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SUMMARY OF SENATE BILL 100  
WITH SENATE BILL 89 AMENDMENTS  
HOUSE BILLS 1135, 1270 AND 1359

Senate Bill 100 ("SB100") passed on the last day of the 2005 Legislature and was signed by Governor Owens. It contains various ambiguities, inconsistencies and legal uncertainties. The law is 27 pages long and difficult to summarize, and so each of its provisions must be read in its entirety. Most of its provisions amend the Colorado Common Interest Ownership Act ("CCIOA"). This summary attempts to express the author's views of the main statutory provisions which will burden associations. Almost all of the requirements are subject to modifications, exceptions and restrictions which are not discussed in detail in this summary. Senate Bill 89 ("SB89") was passed by the 2006 Legislature and signed into law by Governor Owens on May 26, 2006. SB89 was intended to "clean up" SB100, but it makes various other changes, some of which are shown in bold in this summary. In 2008, the Legislature enacted House Bill 1135 ("HB1135") which regulates the imposition of fines and imposes Federal Disability laws. In 2008, the Legislature also adopted House Bill 1270 ("HB1270") to override restrictions on solar devices, windmills and "energy efficiency measures." In 2009, the Legislature passed Senate Bill 249 ("SB249") which expanded Paragraphs 2-7 below to all pre- and post-CCIOA small and limited expense planned communities (i.e., townhomes and single family) in addition to condominiums and large communities as previously. Also in 2009, House Bill 1359 ("HB1359") imposed new requirements for reserve policies, board information and committee chairpersons. Further changes are anticipated in future Legislatures. Here is the brief summary of the sections in their order in the Bill: italicized terms are from SB100 itself, bold provisions are from SB89, bold italicized provisions relate to HB1135 and underlined provisions relate to HB1359.

1. Xeriscaping. Section 37-60-126 declares "unenforceable" any prohibition of "xeriscape" or "drought-tolerant vegetative landscape" or any requirement that "cultivated vegetation" consist exclusively or primarily of "turf grass". The association cannot impose any additional "procedural steps or burdens, financial or otherwise" not included in the "existing declaration or bylaws" which include various items such as "landscaping change fee." However, associations may take enforcement action against an owner who allows "existing landscaping to die" except enforcement actions must be suspended during "water use restrictions", and such enforcement must not be "arbitrary or capricious" and must give reasonable time to replace the landscaping.

2. Flags and Political Signs. Section 38-33.3-106.5 prevents associations from prohibiting American flags, flagpoles, and service flags, but associations may adopt "reasonable rules" regarding placement and manner of display. An association's rules may regulate the location and size of flags and flagpoles but shall not prohibit the installation of a flag or flagpole. The same section allows the "display of a political sign" by owner or occupant of a unit on property within the boundary of the unit or in a window of the unit under certain conditions, but allows the association to reasonably control the size of and the time, place and manner of displaying those sign(s). An association may prohibit political signs earlier than 45 days before election and 7 days after election and regulate size and number, but one sign per office or "ballot issue" with the maximum size the lesser of that allowed by city or county or 36" x 48".

3. Fire or Emergency Vehicle. Section 38-33.3-106.5 prohibits restrictions on parking of vehicles which weigh 10,000 pounds or less, have an "official emblem or other visible designation" and are required to be available at designated periods at the occupant's residence "as a condition of the occupant's employment" when the occupant is a "bona fide member" of a volunteer fire department or "emergency fire fighting, law enforcement, ambulance or emergency medical services". Parking cannot obstruct "emergency access" or interfere with reasonable needs of other owners or occupants to use streets, driveways and guest parking spaces.

4. Removal of Trees, Shrubs and Vegetation for Fire Safety. Section 38-33.3-106.5 requires an association to allow the removal of trees, shrubs and vegetation to comply with a "written defensible space plan created for the property" by the Colorado State Forest Service, Fire Chief, etc. The plan must meet certain requirements.

5. Roofing Materials. Section 38-33.3-106.5 states that an association shall not require the use of cedar shakes or other flammable roofing materials. SB89 deleted the provision that the "declaration or bylaws" may specify "reasonable standards for the color, appearance and general type" for replacement materials, and that the Association could not require roofing which exceeds the "replacement cost of the flammable materials".

