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Presents

Senate Bill 05-100:
What It Says and How to Comply

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SENATE BILL 05-100: WHAT IT SAYS AND HOW TO COMPLY

SB 100 is now law. This bill will affect 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 amends several existing provisions of CCIOA, but it also adds 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. Whether you are a board member or manager, you need to know how this law will affect your community and make sure that you are doing what is necessary to meet its many new requirements. Here is a guide to what SB 100 says and what steps community association board members and managers must take to comply with it.

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.

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.ortenhindman.com on which links to this information are provided.

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.

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)]
- Associations still may take enforcement action against unit owners who let their landscaping wither and 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)]

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

Comments:

1) This section states a strong legislative intent to allow political signs and American flags regardless of what an association's documents say.
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 to display the American flag on their balconies. However, the provision dealing with the display of political signs specifies only that homeowners 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 not less than nine inches by sixteen inches.
5) While an association may regulate the size of political signs, such regulation must allow for political signs with maximum dimensions not less than thirty-six by forty-eight inches.
6) A copy of the Flag Code can be accessed on Orten & Hindman's website at www.ortenhindman.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.
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 the allowable scope of your reasonable regulation of political signs. For example, if the local ordinance allows two signs, you may not pass a regulation that allows only one sign.
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 (it must allow at least the same minimum sign displaying rights as your local ordinance). If there is no ordinance, 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."
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.

What It States:

- Associations may not prohibit unit owners 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. 4 to 10. [Copy of Flag Code available on the Orten & Hindman 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 from displaying a service flag with a star denoting the service of the unit owner or a member of the unit owner'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 window or door of the unit owner's residence. Associations may make reasonable rules to regulate the size and method of the display of service flags, but flags nine inches by sixteen inches and smaller must be allowed. [38-33.3-106.5(1)(b)]
- Associations may not completely prohibit the display of political signs on unit owners' property 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. Associations may regulate the size and number of political signs, but these regulations may not be more restrictive than the applicable local ordinance that addresses this issue for residential property. If there is no local ordinance, the association must allow at least one political sign per political office or ballot issue with the maximum dimensions of thirty-six inches by forty-eight inches. [38-33.3-106.5(1)(c)(I)]

1.3 EMERGENCY VEHICLES (38-33.-106.5(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

Comments:

1) The statute defines "emergency service provider" as a "primary provider of emergency fire fighting, law enforcement, ambulance, emergency medical, or other emergency services."

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'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.
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, emergency medical, or other emergency services."

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 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 and driveways. [38-33.3-106.5]

1.4 FIRE MITIGATION (38-33.3-106.5(e),(f)(I),(II))

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

Comments:

1) The fire mitigation portion of this section applies primarily to mountain associations.
2) If an association has not done so yet, it should adopt standards regarding slash removal, stump height, revegetation, and contractor regulations.

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:
   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) If an association has flammable roofing materials, it should adopt reasonable standards for the color, appearance and general type of nonflammable roofing materials that may be used to replace the flammable ones.

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 prohibit a unit owner from replacing cedar shakes or any other flammable roofing materials with nonflammable materials. [38-33.3-106.5(1)(f)(I)
- An association's governing documents may specify reasonable standards for the color, appearance, and general type of nonflammable roofing materials that may be used. [38-33.3-106.5(f)(II)]
- An association's governing documents may NOT require the use of nonflammable materials that would exceed the cost of replacing the flammable materials for which they are being substituted. [38-33.3-106.5(f)(II)]

II. GENERAL GOVERNANCE

2.1 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

Comments:

1) Be aware that this section contains inconsistencies and ambiguities.
2) Section 38-33.3-308(2.5)(a) [homeowners need authorization to speak at board meetings] conflicts with section 38-33.3-308(2.5)(b) [boards must allow homeowners to speak before taking a final vote]. Since it was the legislative intent to allow for broad homeowner participation in the governing of their associations, associations should allow homeowners to speak liberally. Boards should err on the side of

caution and allow owner participation at board meetings, but should adopt rules of conduct to provide guidelines for such owner participation.

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 physically post a meeting notice applies only to unit owner meetings, not to board member meetings.
6) 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.
7) 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.
8) 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.
9) 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.
10) If possible, an association should make use of the internet to post notice of upcoming meetings as it is easy and inexpensive.

