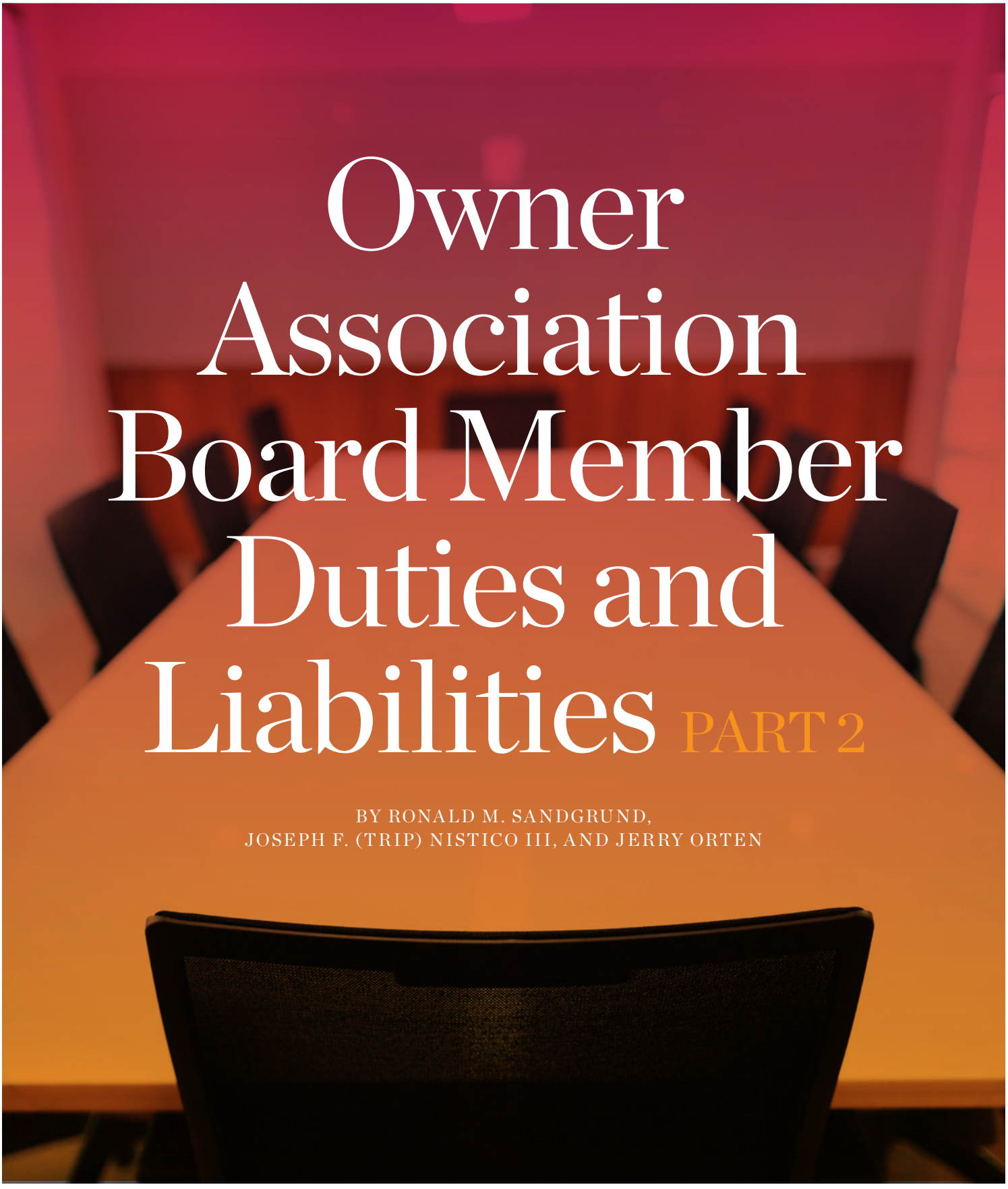

Owner Association Board Member Duties and Liabilities PART 2

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This three-part article examines the relationships among developers, owner association board members, owner associations, and owner association unit owner members. This part 2 focuses on association board members' potential conflicts of interest and ways to manage and mitigate those conflicts.

