a "primary provider of emergency fire fighting, law enforcement, ambulance, or emergency medical services," eliminating the phrase "other emergency services" and any resulting confusion the phrase caused.*

Steps For Compliance:

1) Adopt a written parking policy that clearly states that emergency motor vehicles that fit within the statute may be parked in the unit owner *or occupant's* driveway and in the community's streets and guest parking spaces.
2) Make clear what emergency motor vehicles fall within the statute in the parking policy. The policy should state that:
   - The emergency motor vehicle MUST be required by the unit owner's employer as a condition of employment; AND
   - The emergency motor vehicle must weigh ten thousand pounds or less;
   - The unit owner is a member of a volunteer fire department OR is employed by an emergency service provider;
   - The emergency vehicle has some visible emblem or marking designating it as an emergency vehicle; and
   - The parked emergency vehicle does not block emergency access or prevent other unit owners from using the streets, driveways, and guest parking spaces.
3) Define what constitutes an "emergency service provider" in your parking policy. The statute defines "emergency service providers" as "a primary provider of emergency fire fighting, law enforcement, ambulance, or emergency medical services."

1.4 FIRE MITIGATION AND REPLACEMENT OF FLAMMABLE ROOFING MATERIALS (38-33.3-106.5(1)(e), (2)

Effective Date:	June 6, 2005
Applicability:	Applies to all pre and post-CCIOA common interest communities
New or Amended:	This is a new provision to CCIOA
Amended By SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

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What It States:

- An association may not prohibit owners from removing vegetation around their homes for fire mitigation purposes as long as the removal complies with a written defensible space plan. [38-33.3-106.5(1)(e)]
- Such plan must have been created for the property by:
    - the Colorado state forest service;
    - an individual or company certified by the local government to create a defensible space plan; OR
    - the fire chief, fire marshal, or the property's fire protection district. [38-33.3-106.5(1)(e)]
- A unit owner has the responsibility to:
    - Not remove more vegetation than is necessary to comply with the applicable written defensible space plan.
    - Register the plan with the association before beginning removal of the vegetation.
    - Comply with the applicable association standards regarding slash removal, stump height, revegetation, and contractor regulations.
      [38-33.3-106.5(1)(e)]
- The association retains the right to require changes to the plan if the association obtains the permission of the entity that originally created the plan. [38-33.3-106.5(1)(e)]
- *An association may not require the use of cedar shakes or other flammable roofing materials*. [38-33.3-106.5(2)]

Comments:

1) The fire mitigation portion of this section will primarily affect mountain associations.
2) If an association has not done so yet, it should adopt standards regarding slash removal, stump height, revegetation, and contractor regulations.
3) *SB 100 prohibited an association from prohibiting an owner from replacing flammable roofing materials with nonflammable roofing materials. Associations could adopt reasonable standards for the color, appearance and general type of nonflammable roofing materials that may be used to replace the flammable ones as long as the materials chosen were not more expensive than replacing the flammable roofing material with the same material. Although SB 89 prohibits associations from requiring the use of flammable roofing material, it also removes the limitation on the cost of nonflammable roofing material an association may require owners to use.*

Steps For Compliance:

1) Create a "Fire Suppression" checklist that will help board members to determine whether a unit owner is entitled to remove vegetation.
2) The checklist should include questions such as:

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a) Has the unit owner filed a copy of a written defensible space plan with the association?
b) Was the plan created for the unit owner's property by an entity authorized by the statute to do so?
c) Is the unit owner's removal or planned removal of vegetation within the scope of the plan?
d) Has the owner been informed of the applicable association standards regarding slash removal, stump height, revegetation, and contractor regulations?

3) *Associations whose buildings use flammable roofing materials, such as cedar shake shingles, should adopt procedures to be followed by an owner when replacing flammable roofing materials with nonflammable roofing materials. This procedure should include standards fro the color, appearance, and type of nonflammable roofing materials that may be used.*

II. GENERAL GOVERNANCE

2.1 RESPONSIBLE GOVERNANCE POLICIES AND PROCEDURES (38-33.3-209.5)

Effective Date:	January 1, 2006
Applicability:	All pre and post-CCIOA common interest communities currently covered by CCIOA.
New or Amended:	This provision is new to CCIOA
Amended By SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006). Associations have until January 1, 2007 to adopt the policy addressing disputes between the association and unit owners.

What It States:

- Associations MUST keep *accurate and complete* accounting records [38-33.3-209.5 (1)(a)]
- Associations MUST adopt policies, procedures, rules and regulations regarding:
  - Collection of unpaid assessments;
  - Handling of board member conflicts of interest;
  - Conduct of meetings with reference to applicable provisions in the Nonprofit Act or other recognized rules and principles if desired;
  - Enforcement of covenants and rules – including notice and hearing procedures and the schedule of fines;
  - Inspection and copying of association records by unit owners
  - Investment of reserve funds; and
  - Adoption and amendment of policies, procedures, and rules
  - *Procedures for addressing disputes between the association and unit owners [38-33.3-209.5(1)(b)]*

Comments:

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1) This section conveys the legislative intent to promote responsible governance among Colorado's common interest communities by providing homeowners with the information on how their associations are run as well as the consequences of their actions.
2) *SB 89 removes the requirement for associations to maintain their records using generally accepted accounting principles ("GAAP"). After SB 100 passed, it was brought to attention that the formal and complicated GAAP method of maintaining financial records would be cost-prohibitive and unnecessary for most associations.*
3) *At the request of a state senator, SB 89 adds an additional policy addressing alternative dispute resolution ("ADR"). This requirement is discussed in section 5.2.*

Steps For Compliance:

1) Review current policies and procedures to determine which policies or procedures must be updated and which must be adopted. Remember that these polices MUST be disclosed under 38-33.3-209.4. (discussed in section 3.1)
2) The board should discuss what it believes should be included in the policies and procedures that must be adopted.

