

# **2011 ANNUAL REPORT OF THE HOA INFORMATION AND RESOURCE CENTER**

**Colorado Division of Real Estate  
HOA Information and Resource Center  
1560 Broadway, Suite 925  
Denver, Colorado 80202  
Phone 303.894.2355  
[real-estate@dora.state.co.us](mailto:real-estate@dora.state.co.us)**



## **TABLE OF CONTENTS**

<b>EXECUTIVE SUMMARY.....</b>	<b>1</b>
<b>STATUTORY AUTHORITY.....</b>	<b>2</b>
<b>2011 STATE REGULATORY AND LEGISLATIVE UPDATES.....</b>	<b>3</b>
<b>REGISTRATION INFORMATION AND QUANTITATIVE DATA.....</b>	<b>4</b>
<b>INQUIRIES AND COMPLAINTS.....</b>	<b>8</b>
<b>TRENDS AND INDUSTRY ISSUES.....</b>	<b>16</b>
<b>CONSUMER UNDERSTANDING AND EXPECTATIONS.....</b>	<b>20</b>
<b>CASE STUDIES.....</b>	<b>21</b>

## **EXECUTIVE SUMMARY**

In 2010 the Colorado General Assembly passed House Bill 1278 which created the HOA Information Office and Resource Center (the “Office”) housed within the Division of Real Estate (“Division”). House Bill 10-1278 was the product of years of homeowners’ association (“HOA<sup>1</sup>” or “association”) related questions and complaints being directed to state legislators and part of the larger legislative initiatives surrounding common interest communities<sup>2</sup> in Colorado. The purpose of the law is to compile information on HOAs in Colorado, including statistical data and information on issues homeowners are having in HOAs. The Office also serves as a resource for Colorado consumers providing information about living in an HOA and assisting homeowners, HOA boards, declarants and other interested parties in understanding their rights and responsibilities under the Colorado Common Interest Ownership Act (“CCIOA”).<sup>3</sup>

The Office has been in operation since January 1, 2011 and since that time has compiled data related to HOAs through HOA registration and by listening to issues consumers are having in HOAs on the phone, in emails, in person, and by reviewing complaints submitted through our online complaint database. We have also had input from HOA board members, community association managers (“managers”) and other industry professionals (including attorneys and contractors), which has contributed to the substance of the document. The purpose of this document is to comply with § 12-61-406.5(b)(II), C.R.S. and to provide the Director of the Division of Real Estate information regarding the data compiled by the Office in 2011 and to provide opinions on HOA issues affecting Colorado consumers.

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<sup>1</sup> “HOA or Homeowners’ Association means an association or unit owners’ association formed before, on, or after July 1, 1992, as part of a common interest community as defined in Section 38-33.3-103, C.R.S” § 12-61-101, C.R.S.

<sup>2</sup> HOA’s are a type of common interest community. “Common interest community” is defined as “real estate described in a declaration with respect which a person, by virtue of such person’s ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in the declaration. Ownership of a unit does not include holding a leasehold interest in a unit of less than forty years, including renewal options, is measured from the date the initial term commences.” § 38-33.3-103(8), C.R.S.

<sup>3</sup> § 38-33-101, C.R.S., *et seq.*

## **STATUTORY AUTHORITY**

House Bill 10-1278 created the HOA Information Office and Resource Center<sup>4</sup>. The law in relevant part provides; “[T]here is hereby created, within the Division of Real Estate, The HOA Information and Resource Center...”). The provisions of the bill are codified in both the Real Estate Licensing Law<sup>5</sup> and also CCIOA. Per statute the Office is tasked with:

- Registering HOAs and collecting data through a registration process;<sup>6</sup>
- Acting “as a clearing house for information concerning the basic rights and duties of unit owners, declarants, and unit owners’ associations” under the Colorado Common Interest Ownership Act (“CCIOA”);<sup>7</sup> and
- Tracking “inquiries and complaints and report(ing) annually to the Director of the Division of Real Estate regarding the number and types of inquiries and complaints received.”<sup>8</sup>

In accordance with statutory requirements, this document reports on the activities for the period from January 1, 2011 to December 31, 2011.

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<sup>4</sup> Codified at § 12-61-406.5(1), C.R.S.

<sup>5</sup> § 12-61-101, C.R.S., *et. seq*

<sup>6</sup> § 38-33.3-401, C.R.S.

<sup>7</sup> § 12-61-406.5(3)(a), C.R.S.

<sup>8</sup> § 12-61-406.5(3)(b)(II), C.R.S.

## 2011 STATE REGULATORY AND LEGISLATIVE UPDATES

Legislatively, 2011 was a quite year for HOAs. The only significant legal changes related to the addition of a new conflict of interest provision into CCIOA through House Bill 11-1124.<sup>9</sup> This new law prohibits HOA board members from simultaneously sitting on a Special District board in addition to requiring HOA board members to disclose conflicts of interest for a matter before the board that would financially benefit the member or any of their immediate family. The law required that after making a conflict disclosure that a board member may participate in the discussion on that issue but must abstain from voting on the issue. The other piece of legislation in 2011 that affected HOAs was SB-11-234<sup>10</sup>, the Residential Transfer Fee Bill which prohibited and invalidated transfer fee covenants that didn't "touch and concern" the land. There was an exclusion for management companies to charge one-time fees for services rendered in the conveyance of property and HOA's to collect monies due the association provided by covenant.

There was one legislative initiative regarding the HOA Information Office and Resource Center, which addressed the HOA registration requirements. There has been debate amongst lawyers and HOA industry members about whether the registration requirement in § 38-33.3-401, C.R.S. requires entities formed prior to the date of the passage of the Colorado Common Interest Ownership Act ("pre-CCIOA")<sup>11</sup> to register. In response to the ambiguities in the legislation, a "clean-up bill", Senate Bill 11-253, was introduced in the 2011 legislative session. The clean-up bill passed the Senate but did not pass the House. Senate Bill 11-253 was also intended to amend ambiguous provisions under HB 10-1278, including the "lien provision."<sup>12</sup> The bill specifically required pre-CCIOA entities to register, and truncated the information required to be provided in the registration,<sup>13</sup> in addition to clarifying what constitutes a valid registration.

