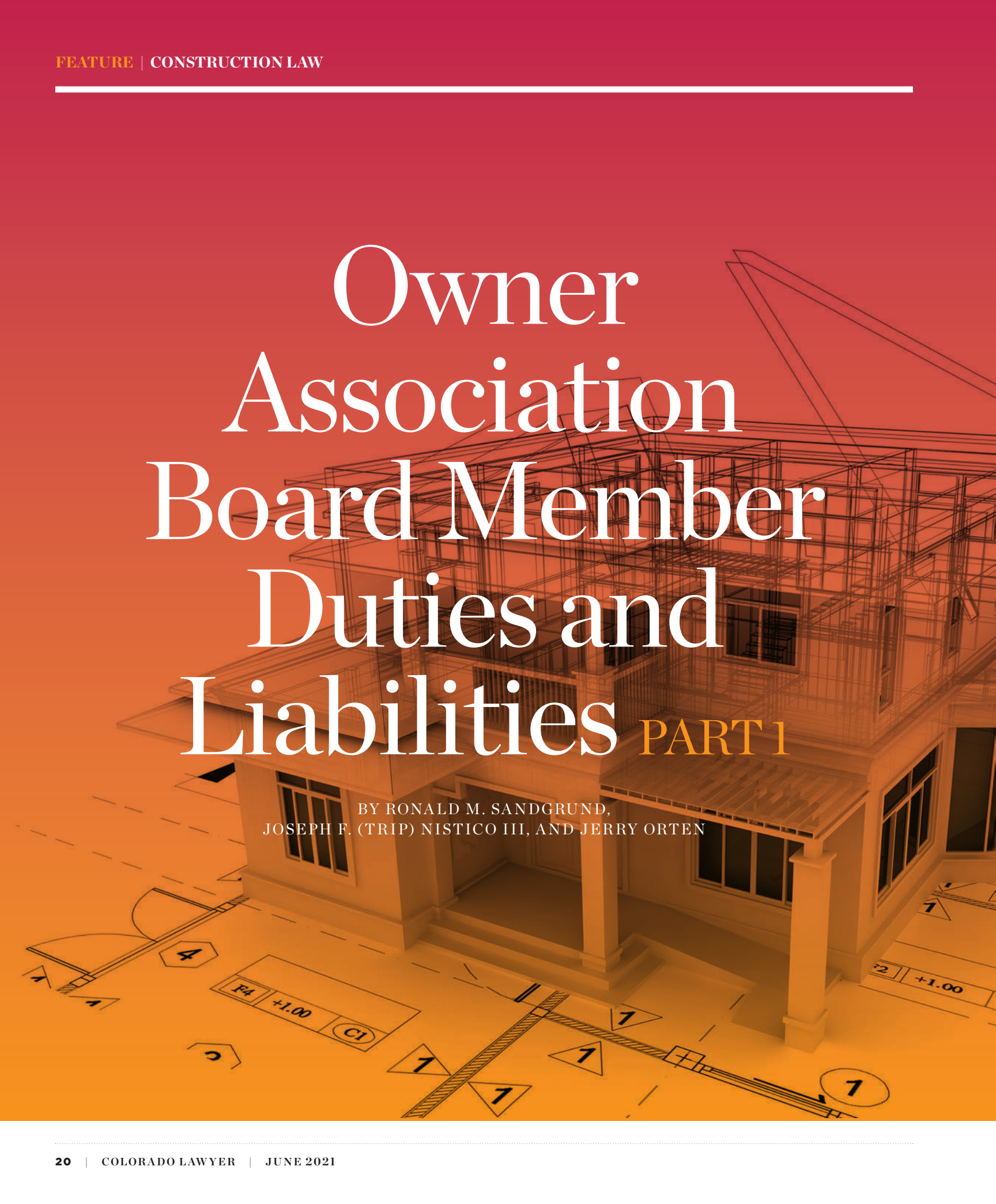


Owner Association Board Member Duties and Liabilities **PART 1**



BY RONALD M. SANDGRUND,
JOSEPH F. (TRIP) NISTICO III, AND JERRY ORTEN

This three-part article examines the relationships among developers, owner association board members, owner associations, and owner association unit owner members. This part 1 focuses on association board members' legal duties and liabilities.

In common interest communities¹ subject to Colorado's Common Interest Ownership Act (CCIOA) all owner association (association) board members owe legal duties to both the association and its owner-members (owners).² Courts carefully examine the conduct of association board members that the community's developer appoints while the developer controls the board (declarant control period),³ because conflicts of interest may exist between the developer and the association and its current and future owners.