In common interest communities[1] 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 appointed by the community's developer while the developer controls the board (declarant control period)[3] because conflicts of interest may exist between the developer and its appointed board members 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] Part 1 examined association board members' legal duties and potential liabilities, including how courts treat developer-appointed board members who serve during the declarant control period.

This part 2 examines board member conflicts of interest that may arise during the declarant control period. These conflicts of interest may involve reasonably investigating conditions that could reveal defective construction, or learning of defective construction within the community; timely pursuing claims arising from defects; providing adequate management, maintenance, and repairs; setting reasonable assessments; maintaining reasonable financial reserves; making adequate and complete disclosures regarding the community's physical and financial condition; and reasonably enforcing the community's restrictive covenants and any community rules and regulations.

> "Courts generally recognize the 'inherent conflict that a developer faces in promoting and marketing property for a profit, while simultaneously ensuring the interests of a homeowners association (HOA) and its members.'"

Potential Claims against Developer-Appointed Board Members

Various legal and equitable claims against developer-appointed board members may arise during the declarant control period. Courts generally recognize the "inherent conflict that a developer faces in promoting and marketing property for a profit, while simultaneously ensuring the interests of a homeowners association (HOA) and its members."[5] As described below, these claims often arise from board members' failure to recognize that their primary loyalty must be to the community association and the owners, not the developer who appointed them and who typically employs them. See the accompanying sidebar for additional resources on this topic.

Board members must remain cognizant of the serious, recurring conflicts of interest that can arise during the declarant control period and avoid violating their fiduciary duties. Some developers may view these potential conflicts and ensuing liabilities as hindrances to completing community development and construction in a timely and cost-beneficial manner. But changing this liability scheme would be a matter for the legislature.

UCIOA and Restatement *Guidance*

In addition to the cases discussed below, the Uniform Common Interest Ownership Act (UCIOA) and its comments help Colorado courts construe CCIOA.[6] The *Restatement (Third) of Property (Servitudes)* (*Restatement*) has also influenced how some courts analyze developer and board member conduct.[7] The *Restatement* draws its summary of duties and liabilities from the extensive body of judicial opinions on the subject. Both UCIOA and the *Restatement* emphasize the fiduciary duties developers and their appointed board members owe associations and their owners.

For example, *Restatement* § 6.20 provides that until the developer relinquishes control, it owes the association and its members the duties to:

- use reasonable care and prudence in managing and maintaining the common property;
- establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves

RESOURCES EXAMINING CLAIMS AGAINST DEVELOPER-APPOINTED BOARD MEMBERS

- 2A Bruner and O'Connor, *Bruner & O'Connor on Construction Law* § 7:29.50, Project Risks—Planning and Selection Risks—Condominium or Multi-Family Housing Developments (West Supp. 2020)
- Levin, "Condo Developers and Fiduciary Duties: An Unlikely Pairing?," 24 *Loy. Consumer L. Rev.* 197 (2011)
- Leder, "Maximizing Values and Minimizing Liabilities in a Failed Phased Community," 38 *Colo. Law.* 89 (July 2009)
- Zuckerman, "Using Good Judicial Judgment: Dispensing with the Business Judgment Rule in Mixed-Use Community Association Disputes," 81 *Temple L. Rev.* 927 (Fall 2008)
- Kennedy, "Discovery of Construction Defects in Planned Unit Developments: The Role of the Homeowners Association," Am. Bar Ass'n Forum on the Construction Industry at 3 (Apr. 7–9, 2005)
- Estis, "Risk Management in Condominium Development: The Developer's Perspective," Am. Bar Ass'n Forum on the Construction Industry (Apr. 7–9, 2005)
- Kennedy and Hirsch de Haan, "Litigation Involving the Developer, Homeowners' Associations, and Lenders," 39 *Real Prop. Prob. & Tr. J.* 1 (Spring 2004)
- Pardon, "Advising Developers in Operating Community Associations," 77 *Wis. Lawyer* 12, 14 (Mar. 2004)
- Sandgrund and Smith, "When the Developer Controls the Homeowner Association Board: The Benevolent Dictator?," 31 *Colo. Law.* 91 (Jan. 2002)
- McNulty, "The Case Against Strict Enforcement of Statutes of Limitations in Community Association Latent Construction Defect Actions," 3 *CAI J. Cmty. Ass'ns L.* 1 (2000)
- Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* (ALI-ABA 3d ed. 2000)
- Brenner, "Consider Conflicts of Interest Before Representing a Developer and Community Association," 3 *CAI J. Cmty. Ass'ns L.* 2 (2000)
- Boken, "Developer's Fiduciary Duty to Condominium Associations," 45 *S.C. L. Rev.* 195 (Autumn 1993)
- Hyatt and Stubblefield, "The Identity Crisis of Community Associations: In Search of the Appropriate Analogy," 27 *Real. Prop. Prob. & Tr. J.* 589 (Winter 1993)
- Natelson, *Law of Property Owners Associations* (Little Brown & Co. 1989)
- Hyatt and Rhoads, "Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations," 12 *Wake Forest L. Rev.* 915 (Winter 1976)
- Shipley, "Self-Dealing by Developers of Condominium Project as Affecting Contracts or Leases with Condominium Association," 73 A.L.R. 3d 613 (1976)

