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# HOW TO COMPLY WITH SB100

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## HOW TO COMPLY WITH SB100

SB100 was signed into law on June 6, 2005. It impacts nearly all aspects of a common interest community's governance, including meetings, policies, record-keeping, elections, document amendments, and use restrictions. Each association will need to review its existing governing documents, written policies and non-written practices to determine how it is affected by SB100, what may need to be reduced to writing, and what may need to be revised. This outline will assist you in that process.

### **Xeriscaping** (C.R.S. § 37-60-126 – this is not a part of CCIOA)

- Effective June 6, 2005
- Affects primarily detached single family communities, but will also affect townhome communities if owner is responsible for landscaping.
- Covenants or rules which prohibit or limit xeriscape or require primarily or exclusive use of turf grass are now unenforceable. Associations may not place more procedural requirements on unit owners who seek approval for xeriscaping. Associations may take enforcement action against unit owners who let their landscaping die, except if water use restrictions have been declared by local authorities. Requires suspension of enforcement action against an owner who allows landscaping to die when water restrictions are imposed and gives the owner a "reasonable and practical opportunity" to reseed and revive turf grass before resodding once a drought emergency is declared.

*Action:* Review governing documents to determine whether they limit xeriscaping or impose procedural steps or financial burdens on an owner who wishes to xeriscape. If so, revise the policies. Develop landscaping policies which include xeriscape guidelines and define "reasonable and practical opportunity" to reseed and revive turf grass before resodding is required. Do not take or pursue enforcement action on landscaping if there are watering restrictions in place.

### **Patriotic and Political Expression** (C.R.S. § 38.33.3-106.5)

- Effective June 6, 2005
- Associations cannot prohibit American flags on the owner's property, in the window or on the balcony. Associations cannot prohibit military service stars or service flags displayed in window or door during time of conflict. Associations also cannot prohibit political signs on the owner's property or in the window. Associations may ban the display of such signs earlier than 45 days before election day and later than 7 days after an election. Associations can adopt certain rules regarding size and manner of display.

*Action:* Adopt policies regarding the size and location of flags and flagpoles, the size and manner of display of service flags, the size and number of political signs, and the length of time such signs may be displayed

### **Emergency Vehicles** (C.R.S. § 38.33.3-106.5)

- Effective June 6, 2005

- An owner will be allowed to park certain emergency vehicles if the vehicle meets certain criteria, he/she is a member of a volunteer fire department or an employee of an emergency service provider, parking the vehicle at times at the residence is a condition of employment, and parking does not obstruct emergency access or unreasonably interfere with use of streets and driveways.

*Action:* Review and modify parking rules or policies, including definitions of commercial vehicles, to define the criteria for parking emergency vehicles. Review layout of property to verify that the vehicle can be parked without obstructing emergency access or interfering with reasonable use of streets and driveways.

#### **Fire Prevention (C.R.S. § 38.33.3-106.5)**

- Effective June 6, 2005
- Affects primarily single family detached homes.
- Cannot prohibit removal of trees, shrubs or vegetation to create defensible space if removal complies with a legitimate and proper written defensible space plan. Cannot prohibit replacement of cedar shakes/other flammable roofing material with nonflammable roofing materials. Can specify standards for color, appearance and general type of nonflammable roofing material, but **cannot** require the use of nonflammable materials that exceed the replacement costs of the flammable materials.

*Action:* Review governing documents regarding roofing materials. If nonflammable roofing materials are prohibited, adopt standards regarding the color, appearance and general type of nonflammable roofing material that will be permitted. If necessary, contact roofers to obtain information about the types of roofing products available.

#### **Enforcement (C.R.S. § 38.33.3-123)**

- Effective January 1, 2006
- Associations may continue to require reimbursement of attorney fees in collection matters without filing suit. Associations and any owner may seek reimbursement of attorney fees for other enforcement actions, but cannot require it. The court is to award attorney fees to the prevailing party on any claim or defense in an enforcement action. This requires the filing of a lawsuit. If the owner is the prevailing party, he will be awarded his attorney fees and the association cannot allocate any portion of its attorney fees and costs to that owner.

*Action:* Adopt a policy regarding the allocation of legal costs in the event the association is not the prevailing party in an action with an owner.

#### **Alternative Dispute Resolution (C.R.S. § 38.33.3-124)**

- Effective January 1, 2006
- Encourages, but does not require, communities to adopt policies that use mediation and/or arbitration as an alternative to lawsuits to resolved disputes between the association and an owner.

