

COMMON INTEREST CONUNDRUMS

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I. Introduction

In 1992, when the Colorado General Assembly enacted the Colorado Common Interest Ownership Act (“CCIOA”), the following legislative declaration¹ introduced the new body of law:

- (a) *That it is in the best interests of the state and its citizens to establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities;*
- (b) *That the continuation of the economic prosperity of Colorado is dependent upon the strengthening of homeowner associations in common interest communities financially through the setting of budget guidelines, the creation of statutory assessment liens, the granting of six months’ lien priority, the facilitation of borrowing, and more certain powers in the association to sue on behalf of the owners and through enhancing the financial stability of associations by increasing the association’s powers to collect delinquent assessments, late charges, fines, and enforcement costs;*
- (c) *That it is the policy of this state to give developers flexible development rights with specific obligations within a uniform structure of development of a common interest community that extends through the transition to owner control;*
- (d) *That it is the policy of this state to promote effective and efficient property management through defined operational requirements that preserve flexibility for such homeowner associations;*
- (e) *That it is the policy of this state to promote the availability of funds for financing the development of such homeowner associations by enabling lenders to extend the financial*

¹ C.R.S. 38-33.3-102.

services to a greater market on a safer, more predictable basis because of standardized practices and prudent insurance and risk management obligations. (Emphasis added.)

Nearly 30 years later those legislative declarations remain intact as guiding principles for common interest community development throughout Colorado. At the same time, other factors compete with CCIOA and sometimes contravene those principles with resulting adverse impacts on unit owners and their associations. Those other factors include, but are not limited to, development boom and bust, changes in financing conditions and availability, and inattention to the technical legal requirements in CCIOA. This handout outlines several scenarios where declarant-recorded documents create conundrums that owners (and the declarant, when available) must untangle.

II. Conundrum Scenarios

A. Declarant did not and does not own property originally subjected to declaration.

Formation of a common interest community involves the recording of a declaration and map or plat that subjects real estate to terms that obligate owners to pay for real estate taxes, insurance, and upkeep of other property.² The original declaration typically defines certain declarant rights, including the right to complete improvements shown on the map or plat and exercise development rights.³ For condominium projects, in particular, the declarant owns all units subject to the declaration until such time that the units are conveyed to purchasers.⁴

If the declarant named in the declaration does not hold title to the real estate described in the declaration at the time the declaration is recorded, then a title issue arises. The declaration appears to function like a wild deed, and the declarant does not clearly hold marketable title to the units.⁵ The declaration must be executed in the same manner as a deed and indexed by the grantor (declarant)/ grantee (association).⁶

Possible solutions may include some or all or a combination of the following:

1. conveyance of the underlying real estate to the declarant after the recording of the declaration
2. re-recording of the declaration with correction of declarant information
3. joinder of the record owner as a declarant under the declaration, or
4. termination of the common interest community.

After conveyance of a unit to a purchaser, the declarant's options to correct the formation of the common interest community will need to involve the third-party purchaser and any first mortgagee to best ensure inclusion of the purchaser's property in any resulting common interest community.

² C.R.S. 38-33.3-103(8) and 38-33.3-201.

³ C.R.S. 38-33.3-103(29) and 38-33.3-205.

⁴ C.R.S. 38-33.3-103(31).

⁵ See C.R.S. 38-33.3-203(4).

⁶ C.R.S. 38-33.3-201.

Practice Pointer: When representing a party in a transaction that is subject to a common interest regime, review the chain of title, including the transfer of the subject real estate to declarant.

B. Failure to identify in the declaration the property that may be withdrawn from the common interest community at a later date.

CCIOA clearly requires the declarant to identify any property subject to withdraw.⁷ Once the declarant sells a unit within an area subject to withdraw to a purchaser, the declarant can no longer withdraw property within that area.⁸ A declarant also cannot increase special declarant rights after selling any unit to a purchaser, except with approval of the owners other than declarant.⁹ Even with these requirements and protections under CCIOA, no third-party oversees the actions of the declarant, and withdraw of property sometimes occurs without compliance with CCIOA. In such situations, the association and unit owners may assert that the property remains subject to the declaration. From the declarant's perspective, failure to identify property that may be withdrawn prohibits the declarant from subsequently withdrawing property that the declarant may no longer wish to develop. This failure limits the flexibility of declarant to modify its development plans when the real estate market changes.

Practice Pointer: Declarant must have a strategy for development of the community. The rights to withdraw, along the rights to annex or add additional property must be clearly thought through and addressed in the declaration.