This three-part article examines case law and articles addressing the relationships among developers, developer-appointed board members, owner-elected board members, associations, and owners generated during the nearly 20 years since publication of an earlier *Colorado Lawyer* article on this topic.⁴

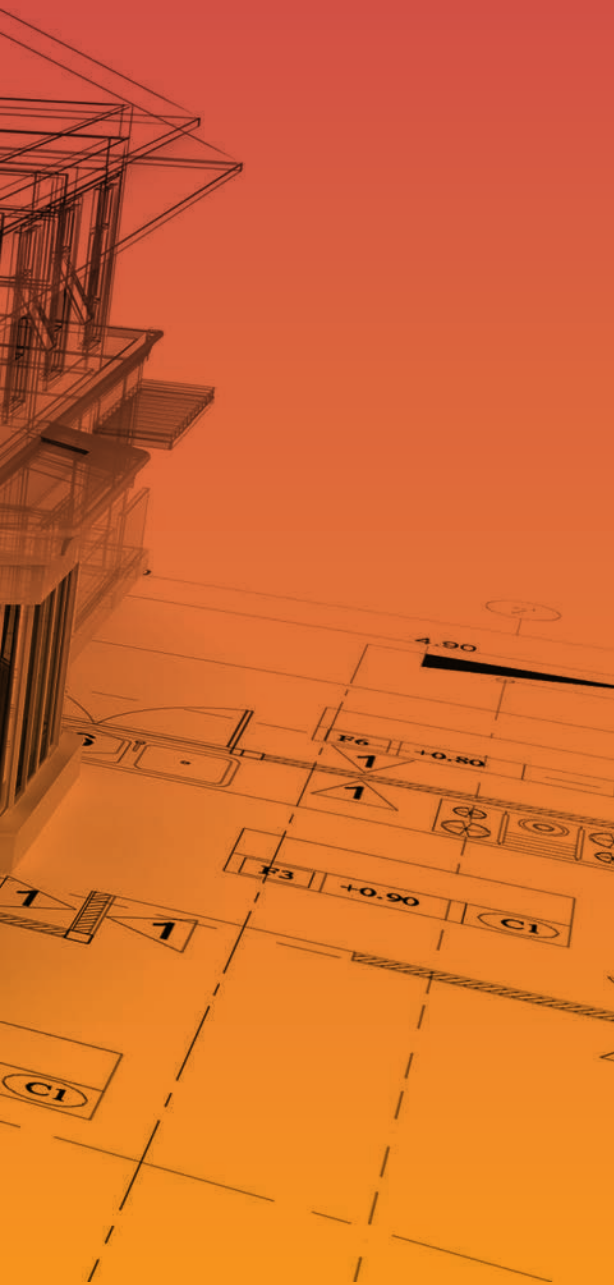
This part 1 examines association board members' legal duties and potential liabilities.

Association Overview

Under CCIOA an association must be organized no later than when the first unit is conveyed to a purchaser.⁵ The association must be organized as a "nonprofit, not-for-profit, or for-profit corporation or as a limited liability company . . ." ⁶ Regardless of how it is formed, the board is the body designated in the community's main governing document, the "declaration,"⁷ to act on the association's behalf. Unless prohibited by CCIOA, the declaration, or the bylaws, the board "may act in all instances on behalf of the association."⁸ Association board member duties are primarily controlled by CCIOA and the Colorado Revised Nonprofit Corporation Act (Nonprofit Act) but other statutes, such as Colorado's Business Corporation Act (Corporation Act), apply in some circumstances.⁹ CCIOA controls if these laws conflict.¹⁰ The association owes many duties under CCIOA.¹¹ The board is responsible for satisfying these duties as well as any duties set forth in the community's governing documents. In addition, as discussed below, the Nonprofit Act standard of care arguably applies to the board's execution of all these duties.¹²

Fiduciary Duties Generally

The starting point for analyzing board member duties is determining whether the member owes a fiduciary duty. "A fiduciary is a person having a duty, created by his or her undertaking, to act principally for the benefit of another in matters connected with that undertaking."¹³ A fiduciary's common law "obligations to the beneficiary include, among other things, a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with the beneficiary."¹⁴ A fiduciary duty may arise



where a “superior party” assumes a duty to act in a “dependent party’s best interest.”¹⁵

As discussed below, when and to what extent association board members owe fiduciary duties depends on whether the board member was appointed by the developer or selected by the owners. For purposes of this article, board members selected to fill board vacancies by developer-appointed board members who constitute a majority of the board are treated as developer-appointed board members. Similarly, board members selected to fill board vacancies by owner-elected board members who constitute a majority of the board are treated as owner-elected board members.¹⁶

Association Board Member Duties

Generally

Board members may be appointed by the developer during the declarant control period or selected later by the owners, usually by election.¹⁷ Board members’ duties are defined to some extent by statute and often also described in the association’s governing documents. These documents may include the declaration and the community plat or map, articles of incorporation, bylaws, rules, regulations, policies, procedures, and architectural guidelines.¹⁸ In the event of any conflict, CCIOA controls.¹⁹

Board members have common law fiduciary duties, and the common law may inform judicial interpretation of their statutory duties.²⁰ Courts have imposed common law fiduciary duties on association developers and board members to, among other things, (1) manage and maintain common property with reasonable care, (2) establish proper reserves to fund future repair or replacement needs, and (3) disclose all material facts regarding the condition of property the association is required to maintain.²¹

Board members generally owe fiduciary duties only to the association and its owners (comprising the association membership),²² and not to the public at large.²³ These baseline duties arise primarily from the Nonprofit Act, whose statutory duties often overlap with, and sometimes preempt, a director’s common law duties. Directors’ Nonprofit Act duties include the broad duties to act

- within the scope of the board member’s statutory authority and as permitted by the community’s governing documents;
- in good faith, with prudence, and in a manner the board member reasonably believes to be in the association’s best interests (duty of good faith or duty of care);²⁴ and
- with undivided loyalty to the association, only for the association’s benefit, and not for a board member’s own personal advantage (duty of loyalty).²⁵