While the Director of the Division of Real Estate was granted the ability to engage in administrative rulemaking, the Office did not create any permanent administrative rules in 2011. The Office did enact Emergency Rule A-1 which extended the period in which HOAs were initially required to register from January 1, 2011 to March 1, 2011. The Office also issued Position Statement 1.1 clarifying our position on whether pre-CCIOA entities were required to register. Position Statement 1.1<sup>14</sup>, drafted in conjunction with the Attorney General's Office, stated that it was the Division's position that pre-CCIOA HOA's who had not elected treatment under CCIOA<sup>15</sup> were not required to register their HOA with the Office.

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<sup>9</sup> Codified at § 38-33.3-209.5(1)(b)(II), C.R.S.

<sup>10</sup> Codified at § 38-35-127, C.R.S.

<sup>11</sup> "Pre-CCIOA" associations are those entities that were formed prior to the passage of CCIOA on July 1, 1992, and who have not elected treatment under the law. Pre-CCIOA entities are not subject to certain parts of CCIOA that HOAs formed after July 1, 1992 are subject to. The provisions which apply to pre-CCIOA entities are outlined in 38-33.3-117, C.R.S.

<sup>12</sup> The "lien provision" refers to the provision under § 38-33.3-401(3), C.R.S, which provides that "an association that fails to register, or whose annual registration has expired, is ineligible to impose or enforce a lien for assessments under section 38-33.3-316 or to pursue any action or employ any enforcement mechanism otherwise available to it under Section 38-33.3-123 until it is again validly registered."

<sup>13</sup> The information required to be provided is outlined in § 38-33.3-.209.4(1), C.R.S.

<sup>14</sup> Position Statement 1.1.specifically provides that "it is the position of the Division of Real Estate that homeowners' associations formed prior to July 1, 1992, that have not elected treatment under CCIOA, are not required to comply with the registration requirement set forth in § 38-33.3-401(1),C.R.S."

<sup>15</sup> By complying with requirements in § 38-33.3-118, C.R.S.

## REGISTRATION INFORMATION AND QUANTITATIVE DATA

One of the major tasks over the past year for the Office has been to register HOAs in the State of Colorado and compile information on those HOAs through a registration database. The law requires that “every unit owner’s association organized under 38-33.3-301 shall register annually with the Director of the Division of Real Estate.”<sup>16</sup> HOAs are required to initially register and renew their registration on a yearly basis and update any relevant information within ninety (90) days of a change.<sup>17</sup> To implement the mandate, the Division of Real Estate created a registration database that has collected the following information:

- The name of the association and contact information for the HOA;
- Whether the HOA was professionally managed and if so the name and contact information of the management company;
- The name and contact information for the designated agent of the HOA (if different than the manager);
- The Secretary of State number and the year the non-profit corporation was incorporated;<sup>18</sup>
- Whether the HOA is a condominium, cooperative or planned community;<sup>19</sup>
- The declaration of covenants recording information; including initial date of recording and the reception number or book and page of the main document that constitutes the declaration;
- The number of units in each HOA.

The Office has received 8,037 HOA registrations to date<sup>20</sup> which comprise 838,211 units. We estimate that those units constitute roughly two (2) million Coloradoans who live under an HOA.<sup>21</sup> We are aware that there are many HOAs who have not registered. Industry experts believe that between 10%-25% of all HOAs in the State have not registered.<sup>22</sup> Several reasons exist for an HOA not registering. One reason an HOA may have failed to register is because they may not be aware of the requirement to register. One of the primary challenges with a new regulatory program is a lack of contact information or manageable lists, in this instance, of all HOAs operating in Colorado. The Office had to rely on HOA boards, lawyers and managers keeping abreast of legislative changes, word of mouth, and the media to communicate to HOAs that they were required to register.<sup>23</sup> Furthermore, many HOAs chose not register because they

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<sup>16</sup> § 38-33.3-401(1), C.R.S.

<sup>17</sup> See § 38-33.3-401(2)(a), C.R.S.

<sup>18</sup> The Secretary of State number begins with the year that the corporation was created, providing a year to determine the age of the HOA.

<sup>19</sup> The Office registered 93 cooperatives, but the Office believes these associations to be improperly registered and are not likely cooperatives.

<sup>20</sup> Statistics as of December 31, 2011.

<sup>21</sup> We estimate this number based upon the average household size of 2.59 persons per home, as provided by the United States Census Bureau (<http://factfinder.census.gov/servlet/SAFFFacts>), and taking into account the fact that many of the units are condominium residences which would tend to be less than an entire household and that some units are timeshares and/or vacation homes. The number may more appropriately be slightly under two (2) million individuals.

<sup>22</sup> Industry experts include representatives from the Community Associations’ Institute (“CAI”), HOA lawyers, lobbyists and other industry professionals.

<sup>23</sup> Contact information for HOAs in Colorado was not available to the Office.

were pre-CCIOA associations and did not believe they were subject to the registration requirement. The practical effect of Position Statement 1.1 and the pre-CCIOA issue is hard to determine without additional data. We are aware that there were HOAs boards and managers that did not draw a distinction between whether they were under the jurisdiction of the entirety of CCIOA or deemed pre-CCIOA in making a decision to register. Furthermore, many associations who were aware of the position statement still chose to register to avoid any potential legal implications. But as noted by the chart below, “post-CCIOA” HOAs outnumbered “pre-CCIOA” HOAs nearly 2 to 1.

