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Homeowner Documents for Developers and Project Owners: Financial, Governance, Control, and Liability Provisions

Limitation of Liability, HOA Dues, Management Fees, Restrictions on Property Owners, Management and Control, Amendments

TUESDAY, OCTOBER 22, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Scott Carpenter, Shareholder, Co-Managing Partner, **Carpenter Hazlewood Delgado & Bolen**, Phoenix

Ronald Garfield, Managing Shareholder, **Garfield & Hecht**, Aspen, Colo.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

An Act

HOUSE BILL 19-1279

BY REPRESENTATIVE(S) Exum and Landgraf, Arndt, Bird, Buckner, Buentello, Catlin, Cutter, Duran, Esgar, Froelich, Galindo, Gonzales-Gutierrez, Gray, Hansen, Herod, Jackson, Kennedy, Kipp, Kraft-Tharp, Liston, McCluskie, Melton, Michaelson Jenet, Roberts, Singer, Sirota, Snyder, Tipper, Titone, Valdez A., Valdez D., Weissman, Becker, Benavidez, Caraveo, Carver, Coleman, Hooton, Lontine, McLachlan, Pelton, Sandridge, Sullivan, Will, Wilson;
also SENATOR(S) Lee and Hisey, Bridges, Crowder, Fenberg, Fields, Gardner, Ginal, Gonzales, Moreno, Pettersen, Rankin, Story, Tate, Todd, Winter.

CONCERNING THE USE OF PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. (1) The general assembly hereby finds and declares that:

(a) The historic use of perfluoroalkyl and polyfluoroalkyl substances, known as PFAS chemicals, in Class B firefighting foams has

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

contaminated the drinking water of nearly 100,000 Coloradans, including five water systems down-gradient from Peterson Air Force Base, and volunteer firefighting station wells at the Sugarloaf Fire District in Boulder county. The full extent of contamination in Colorado has not yet been determined.

(b) PFAS chemicals do not break down in the environment and are toxic to people and wildlife at very low levels. Ingesting even small amounts can cause cancer and other serious health problems. Exposure to PFAS chemicals is linked to kidney and testicular cancer, thyroid problems, pregnancy complications, high cholesterol, and immune system disorders. Firefighters and first responders are exposed to these chemicals at work and nearly every American has measurable amounts in their bodies.

(c) Removing PFAS chemicals from drinking and groundwater supplies is expensive and treatment must continue for decades. The Widefield Aquifer in Fountain, Colorado, is permanently contaminated with PFAS chemicals.

(d) PFAS chemicals are not necessary to put out high temperature fires. Major airports like London Heathrow have successfully used fluorine-free Class B firefighting foams for years, including to combat active fires. Washington state will ban the sale of Class B firefighting foams with intentionally added PFAS chemicals for residential fires in 2020.

(e) In addition to handling PFAS chemicals in emergencies and in training, PFAS chemicals are used on firefighter personal protective equipment. Both turnout gear and station ware have tested positive for PFAS chemicals. Scientists and health experts have determined the hazard this poses for first responders.

(2) Therefore, it is the intent of the general assembly to limit the use of PFAS chemicals by prohibiting the sale of Class B firefighting foams with intentionally added PFAS chemicals, in certain circumstances, by August 2, 2021; prohibiting training with these foams; and by requiring manufacturers to disclose whether the personal protective equipment they sell contains PFAS chemicals.

SECTION 2. In Colorado Revised Statutes, add 24-33.5-1234 as follows:

24-33.5-1234. Training restrictions with certain firefighting foams - penalty - definitions. (1) BEGINNING AUGUST 2, 2019, A PERSON OR FIRE DEPARTMENT MAY NOT DISCHARGE OR OTHERWISE USE FOR TRAINING PURPOSES OR FOR TESTING FIREFIGHTING FOAM FIRE SYSTEMS CLASS B FIREFIGHTING FOAM THAT CONTAINS INTENTIONALLY ADDED PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES. AS USED IN THIS SUBSECTION (1), "FIREFIGHTING FOAM FIRE SYSTEMS" MEANS A SYSTEM DESIGNED TO PROVIDE PROTECTION FROM FIRE, OR FOR THE SUPPRESSION OF FIRE, THROUGH THE USE OF FIREFIGHTING FOAM.