6. Energy Efficiency. HB1270 overrides covenants as to solar devices and windmills and as to "energy efficiency measures" which are: (i) an awning, shutter, trellis, Ramada, or other shade structure that is marketed for the purpose of reducing energy consumption; (ii) a garage or attic fan and any associated vents or louvers; (iii) an evaporative cooler; (iv) an energy-efficient outdoor lighting device; and (v) a retractable clothesline. However, the association may impose "reasonable aesthetic provisions" and "bona fide safety requirements" as defined by HB 1270 and prevent installation on common elements.

7. Disabilities Law. HB1135 imposes provisions of Federal Fair Housing Act so associations cannot prohibit "reasonable modifications to a unit or to common elements as necessary to afford a person with disabilities full use and enjoyment of the unit."

NOTE: SENATE BILL 249 (2008) MAY MAKE ALL OF ABOVE APPLY TO "SMALL" COMMON INTEREST COMMUNITIES.

8. Attorneys Fees. Section 38-33.3-123 allows the owners to recover their attorneys fees if they prevail in any litigation regarding the declaration, articles, bylaws or rules and regulations, and precludes the association from "allocating" to the prevailing owner's "account" any of the association's costs or attorneys fees. SB89 deleted the awarding of attorneys fees on a "per claim" basis.

9. Mediation/Arbitration. Section 38-33.3-124 encourages mediation or arbitration. Before January 1, 2007, the association must adopt a governance policy (see below) setting forth procedure for addressing disputes between the association and owner, and must make a copy of the policy available to owners on request. SB100 allowed either the association or an owner to submit disputes to mediation, but HB1135 replaced that provision with a provision that disputes may be submitted to mediation by "agreement of the parties" but repeated the endorsement and encouragement of "alternative dispute resolution."

10. Public Disclosure of Information. SB89 deleted the requirement in Section 38-33.3-209.4 that the association provide "a written notice" to owners once a year of certain information, but now requires that information be provided "within ninety (90) days after assuming control from the Declarant" and certain updated information thereafter; such information includes the association's name and "valid physical address and telephone number," and the name/address/phone number of "designated agent or management company, if any," and the date and recording information for the declaration. It also requires within ninety (90) days of each fiscal year that the association make available to owners "upon reasonable notice" various information, including its operating budget, a list of all its members, its annual financial statements, including reserves, the results of most recent available financial audit or review, a detailed list of all of the association's insurance policies, copies of the association's bylaws, articles, rules and governance policies, and the minutes of the board and member meetings for the preceding fiscal year. Such "disclosure" means "readily available at no cost to unit owners at their convenience" by one of the following: (i) "posting on internet web page," with notice by mail or e-mail or (ii) maintaining a "literature table or binder" at the association's "principal place of business" or (iii) by "mail or personal delivery".

11. Accounting Records and Governance Policies. Section 38-33.3-209.5 requires associations to maintain accurate and complete accounting records (SB89 deleted the requirement of generally accepted accounting principles ("GAAP") and to adopt "responsible governance policies" as to the following: collection of unpaid assessments, conflicts of interest, conduct of meetings, enforcement of covenants and rules (including notice, hearing and fines), (see Paragraph 25 below regarding fine requirements under HB1135) inspection and copying of records, investment of reserve funds, procedures for adopting and amending policies, procedures and rules, and for addressing disputes between the association and owners. HB1359 requires a reserve policy which states when the association will have "a reserve study prepared for the portions of the community maintained, repaired, replaced, and improved by the association; whether there is a funding plan for any work recommended by the reserve study and, if so, the projected sources of funding for the work; and whether the reserve study is based on a physical analysis and financial analysis."

12. Board Education. Section 38-33.3-209.6 states that the board may authorize reimbursement of board members for "their actual and necessary expenses incurred in attending educational meetings and seminars", but those must be "specific to Colorado" and make "reference to applicable sections" of CCIOA.

13. Owner Education. Section 38-33.3-209.7 requires the association to provide "at no cost" education to owners on at least an annual basis as to the "general operations of the association and the rights and responsibilities of owners, the association, and the board under Colorado law". The criteria for such education shall be determined by the board and may include presentations at annual owners meeting.