2.2 NOTICE OF UNIT OWNER MEETINGS AND OWNER PARTICIPATION IN BOARD MEETINGS (38-33.3-308)

Effective date:	January 1, 2006
Applicability:	All pre and post-CCIOA common interest communities currently covered by CCIOA with the exception of associations that include time-share units.
New or Amended:	This section amends the existing section 308 of CCIOA
Amended By SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- An association MUST physically post the notice of any unit owner meeting – annual or special – in a conspicuous place, if at all feasible and practicable. [38-33.3-308(1)]
- In addition to a physical posting, associations are encouraged to give notice of any unit owner meetings – annual or special – by posting the notice on its website or sending out an email to all unit owners. If an association has the ability to give electronic notice, it MUST provide notice of owner meetings by e-mail if requested by an owner who gives the association his or her e-mail address. The notification e-mail must be sent as soon as possible and at least twenty-four hours before the meeting. [38-33.3-308(2)(b)(I)]
- Associations MUST allow owners (or an owner representative designated in writing by the owner) to attend all association meetings, including board of director meetings. [38-33.3-308(2.5)(a)]

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- At board meetings, boards MUST allow a unit owner to speak at an appropriate time before the board takes formal action on any item under discussion. This opportunity to speak MUST be allowed in addition to any other speaking opportunities provided by the board. The board may place reasonable time restrictions on those speaking. The board also shall provide for a reasonable number of people to speak to each side of an issue. [38-33.3-308(2.5)(b)]

Comments:

1) *SB 89's amendment to this section removed ambiguities as to a unit owner's right to speak at board meetings. SB 100 stated that an owner had a right to speak before the board took formal action at a meeting AND that a unit owner needed board authority before having a right to speak.*
2) *SB 89 clarifies that the notice provision applies only to owner meetings and not board meetings.*
3) The provision addressing unit owner participation applies only to board meetings, not to committee meetings such as an association's architectural control committee meeting. Unit owners, however, do have the right to attend such meetings.
4) While boards should allow for homeowners to speak on both sides of an issue, this number will vary depending on the number of owners who wish to speak. It is not a requirement that the board find an exact number of owners to speak on each side of an issue or even find speakers to speak to both sides of an issue when such issue is uncontroversial and uncontested. Obviously, someone cannot be forced to speak just so that there is compliance with having speakers on both sides of an issue.
5) While not clearly apparent in the statute, it is our opinion that the requirement to allow unit owners to speak before the board takes formal action applies only to those actions discussed at physical meetings and not those taken per email or other means other than a physical meeting.
6) Examples of conspicuous places where physical notice of meetings can be posted to comply with this section are stairways, mail kiosks, elevators, court yards, bulletin boards, and community houses.
7) Although not defined in the statute, it is reasonable to consider an association as having the "ability to give electronic notice" if the association has an electronic address.
8) Since section 38-33.3-308(1) now applies to pre and post-CCIOA common interest communities, notices of annual meetings must include the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove an officer or member of the executive board if to be discussed at that meeting.
9) If possible, an association should make use of the internet to post notice of upcoming meetings as it is easy and inexpensive.

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Steps For Compliance:

1) Determine a conspicuous location to post physical notices of upcoming meetings. "Conspicuous location" is defined as "one that is reasonably calculated to impart the information in question."
2) Clearly define the homeowners' right to participate in meetings in the required 'Conduct of Meetings' policy. This policy should also cover when homeowners may speak and what procedures need to be followed to participate in meetings. The policy should specify that unit owners interested in speaking must sign up to ensure that all who wish to speak have the opportunity. A sign-up sheet also provides evidence that the association is complying with participation requirements.
3) Associations should adopt a policy that clearly defines what "ability to provide electronic notice" means.
4) An association should keep a complete list of the email addresses that are provided to the association by owners to comply with the requirement that if it has the "ability to provide electronic notice" it must honor owner requests for electronic notices of upcoming meetings. An association should also keep a print out or electronic record of sent emails as proof of compliance with this notice requirement.

2.3 STANDARDS FOR APPROVAL OR DENIAL OF UNIT OWNERS' ARCHITECTURAL OR LANDSCAPING APPLICATIONS (38-33.3-302(3)(b))

Effective Date: January 1, 2006
Applicability: All pre and post-CCIOA common interest communities currently covered by CCIOA.
New or Amended: This is a new provision to CCIOA
Amended By SB 89: No.

What It States:

- An association shall have standards and procedures for approving or denying unit owners' applications for architectural or landscaping changes. These standards and procedures may be in the association's declaration or its rules and regulations or bylaws. No decision on an architectural or landscaping application may be made arbitrarily or capriciously. [38-33.3-302(3)(b)].

Comments:

1) While this section does not require an association to make general standards more specific, it is recommended that an association adopt more specific procedures.
2) The reasons for approvals or denials should be written and kept as a record to defend against possible claims that such decisions were made arbitrarily or capriciously.

Steps For Compliance:

1) Associations that do not have standards and procedures for approving or denying architectural or landscaping applications must adopt such procedures.

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2.4 AMENDMENT OF DECLARATION – ALLOWABLE PERCENTAGE OF REQUIRED AFFIRMATIVE VOTES AND FIRST MORTGAGEE NOTIFICATION (38-33.3-217)

Effective Date:	Immediately upon passage of the bill
Applicability:	All pre and post-CCIOA common interest communities currently covered by CCIOA.
New or Amended:	This is a new provision to CCIOA
Amended by SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- This section places a cap on how high the percentage of the votes allocated to the association may be required to amend an association's declaration. An association's declaration may provide that it may be amended by the affirmative vote of any percentage that is more than 50% of the votes allocated to the association, but that percentage may NOT exceed 67%. [38-33.3-217(1)(a)]
- Any provisions in existing declarations that require a percentage larger than 67% is void as contrary to public policy. Association declarations with percentages higher than 67% that remain unamended will be deemed to specify a percentage of 67%. [38-33.3-217(1)(a)]
- *Amendments affecting phased communities and declarant-controlled communites are exempted from this cap. [38-33.3-217(1)(a)(III)(E)]*
- *An association whose declaration allocates 67% or more of the votes in the association to one owner is exempt from the 67% cap. [38-33.3-217(4)(b)]*
- An association's declaration may specify a smaller percentage than a simple majority ONLY IF all of the units are restricted to nonresidential use. [38-33.3-217(1)(a)]
- *An association may seek a court order to reduce the required percentage to less than sixty-seven percent. [38-33.3-217(1)(a)(I)]*
- *An association whose declaration provides for an initial period of applicability, followed by automatic extension periods, may amend its declaration at any time. [38-33.3-217(1)(a)(II)]*
- If a declaration requires the approval of first mortgagees to amend the declaration, the association must 1) send a dated, written notice with a copy of the proposed amendment by certified mail to each mortgagee at its most recent address as shown on the recorded deed of trust or its recorded assignment; and 2) have the dated notice printed with information on how to obtain a copy of the proposed amendment – on separate occasions at least one week apart – in a newspaper of general circulation in the county in which the association is located. [38-33.3-217(1)(b)]
- Once an association meets these notice requirements, a first mortagee that does not give a negative response to the association within sixty days after the notice date will be considered to have assented. [38-33.3-217(1)(b)]

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- *The mortgagee notification provision provided for in this section is not mandatory and an association may use any other procedure set forth in its declaration. [38-33.3-217(1)(b)(III)]*

Comments:

1) *SB 89 clarifies that this section does not prohibit associations from seeking a court order, in accordance with 217(7) to reduce the required percentage to less than sixty-seven percent.*
2) *Declarant-controlled communities, phased communities, and communities where one unit owner holds 67% or more of the votes are exempted from the 67% cap. A phased community is defined as "a common interest community in which the declarant retains development rights." [38-33.3-103(21.5)]*
3) This section applies only to the percentage of affirmative votes needed to amend an association's declaration and does not affect the percentage necessary for budget ratification.
4) Due to the fact that this section may raise constitutional issues, an association should consult an attorney before taking any actions under this section.
5) This section simplifies the process for gaining first-mortgagee approval for amending declarations that require such approval for amending. An association may follow the mortgagee notification procedure set out in this section, regardless of any other mortgagee notification procedures that may be set out in the association's governing documents.