CCIOA (Formed after July 1, 1992)	68% of all HOAs
PRE-CCIOA (Formed prior to July 1, 1992) <sup>24</sup>	32% of all HOAs

One of the issues facing the Office was inducing HOAs to register with the Division. A problem in compelling associations to register was that there is no penalty provision built into the law. The registration fee did not increase for those HOAs who registered late and there was no authority to penalize HOAs in any capacity. The only implication for an HOA that failed to become registered was the lien provision, referenced earlier, which provides that; “[A]n association that fails to register, or whose annual registration has expired, is ineligible to impose a lien for assessments under section 38-33.3-316 or to pursue any action or employ any enforcement mechanism otherwise available to it under section 38-33.3-123 until it is...validly registered...”<sup>25</sup> The lien provision could presumably only be raised as an affirmative defense by a homeowner who is a defendant in a civil action to collect past due assessments. In speaking with homeowners and attorneys, many litigants are unaware of this protection in the law. Furthermore, how the law operates is deemed by many to be ambiguous and requires judicial interpretation. To the Division’s knowledge, the application of the law has not been judicially interpreted.

As part of the registration process we also quantified whether an HOA collected over \$5,000 in annual dues. Those entities that collected more than \$5,000 were required to pay a registration fee and those entities that did not collect fees or that collected less than \$5,000 in annual revenues were not required to pay the fee. As noted below the majority of HOAs collected over \$5,000 in assessments and we are aware some associations collect millions of dollars in assessments per year, which highlights the economic impact of HOAs in Colorado. Below is a breakdown of those entities that paid registration fees and those that were exempt.

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<sup>24</sup> It should be noted that there is a deviation of .9%, provided that in compiling the data we split the registrations from the year 1992 in half. Furthermore, the data was simply compiled looking at the Secretary of State registration number and the year which the number identifies. If perchance the HOA’s Secretary of State number were to be changed then this may affect its status as a pre-CCIOA or post-CCIOA.

<sup>25</sup> § 38-33.3-401(3), C.R.S.

	<b>EXEMPT</b>	<b>PAID</b>
HOA FEES	497	7535
Percentage	6.19%	93.81%

While the statistical data gathered by the Office through the HOA registration database isn't complete, primarily since we opined that "pre-CCIOA" HOAs are not required to be registered; it does provide an adequate picture of the HOA landscape in Colorado and is also helpful in providing information on specific HOAs. Furthermore, The Division's registration database provides consumers a valuable resource to locate information on HOAs and management companies, to get contact information, and to verify whether their HOA was registered with Division of Real Estate. The Division also provided consumers with a master list of the HOAs registered in this state<sup>26</sup> and assists with providing referrals to appropriate government agencies to locate certain information.

The Office also compiled information on where HOAs were located in Colorado and has provided a geographical chart below.<sup>27</sup> In looking at the chart below it is instructive to note that there were many Colorado towns and cities, particularly in the eastern and southern counties, as well as the Western Slope, which did not have any registered HOAs.<sup>28</sup> The geographic distribution of HOAs in Colorado did in some ways mirror the population distribution of the State, but it was interesting to note the large number of condominium complexes in the resort communities compared to the more urban centers and the lack of covenant controlled communities or condominiums in the towns on the Eastern Plains. The Office does speculate that there is more than one condominium complex in all of the northeastern towns and more than fourteen condominium complexes in the whole of Pueblo, Trinidad and the Rocky Ford, Ordway, La Junta area. However, the issue harks back to the HOA's ability to learn of the registration requirement and comply with the law. In talking with board members, homeowners, and other industry professionals, we found that most of the unregistered HOAs we discovered were located in rural areas and were not professionally managed.

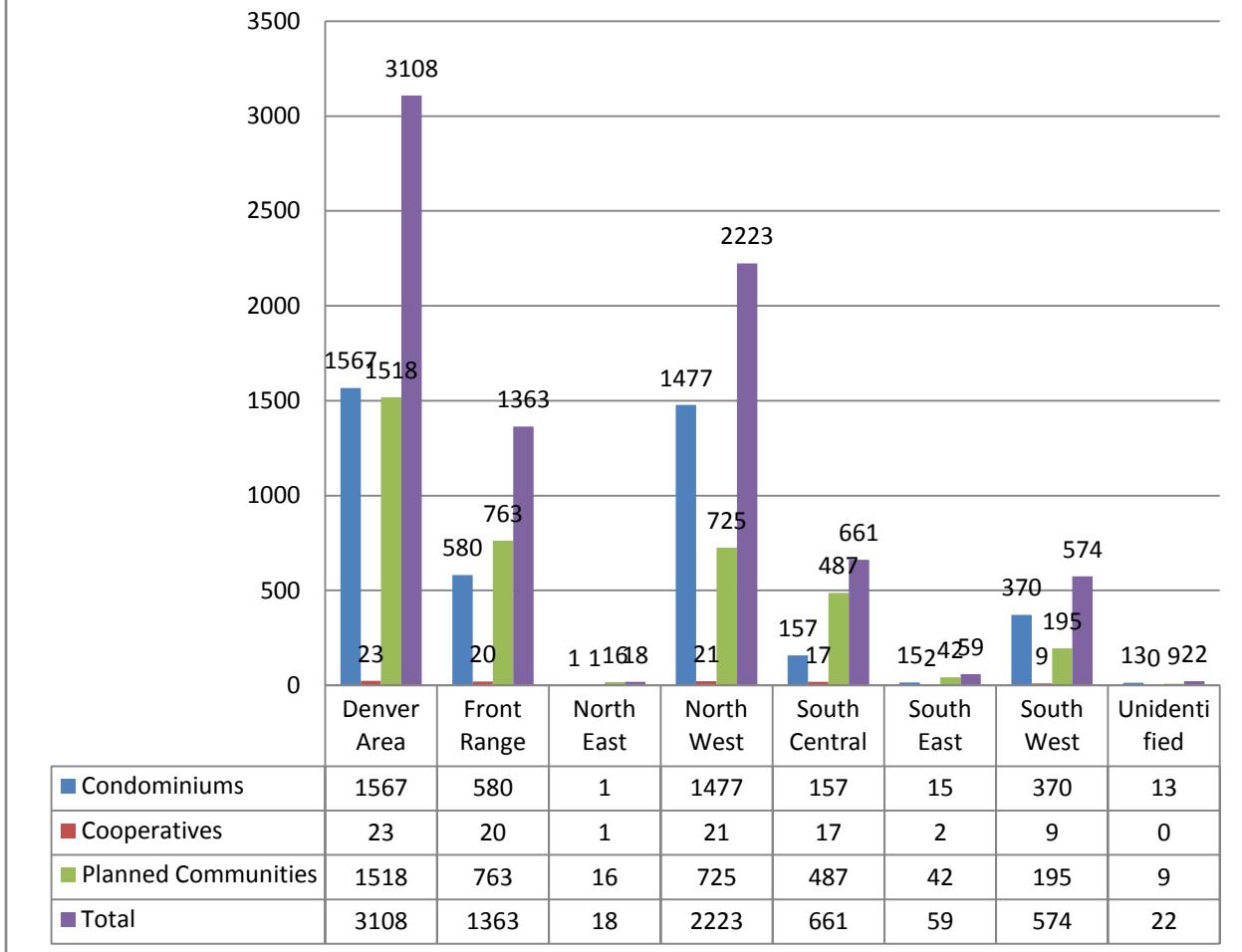
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<sup>26</sup> Available at <http://www.dora.state.co.us/real-estate/hoa.htm>