Other duties prohibit directors from

- disclosing information about the association’s activities (unless that information is already known to the owners or to the public, or is a part of the association’s public records, such as its board meeting minutes);²⁶
- violating the law or engaging in misconduct;²⁷
- improperly transferring or encumbering the association’s assets;²⁸
- borrowing money from the association;²⁹ or
- taking the association’s business opportunities or confidential or proprietary information.³⁰

While compliance with the Nonprofit Act’s duties of care sometimes affords a “safe harbor,” CCIOA imposes different and/or additional duties on *developer-appointed* board members, while providing that *owner-elected* board members are generally liable only for their willful and wanton acts and omissions.³¹

Board Members’ Conflicts of Interest

The Nonprofit Act’s conflict of interest provisions apply to all board members, whether appointed by the developer or elected by the owners. They prescribe how board members are to manage “conflicting-interest transactions.”³² In addition, all associations subject to CCIOA³³ must adopt and maintain conflict of interest policies or rules for their board of directors.³⁴

Generally, an association may not make loans, provide assistance to, or enter into a contract with its board members, their families, or their businesses,³⁵ and any board member who engages in a conflicting-interest transaction must repay the association for its losses.³⁶ However, board members are not liable

for conflicting-interest transactions if they disclose their relationship or interest to other board members before the board approves the transaction, provided the transaction’s approval is made in good faith.³⁷ Board members will also not be liable for conflicting-interest transactions to the extent that these are “fair” to the association.³⁸

Although CCIOA states that owner-elected board members are liable only for their “wanton and willful acts or omissions,”³⁹ it has not been decided whether owner-elected board members are personally liable for violating the Nonprofit Act’s separate conflict of interest prohibitions if they do not act willfully or wantonly.⁴⁰ Generally, the law frowns upon board members who approve transactions in which they have a financial interest.⁴¹ It is also unclear whether owner-elected and/or owner-appointed board members can be held liable for “wanton or willful acts or omissions” if these acts or omissions were later voided.

Owner-Elected Board Member Fiduciary Duties

The Court of Appeals in *Woodmoor Improvement Ass’n v. Brenner* confirmed that association board members, like other corporate board members, owe fiduciary duties to the association under the common law.⁴² In *Woodmoor*, the Court affirmed the lower court’s exoneration of an owner-elected board member for alleged breaches of fiduciary duties for convincing other board members to approve a satellite dish that the association’s covenants arguably prohibited. The board member did not participate in the board’s vote.

The scope of a board member’s duties varies depending on whether the board member was appointed by the developer, appointed by a developer-controlled board to fill a vacancy, elected by the unit owners, or appointed by an owner-controlled board to fill a vacancy. This question of who chose the board member—the developer, the owners, or the board itself—also affects the standard of care to which the board member is held and the defenses available to members responding to allegations that they breached their fiduciary duties.

Does CCIOA Negate Owner-Elected Board Members' Fiduciary Duties?

Arguably, by negative implication, CCIOA relieves owner-elected board members of *any* fiduciary duties, and they are liable only for their wanton and willful acts or omissions, because CCIOA prevails over conflicting statutory and decisional law, including the Nonprofit Act and common law. Colorado's appellate courts have not squarely addressed this argument, although it appears to conflict with *Woodmoor*'s holding, as explained below.

Analysis of this argument starts with CCIOA, which provides in relevant part:

(2) Except as otherwise provided in subsection (2.5) of this section:

(a) *If appointed by the declarant*, in the performance of their duties, the officers and members of the executive board are required to exercise the care required of fiduciaries of the unit owners.

(b) If not appointed by the declarant, no member of the executive board and no officer shall be liable for actions taken or omissions made in the performance of such member's duties except for wanton and willful acts or omissions.⁴³

While subsection (2)(a) specifically refers to a declarant (developer)-appointed board member's fiduciary duties, subsection (2)(b) does not; thus, CCIOA arguably may not impose fiduciary duties on owner-elected board members. Yet four years after Colorado adopted CCIOA, the *Woodmoor* Court did not hesitate to recognize an owner-elected board member's fiduciary duties, though it did not discuss CCIOA. Consistent with *Woodmoor*, the Nonprofit Act itself supports the conclusion that all nonprofit board members owe fiduciary duties; CRS § 7-128-401 describes the duties owed by all nonprofit directors in the same terms as are typically used to describe the types of duties owed by fiduciaries:

(1) Each director shall discharge the director's duties as a director, including the director's duties as a member of a committee of the board, and each officer with discretionary authority shall discharge the officer's duties under that authority:

(a) In good faith;

“
The association
owes many duties
under CCIOA. The
board is responsible
for satisfying these
duties as well as any
duties set forth in the
community's governing
documents. In addition,
as discussed below, the
Nonprofit Act standard
of care arguably applies
to the board's execution
of all these duties.
”

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director or officer reasonably believes to be in the best interests of the nonprofit corporation.⁴⁴

Section 401 also states:

(6) A director or officer of a nonprofit corporation, in the performance of duties in that capacity, shall not have any fiduciary duty to any creditor of the nonprofit corporation arising only from the status as a creditor.

By negative inference, subsection (6) suggests that the statute's other described duties may properly be characterized as fiduciary duties.