for the maintenance and replacement of common property;
- disclose the amount by which the developer is providing or subsidizing services that the association is or will be obligated to provide;
- maintain records and account for the financial affairs of the association from its inception;
- comply with and enforce the terms of the governing documents, including design controls, land-use restrictions, and payment of assessments;
- disclose all material facts and circumstances affecting the condition of the association-maintained property; and
- disclose all material facts and circumstances affecting the association's financial condition, including the developer's and the developer's affiliates' interests in any contract, lease, or other agreement entered into by the association.[8]

Both developer-appointed and owner-elected board members generally assume these same duties, and as discussed in part 3, developers may become liable for an appointed board member's breach of these duties. The following discussion addresses recurring liability exposures that arise during the declarant control period.

Failure to Investigate, Disclose, or Timely Pursue Potential Construction Defect Claims

Developers and developer-appointed board members may bear liability for failing to investigate and repair common element and certain individual unit/home defects and related damage. As one commentator explained, "To the extent that a declarant-developer fails to timely investigate, or fails to timely pursue viable claims against those responsible for . . . construction defects, liability may attach for its breach of fiduciary duty and negligence."[9] As discussed below, several cases from other states have addressed a developer's and its appointed board members' liabilities for failing to investigate potential defects and pursue claims for known defects.

Associations may pursue nondisclosure or concealment claims against developers

and their appointed board members based on the developer-controlled board's alleged failure to disclose construction defects to the owner-elected board before or upon the developer turning control over to that board. These claims may include allegations that the board—with a majority of its members elected by owners other than the developer—may have delayed, qualified, or refused board control and/or some or all of the association's financial responsibilities or liabilities but for the failure to disclose.[10]

Colorado. No published Colorado decision has addressed developer-appointed board members' failure to (1) seek relief against the developer for construction defects known or manifested during the declarant control period, or (2) investigate or disclose knowledge of the existence of such defects to the owner-elected board members before or upon turnover.[11] But in a 2012 Douglas County case, the jury awarded plaintiffs $18.2 million based not only on the developer-appointed board's failure to take remedial action against the developer, but also on its failure to disclose to the community's homeowners the existence of known latent defects.[12]

CCIOA generally provides that "all members of the executive board shall have available to them all information related to the responsibilities and operation of the association obtained by any other member of the executive board."[13] Given this requirement that board members share all pertinent information about the association, it is reasonable to argue that developer-appointed board members have a duty to disclose adverse facts concerning the original construction or current condition of the community's common elements to other board members. As explained further below, this may include information regarding known defects; suspected latent defects; and inadequacies in the association's finances necessary to address any defects, such as artificially low assessments or reserves.

Other States. Other states' decisions may offer insight into how Colorado courts might construe developer-appointed board members' potential construction defect-related liabilities. As discussed below, these cases suggest that, to the extent developer-appointed board members know of construction defects, they have a duty to disclose and take action to remedy such defects, such as setting aside adequate reserves for repairs or pursuing legal action against the responsible parties.[14]

> "Associations may pursue nondisclosure or concealment claims against developers and their appointed board members based on the developer-controlled board's alleged failure to disclose construction defects to the owner-elected board before or upon the developer turning control over to that board."