(2) A PERSON OR FIRE DEPARTMENT WHO ADMINISTERS A TRAINING PROGRAM WHICH VIOLATES SUBSECTION (1) OF THIS SECTION IS SUBJECT TO A CIVIL PENALTY NOT TO EXCEED FIVE THOUSAND DOLLARS FOR EACH VIOLATION IN THE CASE OF A FIRST OFFENSE. A PERSON OR FIRE DEPARTMENT WHO ADMINISTERS A TRAINING PROGRAM WHICH VIOLATES SUBSECTION (1) OF THIS SECTION REPEATEDLY IS SUBJECT TO A CIVIL PENALTY NOT TO EXCEED TEN THOUSAND DOLLARS FOR EACH REPEAT OFFENSE. PENALTIES COLLECTED UNDER THIS SECTION MUST BE DEPOSITED IN THE LOCAL FIREFIGHTER SAFETY AND DISEASE PREVENTION FUND CREATED IN SECTION 24-33.5-1231.

(3) FOR PURPOSES OF THIS SECTION, "CLASS B FIREFIGHTING FOAM", "FIRE DEPARTMENT", AND "PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES" HAVE THE SAME MEANING AS THEY ARE DEFINED IN SECTION 25-5-1302.

SECTION 3. In Colorado Revised Statutes, add part 13 to article 5 of title 25 as follows:

PART 13
FIREFIGHTING FOAMS AND
PERSONAL PROTECTIVE EQUIPMENT

25-5-1301. Short title. THE SHORT TITLE OF THIS PART 13 IS THE "FIREFIGHTING FOAMS AND PERSONAL PROTECTIVE EQUIPMENT CONTROL ACT".

25-5-1302. Definitions. AS USED IN THIS PART 13, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "CHEMICAL PLANT" MEANS A LARGE INTEGRATED PLANT OR THAT PORTION OF SUCH A PLANT, OTHER THAN EITHER A PLANT IN WHICH FLAMMABLE LIQUIDS ARE PRODUCED ON A COMMERCIAL SCALE FROM CRUDE PETROLEUM, NATURAL GASOLINE, OR OTHER HYDROCARBON SOURCES OR A PLANT OR THAT PORTION OF A PLANT WHERE FLAMMABLE LIQUIDS PRODUCED BY FERMENTATION ARE CONCENTRATED AND WHERE THE CONCENTRATED PRODUCTS MAY ALSO BE MIXED, STORED, OR PACKAGED, WHERE FLAMMABLE LIQUIDS ARE PRODUCED BY CHEMICAL REACTIONS OR USED IN CHEMICAL REACTIONS.

(2) "CLASS B FIREFIGHTING FOAM" MEANS FOAM DESIGNED FOR FLAMMABLE LIQUID FIRES.

(3) "DEPARTMENT" MEANS THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT.

(4) "FIRE DEPARTMENT" MEANS THE DULY AUTHORIZED FIRE PROTECTION ORGANIZATION OF A TOWN, CITY, COUNTY, OR CITY AND COUNTY, A FIRE PROTECTION DISTRICT, A METROPOLITAN DISTRICT OR COUNTY IMPROVEMENT DISTRICT THAT PROVIDES FIRE PROTECTION, OR A VOLUNTEER FIRE DEPARTMENT ORGANIZED UNDER SECTION 24-33.5-1208.5.

(5) "FIREFIGHTING PERSONAL PROTECTIVE EQUIPMENT" MEANS ANY CLOTHING, INCLUDING JACKETS, PANTS, SHOES, GLOVES, HELMETS, AND RESPIRATORY EQUIPMENT, DESIGNED, INTENDED, OR MARKETED TO BE WORN BY FIREFIGHTING PERSONNEL IN THE PERFORMANCE OF THEIR DUTIES.

(6) "MANUFACTURER" MEANS A PERSON OR ENTITY THAT MANUFACTURES FIREFIGHTING AGENTS OR FIREFIGHTING EQUIPMENT AND ANY AGENTS OF THAT PERSON OR ENTITY, INCLUDING AN IMPORTER, A DISTRIBUTOR, AN AUTHORIZED SERVICER, A FACTORY BRANCH, AND A DISTRIBUTOR BRANCH.