Based on the foregoing analysis, CCIOA's willful and wanton liability standard arguably does not obviate an owner-elected board member's fiduciary duty, but only limits the circumstances in which its breach gives rise to legal liability. This analysis also suggests that CCIOA's express statement—that developer-appointed board members owe fiduciary duties to “*the unit owners*”—is intended to make clear that such board members must not also serve the developer's interests where conflicts may exist.⁴⁵ As Justice Harlan Stone warned almost a century ago, many mistakes and faults can be ascribed to the “failure to observe the fiduciary principle, the precept as old as holy writ, that ‘a man cannot serve two masters.’”⁴⁶

Developer-Appointed Board Member Fiduciary Duties

As mentioned above, CCIOA provides that developer-appointed board members “are required to exercise the care required of fiduciaries of the unit owners.”⁴⁷ And unlike its limitation on the liability of owner-elected board members to wanton and willful acts or omissions in the performance of their duties, CCIOA provides no similar safe harbor under which developer-appointed board members may seek refuge for their allegedly wrongful conduct.⁴⁸

In *Semler v. Hellerstein*, the Court of Appeals held that developer-appointed board members owe fiduciary duties to both the association and its members when acting in their official capacities as board members or when engaging in transactions involving the association.⁴⁹ However, no fiduciary duty exists when board members engage in private transactions with other association members or the general public, and where those transactions do not involve the association.⁵⁰

Board Duties When Investing Association Funds

As discussed above, owner-elected board members (or board members appointed by owner-elected board members constituting a majority of the board), who are subject to CCIOA, are generally liable only for wanton and willful acts or omissions made in the performance of their duties.⁵¹ However, with regard to the

investment of association reserve funds, *both* developer-appointed *and* owner-elected board members must act in good faith, with the care of an ordinarily prudent person under similar circumstances, and in a manner the member reasonably believes to be in the association’s best interests.⁵² Reserve funds are monies held by associations that are set aside for future needs, such as for maintenance, repair, replacement, improvement, and emergencies, after payment of common expenses has occurred.⁵³

The fiduciary duties governing reserve fund investment and the duties in the Nonprofit Act at CRS § 7-128-401 are identical. The common law “business judgment rule” will also likely apply to reserve fund investment, as discussed below. CCIOA’s imposition of special duties on board members pertaining to reserve investments supersedes CCIOA’s “wanton and willful” safe harbor liability provisions.⁵⁴

In discharging their duties regarding the investment of association reserve funds, all board members are entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- one or more association officers or employees whom the board member reasonably believes to be reliable and competent in the matters presented;
- legal counsel, an accountant, or other persons retained by the association as to matters involving expertise or skill the board member reasonably believes are within such person’s professional or expert competence; and
- a board committee of which the board member is not a member, if the member reasonably believes the committee merits confidence.⁵⁵

However, board members may not rely on such information, opinions, reports, or statements if they have knowledge concerning the matter in question that makes such reliance unwarranted.⁵⁶

The Business Judgment Rule

The business judgment rule generally precludes corporate board member liability where the member acts in “good faith in a manner the

“

This analysis also suggests that CCIOA’s express statement—that developer-appointed board members owe fiduciary duties to “the unit owners”—is intended to make clear that such board members must not also serve the developer’s interests where conflicts may exist.

”

member reasonably believes to be in the best interests of the corporation and with such care as an ordinarily prudent person in a like position would use under similar circumstances.”⁵⁷ “The business judgment rule protects a board’s business decisions and managerial authority from indiscriminate attack, and at the same time, permits the review of improper decisions. . . .”⁵⁸ However, some conduct appropriate in the business judgment of a for-profit board may not be proper for a nonprofit association board because of their different purposes.⁵⁹

Application to Associations

In Colorado, the business judgment rule has

been applied to claims arising from an association’s owner-elected board’s decisions.⁶⁰ The business judgment rule arguably does not apply to developer-appointed board members because (1) CCIOA imposes a fiduciary duty on developer-appointed board members that may supplant the Nonprofit Act, and (2) their liability for the breach of this duty is not restricted to willful and wanton conduct. Consistent with this conclusion, one Colorado district court rejected developer-appointed board members’ reliance on the business judgment rule as a defense to association and owner claims. The court found that CCIOA’s express imposition of fiduciary duties on developer-appointed board members effectively preempts the business judgment rule defense by imposing a much higher standard of care on such persons, in part because any other construction would improperly render portions of CCIOA superfluous.⁶¹ As discussed above, CCIOA provides that its provisions prevail in the event of a conflict with the Nonprofit Act, the Corporation Act, and the common law.⁶²

Statutory Limitations and Exceptions

When applicable, the business judgment rule offers owner-elected board members (including board members appointed by owner-elected board members who constitute a majority of the board) some protection against liability. But even under the Nonprofit Act’s statutory embodiment of the business judgment rule, there are many avenues through which liability may be imposed if an aggrieved party can establish that the challenged conduct involved one or more of following:

- lack of good faith,
- intentional misconduct,
- a knowing violation of the law,
- breach of duty of loyalty,
- conduct specified in CRS §§ 7-128-403 (unlawful distributions) or -501(2) (conflicting interest transaction liability), or
- any transaction from which the board member derived an improper personal benefit.⁶³

Owner-elected board members may be afforded the additional liability protections described below.