Steps For Compliance:

1) Boards should review their association's governing documents to determine whether the percentage required to amend the declaration is 67% or less.
2) If the governing documents provide for a percentage higher than 67%, boards should realize that such percentage is not allowable and will be deemed to state 67%.
3) Boards may not enforce a requirement for a higher percentage than 67%.
4) If a board wishes to have a lower percentage than 67%, but not less than 50%, it will be necessary to amend the documents to state the desired percentage.

2.5 ASSOCIATION RECORDS – RETENTION & OWNER INSPECTION (38-33.3-317)

Effective Date:	January 1, 2006
Applicability:	All pre and post-CCIOA common interest communities currently covered by CCIOA with one exception. Associations do not have to maintain a record of homeowners in a form that allows the preparation of a list of the names and owners, showing the number of votes each homeowner is entitled to vote for any time-share units within their community.
New or Amended:	Parts are new to CCIOA and other parts amend CCIOA
Amended by SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

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What It States:

- Association MUST keep the following as *permanent* records:
  - Minutes of all board and unit owner meetings;
  - All actions taken by the board or unit owners by written ballot instead of holding a meeting;
  - All actions taken by a committee on the behalf of the board instead of the board acting on behalf of the association; and
  - All waivers of the notice requirements for unit owner meetings, board member meetings, or committee meetings. [38-33.3-317(1)(b)]
- *An individual may not obtain a membership list for a purpose unrelated to a unit owner's interest as a unit owner such as, but not limited to:*
  - *Soliciting money or property*
  - *Any commercial purpose*
  - *Selling or purchasing the list [38-33.3-317(2)(b)]*
- In addition to the above that must be kept as permanent records, an association MUST keep a copy of the following records at its principal office:
  - Articles of incorporation or if not a corporation, the applicable organizational documents;
  - The declaration;
  - The covenants;
  - Its bylaws;
  - Board resolutions affecting unit owners;
  - Minutes of all unit owner meetings and records of any actions taken by unit owners without a meeting in the past three years;
  - All written communications within the last three years to unit owners generally as unit owners;
  - A list of the names and the business or home addresses of the current board and its officers;
  - Its most recent annual report, if any; and
  - All financial audits or reviews required by section 38-33.3-303(4)(b) conducted in the last three years. [38-33.3-317(5)(a) – (j)]
- An association or its agent MUST maintain a record of unit owners that allows the preparation of a list of the names and addresses of all unit owners as well as the number of votes each has. This requirement does not apply to time-share communities. [38-33.3-317(1)(c)(I),(II)]
- The records required by this section must be maintained in writing or in a form that can be easily converted into written form within a reasonable time such as within five days of receiving a request. [38-33.3-317(1)(d)]
- All association records MUST be made reasonably available to unit owners for both inspection and copying. An association may charge a fee for copying records*, which may be collected in advance*, but this fee may not exceed the association's actual cost of copying. The section defines "reasonably available" to mean

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available during normal business hours after five business days notice *or at the next regularly scheduled meeting if it occurs within 30 days after the request.* [38-33.3-317(3),(4)]

- For this section to apply, unit owner requests to inspect documents must be made in good faith, for a proper purpose, and describe with reasonable detail what records are needed and why. Requested documents must also be relevant to the unit owner's stated purpose for the request. [38-33.3-317(4)(a)-(c)]
- This section does not affect a unit owner's right to inspect records: 1) under corporation statutes governing the inspection of the shareholder or member list before an annual meeting; or 2) if the unit owner is involved in litigation with the association. This section does not affect the power of the court to compel the production of records once a unit owner has proven a proper purpose. [38-33.3-317(6)]
- This section will not invalidate any provision in an association's governing documents that includes more records into its definition of "association records" or gives owners freer access to these records *with the exception of the privacy protections given to member lists.* [38-33.3-317(7)]

Comments:

1) This section adds further requirements to the current records associations are mandated to keep by CCIOA.
2) This section can be broken into two types of requirements: 1) record keeping requirements and 2) unit owner inspection and copying of those records.
3) *Although owners always needed a "proper purpose" to access association records, including membership lists, SB 89 has further clarified what constitutes a proper purpose for requesting a membership list in response to privacy concerns.*
4) *To make compliance easier for smaller, self-managed associations, SB 89 broadens the time frame associations have to respond to record requests, allowing records to be given at the next regularly scheduled board or owner meeting if it occurs within 30 days of the request.*
5) Records that are required to be kept permanently must never be destroyed or thrown away.
6) A homeowner meets the requirement that his or her request was made in good faith when such requests are not made solely to be frivolous or vexatious.
7) Requested documents must also be "relevant" to the stated purpose of the request, meaning "applying to the matter in question." Association policies should define the term in detail in their required unit owner inspection and copying policy.
8) Except for any documents posted on a website to achieve compliance with an association's disclosure requirements under 38-33.3-209.4, an association may charge its actual cost for providing copies of these documents.
9) Associations should be aware that this list of records to be retained is not exclusive. The Nonprofit Act also contains a record retention provision.

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Steps For Compliance:

1) Develop a record keeping policy that details all the records that must be kept, how long they must be kept, where they will be kept, and who will be responsible for making sure that they are kept.
2) Adopt a written owner inspection and copying policy that sets out the procedure unit owners must follow when requesting access to association records. This policy should include a form for unit owners to fill out that specifies what records the unit owner would like to see, the reason the unit owner would like to inspect the records, convenient times for the unit owner to do so, and whether copies of certain documents are requested.
3) In addition to facilitating compliance with this section, an owner inspection and copying policy is also required by section 38-33.3-209.5, Responsible Governance Policies. (see section 2.1)
4) Educate board members on the right of unit owners to inspect and have copies made of the records listed in this section if made for a proper purpose and in good faith.