(7) "PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES" OR "PFAS CHEMICALS" MEANS A CLASS OF FLUORINATED ORGANIC CHEMICALS CONTAINING AT LEAST ONE FULLY FLUORINATED CARBON ATOM.

25-5-1303. Restriction on sale of certain firefighting foams - exemptions. (1) BEGINNING AUGUST 2, 2021, A MANUFACTURER OF CLASS B FIREFIGHTING FOAM MAY NOT KNOWINGLY SELL, OFFER FOR SALE,

DISTRIBUTE FOR SALE, OR DISTRIBUTE FOR USE IN THE STATE CLASS B FIREFIGHTING FOAM TO WHICH PFAS CHEMICALS HAVE BEEN ADDED.

(2) THE RESTRICTIONS IN SUBSECTION (1) OF THIS SECTION DO NOT APPLY TO THE MANUFACTURE, SALE, OR DISTRIBUTION OF CLASS B FIREFIGHTING FOAM:

(a) WHERE THE INCLUSION OF PFAS CHEMICALS IS REQUIRED BY OR AUTHORIZED BY FEDERAL LAW INCLUDING BUT NOT LIMITED TO 14 C.F.R. PART 139, OR IMPLEMENTED IN ACCORDANCE WITH FEDERAL AVIATION ADMINISTRATION GUIDANCE, OR OTHERWISE REQUIRED FOR A MILITARY PURPOSE;

(b) FOR USE AT A GASOLINE, SPECIAL FUEL, OR JET FUEL STORAGE AND DISTRIBUTION FACILITY THAT IS SUPPLIED BY A PIPELINE, VESSEL, OR REFINERY; A TANK FARM FROM WHICH GASOLINE, SPECIAL FUEL, OR JET FUEL MAY BE REMOVED FOR DISTRIBUTION; OR A REFINERY;

(c) FOR USE AT A CHEMICAL PLANT; AND

(d) FOR USE AT THE EISENHOWER-JOHNSON TUNNELS, IF DEEMED NECESSARY BY THE DEPARTMENT OF TRANSPORTATION. IF THE DEPARTMENT OF TRANSPORTATION DEEMS THE USE OF SUCH CLASS B FIREFIGHTING FOAM NECESSARY, THE DEPARTMENT OF TRANSPORTATION MUST ALSO MAKE A PLAN TO CONTAIN AND SAFELY DISPOSE OF SUCH CLASS B FIREFIGHTING FOAM AND ANY WATER USED IN THE CLEANUP OF SUCH CLASS B FIREFIGHTING FOAM.

25-5-1304. Notification requirement. A MANUFACTURER OF CLASS B FIREFIGHTING FOAM THAT CONTAINS INTENTIONALLY ADDED PFAS CHEMICALS MUST NOTIFY, IN WRITING, PERSONS THAT SELL THE MANUFACTURER'S PRODUCTS IN THE STATE ABOUT THE PROVISIONS OF THIS PART 13 NO LESS THAN ONE YEAR PRIOR TO THE EFFECTIVE DATE OF SECTION 25-5-1303.

25-5-1305. Notice of chemicals in personal protective equipment. (1) BEGINNING AUGUST 2, 2019, A MANUFACTURER OR OTHER PERSON THAT SELLS FIREFIGHTING PERSONAL PROTECTIVE EQUIPMENT MUST PROVIDE WRITTEN NOTICE TO THE PURCHASER AT THE TIME OF SALE IF THE FIREFIGHTING PERSONAL PROTECTIVE EQUIPMENT CONTAINS INTENTIONALLY

ADDED PFAS CHEMICALS. THE WRITTEN NOTICE MUST INCLUDE A STATEMENT THAT THE FIREFIGHTING PERSONAL PROTECTIVE EQUIPMENT BEING SOLD CONTAINS INTENTIONALLY ADDED PFAS CHEMICALS AND THE REASON PFAS CHEMICALS ARE ADDED TO THE EQUIPMENT.

(2) THE MANUFACTURER OR OTHER PERSON SELLING FIREFIGHTING PERSONAL PROTECTIVE EQUIPMENT AND THE PURCHASER OF THE EQUIPMENT MUST RETAIN THE NOTICE DESCRIBED IN SUBSECTION (1) OF THIS SECTION ON FILE FOR AT LEAST THREE YEARS FROM THE DATE OF SALE.