*Action:* Discuss with the association's attorney whether mediation or arbitration is right for your community and the types of matters that might be submitted to mediation or arbitration. Develop a policy regarding the types of disputes that might be submitted, how the mediator/arbitrator will be selected, and how costs will be distributed.

**Public Disclosures** (C.R.S. § 38.33.3-209.4)

- Effective January 1, 2006
- Disclosures **required** once per year: name of association, name of association's designated agent or management company; physical address and telephone number for both the association and the designated agent or management company, if any; name of community, initial recording date of declaration and recording information. Any changes must be noticed within 90 days of change.

*Action:* Include this information with annual meeting notice and other notices to owners.

- Information to be **made available** within 90 days after turnover and within 90 days after end of each fiscal year: date on which fiscal year commences; operating budget; list, by unit type, of current assessments, including regular and special assessments; annual financial statements, including amounts in reserve for preceding fiscal year; results of any financial audit or review for preceding fiscal year; list of association insurance policies; bylaws, articles and rules and regulations; minutes of board and member meetings for fiscal year preceding current disclosure; and responsible governance policies (identified below).

*Action:* On reasonable notice, associations must make this information readily available at no charge to a unit owner at the unit owner's convenience. Associations should decide on the method of disclosure to be used. Information can be kept in binder at association's principal place of business (note: this address is filed with secretary of state; therefore, if association wants information at manager's office, that address should be listed with secretary of state); posted to website (notice of web address must be sent by mail or e-mail). Alternatively, information may be mailed or personally delivered annually.

- *Note:* This section does not apply to a unit or its owner if the unit is a time-share unit.

**Responsible Governance Policies** (C.R.S. § 38.33.3-209.5)

- Effective January 1, 2006
- Association must maintain accounting records using generally accepted accounting principles.

*Action:* Verify with the association's accountant that generally accepted accounting principles are being followed.

- Associations must have policies, procedures and rules and regulations regarding: collection of unpaid assessment; handling of conflicts of interest involving board members; conduct of meetings; enforcement of covenants and rules, including notice and

hearing procedures and schedule of fines; inspection and copying of association records by owners; investment of reserve funds; and procedures for adoption and amendment of policies, procedures and rules.

*Action:* If association does not already have such policies, adopt those policies.

**Board Member Education** (C.R.S. § 38.33.3-209.6)

- Effective January 1, 2006
- Board members may be reimbursed for actual expenses for educational meetings and seminars on responsible governance of unit owners associations.

*Action:* None required, but boards may want to adopt policy for approval of such expenditures.

**Owner Education** (C.R.S. § 38.33.3-209.7)

- Effective January 1, 2006
- Association is required to provide education to owners on an annual basis as to general operations of the association and the rights and responsibilities of owners.

*Action:* Boards may decide how this is done. Alternatives include, but are not limited to, educating owners through newsletters or articles (perhaps with the annual required disclosures or in a newsletter) offering a class, having a new homeowner orientation program, posting information on its website or presentation at annual meeting.

- *Note:* This section does not apply to an association that includes time-share units.

**Amendments to Declaration** (C.R.S. § 38.33.3-217)

- Effective June 6, 2005
- Declarations may not require approval of more than 67% of owners for amendments and any provision that purports to set a higher percentage is void until amended.

*Action:* No action is required, but if association is updating documents, it may want to amend the amendment section if a higher percentage is required.

- If first mortgagee consent is required for amendments, association must send dated written notice and copy of proposed amendment by certified mail to each first mortgagee at its most recent address as shown on the recorded deed of trust or assignment. Additionally, the association must publish a notice of the amendment at least twice, one week apart, in newspaper of general circulation in the county where the property is located. If first mortgagee does not respond negatively in 60 days, the mortgagee is deemed to have approved the amendment.

*Action:* No action is required unless amendments are being pursued.

**Withdrawal of Merged Community (C.R.S. § 38.33.3-221.5)**

- The criteria for withdrawing from a merged or consolidated community are identified in the statute. To take advantage of this statutory provision, the community must have been operating continuously for at least 25 years and the number of owners comprising the association must be 15% or less of the total number of unit owners in the merged or consolidated community. This section does NOT apply to master and subassociations.

*Action:* No action is required.

**Seller Disclosures to Buyer (C.R.S. § 38.33.3-223)**

- Effective January 1, 2006
- Seller of unit must mail or deliver to buyer copies of the following in the most current form available: bylaws and rules; declaration; covenants; any party wall agreements; minutes of the most recent annual unit owners' meeting and of any executive board meetings that occurred within the six months immediately preceding the title deadline; operating budget, income and expenditures statement; annual balance sheet.