C. Creation of a platted, planned community on property already subject to a condominium declaration and map.

The recording of a condominium declaration and map by a declarant-owner of the property described in the declaration forms a common interest community.¹⁰ As a condominium, the unit owners own an undivided interest in the areas of the property identified as common elements.¹¹ If the declarant conveys units to purchasers and then records a plat and planned community declaration that describes the same property already subject to a condominium declaration, the declarant is encumbering property that the declarant does not own. This again looks like a wild deed situation. Any conveyance of platted units from declarant to purchasers lacks a valid chain of title and does not comply with the conveyance requirements for condominium common elements.¹²

⁷ See C.R.S. 38-33.3-103(14)(d), C.R.S. 38-33.3-103(29), and C.R.S. 38-33.3-205(1)(h)

⁸ C.R.S. 38-33.3-210(4)(b).

⁹ C.R.S. 38-33.3-217(4)(a) (requiring approval by at least sixty-seven percent of non-declarant votes).

¹⁰ C.R.S. 38-33.3-201.

¹¹ C.R.S. 38-33.3-103(9).

¹² See C.R.S. 38-33.3-312.

D. Unsigned, recorded declaration.

A declarant must sign and record a declaration like a deed.¹³ The court in *Abril Meadows Homeowner's Ass'n v. Castro* held that an unsigned, recorded declaration failed to create a common interest community.¹⁴ The facts of *Abril Meadows* involve a common interest community consisting of two units only and exorbitant fines levied by one owner against the other. The court effectively terminated the common interest community with its ruling. If an unsigned, recorded declaration were found as the sole declaration that formed a functioning condominium association with multiple unit owners, a court may consider the situation differently than the *Abril Meadows* court and potentially rule in equity to find that the declaration, together with CCIOA, binds unit owners despite the lack of signature on the declaration.¹⁵ Individual deeds to unit owners and other documents in the real property records may factor into the analysis of what constitutes the declaration and how the declaration complies with CCIOA's requirements.

E. Failure to attach exhibit that allocates interests.

CCIOA requires each declaration that creates a common interest community to identify the allocated interests for the units within the community.¹⁶ Unlike other areas of CCIOA where the statute provides default terms unless otherwise defined in the declaration,¹⁷ the statute does not establish default allocated interests. An argument exists that the Colorado Revised Nonprofit Corporation Act ("Nonprofit Act") establishes a default of one vote per member that would apply to a common interest community without defined vote allocations,¹⁸ but the Nonprofit Act does not assist with determining common expense liability or interest in the common elements. The Colorado Supreme Court has held that lack of compliance with the procedures for annexing units into a common interest community, including reallocation of the allocated interests as part of a supplemental declaration, fails to comply with CCIOA.¹⁹ No similar holding exists for a community formed and functioning under CCIOA but operating with a declaration that fails to allocate interests. To the extent the absence of an exhibit corrects the problem, a declarant may hold the authority to record the missing exhibit as a technical amendment even after sale of units to purchasers; however, no state court precedent exists on how the technical amendment option applies under CCIOA.²⁰

¹³ C.R.S. 38-33.3-201.

¹⁴ 211 P.3d 64 (Colo. App. 2009).

¹⁵ C.R.S. 38-33.3-108.

¹⁶ C.R.S. 38-33.3-205(1)(k) and C.R.S. 38-33.3-207.

¹⁷ See, e.g., C.R.S. 38-33.3-207(2).

¹⁸ C.R.S. 7-127-202(2).

¹⁹ *Ryan Ranch Community Ass'n v. Kelley*, 380 P.3d 137 (Colo. 2016).

²⁰ C.R.S. 38-33.3-205(4).

F. Failure to attach legal description or failure to attach correct legal description.

A common interest community must include real estate.²¹ If the declaration fails to identify real estate subject to its terms, then the declaration may not create a common interest community.²² However, CCIOA recognizes that the plat or map may include information that the declaration must include.²³ So a declaration that references a plat or map that describes the real estate suffices for this purpose to create a common interest community.²⁴ Where no reference to a plat or map exists and the declaration does not describe real estate, no common interest community is formed. Attaching the wrong legal description to a declaration may result in another wild deed situation if the declarant named in the declaration does not own the improperly identified real estate. If the declarant owns the real estate named in the declaration but the declarant did not intend to subject the property to the declaration, the declarant will likely need to terminate any common interest community created by recording the proper documentation in conformance with CCIOA.²⁵

G. Allocation of limited common elements by declarant after sale of units and without reservation of right.

CCIOA defines certain limited common elements that do not require specific allocation within the declaration. Beyond these statutorily defined limited common elements, the declarant must allocate portions of the common elements for use by one or more but fewer than all unit owners. A declarant may reserve this declarant right to designate common elements as limited common elements. But failure to designate limited common elements in the declaration or on the map or plat prior to the expiration of development rights extinguishes the right to designate those areas as limited common elements at a later date.