<sup>27</sup> The spreadsheet of all HOAs in Colorado provided by the Office allows consumers to verify how many HOAs exist in a given town, zip code, or County.

<sup>28</sup> For example towns like Craig, La Junta and Rocky Ford did not have any registered HOAs.

## Regions of HOA's



**Denver Area includes** Arvada, Aurora, Brighton, Broomfield, Castle Rock, Centennial, Commerce City, Conifer, Denver, Edgewater, Englewood, Evergreen, Federal Heights, Fort Lupton, Franktown, Glendale, Greenwood Village, Highlands Ranch, Larkspur.

**Front Range includes** Allenspark, Bellevue, Berthoud, Black Hawk, Boulder, Central City, Dacono, Drake, Dumont, Eldorado Springs, Erie, Estes Park, Firestone, Fort Collins, Georgetown, Greeley, Grover, Jamestown, Lafayette, Laporte, Livermore, Longmont, Louisville, Loveland, Lyons, Mead, Milliken, Niwot Platteville, Red Feather Lakes, Severance, Strausburg, Superior, Timnath, Watkins, Wellington, Windsor

**Northeast includes:** Akron, Elbert, Elizabeth, Sterling, Stratton

**Northwest includes:** Aspen, Avon, Basalt, Battlement Mesa, Beaver Creek, Breckenridge, Carbondale, Clifton, Copper Mountain, Dillon, Eagle, Edwards, Fraser, Frisco, Fruita, Gateway, Glenwood Springs, Granby, Grand Junction, Grand Lake, Gypsum, Hayden, Hot Sulphur Springs, Keystone, Meeker, Mesa, Minturn, New Castle, Oak Creek, Palisade, Powderhorn, Red Stone, Rifle, Silt, Silverthorne, Snowmass, Snowmass Village, Steamboat Springs, Tabernash, Vail, Walden, Winter Park, Yampa.

**South Central includes:** Alamosa, Alma, Antonito, Bailey, Buena Vista, Cascade, Canon City, Colorado City, Colorado Springs, Cotopaxi, Creede, Fairplay, Fort Garland, Fountain, Howard, Lake George, Monte Vista, Monument, Mosca, Nathrop, Peyton, Salida, South Fork, Twin Lakes, Westcliffe, Woodland Park

**Southeast includes:** Cuchara, La Veta, Pueblo, Rye, Springfield, Trinidad, Walsenburg, Weston

**Southwest includes:** Almont, Bayfield, Cederedge, Cortex, Crested Butte, Delta, Durango, Gunnison Hesperus, Mancos, Montrose, Mount Crested Butte, Ouray, Pagosa Springs, Paonia, Pitkin, Placerville, Rico, Ridgeway, Telluride.

## INQUIRIES AND COMPLAINTS

One of the main purposes of House Bill 10-1278 was to provide a resource to assist consumers in understanding their rights and responsibilities under the law.<sup>29</sup> This year the Office received 3,053 inquiries and complaints. The communications varied from questions regarding HOA registration to detailed questions regarding particular situations in HOAs. The Division received a total of 478 complaints<sup>30</sup> and hundreds more inquiries and questions regarding HOA living and board procedure. The Office logged complaints and documented details on the complaints and issues we were seeing. The HOA's status as a registered entity was not considered in logging a complaint. Furthermore, while at times we did log information regarding the name of the HOA and whether there was a management company, many complainants did not provide such information and from our perspective the name of the HOA and management company were not as germane to our research as was the complaint issue. The major inquiries to the Office were as follows:

- Inquiries regarding the rights and responsibilities of an HOA or a homeowner under CCIOA;
- General inquiries regarding HOAs and HOA living;
- Questions regarding the Office's registration process and the new registration law;
- Requesting contact information for an HOA or manager;
- Queries regarding whether their HOA was registered with the Division of Real Estate;
- Questions regarding how to receive information pertaining to HOA financial records;
- Questions regarding how to receive HOA covenants and other governing documents.