2.6 ASSOCIATION AUDIT OR REVIEW (38-33.3-303(4)(b)(I) - (IV))

Effective Date:	January 1, 2006
Applicability:	All pre and post-CCIOA common interest communities currently covered by CCIOA with the exception of associations that include time-share units
New or Amended:	New requirement
Amended by SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- An association must have an audit if the following conditions are met:
  - Its annual revenues or expenditures are at least two hundred fifty thousand dollars; AND
  - The owners of at least one-third of the association's units request an audit. [38-33.3-303(4)(b)(II)]
- *An association must have a review if requested by the owners of at least one-third of the association's units. [38-33.3-303(4)(b)(III)]*
- *The audit or review must cover the association's financial statements, which must be prepared using generally accepted accounting principles or the cash or tax basis of accounting. [38-33.3-303(4)(b)(I)]*
- Audits must be done by a certified public accountant. [38-33.3-303(4)(b)(I)]
- *A review must be performed by an independent and qualified person who has at least a basic understanding of the principles of accounting from prior business experience, education above high school, or bona fide home study. [38-33.3-303(4)(b)(I)]*
- The association MUST make copies of the audit or review available upon the request of a unit owner no later than thirty days after its completion. [38-33.3-303(4)(b)(III)]

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Comments:

1) *SB 89 amended the requirement to have an audit or review at least once every two years, requiring an audit or review if certain requirements are met. This was done to spare associations the expense of having an audit or review every two years, while giving owners an ability to request financial accountability if they believe it to be necessary.*
2) *To spare associations the expense of having to use a CPA, only an audit must be performed by a CPA. SB 89 qualifies who may perform a review, listing the minimum requirements as "an independent and qualified person who has at least a basic understanding of the principles of accounting from prior business experience, education above high school, or bona fide home study." Some CPAs have expressed concern that according to the standards of accounting and review services as defined by the American Institute of Certified Public Accountants, an audit OR a review must be performed by a CPA.*
3) If an association's governing documents contain a more stringent requirement for having an audit or review, the board must follow that provision in the governing document.
4) An audit represents a certified public accountant's affirmative assurance that all records are in order and nothing is amiss. As opposed to the affirmative assurance of an audit, a review simply confirms that the reviewer did not find anything amiss without the assurance that is definitely the case.
5) An association may charge its actual costs for providing a copy of the audit or review at the request of a owner, unless the association chooses to provide a copy of the audit or review to satisfy the disclosure requirement of 38-33.3-209.4, which states "the results of any financial audit or review for the fiscal year preceding the current annual disclosure." (see section 3.1)

2.7 USE OF BALLOTS AND PROXIES (38-33.3-310)

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities. Associations that include time-share units are exempt from the provision requiring secret ballots to be used to elect board members.
New or Amended:	Amends section 310 of CCIOA
Amended By SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- Secret ballots MUST be used in *contested* board member elections. At the request of *twenty percent of unit owners present at the meeting in person or represented by proxy,* secret ballots must also be used when voting on other issues on which all unit owners have the right to vote. [38-33.3-310(1)(b)(I)(A), (B)]
- Ballots must be counted by either a neutral third party or *a committee of volunteers who are selected at an open meeting, in a fair manner. Volunteers may not be board members and, in a contested election, candidates*. [38-33.3-310(1)(b)(I)(C)]

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- Written proxies may be used. Proxies obtained through fraud or misrepresentations are invalid. If an association does not provide for the appointment of proxies in its governing documents, the appointment of proxies may be made as provided in the Nonprofit Act, 7-127-203. [38-33.3-310(2)(a)]
- An association has the right to reject a vote, consent, written ballot, waiver, proxy appointment or proxy appointment revocation when it has a reasonable, good faith basis to doubt the validity of a signature or the signatory's authority to sign for the unit owner. The association and its officer or agent who accepts or rejects any of the above in good faith is not liable from any damages that may result from the acceptance or rejection. Unless a court decides otherwise, any action taken on the acceptance or rejection of any of the above will be deemed valid. [38-33.3-310(2)(c) – (e)]

Comments:

1) *SB 89 amended this section to reflect actual association practices and the need for efficiency while balancing a unit owner's potential need to vote by secret ballot.*
2) An association rejects or accepts a proxy in "good faith" when such rejection or acceptance is done with honesty, fairness, and without malice, intent to defraud, or to take unfair advantage.
3) This section's requirement for the use of "secret ballots" means that the ballots can not contain *any* information or markings that would allow another to identify who voted the ballot.

Steps For Compliance:

1) Do not hold a <u>contested</u> election using any other method of voting than a secret ballot. *However, parliamentary procedures such as acclamation may be used for uncontested elections.*
2) Create an election policy that includes the requirement for secret ballots for contested elections, how the individuals who will count the votes are to be chosen, and how the votes will be announced.
3) Create a proxy policy that outlines how proxies may be appointed.
4) Come prepared with a master ballot on all issues and not just for a <u>contested</u> election of board member in the event *twenty percent of unit owners* request a secret ballot on other issues to be voted on.

2.8 <u>BOARD OF DIRECTORS' CONFLICTS OF INTEREST (38-33.3-310.5)</u>

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA with the exception of associations that include time-share units.
New or Amended:	This is a new section to CCIOA
Amended By SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

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What It States:

1) *The conflict of interest section in Colorado's Revised Nonprofit Code (7-128-501) shall apply to board members of associations.* [38-33.3-310.5(1)]

Comments:

1) *SB 100 prohibited conflicted board members from voting and provided that any contract entered into in violation of this section was void. The conflict of interest section of the Nonprofit Act, 7-128-501, however, allows a board member with conflict of interest to vote after disclosing the conflict of interest. In addition, a transaction entered into in violation of the Nonprofit Act's provision is not void or voidable by the association if any of the following conditions have been met:*
    a. *The director disclosed the material facts relating to the conflict of interest or the board is aware of them and the board authorizes the transaction by a majority vote;*
    b. *The director disclosed the material facts to the membership or the membership is aware of them and the membership votes to authorizes the transaction; or*
    c. *The conflicting interest transaction is fair to the association.*
2) An association may choose to have a stricter definition or treatment of board member conflicts of interest. Any such provisions in an association's governing documents will take precedence over the provisions of this section.
3) Section 38-33.3-209.5, Responsible Governance Policies, requires associations to adopt a policy addressing board member conflicts of interest. (see section 2.1)
4) This section applies just to board member conflicts of interest, not committee member conflicts of interest.