For example, a New York appellate court addressed the contention that developer (sponsor)-appointed board members could not be held personally liable for various alleged failures—including failures to ascertain the common areas' condition, correct deficient unit and common area construction, and increase the contingency reserves when many units were still unsold.[15] In that case, the developer-appointed board members failed to take such actions while the developer remained liable for considerable repair and reconstruction assessments. The court held that the developer-appointed members owed fiduciary duties to the eventual (now current) owners and therefore could be held personally liable for damages attributable to their conduct.

Similarly, a Massachusetts court held that several developer-appointed board members (trustees) breached their fiduciary duties by failing to pursue legal action against a developer for known defects that the developer refused to repair.[16] A North Carolina appellate court likewise found that both a developer and its appointed board members "have an obligation to disclose [to the association] material facts regarding the existence of any construction defects of which they were aware."[17]

In addition, the US District Court for the District of Columbia held that under the applicable bylaws and the District of Columbia's condominium act, various board members owed a duty to maintain, repair, and replace condominium common elements, and they could breach that duty by failing to maintain those elements or to notify the association of any defects in a timely manner.[18] The Georgia Court of Appeals found that an association's sole board member could be liable for breach of fiduciary duty to the association for failing to adequately inspect and repair construction defects.[19]

Management and Maintenance

The *Restatement* provides that a developer that does not desire or is unwilling to meet its responsibilities for an association's management and maintenance can relinquish control of the community and the association's board while still retaining development rights sufficient to protect its interests in completing the project.[20] Because most developers are unwilling to surrender control during the declarant control period, they and their appointed board members must use reasonable care and prudence in managing and maintaining the common property.[21]

Following the *Restatement*, the Utah Supreme Court has held that a developer owes an association limited common law fiduciary duties, including duties to use reasonable care in managing and maintaining common property, to establish a sound fiscal basis for the association by collecting assessments and maintaining reserves to maintain and repair common property, and to disclose all material facts affecting the condition of association-maintained property.[22] The court remanded the case to the trial court to determine whether the developer breached its duties to the association by failing to adequately inform the owners of the extent of the maintenance obligations the association was undertaking.

The South Carolina Court of Appeals remanded a case to the trial court in light of evidence that the developer seized an opportunity to "unload" common areas on the association without funding reserves or levying adequate assessments to cover maintenance expenses.[23] The court found that it was unfair for the developer to convey to the association substandard or deteriorated common areas that required immediate maintenance and repair without a plan to cover these expenditures.[24]

Reserves and Assessments

The *Restatement* provides that, in addition to managing and maintaining the property, the developer and its appointed board members owe "a duty to establish a sound fiscal basis for the association [by], among other things, [] imposing and collecting assessments on a realistic basis to provide the association with funds."[25] As discussed above, both the Utah Supreme Court and the South Carolina Court of Appeals have followed the *Restatement* and held that developers have a duty to establish a reasonably adequate reserve fund.[26] The New Jersey Superior Court, Appellate Division, has similarly held that a developer may be held liable for failing to adequately fund and maintain replacement reserves under New Jersey's statutory scheme.[27]

These decisions suggest that, to determine adequate funding, a developer must identify on a case-by-case basis a community's future repair and replacement needs. When developer control ends, the owners should closely examine the condition of the association-maintained property, including by reviewing the association's records and auditing its books and reserves.[28] It is important that developers have a plan to analyze, create, and maintain adequate reserve funds for the community well in advance of turnover.

"When developer control ends the owners should closely examine the condition of the association-maintained property, including by reviewing the association's records and auditing its books and reserves. It is important that developers have a plan to analyze, create, and maintain adequate reserve funds for the community well in advance of turnover."