The office also received hundreds of complaints from homeowners, renters, HOA board members, real estate brokers, and various other parties. The Office took complaints by telephone, by email, by letter, by homeowners coming to the Division offices, and by an online submission database. As noted, we logged complaints against HOA boards, HOA board members, declarants/developers, as well managers. It is important to note that while the Office was tasked with tracking inquiries and complaints from homeowners and other consumers, we did not have investigatory powers. The Office was able to gather good data on issues facing homeowners and associations by looking at the frequent categories of complaints and inquiries and by reviewing documentation regarding the complaints and inquiries. Many of the opinions formed by the Office and noted in this document are not solely based on scientific data but rather by reviewing documentation substantiating allegations in the complaints; hearing repeated complaints involving certain issues and in certain types of associations; as well as discussing issues with consumers and industry experts. We also looked at what specific statutory provisions in CCIOA and the Colorado Revised Non-Profit Corporation Act ("Non-Profit Code")<sup>31</sup> were implicated most frequently. Below is a list of the complaint types received and percentages, in addition a list of the frequent statutory provisions implicated in the complaints:

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<sup>29</sup> § 12-61-406.5(3), C.R.S.

<sup>30</sup> Complaint total as of December 15, 2011

<sup>31</sup> § 7-121-101, C.R.S., *et. seq.* through § 7-137-101, C.R.S., *et. seq.*

<b>Complaint<sup>32</sup></b>	<b>Percentage</b>	<b>Complaints Received</b>
Elections/Voting	7.24%	33
Meetings	5.26%	24
Transparency	16.67%	76
Not Following Governing Documents	14.04%	64
Declarant	7.24%	33
Manager	32.8%	157
HOA or Manager Not Performing Maintenance	11.62%	53
Excessive Fees or Fines	6.14%	28
Improper Enforcement / Selective Enforcement of Covenants	8.33%	38
HOA Board or Manager Not Listening to Homeowner Concerns	12.50%	57
Conflicts of Interest	5.70%	26
Assessments	4.82%	22
Reserves	1.75%	8
Satellite Dish	1.10%	5
Failure to Produce Records	17.11%	78
Nuisance	6.14%	28
Insurance Issues	3.51%	16
Manager Exerting Too Much Control Over HOA Board	2.41%	11
Diversion/Theft/Fraud	5.48%	25
Harassment/Retaliation/Discrimination	10.96%	50
HOA's violating the ADA <sup>33</sup>	1.32%	6
Accounting/Assessments, Fines & Interest	5.92%	27
FHA Certification Issues <sup>34</sup>	2.19%	10
Green Energy/Xeriscaping	0.66%	3
Parking	1.97%	9
Pets	0.88%	4
Pools	0.44%	2

<sup>32</sup> Statistics reflect complaint as of November 15, 2011, totaling 456 total complaints. Many complaints encompassed more than one complaint type. For example one complaint may implicate records, reserves and transparency.

<sup>33</sup> Americans With Disabilities Act and similar state statutes.

<sup>34</sup> Federal Housing Administration Condominium Certification, discussed *infra*.

**Statutory References:** The most common statutory provisions implicated were:

- § 38-33.3-209.5(1)(b), C.R.S. – requiring associations to adopt responsible governance policies; ††
- § 38-33.3-209.5(1), C.R.S. – requiring associations to provide due process requirements, including notice and a hearing, prior to imposing any fine against a homeowner; ††
- § 38-33.3-217(1)(a), C.R.S. – requiring the association to receive an affirmative vote or agreement of 50% to 67% of unit owners' prior to amending the declaration of covenants; ††
- § 38-33.3-303(4)(a), C.R.S. – requiring the association to mail a copy of a proposed budget to the homeowners and set a date for a meeting of the unit owners to consider the budget;
- § 38-33.3-303(5)(a)(I), C.R.S. – requiring a declarant to terminate control of the association when certain criteria are met;
- § 38-33.3-307(1), C.R.S. – providing that the association is responsible for the maintenance, repair, and replacement of the common elements;
- § 38-33.3-308(1), C.R.S. – specifically implicated was the provision requiring an association to hold a special meeting upon request of unit owners having twenty percent, or any lower percentage specified in the bylaws;
- § 38-33.3-308(2)(a) and (2.5)(a), C.R.S. – requiring that association board meetings be open to the members; ††
- § 38-33.3-308(2.5)(a), C.R.S. – permitting members of the association an appropriate time to speak on an issue under discussion prior to a board vote; ††
- § 38-33.3-308(4), C.R.S. – requiring the association board of directors to limit their discussions in executive sessions to specific enumerated topics;
- § 38-33.3-310(b)(I), C.R.S. – requiring that votes for positions on the executive board be taken by secret ballot and that the ballot be counted by a neutral third party or by a unit owner who is not a candidate, who attends the meeting at which the vote is held, and who is selected at random from a pool of two or more such owners; ††
- § 38-33.3-310.5(1), C.R.S. – requiring any association board member to declare a conflict of interest and abstain from voting on any issue that would financially benefit himself/herself or a member of their immediate family;<sup>35</sup>
- § 38-33.3-317(1)(b), C.R.S. – requiring the association to keep records of meeting minutes, actions taken by unit owners or the executive board by written ballot or written consent in lieu of a meeting, records of committee action...; ††
- § 38-33.3-317(2)(a), C.R.S. – requiring the association to make all financial and other records reasonable available for examination and copying to the unit owners'; ††
- § 38-33.3-317(3), C.R.S. – providing that the association may only charge “actual cost” per page for copies of association records; ††
- § 7-128-401, C.R.S. – outlining the fiduciary standards of conduct for officers and directors of a non-profit corporation;

††Denotes that this section was addressed in Senate Bill 05-100<sup>36</sup>

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<sup>35</sup> Provision was incorporated into CCIOA through the passage of House Bill 11-1124

Prior to the Office opening many industry members thought that we would be primarily hearing complaints about the notorious three P's (Pets/Parking/Paint). The reality was that the complaints were much more substantial than that, and the "three P's" along with satellite dishes and pools, made up a very small subset of the complaints received.<sup>37</sup> What we discovered was that the complaints we received primarily involved the board of director's failure to follow corporate governance rules and procedures of the HOA; the transparency of the board of directors, particularly as it related to the finances of the HOA; and harassment and bullying of homeowners by the board of directors and management company by arbitrary fining, preclusion from providing input into the associations' affairs, and verbal harassment. These complaint types were much more serious than the aforementioned three P's because they substantially interfered with a homeowner's ability to enjoy his property and to have avenues of democratic participation in the HOA to remedy their issues.