(3) UPON THE REQUEST OF THE DEPARTMENT, A PERSON, MANUFACTURER, OR PURCHASER MUST FURNISH THE NOTICE, OR WRITTEN COPIES, AND ASSOCIATED SALES DOCUMENTATION TO THE DEPARTMENT WITHIN SIXTY DAYS AFTER THE REQUEST.

25-5-1306. Certificate of compliance. THE DEPARTMENT MAY REQUEST A CERTIFICATE OF COMPLIANCE FROM A MANUFACTURER OF CLASS B FIREFIGHTING FOAM OR FIREFIGHTING PERSONAL PROTECTIVE EQUIPMENT. A CERTIFICATE OF COMPLIANCE MUST ATTEST THAT A MANUFACTURER'S PRODUCTS MEET THE REQUIREMENTS OF THIS PART 13.

25-5-1307. Civil penalty. A MANUFACTURER OR A PERSON WHO VIOLATES THE PROVISIONS OF THIS PART 13 IS SUBJECT TO A CIVIL PENALTY NOT TO EXCEED FIVE THOUSAND DOLLARS FOR EACH VIOLATION IN THE CASE OF A FIRST OFFENSE. A MANUFACTURER OR A PERSON WHO VIOLATES THIS PART 13 REPEATEDLY IS SUBJECT TO A CIVIL PENALTY NOT TO EXCEED TEN THOUSAND DOLLARS FOR EACH REPEAT OFFENSE. PENALTIES COLLECTED UNDER THIS PART 13 MUST BE DEPOSITED IN THE LOCAL FIREFIGHTER SAFETY AND DISEASE PREVENTION FUND CREATED IN SECTION 24-33.5-1231.

25-5-1308. Survey. (1) ONCE EVERY THREE YEARS, THE DEPARTMENT SHALL CONDUCT A SURVEY OF FIRE DEPARTMENTS TO DETERMINE, AS APPLICABLE:

(a) EACH FIRE DEPARTMENT'S NAME, FIRE DEPARTMENT IDENTIFICATION NUMBER, AND ADDRESS;

(b) THE AMOUNT, TYPE, AND DATE OF MANUFACTURE OF ANY CLASS B FIREFIGHTING FOAM THAT CONTAINS INTENTIONALLY ADDED PFAS CHEMICALS WHICH EACH FIRE DEPARTMENT POSSESSES;

(c) HOW, WHERE, AND WHEN THE FIRE DEPARTMENT HAS USED CLASS B FIREFIGHTING FOAM THAT CONTAINS INTENTIONALLY ADDED PFAS CHEMICALS FOR FIREFIGHTER TRAINING;

(d) WHETHER THE FIRE DEPARTMENT'S STATIONS ARE SERVED BY A WELL OR PUBLIC DRINKING WATER SOURCE;

(e) WHETHER THE FIRE DEPARTMENT HAS USED CLASS B FIREFIGHTING FOAM THAT CONTAINS INTENTIONALLY ADDED PFAS CHEMICALS IN THE LAST FIVE YEARS, WHETHER THAT USE WAS REPORTED TO THE DEPARTMENT, AND IF NOT WHEN AND WHERE THE CLASS B FIREFIGHTING FOAM THAT CONTAINS INTENTIONALLY ADDED PFAS CHEMICALS WAS USED; AND

(f) HOW MUCH, IF ANY, CLASS B FIREFIGHTING FOAM THAT CONTAINS INTENTIONALLY ADDED PFAS CHEMICALS THE FIRE DEPARTMENT HAS DISPOSED OF.

(2) ON OR BEFORE JANUARY 1, 2020, THE DEPARTMENT SHALL COMPILE THE RESULTS OF THE SURVEY CONDUCTED UNDER SUBSECTION (1) OF THIS SECTION AND PRESENT THE RESULTS TO THE HEALTH AND INSURANCE COMMITTEE OF THE HOUSE OF REPRESENTATIVES, OR ITS SUCCESSOR COMMITTEE, AND THE HEALTH AND HUMAN SERVICES COMMITTEE OF THE SENATE, OR ITS SUCCESSOR COMMITTEE.