A 1999 Illinois case illustrates the importance of developer reserve planning.[29] There, an association sued a developer and its two appointed board members, alleging that the association was insufficiently funded at turnover.[30] The association had less than $27,000 in capital reserves and faced necessary roofing system replacement costs exceeding $400,000 and parking lot repairs of $100,000. Given these circumstances, the Illinois Court of Appeals found that the association alleged a plausible claim that the association's former board members breached their fiduciary duties by failing to reasonably examine whether adequate funds had been set aside to cover repair costs.[31]

In addition to ensuring that reserves are adequately funded, developers must generally also pay their share of the community's expenses, as the owner of unsold units, to fund current operations and reserves.[32] This reserve funding obligation is illustrated in another Illinois case, where an owner-controlled association sued a developer that left only $7,000 in the association's account, rendering various contingencies, repairs, and replacement projects underfunded.[33] The association contended that the developer and its principal breached their fiduciary duties by failing to fund adequate reserves and pay a proportionate share of expenses during the declarant control period. The Illinois Court of Appeals held that the developer and the condominium board it controlled owed fiduciary duties to act in the unit owners' best interests, which required paying a reasonable and proportionate share of assessments and contributing to reserve funds from the time the declaration was recorded. The court therefore affirmed the trial court's judgment against the developer and its principal in the amount of the underfunded repair liability.

In some cases, developer-appointed board members also have duties to take remedial action against a developer that fails to fund a proportionate share of the reserves. For instance, it may be necessary for a developer-controlled board to place a lien on the developer's units to secure the developer's liability for the cost of repairs, if the declaration so allows.[34] In a 2012 case

noted above involving a developer-appointed board's failure to take such action, a Douglas County jury returned an $18.2 million verdict against two developer-appointed directors, personally, for fraud and breach of fiduciary duty for, among other things, failing to lien the many units the developer still owned to secure payment of its alleged construction defect liability (as allegedly permitted by the declaration) when they had the opportunity to do so while serving as developer-appointed directors.[35]

Covenant Enforcement

An association and its board members owe certain duties to protect owners from "the arbitrary enforcement of covenants that could have an equally or possibly more adverse impact upon the value of a residence."[36] For the association itself, this is a contractual duty, governed by the community's governing documents' terms regarding covenant enforcement: "associations must exercise their authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of covenant restrictions, and in good faith."[37]

The association's board members owe an independent duty of care.[38] This independent duty recognizes that, unlike contracts that require specific acts at specific times by contracting parties, covenant enforcement may require exercising discretion in the timing and the manner of enforcement.[39] Board members must therefore exercise this discretion in a reasonable manner,[40] which sometimes may require the board to conduct an investigation before initiating enforcement proceedings.

For example, in one case the Colorado Court of Appeals suggested that before initiating enforcement proceedings a board should have investigated homeowners' claims that they were exercising First Amendment rights in their picketing and signage activities and that they received law enforcement approval for these activities.[41] However, the Court also held that the board members should have been permitted to present a defense under the business judgment rule, and it therefore ordered a retrial of the claims against the board members.[42]

> "In addition to ensuring that reserves are adequately funded, developers must generally also pay their share of the community's expenses, as the owner of unsold units, to fund current operations and reserves."

Marketing and Sales Activities

During the declarant control period, the developer is typically engaged in marketing and sales activities. In addition to making, authorizing, or approving the information to disclose or not disclose, the developer and its appointed board members may have other responsibilities related to marketing and sales.[43] For example, existing owners and prospective purchasers may ask about construction quality, the adequacy of reserves and how they were determined, current and anticipated future assessments and fees, past and pending maintenance and repairs, past and pending litigation, building component useful life estimates, and other matters. Board members (whether declarant-appointed or owner-elected) involved in disclosing or disseminating this information are required to take reasonable steps to ensure the information they provide is accurate, complete, and not misleading.

Several courts have held developer-appointed board members liable for failing to disclose information or presenting misleading information regarding the association's financial health. A Washington D.C. appellate court, for example, affirmed a substantial remedial judgment for an association and its owners against a developer and its appointed board members based on the defendants' failure to adequately disclose the association's indebtedness, changes to the terms of that indebtedness, and anticipated significant increases in future maintenance fees.[44]

The Minnesota Court of Appeals likewise held that these fiduciary duties apply even when a board member is acting as the developer's sales representative.[45] The court reasoned that such board members cannot take off their "hat" as an association board member and dispense with their fiduciary obligations when arranging unit sales because "[r]elaxing those obligations would be a limitation on the statute, inviting and excusing pernicious conduct."[46] Therefore, if there is a conflict between a board member's and the association's interests, it is the board member's responsibility to candidly disclose the conflict and, "whether by resignation, recusal, consent, or some other strategy, to address and resolve the conflict with the person or entity to which the obligation is owed . . . ."[47]