Parallel Nonprofit Board Member Liability Limitations

CRS § 13-21-116(2)(b)(1) provides that nonprofit board members are not liable for conduct occurring in the performance of their duties except for wanton and willful acts or omissions. CRS § 13-21-115.7(2) similarly provides that uncompensated board members of nonprofit organizations are immune from civil liability for damage or injury if they were acting within the scope of their official duties, unless the damage or injury was caused by the member's willful and wanton conduct.⁶⁴ A Colorado district court has ruled that neither of these statutes limits developer-appointed board members' fiduciary duties and liability under CRS § 38-33.3-302(2).⁶⁵

Association and Owner Remedies for Board Misconduct

Board members owe legal duties to both the association and its owner-members.⁶⁶ Various mechanisms are available to seek redress for breach of these duties. For example, owners may be able to pursue administrative/internal remedies created by the declaration or pursue a derivative action against the board on behalf of the association.⁶⁷ The association can also sue board members for damages in its own name or on behalf of two or more unit owners,⁶⁸ although this would likely occur only after the alleged bad actors have vacated their board positions, as presumably they would be unlikely to authorize suit against themselves while serving on the board.⁶⁹ Sometimes a board will delegate its authority to bring suit to a litigation committee, which may be empowered to sue the board or its individual members.⁷⁰

Conclusion

Association board members are subject to various statutory and common law duties depending on whether they were appointed by the developer, selected by the owners, or appointed by the board itself to fill a vacancy. If appointed to fill a vacancy, the appointing board's character—whether it is a developer-controlled or an owner-controlled board—determines the applicable standard of care.

“
The business judgment rule arguably does not apply to developer-appointed board members because (1) CCIOA imposes a fiduciary duty on developer-appointed board members that may supplant the Nonprofit Act, and (2) their liability for the breach of this duty is not restricted to willful and wanton conduct.
”

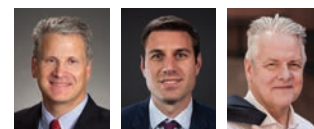
Board members appointed by the developer (including board members appointed by developer-appointed board members) will be held to the standard of care of a fiduciary. Board members selected by the owners (including board members appointed by owner-elected board members) must, at a minimum, exercise their judgment in good faith, in a manner reasonably thought to be in the best interests of the association and with the care of an ordinarily prudent person.

If owner-elected board members fail to meet these standards—regardless of whether

they are deemed to be fiduciaries—they bear personal liability only for their willful and wanton conduct (except for decisions concerning the investment of association reserves, which are measured against the Nonprofit Act's business judgment rule), and for loans made to them by the association.

Part 2 will discuss recurring conflicts between the developer and its appointed board members and the association and its owners that may arise during the control period, with a focus on conflicts of interest.

Part 3 will discuss theories supporting a developer's direct liability, and vicarious liability for its appointed board members' wrongful conduct. It will also explore how developers and board members can mitigate potential liability risks and examine how they may insure or obtain indemnity against these risks. **CL**



Ronald M. Sandgrund (of counsel) and **Joseph F. (Trip) Nistico, III** (associate)

are part of Burg Simpson Eldridge Hersh Jardine PC's Construction Defect Group. The firm represents commercial and residential property owners, homeowner associations and unit owners, and construction professionals and insurers in construction defect, product liability, and insurance coverage disputes. The firm also handles mass tort, class action, personal injury, workers compensation, premises liability, and wrongful death litigation, among other practice concentrations—rms.sandgrund@gmail.com; jnistico@burgsimpson.com. **Jerry Orten** is a founder of and special counsel to Orten Cavanaugh Holmes & Hunt, LLC, which firm serves as general counsel to common interest community developers and owner associations. The firm advises developers in the creation of common interest communities, owner associations, and executive boards. The firm also advises developers, board members, owner-members, and managers concerning the governance and operation of owner associations, including compliance with the governing documents, state and federal laws, and regulations. Orten also serves as an expert witness—jorten@ochhoalaw.com.

Coordinating Editors: Leslie Tuft, ltuft@burgsimpson.com; Jennifer Seidman, jseidman@burgsimpson.com

NOTES

1. Common interest communities are established where owners are obligated to pay assessments related to real estate other than their own property. See generally CRS § 38-33.3-103 (8) (defining “common interest community”); Hess, ed., *2A Methods of Practice, Colorado Practice Series* §§ 73:1, 73:9 (Thomson West 7th ed. June 2020 update) (describing types and creation of common interest communities).

2. CCIOA became effective July 1, 1992, and it is codified at CRS §§ 38-33.3-101 et seq. CCIOA’s provisions concerning the duties of board members are found in CRS § 38-33.3-303(2). In addition, the Nonprofit Act’s general standards of conduct for directors and officers, as set forth in CRS § 7-128-401, generally apply to owner association board member conduct as well. See, e.g., *Greens at Buffalo Run Homeowners Ass’n v. Cotton*, No. 15-CV-71, 2016 Colo. Dist. LEXIS 2007 at *21-22 (Adams Cty. Dist. Ct. Mar. 4, 2016).