Steps For Compliance:

1) *Managers and board members need to familiarize themselves with conflict of interest provision of the Nonprofit Act.*
2) *Revise required Conflict of Interest Policy to reflect the change in law.*
3) Educate board members on the obligation to disclose conflicts of interests. This can be done by preparing a Conflicts of Interest policy that outlines this obligation and that must be signed prior to a new member serving on the board.
4) The document should include examples of conflicts of interest and all the relationships that this section covers.
5) A board member with a conflict of interest is still to be counted in determining whether a quorum exists.

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2.9 <u>BOARD OF DIRECTORS' STANDARD OF CARE FOR INVESTMENT OF RESERVE FUNDS (38-33.3-303(2.5)</u>
Please note this provision is a new requirement added by SB 89

Effective Date:	*Effective on the Governor's signature*
Applicability:	*All pre and post-CCIOA common interest communities currently covered by CCIOA.*
New or Amended:	*This section amends the existing section 303 of CCIOA*

What It States:

- *The board of directors are subject to the standard of care set out in section 7-128-401 of the Colorado Revised Nonprofit Code when investing association reserve funds. [38-33.3-303(2.5)]*

Comments:

- *Section 7-128-401 of the Nonprofit Code addresses the general standards of care required by directors and officers of nonprofits. It requires board members to invest reserve funds in good faith and with the care of an ordinarily prudent person in like circumstances would take.*

Steps for Compliance:

- *Revise the required Investment of Reserve Funds policy to reflect this standard of care.*

III. REQUIRED DISCLOSURES

3.1 GENERAL ASSOCIATION DISCLOSURES (38-33.3-209.4)

Effective Date:	January 1, 2006
Applicability:	All pre and post-CCIOA common interest communities currently covered by CCIOA with two exceptions. Time-share units are exempt from the entire section, and developer-controlled associations are exempt from the requirement to make certain information available to homeowners 90 days after the end of each fiscal year. (38-33.3-209.4(2))
New or Amended:	New requirement not previously covered in CCIOA
Amended By SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- *Within 90 days after assuming control from the declarant, the association shall make the following information available on reasonable notice:*
  - the association's name;

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- the name of any designated agent or management company for the association;
- the physical address and telephone number for the association and any designated agent or management company;
- the name of the common interest community;
- the initial date of the recording of the declaration; and
- the declaration's reception number or book and page where the declaration is located. [38-33.3-209.4(1)]

- *An association must make the above information available by*
  - *Posting the information on an internet web page with notice of the web address sent either by first-class mail or e-mail to all owners;*
  - *Mailing the information to all owners;*
  - *Personally delivering the information to all owners; or*
  - *Maintaining a literature table or binder at the association's principal place of business.* [38-33.3-209.4(1)]
- An association must *make updated information available* within 90 days if the association's address, designated agent, or management company changes. [38-33.3-209.4(1)]
- An association MUST have the following information compiled and ready for disclosure within 90 days after assuming control from the declarant AND within 90 days after the end of *each* fiscal year after that:
  - the date the association's fiscal year begins;
  - the association's operating budget for the current fiscal year;
  - a list – organized by unit type – of the association's current regular and special assessments;
  - the association's annual financial statements – including any money held in reserve for the fiscal year immediately preceding the current annual disclosure;
  - the results of *its most recent available* financial audit or review;
  - a list of all association insurance policies, including – but not limited to the following:
    - property
    - general liability
    - association director and officer professional liability
    - fidelity policies;
  - The insurance company names, policy limits, policy deductibles, additional named insureds, and expiration dates of all policies listed;
  - The association's bylaws, articles, and rules and regulations;
  - The board meeting and member meeting minutes for the fiscal year immediately preceding the current annual disclosure; and
  - The association's responsible governance policies adopted under section 38-33.3-209.5. concerning:
    - Collection of unpaid assessments

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  - Handling of conflicts of interest involving board members
  - Conduct of meetings
  - Enforcement of covenants and rules, including notice and hearing procedures and the schedule of fines
  - Inspection and copying of association records by unit owners
  - Investment of reserve funds;
  - Procedures for the adoption and amendment of policies , procedures, and rules; and
  - *Procedures for addressing disputes arising between the association and unit owners.* [38-33.3-209.4(2)(a)-(i)] (required policies discussed in section 2.1)

- On reasonable notice, associations must make this information readily available at no charge to a unit owner at the unit owner's convenience. [38-33.3-209.4(3)]
- Acceptable means of disclosure include ONLY the following:
  - Posting the information on an internet web page with notice of the web address sent either by first-class mail or e-mail to all owners;
  - Mailing the information to all owners;
  - Personally delivering the information to all owners; or
  - Maintaining a literature table or binder at the association's principal place of business. [38-33.3-209.4(3)]
- Any costs incurred meeting the disclosure requirement must be a common expense liability. However, owners may be charged for copies of documents if disclosure is made through the maintenance of a binder or a literature table. [38-33.3-209.4(3)]

Comments:

1) *SB 100 required an affirmative annual disclosure of the information contained in the first bullet in the above section (physical address and telephone number for association etc.). SB 89 allows this disclosure to be made on request of a unit owner to ease compliance for smaller, self-managed associations.*
2) The disclosures required by this section are new and include information to be compiled, organized, and readily accessible. Having the information stuck in various folders and piled-up boxes does not meet this section's requirements. If not done already, boards and managers must organize the required information and make it available for ready disclosure through the four means specified in this section.
3) Unit owners should be educated on the availability of this information. This education can be done by such means as the association's newsletter, presentation at the next annual owners' meeting, e-mail, or the association's website.
4) An association may provide the required information on disk if requested by the homeowner. However, an association must have the ability to provide a hard copy of the information for homeowners who want it in that form.

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5) This section conveys the legislative intent to have better informed homeowners through broad disclosures. If faced with a question of how much information needs to be disclosed to meet the disclosure requirement, err on the side of broader disclosure.
6) An association may not charge homeowners for the cost of such disclosure with the exception of its actual costs for copying the disclosed documents if disclosure is made through the maintenance of a literature table or binder.
7) The annual required disclosure must be made by at least 90 days after the end of an association's fiscal year. Therefore, because the law takes effect on January 1, 2006, an association whose current fiscal year ends on or before December 31, 2005 does not have to make its first disclosure until 2007, at least 90 days after the end of its 2006 fiscal year. However, if an association's current fiscal year ends on or after this provision's effective date of January 1, 2006, the association must be prepared to make its first disclosure in 2006, by at least 90 days after the end of its current fiscal year.