14. Amendment Percentage. Section 38-33.3-217 provides that the percentage for amendments to the declaration shall "not exceed sixty-seven percent (67%)" and any higher percentage is "void" and deemed to be 67%. This section also provides a process (if the declaration "does not set forth a procedure for registration or notification of First mortgagee," by which implied "approval" of mortgage holders may be obtained by certified mail and newspaper publication of proposed amendments. SB89 adds that mortgagee consent may be obtained in accordance with the declaration. SB89 also adds a provision which states "if the declaration provides for an initial period of applicability to be followed by automatic extension periods, the declaration may be amended at any time" in accordance with Section 217.

15. Withdrawal from Merged Association. Section 38-33.3-221.5 has some ambiguous and confusing provisions regarding withdrawal of an association from a merged common interest community.

16. Seller Disclosure of Association Documents. SB89 has repealed Section 38-33.3-223 requiring the association to provide various materials to the buyer, but effective January 1, 2007, certain disclosures and documents are now required by the real estate sales contract. See Paragraph 23 below regarding such disclosures and documents.

17. Property Managers. Section 38-33.3-302 provides that the property manager (as well as any "employee, independent contractor or other person acting on behalf of the association") shall be "subject to" CCIOA "to the same extent as the association itself would be." It also provides for termination of management contracts "for cause without penalty," and "any such contract" shall be subject to "renegotiation".

18. Architectural Review. Section 38-33.3-302 states that "decisions" regarding the approval or denial of "architectural or landscaping changes" shall be made in accordance with "standards and procedures" set forth in the declaration or rules or bylaws and "shall not be made arbitrarily or capriciously".

19. Budget and Audit. Section 38-33.3-303 will require a budget to be adopted by the association and requires that the books and records of the association shall be subject to an "audit" or a "review" under specified standards; however, an audit is only required if the association has annual revenues or expenditures of at least \$250,000 and an audit is requested by the owners of at least a third of the units. Audit must be done by CPA. Financial records must be prepared using generally accepted accounting principles or the cash or tax basis of accounting. SB89 deleted the "every two (2) year requirement" but added that a "review" by an "independent and qualified person" must be done when requested by owners of a third of the units. Copies of the audit or review must be available "upon request" of any owner no later than thirty (30) days after completion. SB89 adds a new requirement that the board members and officers are subject to nonprofit fiduciary standards "with regard to the investment of reserve funds".

20. Notice of Meetings and Owner Participation. Section 38-33.3-308 requires that the notice of "any meeting" of unit owners shall be "physically posted in a conspicuous place" to the extent that such posting is "feasible and practicable," in addition, "electronic posting or electronic mail" is "encouraged". If electronic means of notice are available, the association shall provide twenty-four (24) hours prior notice of all regular and special meetings of owners to all owners who so request and who furnish the association with their electronic mail addresses.

This section also provides that all meetings of the association's board of directors are "open" to every unit owner or "any person designated" by a unit owner. SB89 deleted the requirement that owners or representatives shall be permitted to "attend, listen and speak at an appropriate time", but "may not participate in any deliberation or discussion" without board approval. However, SB89 allows owners and representatives to "speak" regarding issues before the board votes, but the board may place "reasonable time restrictions" on such speeches.

21. Ballots and Proxies. Section 38-33.3-310 requires "secret ballots" for contested board elections and upon owner request for "any other matter" on which owners are entitled to vote. Ballots must be "counted by a neutral third party" or committee of volunteers who are not board members or candidates and are "selected or appointed at an open meeting in a fair manner" by the chair of board or presiding officer. The results of any vote must be "reported without reference to names, addresses or other identifying information." This section also provides for written proxies, but a proxy is not valid if it is obtained through "fraud or misrepresentation". The association is entitled to reject a vote, consent, proxy or ballot if it has reasonable (good faith) basis to doubt the validity. Any action based upon acceptance or rejection of a vote, etc., is valid unless a court determines otherwise.

22. Board Conflict of Interest. SB89 repealed the SB100 standards and so replaced them with the conflict of interest standards of the Colorado Revised Nonprofit Corporation Act.

23. Lender Escrow for Assessments. Section 38-33.3-315 allows the association to enter into an escrow agreement with a mortgage holder for the payment of assessments.