In concluding that the developer and its representatives breached their board member duties to the association, the Minnesota court considered the developer's overall role and the unique factual circumstances, including that the declaration required that 75% of the units be owner-occupied. After running into financial difficulties, however, the developer sold its last 17 units to three commercial buyers, violating the declaration's owner-occupancy covenant. These buyers posed an obvious financial risk, as their purchases were 100% mortgage financed. Subsequently, none "made a single mortgage, property-tax, or condominium-association payment" and all the units were foreclosed, significantly depressing other unit owners' property values.[48] In addition to the foreclosures, other problems arose, including "squatters occupying vacant units, vandalism, stolen property, and frequent 'loud, boisterous incidents' in the building."[49]

Given these facts and its determination that developer-appointed board members' duties apply to all acts that affect the association, including selling units for the developer, the court affirmed liability judgments for the plaintiff-homeowners.[50] The court held that the proper measure of damages was the decline in the affected homeowners' property values from the time the developer-appointed board members breached their obligations, and it remanded the matter for the trial court to calculate damages in a manner consistent with this ruling.

Conclusion

Developers and developer-appointed board members must remain alert to the many potential conflicts of interest between them and the non-developer unit/home owners. It may be easy for such board members to overlook or not act to resolve these conflicts during the declarant control period, but such inattention can lead to problems and personal liability arising from the appointed board members' fiduciary and other legal duties.

Part 3 of this article will explore grounds upon which a developer may be directly liable for its appointed board members' wrongful conduct, including conventional vicarious and imputed liability theories, as well as statutory "acting in concert" liability and civil conspiracy theories. Part 3 will also discuss ways to manage recurring conflicts between a developer and its appointed board members and the association and its owners, thereby limiting liability exposures. Finally, it will review potential means by which developer-appointed and owner-elected board members might insure and obtain indemnity against some of these risks. CL



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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, Colo. Practice Series* § 74:39 (Thomson West 7th ed. June 2020 update).

2. CCIOA became effective July 1, 1992, and it is codified at CRS §§ 38-33.3-101 et seq. CCIOA's provisions concerning board member duties are found in CRS § 38-33.3-303(2). In addition, Colorado's Revised Nonprofit Corporation 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. *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 246 (Utah 2009). *Cf.* UCIOA § 3-103, cmt. 8 (transition from developer to unit owner control "frequently leads to disagreements . . . about . . . construction quality, management of the association and its funds, allegations of unfulfilled representations, or other matters."). For a comprehensive suggested protocol for developers and board members to consider during the transition to unit owner control, *see* Hess, ed., *supra* note 1 at § 74:21.

6. *See generally* UCIOA (amended 2014). CCIOA is based on the 1982 version of UCIOA, and Colorado courts look to UCIOA and its comments for guidance. *Hiwan Homeowners Ass'n v. Knotts*, 215 P.3d 1271, 1273 (Colo.App. 2009).

7. "Colorado courts increasingly cite the Restatement." Hess, ed., *supra* note 1 at § 73:5.

8. *Restatement (Third) of Property (Servitudes)* § 6.20 (Am. Law Inst. 2000) (*Restatement*).

9. Levin, "Condo Developers and Fiduciary Duties: An Unlikely Pairing?," 24 *Loy. Consumer L. Rev.* 197, 213–15 (2011). *Cf. Concerned Dunes W. Residents, Inc. v. Georgia-Pacific Corp.*, 562 S.E.2d 633, 638 (S.C. 2002) (holding developers are responsible for the condition of common areas when deeded to the association; if these areas are not in good repair when conveyed, the developer is liable for the repair costs).

10. Colorado has not considered if and when an owner-elected board may properly delay, qualify, or refuse turnover and assume control of the association, or any financial responsibilities, if it believes the developer or its appointed board members have failed to disclose or properly address construction defects. There are good reasons for the unit owners *not* to delay turnover, primarily to ensure their taking control of the association as soon as possible. Individual unit owners may be entitled to assert their own direct damages claims for misrepresentation or concealment against the developer and its appointed board members under these circumstances.