Steps For Compliance:

1) Boards and managers must decide how they wish to comply with the disclosure requirement (i.e. literature table, mail, website, or personal delivery) and take the appropriate steps to do so.
2) The final decision on how to comply should be adopted into a written policy that includes the following information:
   a) How the information will be disclosed – on a website, literature table, mail, or personal delivery.
   b) When owners will have access to the updated information each year. For example, will an association have the updates complete by a set time after the end of the association's fiscal year or at a flexible, unspecified time within the allotted three months?
   c) Whose primary responsibility will it be to gather the information annually? The manager? An officer on the board?
3) Homeowners may not be charged by the association for the cost of such disclosure with the exception of its actual costs for copying the disclosed documents if disclosure is made through the maintenance of a literature table or binder.

3.2 SALE OF UNIT – SELLER'S DISCLOSURE TO BUYER (38-33.3-223)

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA with the exception of time-share units.
New or Amended:	This is new to CCIOA but consistent with existing Colorado Real Estate Commission practices.
Amended by SB 89:	Yes.
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

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- *This section is repealed in its entirety.*

Comments:

1) *SB 89 repeals this section that required sellers to disclose association documents to potential buyers. Amended section 38-33.3-35.7 is intended to serve the same purpose of disclosure that repealed section 38-33.3-223 did and is discussed in section 3.3.*

3.3 <u>SALE OF UNIT – SELLER'S DISCLOSURE OF BUYER'S RESPONSIBILITIES TO ASSOCIATION AND REQUIREMENT FOR ARCHITECTURAL APPROVAL(38-35.7-102)</u>

Effective Date:	January 1, 2006
Applicability:	Applies to sales of all pre and post-CCIOA common interest communities with the exception of time-share units.
New or Amended:	This provision is not part of CCIOA, nor has it been addressed previously by the Colorado Real Estate Commission.
Amended by SB 89:	Yes.
Effective date of amendment:	Effective on Governor's signature (May 26, 2006). All residential buy/sell contracts for residential real property located in a common interest community must contain amended disclosure statement by January 1, 2007.

What It States:

- *On or after January 1, 2007, every contract for the sale of property in a common interest community must contain a disclosure statement in bold-faced type that substantially states the following:*

> The property is located within a common interest community and is subject to the declaration for such community. The owner of the property will be required to be a member of the owner's association for the community and will be subject to the bylaws and rules and regulations of the association. The declaration, bylaws, and rules and regulations will impose financial obligations upon the owner of the property, including an obligation to pay assessments of the association. If the owner does not pay these assessments, the association could place a lien on the property and possibly sell it to pay the debt. The declaration, bylaws, and rules and regulations of the community may prohibit the owner from making changes to the property without an architectural review by the association (or a committee of the association) and the approval of the association. Purchasers of property within the common interest community should investigate the financial obligations of members of the association. Purchasers should carefully read the declaration for the community and the bylaws and rules and regulations of the association. [38-35.7-102(1)]

- *The seller has the responsibility to make the above disclosure. If the seller fails to provide the above disclosure, the buyer has a claim for actual damages directly and proximately caused by this failure as well*

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as court costs. The seller may defend such a claim by showing that the buyer had actual or constructive knowledge of the information to be disclosed. [38-35.7-102(2)(a)]

- *On request, the seller shall provide to the buyer OR authorize the association to provide to the buyer all of the common interest community's governing and financial documents listed in the most available version of the purchase contract promulgated by the Colorado Real Estate Commission as of the contract's date. The association may charge its usual fee.* [38-35.7-102(2)(b)]

Comments:

1) *The disclosure statement was amended to mirror the disclosure statement provided when purchasing property located in a special district.*
2) *SB 89 narrowed the damages available to a buyer in the event a seller fails to provide the required disclosure statement to actual and proximate damages caused by this failure.*
3) Except for any documents posted on a website to achieve compliance with an association's disclosure requirements under 38-33.3-209.4, an association may charge its actual cost for providing copies of the documents requested by the seller.

Steps For Compliance:

1) An association should have a written policy that states the association's desire and intent to cooperate to its best ability with any requests for documents from unit owners selling their unit.
2) *An association should have a written policy that outlines the procedure and steps that a seller must take to authorize the association to release the requested information to the buyer. Requiring a written request is highly advisable so that records can be kept of all requests received.*

IV. BOARD MEMBER AND OWNER EDUCATION

4.1 BOARD MEMBER EDUCATION (38-33.3-209.6)

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA
New or Amended:	This is a new provision to CCIOA
Amended by SB 89:	No.

What It States:

- An association's board of directors may authorize the reimbursement of board members for the actual and necessary expenses incurred in attending educational classes and seminars. [38-33.3-209.6]
- To qualify for reimbursement, the subject matter of the classes and seminars attended must be specific to Colorado and make reference to applicable sections of CCIOA. [38-33.3-209.6]

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- Reimbursements shall be treated as a common expense. [38-33.3-209.6]

Comments:

1) This new section expresses a strong legislative intent for boards to financially support and encourage board members to attend educational programs that will help them govern their associations more efficiently and responsibly by allowing them to do so without having to expend their own personal funds.

Steps For Compliance:

1) To authorize a reimbursement for board member education, an association should take the following steps:
   a) Create a procedure that board members can use to apply for reimbursements. The procedure should require board members:
      i) To show proof of attendance
      ii) To provide an agenda of the program to ensure that its contents meet the requirement that the education relate to Colorado issues and statutes.
   b) Establish guidelines that define what type of classes will qualify for reimbursement .

4.2 <u>OWNER EDUCATION (38-33.3-209.7)</u>

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA with the exception of associations that include time-share units.
New or Amended:	This is a new provision to CCIOA
Amended By SB 89:	No.

What It States:

- At least once a year and at no individual cost to unit owners, associations must provide education to their owners. Any cost associated with providing this education must be accounted for as a common expense. [38-33.3-209.7]
- 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. [38-33.3-209.7]
- An association's board has the discretion to determine how to comply with this provision. [38-33.3-209.7]

Comments:

1) This new section to CCIOA illustrates a strong legislative intent to encourage associations to provide education to owners as well as board members.
2) The statute gives a board the discretion on how to achieve compliance with this section. The statute does not specify how long educational programs must run, how many topics they must cover, who must teach

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the class, or even whether associations must offer traditional face-to-face presentations rather then offering educational material on its website.

Steps For Compliance:

1) The board must decide how and when it wishes to comply with the requirement that its unit owners have an opportunity annually to receive education on some association-related topics.
2) Some ways an association may comply include offering presentations at the annual owners meeting, inserting educational articles into the association newsletter, offering a class, having a new homeowner orientation program, or posting information on its website.
3) Adopt an education policy that covers when and how education will be offered and disseminate it to unit owners.
4) Associations may not charge homeowners for providing the education.
5) Remember that the association must just *offer* the education. There is no liability to the association if owners choose not to attend or take advantage of the offerings.