*Action:* Association is obligated to use its best efforts to accommodate a request by the seller for documents that are within the association's control in accordance with the books and records section of CCIOA (see below)

- Buyer is deemed to have accepted terms of documents if buyer fails to object by objection deadline.

*Note:* This section makes it even more difficult for owners to plead ignorance of covenant provisions.

- *Note:* This section does not apply to a unit or its owner if the unit is a time-share unit.

**Seller Disclosure (C.R.S. § 38-35.7-102 – this is not part of CCIOA)**

- Effective January 1, 2006
- The seller must provide the buyer with a disclosure statement in the form set forth in the statute in which the buyer acknowledges receipt of governing documents, that buyer has read those documents and understands the assessment obligation and fact that association can foreclose for failure to pay assessments, and that changes to exterior of property may be subject to architectural review. It is seller's obligation to obtain disclosure and provide it to association.

- *Note:* This section does not apply to the sale of a unit that is time-share unit.

**Organization of Unit Owners' Association (C.R.S. § 38-33.3-301)**

- Effective January 1, 2006
- An association may be set up as nonprofit, not-for-profit, for-profit, or limited liability company and form of organizational structure does not affect substantive rights under CCIOA.

*Action* No action is required.

**Powers of Unit Owners Association Compliance With CCIOA and Management Controls**  
(C.R.S. § 38.33.3-302)

- Effective January 1, 2006
- Any managing agent, employee, independent contractor, or other person acting on behalf of the association is subject to CCIOA to the same extent as the association itself would be.

*Action:* No action is required.

- Applications for architectural changes or landscaping changes must be made in accordance with standards and procedures set forth in declaration, bylaws or rules and regulations and shall not be made arbitrarily or capriciously.

*Action:* Determine if declaration or rules and regulations have policies and procedures for architectural and landscaping changes; if not, adopt rules or policies setting forth standards and procedures.

- Association's contract with managing agent is terminable for cause without penalty. Such contracts will also be subject to renegotiation.

*Note:* This subsection regarding the association's contract with a managing agent does not apply to an association that includes time-share units.

**Audits/Reviews** (C.R.S. § 38.33.3-303(4))

- Effective January 1, 2006
- Association books and records are subject to an audit or review at least once every two years by person selected by board. Such person must be a CPA only if an audit is performed. An audit is required only if association has annual revenues or expenditures of at least \$250,000; **and** an audit is requested by owners of at least 1/3 of the units represented by the association. 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.

*Action:* Associations must have completed the first of the review or audits that this section requires once every two years by January 1, 2008.

*Note:* This paragraph does not apply to an association that includes time-share units.

**Meetings of Owners and Owner Participation at Board Meetings** (C.R.S. § 38.33.3-308)

- Effective January 1, 2006
- Notices of owner meetings must be physically posted in a conspicuous place to the extent feasible and practicable, in addition to any electronic posting or electronic mail notices that may be given as provided below.

*Action:* 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."

- Associations are **encouraged** to provide notices and agendas as required by CCIOA in electronic form by posting on a web site or otherwise, in addition to printed form. If an owner requests notices of unit owner meetings by electronic mail and provides an e-mail address, the Association must provide notice electronically. Electronic notice of special owner meetings must be given at least 24 hours before the meeting.

*Action:* Associations should adopt a policy that clearly defines what "ability to provide electronic notice" means. 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.

*Note:* This paragraph does not apply to an association that includes time-share units.

- Board may place reasonable time restrictions on those persons speaking during the meeting, "but shall permit a unit owner to speak before the Board takes any formal action on an item under discussion in addition to any other opportunities to speak." Board must provide for a reasonable number of persons to speak on each side of an issue. *Note:* Presumably this applies only to owner meetings and board meetings at which a quorum of the Board have voted to allow owners to participate

*Action:* Include rules for owner participation in owner meetings in the required policy for conduct of meetings.

*Note:* This paragraph does not apply to an association that includes time-share units.

- After resolution of a matter for which the board has received legal advice the board may preserve the attorney-client privilege or it may disclose such information it deems appropriate.

#### **Voting – Proxies** (C.R.S. § 38.33.3-310)

- Effective January 1, 2006
- Election of directors: secret ballot is required.

*Action:* Do not hold an election using any other method of voting other than a secret ballot. Although it is counter-intuitive, the safest practice is not to use the parliamentary procedure of acclamation as a method of election in uncontested elections.

- Other votes: secret ballot required upon request of one or more members.