CCIOA uses the following terms, which the authors have simplified for ease of reference as shown in parentheses: unit owners association (association or owners association); common interest community (community); declarant (developer); executive board (board); unit (home or property); and unit owners (owners). See CRS § 38-33.3-103(3), (8), (12), (16), (30), and (31), respectively. The authors sometimes use the terms declarant and developer interchangeably for ease of reference, although not all declarants may be involved in the community’s physical construction or other, typical development activities, and not all developers qualify as statutory declarants.

A number of out-of-state cases are cited in which the developer may be known by other designations, such as sponsor, incorporator, etc. Similarly, the association board may be referred to in other states as the board of trustees, board of managers, board of directors, executive board, property regime, council of co-owners, council of unit owners, and so forth. Communities formed as cooperatives are typically managed by a board of directors. For ease of reference, all these governing bodies are referred to as boards, and the persons comprising these boards as board members.

3. The “declarant control period” and what constitutes “turnover” are defined and described in CRS § 38-33.3-303(5)(a)(II) through (7).

4. Sandgrund and Smith, “When the Developer Controls the Homeowner Association Board: The Benevolent Dictator?” 31 *Colo. Law.* 91 (Jan. 2002).

5. CRS § 38-33.3-301.

6. *Id.*

7. See CRS § 38-33.3-103(16). The declaration is the recorded instrument that creates the community. See also CRS §§ 38-33.3-303 (describing board powers and responsibilities) and -306 (bylaws to prescribe number, qualifications of, powers, duties, and other details regarding board members).

8. CRS § 38-33.3-319 includes a CCIOA “supremacy” clause, providing that CCIOA

controls when it conflicts with other statutes or laws, whether now existing or later enacted. The Nonprofit Act describes the duties of board directors. See CRS §§ 7-128-401, -402, and -403.

9. CRS § 38-33.3-319. All references to the Corporation Act include the amendments made effective July 1, 2020, and not predecessor versions of that law.

10. *Id.* See also *Triple Crown at Observatory Village Ass’n, Inc. v. Village Homes of Colo., Inc.*, 328 P.3d 275, 278 (Colo.App. 2013) (noting that while provisions of the Colorado corporate statutes that conflict with CCIOA will not override it, the court would apply the Nonprofit Act to a matter that CCIOA did not address). *Cf.* CRS § 38-33.3-108 (principles of law and equity, including the law of corporations, “supplement the provisions of this article, except to the extent inconsistent with this article”).

11. See, e.g., § 38-33.3-106.7 (prohibiting unreasonable restrictions on owner energy efficiency measures); CRS § 38-33.3-313 (maintenance of insurance); CRS § 38-33.3-316 (assessment collection and lien foreclosure); and CRS § 38-33.3-317 (record keeping).

12. See CRS § 7-128-401. All references to the Corporation Act include the amendments made effective July 1, 2020 and not predecessor versions of that law.

13. *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo.App. 1992). See also CJI-Civ. 26:2-4 (defining fiduciary and confidential relationships).

14. *Bailey*, 844 P.2d at 1339 (citing *Destefano v. Gabrian*, 763 P.2d 275 (Colo. 1988)).

15. *Id.* *Cf. Moses v. Diocese of Colo.*, 863 P.2d 310, 322 (Colo. 1993) (“An unequal relationship does not automatically create a fiduciary duty”).

16. See CRS § 38-33.3-303 (3)(a) (“executive board may fill vacancies in its membership for the unexpired portion of any term”); CRS § 38-33.3-306(1)(c) (association bylaws may provide for the “manner of electing and removing, executive board members and officers and the manner of filling vacancies”). While the authors believe that board members selected by developer-appointed board members comprising a majority of the board to fill board vacancies should be treated as developer-appointed board members, there is no controlling law on this point.

17. CRS § 38-33.3-303.

18. In the event of conflict between the declaration and the bylaws, the declaration controls. CRS § 38-33.3-203(3).

19. *Id.*

20. See, e.g., *Semler v. Hellerstein*, 428 P.3d 555, 563-564 (Colo.App. 2016), *rev’d in part on other grounds sub nom. Bewley v. Semler*, 432 P.3d 582 (interpreting CRS § 38-33.3-303(2)(a)), but borrowing from the common law (see, e.g., *Michaelson v. Michaelson*, 939 P.2d 835, 841-42 (Colo. 1997), in making that interpretation).

21. See, e.g., *Davencourt at Pilgrims Landing Homeowners Ass’n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 246-47 (Utah

2009) (recognizing developer’s limited fiduciary duty); *Raven’s Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 171 Cal. Rptr. 334 (Cal. Ct.App. 1981) (recognizing fiduciary duties of initial board members comprising the developer’s owners and employees); *Laurel Road Homeowners Ass’n, Inc. v. Freas*, 191 A.3d 938, 950 (Pa. Cmwlth. 2018) (until developer relinquishes control to association, developer owes the association and its members a fiduciary duty).

22. See CRS § 38-33.3-301 (“A unit owners’ association shall be organized no later than the date the first unit in the common interest community is conveyed to a purchaser. The membership of the association at all times shall consist exclusively of all unit owners . . .”).

23. Hess, ed., *supra* note 1.

24. CRS § 7-128-401(1)(a)-(c). Compliance with these standards may give rise to application of the business judgment defense discussed below.