V. MISCELLANEOUS

5.1 HOMEOWNER'S INSURANCE (10-4-110.8(5))

Effective Date:	January 1, 2006
Applicability:	Applies differently to pre and post-CCIOA common interest communities.
New or Amended:	This section is not a part of CCIOA, however, it amends the existing section 10-4-110.8(5)
Amended by SB 89:	Yes.
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- *A unit owner may file a claim against an association's insurance policy as if the unit owner were a named insured if the following conditions are met:*
    - *The unit owner has contacted the board or the association manager in writing, and in compliance with any applicable association policies or procedures for owner-initiated insurance claims, about the claim's subject matter;*
    - *The unit owner has given the association at least fifteen days to respond in writing and, if requested, has given the association's agent a reasonable opportunity to inspect the damage; AND*
    - *The subject matter of the claim falls within the association's insurance responsibilities. [10-4-110.8(5)(a)]*
- *The association's insurer shall not consider unit owner requests for clarification of coverage when determining premiums. [10-4-110.8(5)(b)]*

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Comments:

1) *SB 100 placed no conditions on a unit owner's ability to file a claim against the association's insurance as an additional named insured. This amendment attempts to balance a unit owner's need to file a claim with the appropriate insurance company with an association's need to have some control over such filings to prevent frivolous claims and manage insurance rates.*
2) *Since this provision qualifies a unit owner's ability to file against the association's insurance policy to claims that "fall within the association's insurance responsibilities," an association should have an insurance chart created, which outlines an association's insurance responsibilities as provided for in the declaration. Such a chart clearly states the association's insurance responsibilities and avoids confusion, conflict, and potential litigation.*
3) This new law, which is not a part of CCIOA, has different applications to pre and post-CCIOA communities. CCIOA contains a provision stating that an association may adjust claims and also allows owners – to the extent that they are an insured in respect to liability arising out of their interest in the association's common elements or their association membership – to make claims against an association's insurance policy. CCIOA also has a provision stating that in the event of a conflicting state statute, the provisions in CCIOA will take precedence. Since post-CCIOA communities are subject to *all* of CCIOA, they are not bound by this new insurance law because the provisions in CCIOA take precedence over this conflicting new law. Pre-CCIOA communities, however, are *not* subject to these two provisions in CCIOA (the supremacy clause and the section allowing the association to file claims) unless they have elected to be included in all of CCIOA per 38-33.3-118, making this new insurance law applicable to them.
4) A pre-CCIOA association must allow unit owners to file claims against all association insurance policies in accordance to this provision.
5) In a post-CCIOA community, the association has the capability of managing claims, but owners may make direct claims to the extent of their liability arising out of their interests in the common elements or out of their membership in the association.
6) A pre-CCIOA association should meet with the association's insurance company's representative to discuss procedures for compliance with this provision.
7) Both pre and post-CCIOA associations should establish written procedures for owners desiring to file a claim to follow.

5.2 ALTERNATIVE DISPUTE RESOLUTION POLICY REQUIRED (38-33.3-124)

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA.
New or Amended:	This adds to the existing section 124 of CCIOA
Amended by SB 89:	Yes
Effective date of amendment:	Effective on Governor's signature (May 26, 2006) Associations have until

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January 1, 2007 to adopt policy addressing disputes between owners and association.

What It States:

- It is the legislative intent to declare that litigation is a costly and time-consuming process that makes it inefficient in the resolution of conflicts within associations. [38-33.3-124(1)]
- Associations are strongly encouraged by the legislature to adopt policies and procedures for the use of alternative dispute resolution methods such as mediation or arbitration as an alternative or precondition to the filing of a complaint between the association and a unit owner. [38-33.3-124(1)].
- *On or before January 1, 2007, associations must adopt a written policy outlining its procedure for addressing disputes between the association and unit owners. Association must make a copy of the policy available to unit owners on request. [38-33.3-124(1)(b)].*
- An association may specify in its governing documents certain disputes that must be resolved by binding arbitration under the Uniform Arbitration Act, 13-22-2. [38-33.3-124(3)]
- Parties to a dispute may choose to submit their controversy to mediation before beginning a legal proceeding. [38-33.3-124(2)(a)]
- If a mediation agreement is reached, it may be presented to the court as a stipulation. Either party to mediation has the right to terminate the mediation process without prejudice. [38-33.3-124(2)(b)]
- If either party violates the stipulation, the other party may apply immediately to the court for relief. [38-33.3-124(2)(c)]

Comments:

1) *Although associations must adopt a written policy on how disputes with unit owners are to be handled, there is no requirement for associations to use any type of alternative dispute resolution. ("ADR")*
2) *If the association chooses to require the use of mediation or arbitration as a precondition to legal action, the policy should cover what types of disputes will require ADR as a prerequisite, how a mediator or arbitrator will be chosen, and how the costs of ADR will be distributed.*
3) The policy should be reviewed by an attorney to ensure that the requirements of the Uniform Arbitration Act are met.

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5.3 ATTORNEY FEES (38-33.3-123)

Effective Date:	January 1, 2006
Applicability:	All pre and post-CCIOA common interest communities currently covered by CCIOA
New or Amended:	This provision amends section 123 dealing with attorney fees. Many existing provisions of section 123 remain.
Amended by SB 89:	Yes.
Effective date of amendment:	Effective on Governor's signature (May 26, 2006)

What It States:

- Associations may require unit owners to reimburse the association for collection costs, reasonable attorney fees, and any other costs incurred by its attempts to collect delinquent assessments in addition to any other money or sums due to the association. [38-33.3-123(1)(a)]
- Associations do not have to commence a legal proceeding before having the right to require unit owners to reimburse the association for monies spent in the collection efforts described above. [38-33.3-123(1)(a)]
- When delinquent assessments or certain monies owed to the association are NOT at issue, any party – including the association, a unit owner, or class of unit owners – affected by another party's failure to comply with CCIOA or the association's governing documents may SEEK reimbursement for costs and attorneys fees without commencing a legal proceeding. [38-33.3-123(2)]
- *In any civil action,* courts must award costs and reasonable attorney fees to the prevailing party in an action to enforce or defend any provision of CCIOA or an association's governing documents. [38-33.3-123(1)(c)]
- When the court finds in favor of a unit owner in legal actions claiming that the owner violated a provision of CCIOA or the association's governing documents, the court MUST award the unit owner costs and reasonable attorney fees and may NOT award costs or attorney fees to the association. [38-33.3-123(1)(d)(I),(II)]
- In the situation described above, an association is PROHIBITED from allocating ANY of the association's costs or attorney fees to the unit owner's account. [38-33.3-123(1)(d)(I),(II)]
- A unit owner may not be considered to have confessed judgment to attorney fees or collection costs. [38-33.3-123(1)(e)]

Comments:

1) *Prior to this amendment by SB 89, CCIOA allowed the court to award costs and attorney fees to the prevailing party on a claim by claim basis. SB 89 deletes the claim-by-claim award of costs and allows for the award of attorney fees to the prevailing party. Although intended to clean up the process of awarding*

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fees, this provision may cause difficulties as it is often difficult to determine who is the prevailing party in a suit with several claims and cross-claims.