11. CCIOA requires a developer to follow a statutory process to transition board control to

the owners, including providing the association copies of certain construction plans, specifications, and warranties; an audit; and more. *See* CRS § 38-33.3-303(5) to (9)(e)–(i). Developers sometimes begin the transition before CCIOA's deadlines, allowing the owners to elect some association board members during the declarant control period, but usually not enough to permit them to out-vote the developer-appointed members.

Arguably, an owner-elected board has discretion to delay, qualify, or refuse turnover if (1) the developer violated any of its statutory turnover obligations (*see, e.g.*, CRS §§ 38-33.3-303(5)(a) (describing the conditions when turnover of developer control occurs; -303(9) (describing developers' obligations upon turnover); -311 (describing developers' liabilities to an association for certain acts and omissions pre-dating turnover and for improper expenditure of association funds)); or (2) the developer or a developer-appointed board breached fiduciary or other duties to the association before turnover and such breach renders it unfair or inequitable to require the owner-elected board to accept certain financial or other responsibilities, even if all the developer's statutory turnover obligations have been met.

For a comprehensive description of some options available to developers and owner-elected boards to deal with construction defects upon or before turnover, including commissioning engineering reports, entering into non-waiver and workout agreements, separating individual unit owner and community-wide association claims, and mediating or arbitrating unresolved disputes, *see* Hess, ed., *supra* note 1 at § 74:21. Frank and regular communication among the board, the unit owners, and the developer is key to a successful turnover.

12. *Gold Peak Homeowners Ass'n v. Gold Peak at Palomino Park, LLC*, No. 2010CV3106 (Douglas Cty. Dist. Ct. 2012).

13. CRS § 38-33.3-303(1)(b).

14. *But see Olympian W. Condo. Ass'n v. Kramer*, 427 So. 2d 1039 (Dist.Ct.App.Fla. 1983) (board members appointed by a developer before the expiration of the declarant control period are not personally liable to the association for the existence of, or the failure to correct, construction defects allegedly created by the developer).

15. *Bd. of Managers of Fairways at N. Hills Condo. v. Fairway at N. Hills*, 603 N.Y.S.2d 867 (N.Y.App.Div. 1993).

16. *Hoover v. Newpro Dev. Inc.*, No. 917417, 1993 Mass. Super. LEXIS 67, 1993 WL 818641 (Mass. Super.Ct. Oct. 1, 1993). In a different case, a Massachusetts court held it "will not permit a developer to prevail on statute of limitations grounds against a condominium trust when the trustees [i.e., the board members] the developer appointed and continued to employ failed timely to sue the developer." *Harris v. McIntyre*, No. 94-3597-H, 2000 Mass. Super. LEXIS 181 at *47 (Mass.Super.Ct. June 27, 2000).

17. *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 764 S.E.2d 203, 218 (N.C.Ct.App. 2014).

18. *Millennium Square Residential Ass'n v. 2200 M Street LLC*, 952 F.Supp.2d 234 (D.D.C. 2013).

19. *Thunderbolt Harbour Phase II Condo. Ass'n, Inc. v. Ryan*, 757 S.E.2d 189 (Ga.App. 2014). *See also Clarence L. Martin, P.C. v. Chatham County Tax Commr.*, 574 S.E.2d 407, 409 (Ga.App. 2002) (in construction defect suit, jury could find that sole board member, through date of developer's turnover, breached his fiduciary duties to the association by failing to "protect corporate property").

20. *Restatement* § 6.20, comment b. Developers are not required to appoint their representatives as board members; they could appoint interested homeowners while retaining the right to appoint or remove these persons. A developer could even relinquish the right to appoint or remove board members yet retain veto power over certain actions pursuant to CRS § 38-33.3-303(5)(b). It is an open question what liabilities might accrue to a developer if owner-elected board member directors comprise a board majority while the developer retains the right to appoint and remove board members.

21. *Id.*

22. *Davencourt at Pilgrims Landing Homeowners Ass'n*, 221 P.3d at 247.

23. *Goddard v. Fairways Dev. Gen. P'ship*, 426 S.E.2d 828, 832 (S.C.App. 1993).

24. *Id.* at 832–33.