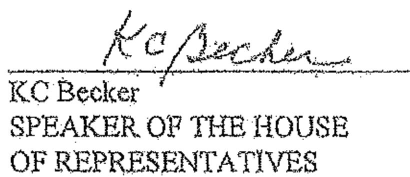
SECTION 4. Appropriation. (1) For the 2019-20 state fiscal year, $55,278 is appropriated to the department of public health and environment for use by the water quality control division. This appropriation is from the general fund. To implement this act, the division may use this appropriation as follows:

(a) $49,910 for personal services, which amount is based on an assumption that the division will require an additional 0.7 FTE; and

(b) $5,368 for operating expenses.

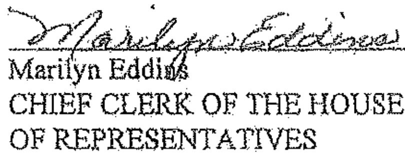
SECTION 5. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 2, 2019, if adjournment sine die is on May 3, 2019); except that, if a

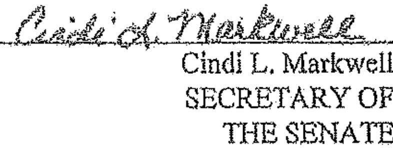
referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.



KC Becker
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Leroy M. Garcia
PRESIDENT OF
THE SENATE

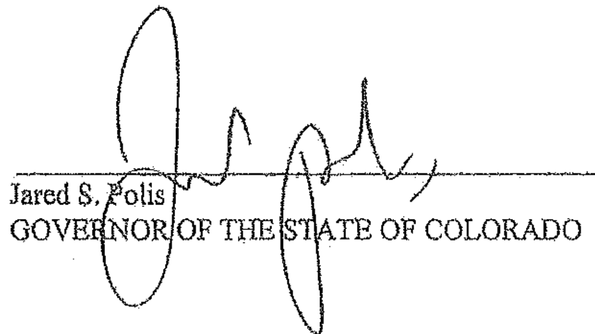




Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED June 3, 2019 at 2:35 p.m.
(Date and Time)



Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO

Ronald Garfield
Colorado Lawyer Submission
Draft 9/13/19

CONDOMINIUM OBSOLESCENCE, THE FINAL ACT OR NEW BEGINNING

Introduction.

This article addresses some options and practical considerations condominium owners should consider when physical structures are at or near the end of their useful life ("Obsolescence") or are in need of major capital improvements ("Major Upgrades"). Many condominium projects in Colorado were constructed in the 1960s and 1970s or earlier. Even if properly maintained, structures, systems, and other elements of buildings inevitably become degraded due to use and exposure to the elements.[1] Similarly, the architecture of a project could be dated and out of step with current design features rendering the project less attractive to prospective renters or buyers. For example, certain amenities considered important today, such as fitness centers, may not have been considered when the project was first conceived. Projects in mountain communities often face additional stress due to greater snow loads, extreme temperatures, erosion, grade changes, and unstable soils, any or all of which might accelerate the physical deterioration of a project or require special structural considerations.[2] In some projects, less rigorous building codes in place 40 or 50 years ago have contributed to a more rapid deterioration of the project.

Even though condominiums can rely on reserve studies to establish sinking funds for the repair or replacement of common elements,[3] sinking funds are typically not established for or adequate to cover the cost of complete demolition and replacement of physical structures.[4] Despite such issues, many condominium projects have appreciated dramatically in value. Sometimes the current value of the land alone greatly exceeds the original acquisition and construction cost of the project. In addition, redevelopment might create an opportunity to add additional units that could provide a welcome source of funds to offset some of the redevelopment costs.[5] Furthermore, in some cases where there has been significant appreciation in the value of the land, it might make sense to sell the entire project rather than redevelop.

What Is Obsolescence?

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It should be noted that the Colorado Common Interest Ownership Act ("CCIOA") does not define when a project or physical structures become obsolete.[6] This author contends that the term "obsolete" may not be the most accurate term to describe a condominium project at the end of its useful life (whether due to the potential failure of structural elements, market conditions or for any other reasons). In reality, at least for condominiums created after July 1, 1992, a project is obsolete if at least sixty-seven percent (67%) of the votes allocated to units of any project decide it has become obsolete.[7] Declarations yet to be drafted could address de-conversion and redevelopment (both discussed below) and eschew terms such as obsolete and obsolescence. Indeed, defining obsolescence and the use of other defined terms may limit options available to owners when they might want to de-convert or redevelop. If a declaration is being drafted and the declaration contemplates de-conversion or redevelopment, this author recommends that de-conversion and redevelopment should be permitted without requiring consent by lienholders; otherwise their liens will need to be released in order to implement such a plan.