2) Boards and managers should be aware that the law has not substantially changed for the collection of delinquent assessments or any sums due to the association, including fines. The law still provides that the association can require reimbursement for such actions without having to file a lawsuit.
3) Associations still have the legal authority to place liens on the property of homeowners who owe delinquent assessments or have unpaid fines, which may also include attorney fees and costs.
4) The most significant change caused by this amendment is that an association may not require a prevailing unit owner to pay ANY of the attorney fees or costs incurred by the association in litigation. This means that as the association divides the cost among its unit owners, it may not include the prevailing unit owner in its calculations.
5) Amended section 38-33.3-123 should be read in conjunction with 38-33.3-302(1)(k), which gives associations the right to recover reasonable attorney fees and other costs for the collection of assessments and other actions to enforce the power of the association without filing a lawsuit.

Steps For Compliance:

1) Boards and managers need to review their governing documents to determine how they provide for the allocation of expenses incurred in litigation.
2) An association should adopt a policy on how to handle the allocation of legal costs in the case of a prevailing unit owner that ensures that the prevailing owner is not charged *any* of the costs.

5.4 ASSOCIATION AGENTS & EMPLOYEES AND MANAGEMENT CONTRACTS (38-33.3-302)

Effective Date:	January 1, 2006
Applicability:	Most of the section applies to all pre and post-CCIOA common interest communities currently covered under CCIOA. Associations that include time-share units are exempt from the provision stating that an association's contract with a management company shall be terminable with cause as well as subject to renegotiation.
New or Amended:	This is a new section to section 302 of CCIOA
Amended by SB 89:	No

What It States:

- Any manager, employee, independent contractor or ANY other person acting for the association is subject to CCIOA to the same extent as the association. [38-33.3-302(3)(a)]
- Associations MUST be able to terminate management contracts for cause and without any penalty. Such contracts will also be subject to renegotiation. [38-33.3-302(4)(a)]

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Comments:

- Managers and board members should be aware that any agent of the association is bound to the requirements of CCIOA. Attempts to circumvent any of its provisions through the use of others will be unsuccessful.
- Association employees, contractors, and agents should be informed of any responsibilities they may incur under CCIOA. Associations should consider including such information in employment and vendor contracts.
- Associations should be aware of the right to terminate management contracts *for cause* under this section despite any penalties that may be listed in the contract for early termination.

5.5 ESCROW AGREEMENTS WITH MORTGAGEES (38-33.3-315)

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA.
New or Amended:	This is a new provision to CCIOA
Amended by SB 89:	No

What It States:

- Unless prohibited by an association's governing documents, an association may enter into an agreement with a unit owner's mortgage holder to collect the owner's assessment payments along with the owner's mortgage payments. [38-33.3-315]
- Any escrow agreement reached under this section must comply with any applicable rules of the Federal Housing Administration, Department of Housing and Urban Development, Veterans' Administration, or any other government agency. [38-33.3-315]

Comments:

1) If an association chooses to set up such escrow agreements with unit owners' mortgage companies, an attorney should review such agreements to ensure compliance with all applicable federal statutes.

5.6 WITHDRAWAL FROM MERGED COMMON INTEREST COMMUNITY (38-33.3-221.5)

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA.
New or Amended:	This is a new section to CCIOA
Amended by SB 89:	No

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What It States:

- Common interest communities that are merged, consolidated with another common interest community, or have an agreement to do may withdraw from the merged or consolidated common interest community or terminate the agreement to do so without the approval of the other communities involved if the following criteria are met:
    - It is a separate, platted subdivision;
    - Its unit owners must pay into two common interest communities or separate homeowner associations;
    - It has been self-operating continuously for at least twenty-five years;
    - The total number of unit owners within the community comprises fifteen percent or less of the total number of unit owners in the merged community;
    - Its unit owners have approved the withdrawal by a majority vote with at least seventy-five percent of the allocated interests participated in the vote; and
    - Its withdrawal would not negatively impact the remaining community in enforcing existing covenants, maintaining existing facilities, or continuing to exist.
- An association will be considered withdrawn as of the date that the owners successfully voted for the withdrawal. [38-33.3-221.5(2)]

Comments:

1) This section addresses the narrow situation in which two common interest communities are merged in a corporate sense.
2) This section does NOT apply to master and sub associations.

5.7 BOARD'S DECISION TO PRESERVE ATTORNEY-CLIENT PRIVILEGE (38-33.3-308(4.5))

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA
New or Amended:	This provision amends section 308 of CCIOA
Amended by SB 89:	No

What It States:

- Once the board has resolved any matter for which they sought legal advice or concerned litigation, the board has the discretion to decide whether to disclose such communications at an open meeting or to preserve its attorney-client privilege. [38-33.3-308(4.5)]

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Comments:

1) This new section to section 308 of CCIOA grants boards the statutory authority to use their discretion on whether or not to disclose attorney-client privileged communications with the result of waiving the privilege.
2) Boards should use act in good faith with the best interests of the association in prudently deciding this question.

5.8 <u>ORGANIZATION OF UNIT OWNERS' ASSOCIATION (38-33.3-301)</u>

Effective Date:	January 1, 2006
Applicability:	Applies to all pre and post-CCIOA common interest communities currently covered by CCIOA
New or Amended:	This provision amends section 301 of CCIOA
Amended by SB 89:	No

What It States:

- An association is to organize as a nonprofit, not-for-profit, or for-profit corporation or a limited liability company. The failure of an association to do so will not have a negative effect on the community's existence under CCIOA or the rights of any individuals who relied on the association's existence as one of the above entities. None of the association's substantive rights or obligations under CCIOA will be affected by the choice of organization. [38-33.3-301]

Comments:

1) Boards need to be aware that how an association is structured has no bearing on its rights and responsibilities under CCIOA. It may be prudent for boards to check that the association's articles of incorporation (or any other relevant organization documents if not a corporation) are current.

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