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) Draft a homeowner participation policy that clearly defines the homeowners' right to participate in meetings. Such a policy should 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.

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. Owners MUST be allowed to speak at unit owner meetings. Owners must be allowed to speak at board member meetings only if expressly authorized by a majority vote of a quorum of the board. [38-33.3-308(2.5)(a)]
- The board may place reasonable time restrictions on the unit owner's speaking, but MUST allow a unit owner to speak 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 also shall provide for a reasonable number of people to speak to each side of an issue. [38-33.3-308(2.5)(b)]

2.2 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

Comments:

1) This new section to CCIOA 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) For more information on "generally accepted accounting principles," contact your association's accountant or the American Institute of Certified Public Accountants (AICPA) at www.aicpa.org.

Steps For Compliance:

1) Review current policies 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 2.2)
2) The board should discuss what it believes should be included in the policies that must be adopted.

What It States:

- Associations MUST keep their accounting records using generally accepted accounting principles. [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

2.3 STANDARDS FOR APPROVAL OR DENIAL OF UNIT OWNERS' ARCHITECTUAL 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

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.

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)].

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

Comments:

1) This section is an alternative to the court petition process and cannot be used in addition to the court petition process.
2) This section applies only to the percentage needed to amend an association's governing documents and does not affect the percentage necessary for budget ratification.
3) Due to the fact that this section may raise constitutional issues, an association should consult an attorney before taking any actions under this section.
4) This section simplifies the process for gaining first-mortgagee approval for amending declarations that require such approval for amending.

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.

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)]
- 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)]
- 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 in full with information on how to obtain a copy of the proposed amendment – on separate occasions at least one week apart – in a newspaper located 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)]

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

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) Records that are required to be kept permanently must never be destroyed or thrown away.

4) A homeowner meets the requirement that his or her request was made in good faith and for a proper purpose when such requests are not made solely to be frivolous or vexatious.

5) 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 unit owner inspection and copying policy.

6) 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.

7) Associations should be aware that this list of records to be retained is not exclusive. The Nonprofit Act also contains a record retention provision.

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 2.2)
4) Educate board members on the right of unit owners to inspect and have copies made of the records listed in this section.

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)]
- 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 to unit owners in the past three years;
  - 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, but this fee may not exceed the association's actual cost of copying. The section defines "reasonably available" to mean available during normal business hours after five days notice.
- 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(2) – (4)]
- 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. [38-33.3-317(7)]

2.6 REQUIRED AUDIT OR REVIEW (38-33.3-303(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

Comments:

1) This is a new requirement. Before SB 100, an association could have a review, audit, or compilation based on requirements in its governing documents or due to a decision to do so by the board or association manager.
2) 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.
3) Boards need to decide whether they should meet the requirements of this section by having a review or audit at least once every two years. In making this decision, boards should consult their governing documents to determine whether they specify whether the association must have an audit or a review.
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) Boards need to factor in the cost of the review or audit into their budgets accordingly.
6) The timing and procedure for conducting a review or audit should be included in a written policy.
7) 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)

Steps For Compliance:

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

What It States:

- At least once every two years, an association's books and records must be audited or reviewed using generally accepted auditing standards by an individual chosen by the board. Unless the association chooses to have an audit, the individual selected does not have to be a certified public accountant. [38-33.3-303(b)(I)]
- An association MUST have an audit – as opposed to a review – 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(b)(II)]
- 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(b)(III)]

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

Comments:

1) 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.
2) 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 an election using any other method of voting 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.
2) Create an election policy that includes the requirement for secret ballots, 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 the election of board member in the event an owner requests a secret ballot on other issues to be voted on.

What It States:

- Secret ballots MUST be used in board member elections. At the request of one or more unit owners, 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)]
- Ballots must be counted by either a neutral third party or a unit owner who is not a candidate, is present at the meeting, and is selected randomly from a pool of two or more such non-candidate owners. When reporting the vote results, no reference may be made to names, addresses or any other identifying information. [38-33.3-310(1)(b)(I)]
- 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 signature's validity 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)]

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

Comments:

1) This section is stricter than and overrides the conflict of interest section of the Nonprofit Act, 7-128-501, which allows a board member with conflict of interest to vote after disclosing the conflict of interest.