Looking at the major complaint types in conjunction with the major statutory violations, the Office determined that Section 317 of CCIOA was the most frequently implicated statutory provision in the complaints.<sup>38</sup> As noted by the charts, the complaint types were varied but the largest subset of complaints related to transparency and production of records of the HOA, particularly in regards to the HOA releasing financial records. Transparency is a larger subset of several complaint categories and references the homeowner's ability to get information about the HOA finances; the meeting times and location; ability to attend and participate in meetings; or, the ability of the homeowner to understand what initiatives were being undertaken in the HOA. Responsible governance issues were also a major category of complaints that were received in the Office. Responsible governance complaints included issues dealing with the enforcement of covenants, following corporate procedure, failure to adequately address disputes, investment of monies, accounting issues and conflict of interest transactions by board members.

There were also a large number of complaints which alleged that the HOA board was not following or abiding by the requirements in the HOA's governing documents (14% of all complaints had a component of boards not following the requirements and procedures in the corporate documents). The Office heard many complaints that boards were not following the procedures regarding corporate election of directors; meetings; amending the governing documents; creating rules and regulations; and setting an annual budget, amongst other issues. While there is no specific statutory provision that addresses boards circumventing procedure, many of the complaints heard by the office implicated the board's fiduciary duties.<sup>39</sup>

Another significant complaint was that the HOA board or manager was not maintaining the common areas or that the maintenance and upkeep of the common areas were not adequate (12% of all complaints). This complaint category was extremely subjective and thus it was hard to really look at it as a major issue in associations. Many times this complaint type was accompanied by an allegation that the board or management company was diverting monies for

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<sup>36</sup> Referring to S.B. 05-100 labeled "Concerning Increased Protections for Homeowners" and often referred to as the "Homeowners' Bill of Rights" was a legislative initiative to increase protections for homeowners in associations and apply additional protections to those owners in "Pre-CCIOA" communities.

<sup>37</sup> Complaints dealing with pets, parking, pools, paint and satellite dishes made up under 5% of the total number of complaints.

<sup>38</sup> Section 317 involves the HOA's requirement to produce HOA records to members.

<sup>39</sup> Fiduciary duties for officers and directors of non-profit corporations are outlined § 7-128-401, C.R.S. in addition to common law standards.

maintenance. In talking with many HOA industry professionals and board members, often the reality in many associations is that too often the HOA does not have adequate funding to provide for adequate maintenance. Frequently there is a misconception of how assessments and HOA funds are spent and several homeowners we spoke with were unaware that assessment monies also went to insurance, legal fees, reserves, and other expenses that aren't apparent without looking at the financials of the HOA. Often a lack of maintenance is a product of an underfunded HOA and may be a symptom of an unhealthy and not due to the board's failure to address the issue.

An additional and perhaps one of the more troubling complaint types the Office heard was that the HOA board or manager was harassing, discriminating or retaliating against homeowners. Many homeowners felt that their boards had singled them out and were arbitrarily fining them for violations, when they were not in violation; engaging in selective enforcement of covenants; and precluding them from participating in meetings. There were very few cases where racial, gender or sexual orientation discrimination was alleged,<sup>40</sup> but there were several cases where there was age discrimination and discrimination against renters. A frequent complaint heard was that older board members were discriminating against younger homeowners or where older homeowners felt they were discriminated against by younger board members. A frequent claim was that renters were being discriminated against by property owners.

The more frequent instances of harassment and retaliation involved vindictive board members using their position in the HOA to exact retribution against persons in the HOA who they did not agree with or who they had previous disagreements with. Many homeowners I spoke with believe that by speaking out against their HOA board or if they went contrary to the board's agenda that they were then targeted by the HOA board or manager. The Office has been presented with evidence in several cases which substantiates these claims and found that harassment and bullying complaints were some of the most serious issues facing homeowners. The harassment claims are especially concerning because they impact the homeowners' ability to live comfortably in their property. Many homeowners the Office spoke with said that the constant badgering by HOA board members and managers often caused great emotional stress and that they felt threatened. One particular complaint that the HOA Information Office received, where a renter (who was leasing from her mother) was frequently being fined for a noise complaint, because her neighbor, the board president would file complaints against her for noise violations whenever she would entertain guests or turn on her television. The complainant stated that it did not matter how quiet she tried to be, she could not enjoy her property without fear of repercussion from the president of the HOA, who she believed had an agenda to constructively force her to move. The problem with harassment claims is that there are few checks and balances to stop the abusive behavior in associations.

Another troubling subset of complaints involved diversion, fraud, and theft. In my estimation there were many complainants who assumed that since their common areas were not being adequately maintained that the HOA was stealing money. But there were also legitimate cases in which there were insurance payments missing, conflict of interest transactions, financial audits in which numbers didn't add up, and allegations of directors using HOA monies for personal use. More often this occurred in smaller associations who were not professionally managed, but there

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<sup>40</sup> In those cases where racial, religious, or sexual discrimination were alleged, there was a referral made to the Colorado Division of Civil Rights.

were troubling cases involving managers who were using their position in the HOA and access to the monies to promote their own agendas often for pecuniary gain.