<u>What CCIOA Tells Us</u>

CRS § 38-33.3-218 addresses de-conversion and describes what can be done if owners want to sell the entire project, and how proceeds of the sale will be distributed by the homeowners association ("Association").[8] Even though CCIOA does not address how owners can go about demolishing the entire project and redeveloping a new project in its place, it can serve as a useful first step insofar as it contemplates a vote to terminate the condominium and a sale by the Association (to a third party or a re-development entity that consists of the pre-termination owners).

<u>Plan for Obsolescence</u>

Condominium declarations that do address Obsolescence typically require owners to formally approve a plan which includes a finding of Obsolescence along with details of what the owners intend for the future of the project ("Plan"). Navigating through the condominium documents and obtaining owner approvals may be the easiest part of implementing the Plan. Before any further steps are taken, it is wise for the Association to obtain a cost-benefit study comparing the expected costs and expected benefits of

(i) major upgrades, (ii) complete demolition and redevelopment, and (iii) outright sale of the entire project to a developer, sometimes referred to as "de-conversion". In the case of demolition, the Association should plan on owners being unable to occupy their units for at least two years. Major upgrades might be more cost-effective than complete demolition and redevelopment, especially in light of current costs of construction and building code requirements. Any cost-benefit study for a Plan that contemplates adding units to the project should also consider the time and expense involved in obtaining any land use entitlements that might be necessary. Preliminary architectural plans will often be necessary to obtain even a rough estimate of construction costs. A title company should be included in early planning to provide requirements to be satisfied in order for there to be insurable title for new units when re-development is complete.[9] Finally, such a study should also consider additional costs such as exactions that local governmental authorities may require (e.g., green construction, employee housing mitigation, improvements to public infrastructure, etc.) especially where additional density is part of the Plan. Informal discussions about redevelopment might initially sound promising, but a rigorous analysis may show redevelopment to be cost-prohibitive or have other major unforeseen obstacles.[10]

Multiple Buildings

Condominium projects can consist of a single free-standing building or multiple buildings, all operating as a single condominium regime.[11] Sometimes buildings are added in phases over time, which can cause earlier phases to come to Obsolescence sooner. In some projects, it may be the case that only a single building or fewer than all the buildings might want to adopt a Plan, which raises the question as to how only the owners of the affected building(s) can implement a Plan for fewer than all of the buildings in the project. In such case, the condominium declaration may provide some guidance. Some declarations allow individual buildings within the condominium regime to separate or "de-annex" in order to carry out a Plan and then "re-annex" after the work is complete. If the declaration does not offer a clear path to de-annex, the declaration may allow owners of one building to carry out major upgrades for their building. Even where de-annexation is allowed, the declaration might present other potential problems such as

rights of first refusal across the entire project. In the case of a Plan that contemplates demolition, existing mortgages on condominium units should not trigger the need to obtain lienholder consents as long as the lenders will be paid off. If the lenders will not be paid off, it may be necessary to move their liens to some other collateral.

Major Upgrades

In situations where a complete demolition and reconstruction of a development is not feasible or appropriate, condominium owners could consider a more limited approach by approving upgrades or replacements that are both structural and cosmetic in nature. Examples include new roofing, new elevators, upgrading the lobby, adding a parking structure, new exterior siding, windows or balconies, fitness or business centers, bike and ski storage lockers, the addition of or upgrades to a swimming pool, new exterior lighting or landscaping, or other improvements intended to make the project more attractive to owners, prospective renters and purchasers. Financing the cost of major upgrades is beyond the scope of this article but has been addressed in a prior article by this author[12]

Land Use Approvals

Over any period of years, the local land use regulations governing a condominium project typically become more and more onerous.[13] For example, the land on which the project is located may have been downzoned, or the building(s) rendered non-conforming.[14] The municipality may require exactions for new development that far exceed anything that was imposed when the project was initially constructed. Often, replacing the existing square footage is allowed without undue difficulty; however, the ability to add additional square footage or units might not be allowed under current land use regulations, or if allowed, may require supplemental exactions.[15] Also, de-annexation might be considered a subdivision under current land-use regulations, which could require compliance with additional land use regulations.