2) Section 38-33.3-209.5, Responsible Governance Policies, requires associations to adopt a policy addressing board member conflicts of interest. (see section 2.2)
3) This section applies just to board member conflicts of interest, not committee member conflicts of interest.

Steps For Compliance:

1) 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.
2) The document should include examples of conflicts of interest and all the relationships that this section covers.
3) Managers and board members need to be familiar with the Conflicts of Interest provisions in both CCIOA and the Nonprofit Act.
4) A board member with a conflict of interest is still to be counted in determining whether a quorum exists.

What It States:

1) Board members must disclose that they have a conflict of interest in any action or contract that would financially benefit any board member or the parent, grandparent, spouse, child, or sibling of any board member. This disclosure must be made in an open meeting before any action is taken on the matter. Board members with conflicts of interest are prohibited from voting on that matter. [38-33.3-310.5(1)]
2) Contracts entered into in violation of this section are void and unenforceable. [38-33.3-310.5(2)]
3) 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. [38-33.3-310.5(3)]

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

Comments:

1) 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.
2) 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.
3) 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.
4) 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.
5) 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.
6) The disclosures required by this section must be made by at least 90 days after the end of an association's fiscal year *after the law takes effect* on January 1, 2006. Therefore, if an association's current fiscal year ends on or before December 31, 2005, that association's first disclosure does not have to be

made until 2007, by 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) Associations need to make sure that they have adopted the responsible governance policies required by section 38-33.3-209.5. These policies are discussed in section 2.2.
4) 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.

What It States:

- At least once a year, an association MUST provide to its unit owners a written notice that states:
  - the association's name;
  - 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 provide all unit owners with an amended written notice 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 any financial audit or review for the fiscal year preceding the current annual disclosure;
    - 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
        - 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; and

  - Procedures for the adoption and amendment of policies , procedures, and rules [38-33.3-209.4(2)(a)-(i)] (required policies discussed in section 2.2)
- 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;
  - Maintaining a literature table or binder at the association's principal place of business;
  - Mailing the information to all owners; or
  - Personally delivering the information to all owners. [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)]

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.

Comments:

1) This new section to CCIOA places a responsibility on the seller to make the required disclosures, which is consistent with current Colorado Real Estate Commission practices.
2) A discrepancy exists between the timing required by this section and 38-35.7-102 (Disclosure of Buyer's Responsibilities to Association and Requirement for Architectural Approval). This section requires the disclosures to be made on or before the title deadline. Section 38-35.7-102 differentiates between sales using a broker and sales by owner. That section states that in sale-by-owner transactions, the owner must furnish the documents at least ten days before closing. In brokered transactions, the disclosures must be made on or before the title deadline as specified in 38-33.3-223.

Steps For Compliance:

1) If the seller requests the association for a document that the association is required to keep under section 38-33.3-317 (discussed in section 2.5), boards and managers must use best efforts to comply with the request. The requirement for "best efforts" means that boards and managers must make a reasonable good faith effort to comply with the seller's request.

What It States:

- The seller of a unit in a common interest community MUST mail or deliver personally to the buyer copies of the most current version of the following documents:
    - The association's bylaws and rules;
    - The association's declaration;
    - The association's covenants;
    - Any party wall agreements;
    - Minutes of the most recent annual unit owners' meeting and of any board meetings held within the six months preceding the title deadline;
    - The association's operating budget;
    - The association's annual income and expenditures statement; and
    - The association's annual balance sheet. [38-33.3-223(1)(a)-(b)]
- These documents must be mailed or delivered to the buyer on or before the title deadline. [38-33.3-223(1)]
- The association MUST use its best efforts when asked by the seller to help collect any documents that are within its control, in accordance with 38-33.3-317. [38-33.3-223(2)]
- If the buyer finds any of the documents' terms unacceptable, the buyer may terminate the contract by giving the seller a written notice specifying the objectionable provisions. This notice must be signed by the buyer or on behalf of the buyer and must be delivered to the seller on or before the governing documents objection deadline. If the seller does not receive such a notice, it will be assumed that the buyer has accepted the documents' terms. [38-33.3-223(3)]
- The parties may change the time periods of this section by mutual agreement. [38-33.3-223(4)]

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

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.