H. Map showing labeled limited common elements that declarant never allocated to specific unit owners.

Limited common elements not designated for use by one or some or fewer than all unit owners do not function as common elements. Rather, if not designated on the map, by deed, or in the declaration or a supplement to the declaration, such areas effectively function as common elements. Nothing in CCIOA permits an association to designate limited common elements not previously designated by the declarant. An owner-approved amendment to designate a limited common element shown on the map but not designated for use by any particular unit owner(s) could overcome the discrepancy.

²¹ C.R.S. 38-33.3-103(3).

²² C.R.S. 38-33.3-201.

²³ C.R.S. 38-33.3-205(3).

²⁴ See *Pulte Home Corp. v. Countryside Cmty. Ass'n, Inc.*, 2016 CO 64, 382 P.3d 821.

²⁵ See generally C.R.S. 38-33.3-218.

I. Map or exhibit square footage allocations that do not match as-built dimensions.

CCIOA requires the declaration to include allocated interests for the units,²⁶ which consist of the following:

1. In a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association;
2. In a cooperative, the common expense liability and the ownership interest and votes in the association; and
3. In a planned community, the common expense liability and votes in the association.²⁷

Many declarations list allocated interests based on square footage. However, CCIOA does not require the declarant to establish allocated interests based on the square footage generally or on as-built square footage for the units. The statute simply requires the allocations not to discriminate in favor of the declarant.²⁸ Some allocated interests are calculated based on the total number of units while others use bedrooms and occupants as part of the calculation. That said, many declarations establish square footage based on map measurements or other figures provided by the declarant. These measurements do not necessarily equate to as-built measurements. The measurements also do not always align with unit measurements used by the county Assessor; in some cases, Assessor measurements may change over time to include or exclude areas from the unit. These discrepancies can lead to owner challenges to the numbers used in the declaration and the allocations applied to their units. While CCIOA does not dictate how the declarant determines the allocations and does not even require allocations based on square footage, the allocations set by the declarant in the declaration control. Absent a technical or typographical error that the declarant may correct, or an exercise of development rights, any recalculation of the allocated interests requires an owner vote to amend the declaration.

J. Failure to reserve all or some of the development rights/special declarant rights.

Many communities amend and restate their declarations after the development rights expire. Exclusion of development rights in these documents seems appropriate. But not including development rights in a document recorded by the declarant could result in problems as development proceeds. CCIOA identifies the “development rights” as “any right or combination of rights reserved by a declarant in a declaration to:

- (a) Add real estate to a common interest community;
- (b) Create units, common elements, or limited common elements within a common interest community;

²⁶ C.R.S. 38-33.3-205(1)(k) and C.R.S. 38-33.3-207.

²⁷ C.R.S. 38-33.3-103(2).

²⁸ C.R.S. 38-33.3-207(2).

- (c) Subdivide units or convert units into common elements; or
- (d) Withdraw real estate from a common interest community.”²⁹

Failure to include a time limitation on the development rights however results in the development rights being void ab initio. CCIOA requires a description of any development rights and other special declarant rights reserved by the declaration, together with a description sufficient to identify the real estate to which each of those rights applies and the time limit within which each of those rights must be exercised.³⁰

Addition of unspecified real estate. A declarant may also reserve the right to amend the declaration at any time during as many years as are specified in the declaration to add additional real estate to the common interest community without describing the location of that real estate in the original declaration, but the area may not exceed 10 percent of the total area of the real estate described in the declaration and the real estate subject to development rights. The number of units may be increased than stated in the original declaration except by amendment to the declaration.

Declarant must reserve the right to maintain sales offices, models, management offices, or signs as special declarant rights in the declaration or no such rights exist in the declarant.³¹

Practice Pointer: The declaration must contain everything that the declarant desires with regard to the development of the community, development rights and special declarant rights.