25. Hess, ed., *supra* note 1 at § 74:22.

26. *Id.*

27. *Id.*

28. CRS § 7-128-403.

29. CRS § 7-128-501(2).

30. Such misappropriation may constitute civil theft. See CRS § 18-4-405.

31. See generally CRS § 38-33.3-303(2)(a) and (b).

32. CRS § 38-33.3-310.5, cross-referencing and incorporating CRS § 7-128-501.

33. Note that so-called “pre-CCIOA” associations are only subject to specified parts of CCIOA as set forth in CRS § 38-33.3-117.

34. CRS § 38-33.3-209.5(1)(b)(II) and (4)(a)(I)-(III). Pursuant to CRS § 38-33.3-209.5(4)(a)(I)-(III), the policy must “[d]efine or describe the circumstances under which a conflict of interest exists”; “[s]et forth procedures to follow when a conflict exists, including how, and to whom, the conflict . . . must be disclosed and whether a board member must recuse himself or herself from discussing or voting on the issue”; and “[p]rovide for the periodic review of the association’s conflict . . . policies, procedures, and rules and regulations,” which (as provided for in CRS § 38-33.3-209.5(4)(b)) must comply with CRS § 38-33.3-310.5.

35. The loan or assistance also may not be made to, and the association may not enter into a contract with, an entity in which the board member has a financial interest known and material to the member. See CRS § 7-128-501(1) and (2).

36. CRS § 7-128-501(2).

37. CRS § 7-128-501(3)(a)-(c).

38. CRS § 7-128-501(3)(c).

39. CRS § 38-33.3-303(2)(b). While it might be argued that an association board member could not unintentionally approve a conflicting transaction, there might be rare circumstances where the board member forgets or is ignorant of the conflict.

40. CRS § 38-33.3-303(2)(b) imposes responsibility on board members not appointed by the developer (or board members appointed

by owner-elected board members comprising a majority of the board) for only “wanton and willful acts or omissions.”

41. See *Kim v. Grover C. Coors Trust*, 179 P.3d 86, 91 (Colo.App. 2007) (board director bears burden of proving his or her transaction with corporation took place in good faith, was fair, and was accompanied by full disclosure).

42. *Woodmoor Improvement Ass’n v. Brenner*, 919 P.2d 928, 933 (Colo.App. 1996) (citing *Rifkin v. Platt*, 824 P.2d 32 (Colo.App. 1991)), followed in *Summit View Subdivision Homeowners Ass’n v. Summit View Dev., LLC*, Nos. 11CA0753 and 11CA0754 (Colo.App. 2012) (affirming judgment against developer-appointed board members for breach of fiduciary duty for failing to collect assessments and file lien against lots owned by co-defendant, a related entity) (not selected for official publication). *Accord* Grund et al., *7A Colorado Personal Injury Practice: Torts and Insurance 3d* at § 25:9 n.4 (Thomson West 3d ed. Dec. 2020 update) (board members owe fiduciary duties) and § 25:13 n.4 (same). See also 31 C.J.S. Estates § 251 (Dec. 2020 update) (condominium board has a fiduciary obligation to unit owners).

43. CRS § 38-33.3-303(2)(a)–(b) (emphasis added).

44. See also *Triple Crown at Observatory Vill. Ass’n, Inc. v. Vill. Homes of Colo., Inc.*, 328 P.3d 275, 278 (Colo.App. 2013) (CCIOA incorporates Colorado corporate law by reference; where CCIOA is silent on the issue, Nonprofit Act provisions apply where they can be harmonized with CCIOA).

45. See CRS § 38-33.3-303(2)(a) (emphasis added).

46. Stone, “The Public Influence of the Bar,” 48 *Harv. L. Rev.* 1, 8–9 (Nov. 1934) (“those who serve nominally as trustees, but relieved, by clever legal devices, from the obligation to protect those whose interests they purport to represent . . . suggest how far we have ignored the necessary implications of that principle”). See also *First Data Corp. v. Konya*, 2008 WL 2228657 *5 (D.Colo. May 27, 2008) (“A person cannot serve two masters . . .”).

47. CRS § 38-33.3-303(2)(a). See also Wolf, ed., 8 *Powell on Real Property* at § 54A.04 (Matthew Bender Supp. 2000) (developer-appointed directors held “to a higher standard of care than unit-owner elected directors.”). CCIOA is based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA), and Colorado courts look to the UCIOA and its comments for guidance. See *Hiwan Homeowners Ass’n v. Knotts*, 215 P.3d 1271, 1273 (Colo.App. 2009). UCIOA § 3-103(a) (1994) changed the standard of care from fiduciary to trustee, noting that the law recognizes many kinds of fiduciary relationships, of which “the trustee’s duty is the highest.” *Id.* at cmt. 5.

48. One court noted a “practical concern” supporting holding developer-appointed board members personally liable: “unit owners damaged by the bad-faith depredations of unscrupulous boards may find themselves without any realistic legal recourse in the event that the [developer’s] assets become unavailable

or dispersed due to voluntary corporate dissolution” *Bd. of Managers of Fairways at North Hills Condo. v. Fairway at North Hills*, 603 N.Y.S.2d 867, 870–71, (N.Y.App.Div. 1993).

49. *Semler*, 428 P.3d 555.

50. *Id.*

51. CRS § 38-33.3-303(2)(b).

52. See CRS § 38-33.3-303(2.5) (excepting from subsection 303(2)(b)’s application board member responsibilities and liabilities for investment reserves imposed by subsection 303(2.5), which incorporates the “standards” provided by CRS § 7-128-401 of the Nonprofit Act).