Comments:

1) This section is new to Colorado Real Estate Commission practices.
2) An association should verify that its resale package contains a copy of the signed disclosure statement.
3) An association should also have a process in place to expedite homeowner requests for documents that the association is required to be keep under 38-33.3-317.
4) 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.
5) For further information, please see above discussion of 38-33.3-223.

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. Associations must also make sure that they keep the records required by section 38-33.3-317 (discussed in section 2.5)
2) An association should have a written policy that outlines the procedure and steps that a seller must take to request the information from the association. Requiring a written request is highly advisable so that records can be kept of all requests received.

What It States:

- This section applies to EVERY purchase and sale of residential property in a common interest community. [38-35.7-102(1)]
- The seller has the responsibility at the seller's expense to furnish the documents required by 38-33.3-223. (discussed in section 3.2) These documents must be furnished at least ten days before closing in a

sale by an owner or within the time limits specified in 38-33.3-223 if a real estate agent is used. [38-35.7-102(1)(a)]

- The seller MUST provide the buyer with a disclosure statement in bold-faced type that substantially states the following:

> **The buyer hereby acknowledges that the buyer has received copies of the declaration, covenants, bylaws, and rules and regulations of the homeowners' association of the [name of common interest community], in which the property is located, and the buyer understands that these documents constitute an agreement between the association and the buyer. By signing this statement, the buyer acknowledges that the buyer has read and understands the association's declaration, covenants, bylaws, and rules and regulations. The buyer also understands that by completing this purchase, the buyer is responsible for paying assessments to the association. If the buyer does not pay these assessments, the association could place a lien on the property and possibly sell it to collect the debt. The buyer also understands that any change to the exterior of the property may be subject to architectural review and approval could be a violation of the declaration and could result in remedial action being taking by the association.** [38-35.7-102(1)(b)(I)]

- The seller has the responsibility to obtain from the buyer a signed acknowledgement of receipt of the required information and disclosure statement. This acknowledgement may be incorporated into the real estate contract or otherwise, or collected at the time of closing. The seller is responsible for delivering the acknowledgement to the association as soon as possible after it is acquired. [38-35.7-102(1)(b)(II)]
- If a seller fails to do the above, the buyer has a claim against the seller for all damages resulting from the seller's failure to comply with disclosure requirements UNLESS 1) the buyer's damages were caused by the association's failure or refusal (without legal justification) to provide documents within its control despite the seller's good faith attempts to obtain them; OR 2) the association failed to maintain its records as required by 38-33.3-317. [38-35.7-102(1)(b)(II)]

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

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 .

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

4.2 OWNER EDUCATION (38-33.3-209.7)

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

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 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.

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]

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)

Comments:

1) 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 only an association –not its homeowners - may file claims on an association's insurance policy and 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 unless they have elected to be included in all of CCIOA per 38-33.3-118.
2) A pre-CCIOA association must allow unit owners to file claims against an association's insurance policy.
3) A pre-CCIOA association should meet with the association's insurance company's representative to discuss procedures for compliance with this provision.
4) A pre-CCIOA association should establish written procedures for owners desiring to file a claim to follow.

What It States:

A unit owner may file a claim against an association's insurance policy as if the unit owner were an additional named insured. [10-4-110.8(5)]

5.2 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.

Comments:

1) 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.
2) Associations still have the legal authority to place liens on homeowner's property who owes delinquent assessments or has a unpaid fines, which may also include attorney fees and costs.
3) 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.
4) 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.

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)]
- 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(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(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(d)(I),(II)]
- A unit owner may not be considered to have confessed judgment to attorney fees or collection costs. [38-33.3-123(e)]

5.3 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

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.

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)]

5.4 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

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.

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]

5.5 ALTERNATIVE DISPUTE RESOLUTION ENCOURAGED (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

Comments:

1) Associations should decide whether alternative dispute resolution would work for their community.
2) Associations who decide that they would like to require the use of mediation or arbitration as a precondition to legal action should develop a written policy on the subject.
3) 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.
4) The policy should be reviewed by an attorney to ensure that the requirements of the Uniform Arbitration Act are met.

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)].
- 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)]

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

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.

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 terminated 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)]

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

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.

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)]

5.8 ORGANIZATION OF UNIT OWNERS' ASSOCIATION (38-33.3-301)

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

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.

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]