25. *Restatement* § 6.20, comment c.

26. *See Davencourt at Pilgrims Landing Homeowners Ass'n*, 221 P.3d at 246–47; *Goddard*, 426 S.E.2d at 832.

27. *Ocean Club Condo. Ass'n v. Gardner*, 723 A.2d 623, 625–26 (N.J.Super.Ct.App.Div. 1998).

28. Before developer control ends, the association and its board are subject to many CCIOA transparency requirements relating to their records, finances, and other matters. *See generally* CRS §§ 38-33.3-209.5(1)(b)(V) (record inspection procedures); -308 (meetings, meeting minutes, budgets, and rule adoption); and -317 (records to be maintained and made available for inspection and copying). After developer control ends, the developer is subject to disclosure requirements, including obtaining and providing an audit of the association's books at the developer's expense. CRS § 38-33.3-303(9).

29. *Bd. of Managers of Weathersfield Condo. Ass'n v. Schaumburg Ltd. P'ship*, 717 N.E.2d 429 (Ill.App.Ct. 1999).

30. *Id.* at 432.

31. *Id.* at 436.

32. *See* CRS § 38-33.3-315.

33. *Maercker Point Villas Condo. Ass'n v. Szymski*, 655 N.E.2d 1192 (Ill.App.Ct. 1995).

34. *See, e.g.*, *Summit View Subdivision Homeowners Ass'n v. Summit View Dev., LLC*, Nos. 11CA0753 and 11CA0754 (Colo.App. 2012) (not selected for official publication) (affirming judgment against developer-appointed board members for breach of fiduciary duties for failing to collect assessments and file lien against lots owned by co-defendant, a related entity). Practitioners should note that under CCIOA, an association's lien rights do not extend to a developer's failure to adequately fund association operations. *See* CRS § 38-33.3-316(1) ("The association . . . *has a statutory lien* on a unit *for any assessment levied* against that unit or fines imposed against its unit owner." (Emphasis added)). CRS § 38-33.3-316(2)(b)(I)'s list of priority liens does not include assessments that a developer should have levied against itself, but did not, when it controlled the association. *Cf. First Atl. Mortgage v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo.App. 2006) (special priority lien held by an HOA under CRS § 38-33.3-316(2)(b)(I) may include unpaid common expense assessments, late charges, attorney fees, fines, and interest).

35. *See Gold Peak Homeowners Ass'n*, No. 2010CV3106 (trial verdicts). *Cf. Moscov v. Terrace Condos. Homeowners Ass'n*, No. 18CA0518 (Colo.App. 2019) (not selected for official publication) (finding not spurious HOA lien against owner's unit under declaration provision substantially similar to that at issue in *Gold Peak*).

36. *Colo. Homes, Ltd. v. Loerch-Wilson*, 43 P.3d 718, 722 (Colo.App. 2001).

37. *Cohen v. Kite Hill Cmty. Ass'n*, 142 Cal. App. 3d 642, 650 (Cal.Ct.App. 1983); *accord Loerch-Wilson*, 43 P.3d at 721–22.

38. *Loerch-Wilson*, 43 P.3d at 723–24.

39. *Id.* at 723.

40. *Id.* at 723–24; *Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, Inc.*, 155 P.3d 621, 624–25 (Colo.App. 2007) (HOA board has a fiduciary duty to enforce covenants in a reasonable manner). *See also generally* Hess, ed., *supra* note 1 at § 74:51.

41. *Loerch-Wilson*, 43 P.3d at 723–24.

42. *Id.* at 724.

43. *See, e.g.*, *Wis. Ave. Assocs., Inc. v. 2720 Wis. Ave. Coop. Ass'n*, 441 A.2d 956, 963 (D.C. 1982) (discussing various failures to disclose outside the sales process).

44. *Id.*

45. *Larson v. Lakeview Lofts, LLC,* 804 N.W.2d 350, 356 (Minn.Ct.App. 2011), *decision vacated and appeal dismissed upon parties' stipulation*, No. A10-2031, 2011 Minn. LEXIS 726, 2011 WL 7983339 (Minn. 2011).

46.*Id.*

47. *Id.*

48. *Id.* at 353.

49. *Id.*

50. *See id.* at 360.