24. Association Records Required. Section 38-33.3-317 requires the association to maintain "permanent records" of minutes of all meetings of owners and board, all actions taken by owners, the board or a committee acting "in place" of the board, and all waivers of notice. It also requires a record of owners' names and addresses. It requires the association to allow copying, but it may charge a fee of no more than the "actual cost per page" which may be collected in advance. All financial and other records must be "reasonably available" for inspection and copying, but SB89 provides "privacy protection" that membership lists may not be obtained or used "by any person for any purpose unrelated to a unit owner's interest as a unit owner without consent of the board"; examples of improper purpose include soliciting money, using for commercial purposes, or selling the list. "Reasonably available" means available "during normal business hours" upon five (5) days business notice or at the next regularly scheduled meeting if such meeting occurs within thirty (30) days after the request for good faith, proper purpose, particular and relevant requests. The association must keep a copy at its "principal office" of the following: its declaration, articles, bylaws, covenants, resolutions of certain board actions, minutes of owners meetings for the past three years, all "written communications within the past three (3) years to unit owners generally as unit owners", a list of the names and business or home addresses of current officers and directors, its "most recent annual report, if any," and all financial audits or reviews for the immediate three (3) years. In addition, owners have inspection rights under corporate statutes, litigation and court order.

25. Seller Disclosure of Buyer's Responsibilities. Section 38-35.7-102 was repealed and replaced with substantial changes. It still requires a "bold face" disclosure in the sales contract and provides for "damages" against the seller for failure to disclose. However, now the burden of document production is on the seller "who may authorize" the association to provide documents "upon payment of the association's usual fee".

26. Insurance Claims. SB89 amended Section 10-4-110.8; it still allows owners to file a claim directly against the association's insurance, but only if three (3) conditions are met: (i) the owner contacts the board or manager; (ii) the owner gives the association fifteen (15) days to respond or the agent "reasonable opportunity to inspect the damage"; and (iii) the subject matter of the claim falls within "the association's insurance responsibilities". SB89 adds the following provision:

"(b) The association's insurer, when determining premiums to be charged to the association, shall not take into account any request by a unit owner for a clarification of coverage."

27. Fines. *In 2008, HB1135 added new "due process" requirements before fines could be imposed. Primarily, those changes are to require (i) that the alleged violator receive "adequate notice"; such notice is not defined but most likely satisfied by regular or certified mail; (ii) that the violation be determined by an "impartial decision maker" which may be the Board so long as the board members do not have a direct "personal or financial interest in the outcome" and which is probably satisfied if the Board is not the prosecutor regarding the violation but rather hears the complaint from an owner, a violations committee or the management company; and (iii) that the Board make a finding "whether the alleged violation actually occurred and whether the unit owner is the one that should be held responsible for the violation"; that provision may require formal written findings as to those matters and may impose some barrier to fines upon tenants and family members. HB1135 continues to support alternative dispute resolution but appears to depend upon the agreement of the Association and the owner to undertake unless, perhaps, the documents require mandatory mediation or arbitration."*

28. Board Information. HB1359 requires that all Board members "shall have available" to them "all information related to the responsibilities and operation of the association obtained" by any other Board member, including (but not limited to) monthly reports, contracts, and communications, reports and opinions of association managers, attorneys or accountants.

29. Committee Chairpersons. HB1359 requires that the committee chairpersons "shall meet the same qualifications as are required by the governing documents of the association for election or appointment to the executive board of the association."

THE ABOVE SUMMARY IS NOT INTENDED TO INCLUDE ALL OF THE PROVISIONS, EXCEPTIONS AND CONDITIONS OF THE NEW LAW, BUT RATHER TO SUMMARIZE THE MAIN IMPOSITIONS OF SENATE BILL 100, AS SUBSEQUENTLY AMENDED, UPON ASSOCIATIONS. THIS SUMMARY IS NOT INTENDED TO PROVIDE ANY LEGAL ADVICE AS TO ANY PARTICULAR ASSOCIATION, DOCUMENT, LEGAL OBLIGATION OR FACT SITUATION. RECIPIENTS SHOULD DISCUSS PARTICULAR ISSUES WITH THEIR OWN ATTORNEYS.

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