As noted, the majority of the statutory provisions implicated in the complaints that the Office heard were addressed in Senate Bill 05-100 (“SB-100”), labeled “Concerning Increased Protections for Homeowners.” SB-100 was instituted to provide additional protections to homeowners and place many of the requirements in CCIOA that only applied to post-CCIOA HOAs to all HOAs. A major focus of SB-100 was transparency and responsible governance and the provisions under § 38-33.3-209.5, 209.6, 209, 303(4), 308, 310 and 317 all were meant to promote fairness and openness in associations. Senate Bill 06-089 (SB-89) also provided additional protections to homeowners and was a follow up and clean-up of SB-100. The drafters of SB-100 and SB-89 obviously understood the need for statutory protections to homeowners, but the issue homeowners are having is not that the law does not address their specific issues, rather the law does not provide a realistic or economic means to seek redress.

### **Complaints against Community Association Managers**

A significant portion of the complaints received in the office were against community association managers. The statistical evidence on whether the complaint is against a manager or HOA board is difficult to compile given that many homeowners we spoke with had difficulty in differentiating between the actions that were taken by their HOA board and their HOA manager. Also complicating the issue is that many actions implemented by an HOA manager may be attributed to a decision handed down by the board and as an agent of the board the manager is merely the messenger. Compounding the misunderstanding is that managers often write letters on behalf of the HOA on HOA letterhead as if they were the HOA, which creates significant confusion amongst homeowners about the distinction between HOA manager and board.

Managers sit in a unique position in HOAs as they often have more interaction with homeowners in relation to the volunteer HOA board. The reality of the manager’s position is that they often serve as a mentor and resource for the board given their experience in HOA law, board procedure and business matters regarding HOAs. It was very surprising that many homeowners were unable to distinguish between their board and their manager and often attributed board actions to managers and manager actions to boards. Empirically we identified 157 of a total of 478<sup>41</sup> (33%) complaints that identified the manager or that stated that the manager was directly involved. Many of the complaints alleged managers used their relationship and power over boards to further their own agendas, often for their own pecuniary benefit to the detriment of homeowners. It is important to note that many of the complaint types involving managers also occur in associations without managers and thus seem to be endemic in associations regardless of management. While managers are often directly responsible for complaints, the fact remains that HOA boards do retain the right to terminate management contracts and as principals in an agency relationship have responsibility for the actions of the managers to a certain extent.

The most frequent complaint types filed against managers mirrored those pertaining to HOAs, including access to records, transparency and communications, not communicating with homeowners, harassment and selective enforcement of covenants. There were a few complaint types that were unique to managers; including managers controlling HOA boards and making

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<sup>41</sup> Statistics compiled as of December 19, 2011

decisions that are appropriate for the HOA board to make; managers manufacturing delinquencies;<sup>42</sup> aggressive collections; and allegations pertaining to the unauthorized practice of law.<sup>43</sup> There is another large subset of complaints against managers which I do not believe rise to the level of consumer harm, including managers not providing the required maintenance; managers being rude to homeowners; and managers taking a long time to respond to homeowners concerns. These are concerns ultimately that the board of directors needs to address and make a decision of whether to retain the management company or not. It is important to consider that board members owe a fiduciary duty to the association members and should be making informed and sound business decisions regarding relationships with management companies and should act appropriately on behalf of the members when there are legitimate concerns against a management company.

### **Complaints in Declarant Controlled HOAs**

The Office also received several complaints from homeowners in declarant<sup>44</sup> controlled associations.<sup>45</sup> Declarant complaints constituted seven (7) percent of all complaints received, although the number may be higher as complainants may not specifically identify their HOA as being declarant controlled or may not understand the distinction. The most frequent complaint was that the declarant refused to cede control of the association per the legal or contractual requirements.<sup>46</sup> There were also several complaints against declarants not maintaining the property or contributing to the HOA funding. There were more instances of fraud or theft allegations relative to the number of complaints, levied against declarants. One of the potential reasons for the complaints is that given the timing in the real estate financial crisis which has beset our nation, declarants are increasingly experiencing insolvency and bankruptcy and the initial capital expectations that were anticipated in the projects aren't in existence, forcing declarants to not be able to comply with their contractual obligations to the owners or to cut corners. The problem in declarant controlled associations is that homeowners, as a product of the governing structure in declarant controlled HOAs, don't have the ability to use the democratic channels of the HOA to engender change and are often forced to institute suit to hold their HOA accountable. This makes abuses in declarant controlled communities harder to remedy and also means that the board has greater latitude for abuse due to the lack of institutional checks and balances.

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<sup>42</sup> Many complainants stated that HOA managers failed to process payments timely, resulting in delinquencies and failing to acknowledge receipt of payments resulting in additional costs and often these complaints were accompanied by very aggressive collection tactics including foreclosure instituted on only a few months of delinquencies.

<sup>43</sup> While many homeowners were unable to identify the issue and understand what constitutes the unauthorized practice of law, the HOA Information Officer and several industry professionals were apt to point out this troubling manager practice.

<sup>44</sup> Declarant refers to builder, developer, or initial investor. Declarant is defined under § 38-33.3-102(12)(a) as “[a]ny person or group of persons who as part of a common promotional plan, offers to dispose of to a purchaser such declarant’s interest in a unit not previously disposed of to a purchaser.”

<sup>45</sup> A declarant controlled association is an HOA in which the developer of the subdevelopment, often a builder, still retains a seat on the board of directors and may have much of the voting control over the board and the HOA. CCIOA has requirements on when a declarant is required to cede control of seats on the HOA board to the homeowners and a HOA’s governing documents may also contractually obligate the declarant to cede control of the HOA board at a certain point.

<sup>46</sup> § 38-33-303(5-7), C.R.S address the requirements for declarants to cede control of the association. An HOA’s covenants also provide requirements and procedures for transfer of HOA governance to the homeowners.