53. See, e.g., CRS § 38-33.3-209.5(1)(b)(IX).

54. See *supra* note 52.

55. *Id.*

56. CRS § 7-128-401(3).

57. Hess, ed., *supra* note 1 at § 2:76. The rule derives both from the common law, *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402, 405 (Colo.App. 2000) (finding business judgment rule acts to protect from liability corporate directors acting in good faith), and statute, CRS § 7-108-402(1)(a)–(g).

58. Blum, “Application of Business Judgment Rule to Decisions by Real Estate Condominium or Cooperative Corporations,” 9 A.L.R.7th 5 (Supp. 2020).

59. See generally *Unrau v. Kidron Bethel Retirement Servs., Inc.*, 27 P.3d 1, 14 (Kan. 2001) (“Conduct and judgments that would be permissible among businesspersons may be impermissible for officials of a property owners association.”) (citing Natelson, *Law of Property Owners Associations* § 10.3.1 (Little Brown & Co. 1989)).

60. See *Colo. Homes, Ltd. v. Loerch-Wilson*, 43 P.3d 718, 72–25 (Colo.App. 2001) (with regard to covenant enforcement, board’s conduct generally will be measured against the business judgment rule because the enforcement of restrictive covenants may require the exercise of discretion as to the timing and manner of enforcement). *Colo. Homes* noted that *Rhue v. Cheyenne Homes, Inc.*, 449 P.2d 261 (Colo. 1969), held that an association’s board’s refusal to approve building plans must be made in good faith and must not be arbitrary, describing, in substance, “the business judgment rule.” *Id.* at 724. See also *Rywalt v. Writer Corp.*, 526 P.2d 316, 317 (Colo.App. 1974) (applying rule to tennis court construction approval); *Wright v. Beauvallon Condo. Assoc., Inc.*, No. 19CA0252 (Colo.App. 2020) (unpublished) (applying rule to making repairs after construction defect lawsuit settlement).

61. See *Counts v. Ironbridge Homes, LLC*, No. 10 CV 142 (Garfield Cty. Dist. Ct. June 30, 2015). But see *Ajax Lofts Condo. Ass’n v. Ajax Lofts, LLC*, No. 2011CV7763 at 5–6 (Denver Cty. Dist. Ct. Mar. 13, 2014) (holding that CCIOA does not preempt application of the business judgment rule to declarant-appointed board members, but the court could not determine whether the rule and its rebuttable presumption of good faith applied where disputed facts existed regarding the board members’ interest in the transactions at issue and good faith. *Cf.*

McShane v. Stirling Ranch Prop. Owners Ass’n, 411 P.3d 145, 150 (Colo.App. 2015) (holding CRS § 38-33.3-303(2)(b) grants statutory immunity to executive board members not appointed by the declarant except for wanton and willful acts or omissions), *rev’d on other grounds*, 393 P.3d 978. See also *Millennium Square Residential Ass’n v. 2200 M Street LLC*, 952 F.Supp.2d 234, 249 (D.D.C. 2013) (business judgment rule inapplicable to breach of fiduciary duty claim where board members also sat on developer’s or related entities’ boards and were alleged to have acted in bad faith by failing to pursue construction defect claims against their employer; rule does not apply to board members who “lack independence relative to the decision,” do not act in good faith, or act in a way not attributable to a rational business purpose) (internal citations omitted). But see *Rywalt*, 526 P.2d 316, a pre-CCIOA decision suggesting that the business judgment rule applies to all decisions made by nonprofit corporations.

62. See CRS § 38-33.3-319.

63. CRS § 7-128-402(1) (Limitation of certain liabilities of directors and officers.).

64. A former El Paso County district court judge ruled in an arbitration that this statute does not apply to developer-appointed board members. See *Northfield Commons Duplex Condo. Ass’n v. North Boulder Residential Dev., Inc.*, Order Concerning Dispositive Motions (Dec. 19, 2020).

65. *Ajax Lofts Condo. Ass’n*, No. 2011CV7763.

66. See *Semler*, 428 P.3d 555 (finding developer-appointed owners association board members owe fiduciary duties to both the association and its members).

67. See generally Hess, ed., *supra* note 1 at § 2:66. But see CRS § 7-126-401 (limiting standing to bring derivative actions to board members and to voting members with 5% or more of the voting power. Sometimes administrative remedies may need to be exhausted before more formal action can be pursued. See also CRCP 23.1, which has both rule-based and decisional law prerequisites to bringing a derivative action).

68. CRS § 38-33.3-302(1)(d) allows an association to bring a lawsuit in its own name or on behalf of two or more owners on matters affecting the community.

69. If a unit owner claims board member wrongdoing, it may be necessary for the accused board members to recuse themselves from the review process or to delegate the review to an independent body. See *Greenfield v. Hamilton Oil Corp.*, 760 P.2d 664, 668 (Colo. App. 1988) (“purpose to be served by any special litigation committee is to substitute its independent, and presumably objective, judgment for the judgment of the directors who have been accused of wrongdoing” (emphasis in original)).

70. See *In re Hirsch*, 984 P.2d 629, 637–38 (Colo. 1999) (discussing use of special litigation committee and outside, independent counsel to review shareholder complaints).