*Action:* Come prepared with a master ballot on all issues and not just the election of board member in the event an owner requests a secret ballot on other issues to be voted on.

- Counting of ballots: ballots must be counted by a neutral third party or by a unit owner who is not a candidate who attends the meeting at which the vote is held and who is selected at random from a pool of two or more such unit owners. Votes must be reported without reference to names, addresses or other identifying information.

*Action:* Include ballot counting procedure in meeting policy.

- Votes obtained through fraud or misrepresentations are not valid.
- Association may reject a vote, consent, written ballot, waiver, proxy appointment or proxy appointment revocation if secretary or other officer or agent, acting in good faith has reasonable basis to doubt validity of signature. As long as such person acts in good faith, they are not liable for damages for the consequences of acceptance or rejection. Only a court decision can invalidate an action taken based on acceptance or rejection of a vote, consent, etc.

*Action:* No action required.

#### **Board Member Conflicts of Interest** (C.R.S. § 38.33.3-310.5)

- Effective January 1, 2006
- If a contract would financially benefit any board member or any person who is a parent, grandparent, spouse, child or sibling of a board member or parent or spouse of any of those persons, the board member is required to declare a conflict of interest in an open meeting prior to any discussion or action on that issue. After the declaration, the member may participate in the discussion but may not vote. Any contract entered in violation of this provision is void. Existing provisions of governing documents regarding conflicts or director participation will control.

*Action:* Adopt a conflict of interest policy. Note any existing conflict provisions in governing documents as stricter requirements will control.

*Note:* This section does not apply to an association that includes time-share units.

#### **Escrow Agreements** (C.R.S. § 38.33.3-315)

- Effective January 1, 2006
- Unless prohibited, association may enter into an escrow agreement with the holder of a unit owner's mortgage so that assessments may be added to owner's mortgage payments and paid in the same manner. Any such agreements must comply with applicable rules of the FHA, HUD, VA and other federal agencies.

*Action:* No action required.

*Note:* Such escrow agreements may be good in theory and may happen at some time in the future and there is discussion of this policy, but to date

there is no indication that mortgagees are interested in collecting association assessments.

**Association Records** (C.R.S. § 38.33.3-317)

- Effective January 1, 2006
- Permanent records: minutes of member and board meetings; record of all actions taken by written ballot or consent in lieu of a meeting, record of actions taken by committee of board in place of board on behalf of the association and record of waivers of notices of meeting of owners and board or any committee of board.

*Action:* Although not required by statute, it may be prudent to adopt a record retention policy, at least to address permanent records.

*Note:* Permanent records would include decisions by ACC or ARC.

- Record of unit owners in form that permits preparation of list of names and addresses of all unit owners, showing the number of votes each unit owner is entitled to vote.

*Note:* This is already required under Colorado Revised Nonprofit Code.

- Additional records required to be kept at principal office: articles of incorporation or other organizational documents; declaration; covenants; bylaws; resolutions of board related to characteristics, qualifications, rights, limitations, and obligations of owners or any class or category of owners; minutes of all owners' meetings and records of actions taken by owners without a meeting for the past three years; all written communications within the past three years to unit owners generally as owners; list of names and business or home addresses of current directors and officers; most recent annual report, if any; and all financial audits or reviews conducted in compliance with CCIOA audit/review requirement.

*Action:* Maintain copies of these records.

*Note:* If governing documents more broadly define records subject to inspection, the governing documents control. If the governing documents are more liberal, the Association may consider amending the governing documents to be consistent with the scope outlined in CCIOA.

- Records must be kept in written form or other form capable of conversion to written form within a reasonable time.
- Inspection of records: All financial and other records shall be made reasonably available for examination and copying by any owner and their agents. The association may charge a fee not to exceed the association's actual cost per page for copies of association records. Reasonably available means available during normal business hours upon notice of five business days. The request must be made in good faith for a proper purpose; the request must describe with reasonable particularity the records sought and the purpose of the request; and the records must be relevant to the purpose of the request.

*Action* Adopt policy for inspection and copying of association records and form for record request.

**Homeowners Insurance** (C.R.S. § 10-4-110.8 – this is not part of CCIOA)

- Effective January 1, 2006
- A unit owner may file a claim against the association's insurance policy to the same extent, and with the same effect, as if the unit owner was an additional insured.

*Action:* Adopt insurance claim reporting policies that encourage owners to report claims to association. Board may also consider higher deductibles and guidelines that make the owner responsible for deductibles if not inconsistent with the governing documents.