## **Geographic Trends and Statistics**

The Office also looked at where geographically the complaints were coming from and found that the majority of the complaints came from the Front Range. Colorado Springs and Aurora had the most complaints. The following is a breakdown of the percentage of complaints per region (note that not all complainants provided information to determine the area and the data considered was that available):

- Colorado Springs/El Paso County (21% of complaints)<sup>47</sup>
- Aurora and Parker/Adams County and East Arapahoe Counties (20% of complaints)<sup>48</sup>
- City and County of Denver (12% of complaints)
- South Suburbs/Arapahoe and Douglas County/ (11% of complaints)<sup>49</sup>
- West Suburbs and Foothills/Jefferson County (8% of complaints)<sup>50</sup>
- Boulder and Longmont/Boulder County (6% of complaints)<sup>51</sup>
- North Suburbs/Adams, North Jefferson and Broomfield Counties (6% of complaints)<sup>52</sup>
- Western Slope/Grand Junction and Durango (6% of complaints)<sup>53</sup>
- Resort Communities (5% of complaints)<sup>54</sup>
- Larimer and Weld Counties (3% of complaints)<sup>55</sup>
- Southern Colorado (2% of complaints)<sup>56</sup>
- Inner Mountains (.25% of complaints)<sup>57</sup>

Most of the complaints came from condominium associations as opposed to single-family home communities. One of the surprising items noted by the Office was that the larger single-family home communities, particularly in the Arapahoe County, Douglas County, Southern Jefferson County, Fort Collins/Loveland, as well as the Boulder area had few complaints compared to the large condominium associations in Aurora, Colorado Springs, East Denver and Lakewood. Typical complaints in single-family communities involved covenant enforcement and boards not following proper procedure, lack of notice for meetings and failure to provide maintenance. Condominiums and townhomes tended to have more complaints of harassment, theft and fraud, and failure to produce records. The aforementioned distinctions are in no doubt due to the dynamic of the different property types and the HOA's role in each. In planned communities, the dues are generally much less as opposed to condominiums that have many more services to provide for the units. Also the nature of condominium living as opposed to planned communities also created more hostility between the board and homeowners we found.

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<sup>47</sup> Includes Colorado Springs, Manitou Springs, Fountain, Monument, Woodland Park, and Elbert County

<sup>48</sup> Includes only Aurora and Parker.

<sup>49</sup> Includes Centennial, Greenwood Village, Highlands Ranch, Lone Tree, Englewood, Cherry Hills Village, Castle Pines, and Castle Rock.

<sup>50</sup> Includes Littleton, Lakewood, Golden, Sheridan, Evergreen, Morrison.

<sup>51</sup> Includes Boulder, Longmont, Lafayette, Louisville, Superior.

<sup>52</sup> Includes Westminster, Broomfield, Thornton, Northglenn, Arvada, Wheat Ridge.

<sup>53</sup> Includes Grand Junction, Montrose, Fruita, Durango.

<sup>54</sup> Includes Dillon, Frasier, Silverthorne, Breckenridge, Vail, Eagle, Avon, Aspen, Snowmass Village, Glenwood Springs, Steamboat, Telluride, Pagosa Springs.

<sup>55</sup> Includes Fort Collins, Loveland, Greeley, Windsor.

<sup>56</sup> Includes Pueblo, Trinidad, San Luis Valley.

<sup>57</sup> Includes communities in Park, Chafee and Fremont Counties.

## **CONSUMER UNDERSTANDING AND EXPECTATIONS**

After a year of being in existence the largest challenge to the Office has been trying to meet the consumer expectations for the Office and provide the level of service expected. The consumer misinterpretation of the functions of the office continues to challenge the Office. Many consumers believe the Office to have regulatory or investigative powers. Other consumers believe the Office to be empowered to intervene in their disputes or provide alternative dispute resolution services.<sup>58</sup> Many consumers have expectations that the Office will help solve their disputes, while ultimately the homeowner needs to take the necessary steps to resolve their issues. There were also several consumers who were looking for the Office to provide pro-bono legal service and requested the Office to interpret their governing documents; write letters to HOA boards and management companies on their behalf; to attend their meetings; and assist in their legal proceedings with their HOA. There were also expectations by consumers and stakeholders that the Office would publicly censure HOAs or managers complained against or would provide such information to the public<sup>59</sup>. All of these expectations are outside of the statutory authority which merely provided the Office the ability to “act as a clearinghouse for information concerning the basic rights and duties of unit owners, declarants, and unit owners’ association under the Act.”<sup>60</sup> The statute also requires the Office to track inquiries and complaints and report annually to the Director of the Division of Real Estate regarding the number and types of inquires and complaints received<sup>61</sup>.”

As noted above the Office received 3,053 inquiries and complaints throughout the year and provided an excellent level of service to the consumers regarding their queries and, considering our staff limitations, we successfully accomplished our mandate to return all calls and queries in a timely manner. The Office engaged in significant discussions with hundreds of homeowners regarding their queries and complaints and received tremendous positive feedback. Throughout the year we were successful in providing resource material and laws to consumers, empowering them with information. As we look at the year we consider the arduous task we were set to and feel like we have accomplished the goals enumerated in the statute, and will continue to provide a high level of service in 2011.

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<sup>58</sup> Part of the misunderstanding can be traced back to the initial proposal of House Bill 10-12789 which provided for an Ombudsman who would be able to intervene in disputes and provide mediation services for homeowners.

<sup>59</sup> Such publication without providing the ability of the HOA or management company to rebuke the allegations alleged would amount to a public censure against those entities which the Office deemed to be an affront to due process requirements.

<sup>60</sup> The Act referring to the Colorado Common Interest Ownership Act. Specific statutory authority cited at § 12-61-406(b), C.R.S.

<sup>61</sup> Specific statutory authority cited at § 12-61-406(b), C.R.S.