K. Subjecting all of the developable property to the declaration (as opposed to annexing parcels over time).

Once a declaration makes real estate subject to its terms, that property remains subject to the declaration absent (i) an amendment to the declaration by declarant prior to conveyance of a unit to a purchaser or (2) a proper owner-approved sale of common elements or other amendment at a later date.³² A declarant must describe any development right to withdraw property within the declaration to exercise such right.³³ Even if the declarant retains the right to withdraw property, in addition to any time limits that apply to the exercise of such right, CCIOA limits that right as follows:

If the declaration provides, pursuant to section 38-33.3-205, that all or a portion of the real estate is subject to a right of withdrawal:

²⁹ C.R.S. 38-33.3-103(14).

³⁰ C.R.S. 38-33.3-205 (1) (h)

³¹ C.R.S. 38-33.3-215

³² See C.R.S. 38-33.3-312 and C.R.S. 38-33.3-217.

³³ C.R.S. 38-33.3-205(1)(h).

- (a) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and
- (b) If any portion of the real estate is subject to withdrawal, it may not be withdrawn after a unit in that portion has been conveyed to a purchaser.³⁴

As a result, query if it makes sense to subject all of the real estate to the Declaration initially or if only a portion of the real estate should initially be described as the “real estate” subject to the declaration with the balance of the property being additional real estate to be added at a later date. The real estate subject to the declaration and the real estate to be added at a subsequent date must be separately described.

Practice Pointer: The “real estate” described in the declaration requires careful consideration of a number of issues depending on the characteristics of the common interest community. The exhibit containing the legal description of the “real estate” must be discussed with the long term vision of the declarant with a thoughtful discussion of competing aims (costs, flexibility, certainty, etc.).

III. Development Rights Decisions

- A. Include all development rights in the declaration. If the right is not included in the declaration, declarant does not have that type of development right. For example, if the declaration fails to include the right to withdraw a portion of the property, there is no right to withdraw property, without amending the declaration to allow a withdrawal.
- B. Know when to extend certain rights or all of the rights
- C. Allow ample time to complete development, including flexibility for possible economic recessions, changes in financing requirements, and other work stop situations
- D. Small planned communities may not allocate development rights to declarant.³⁵ A developer “may not ... use any ... device to evade the limitations or prohibitions of this article” and the “rights conferred by this article may not be waived.”³⁶
- E. Include all special declarant rights necessary. Special declaration rights means rights reserved for the benefit of a declarant: to complete improvements indicated on plats and maps filed with the declaration; to exercise any development right; to maintain sales offices, management offices, signs advertising the common interest community, and models; to use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community; to make the common interest community subject to a master association; to merge or consolidate a common interest community of the same form of ownership; or to appoint or remove any officer of the association or any executive board member during any period of declarant control.³⁷

³⁴ C.R.S. 38-33.3-210(4).

³⁵ C.R.S. 38-33.3-116(2)

³⁶ C.R.S. 38-33.3-116. *See also Arrabelle at Vail Square Residential Condominium Association, Inc. v. Arrabelle at Vail Square LLC*, 2016 COA 123, 382 P.3d 1275.

³⁷ C.R.S. 38-33.3-103(29).

- F. Include the maximum number of units that the declarant reserves the right to create.³⁸ Keep in mind the right to subdivide units or add additional real estate when determining this number.
- G. Transfer of special declarant rights may occur only by an instrument evidencing the transfer recorded in every county in which a portion of the real estate is located and must be executed by the transferee.³⁹ If a successor is an affiliate of the declarant, the transferor and transferee are jointly and severally liable for the liabilities and obligations of the

IV. Considerations When Transitioning from Declarant to Owner/Association Control

- A. Retain board appointment and architectural oversight if special declarant rights remain in effect.
- B. Retain right to review association records.
- C. Consider rights and possible agreements between the association and declarant if development remains incomplete when the declarant control period ends
- D. Enter into and record a transition agreement between the declarant and association
- E. Prepare a transition letter and arrange for document delivery on or before 90 days after the declarant control period ends

V. Conclusion

The Colorado Court of Appeals summarized the essence of CCIOA in the *Arrabelle at Vail Square* case, saying, “The General Assembly intended for most common interest communities to be bound by CCIOA and for developers to have ‘flexible development rights with specific obligations within a uniform structure of development of a common interest community.’ § 38-33.3-102(1)(c).”⁴⁰ Attempts to avoid the structures of CCIOA are fraught with various risks and difficulties.

³⁸ C.R.S. 38-33.3-205(d).

³⁹ C.R.S. 38-33.3-304(1).

⁴⁰ *Arrabelle at Vail Square Residential Condominium Association, Inc. v. Arrabelle at Vail Square LLC*, 382 P.3d 1275.