De-Converting

As mentioned earlier, an alternative to either demolition and redevelopment or Major Upgrades is an end-of-life scenario where owners agree to sell the entire project to a developer, take the money, and have nothing further to do with the property.[16] Without regard to CCIOA, owners could individually agree to sell all their units to the developer. However, as discussed above, CCIOA allows for the Association to serve as a vehicle for the sale, which might be beneficial because it avoids exposing individual unit owners to seller liability and it provides a mechanism to establish each owner's share of the proceeds based on relative market values.

The Developer

Owners of a condominium project that wish to completely redevelop the project with new units must decide who will act as the developer. If a sufficient number of owners want to remain in the project and buy back new units, a new development entity can be formed where owners agree to contribute their existing units to the new development entity in exchange for interests in the new development entity coupled with contracts to buy back new units when the redeveloped project is completed. The new development entity would be used to obtain entitlements, secure construction financing, and procure contracts with builders, architects, and other construction professionals. Use of a new development entity raises yet to be answered questions concerning several issues including whether or not the new development entity will be recognized as a separate legal entity or treated as the alter ego of the Association, and whether the new development entity should be treated as the developer, declarant, or both for the purpose of allowing certain claims and enforcing specific rights by purchasers of the new units. As long as corporate formalities are adhered to, the new development entity should be recognized as a separate legal entity and treated no differently than if it were an unrelated third party, that purchasers of new units (even those who have an equity interest in the new development entity and owned a pre-demolition unit) should have all rights that an unrelated buyer would have against an unrelated third party developer, and that the new development entity should be treated as the declarant under the new condominium documents.

Dissenting Owners

Some existing declarations allow owners to dissent from any plan for Obsolescence which triggers a required buy-out of their condominium unit at fair market value.[17] Such provisions may present additional challenges to implementing any Plan for Obsolescence because the cost to pay off dissenting owners would have to be paid up-front before demolition could begin, and the Association may lack sufficient funds for the buy-out. In such cases, assuming at least 67% of the owners are in favor of the Plan, a solution might be to first amend the declaration to remove any dissenting owners' rights.[18] Another possibility might be for the Association to use reserve study sinking funds to fund the buy-out; however, non-dissenting owners might object. Pre-CCIOA declarations that have higher voting requirements have been upheld by Colorado courts where common elements are affected.[19] However, the same case tells us it would be valid for the 67% to pass an amendment allowing the Association to buyout the dissenting owners.[20] Colorado case law also tells us that a higher than 67% voting requirement to amend the declaration will be upheld as long as the voting requirement (even unanimous) did not violate existing law at the time the declaration was recorded.[21]

Tax Issues

When a condominium is to be demolished, the individual condominium units would cease to exist and they should be removed from the records of the local county assessor.[22] In such a case, the entire post-demolition footprint of a demolished building should be revalued as a single vacant parcel with a valuation considerably less than the pre-demolition value of the individual units. Real property in Colorado is automatically revalued every two years, and this year (2019) is a valuation year. Valuations are based on comparable sales in the prior two years or, absent comparable sales, other relevant data. Where real property is overvalued, a timely written protest to the County Assessor should be made.[23] Once the initial protest is submitted, the Assessor must issue a determination. If the initial determination is not satisfactory, there is further recourse to the County Board of Equalization and, if necessary, yet another appeal to Colorado's Board of Assessment Appeals. In any sale to a developer for de-converting,

the parties might agree to re-adjust closing tax prorations when the County Assessor's re-evaluation takes place. Another issue would be whether any real estate transfer tax ("RETT") may be applicable by a local government authority that imposes such a tax.[24] Under CCIOA, when a termination occurs "title…vests in the Association as trustee for the holders of all interests in the units."[25] This presents the question of whether or not such a vesting or transfer would trigger a RETT payment, and, if the RETT is triggered, whether an exemption would be available. If the RETT is triggered and an exemption is not available, it is unclear how the parties would determine the amount of the consideration that would be subject to the RETT.

Pre-CCIOA Regimes

If the condominium project is a pre-CCIOA regime (i.e., created prior to July 1, 1992) and there is a complete demolition and replacement with a new building or buildings, it is not clear if the redeveloped project would retain its status as a pre-CCIOA regime.[26] When a condominium building is demolished, there are no longer any units, and, for that reason, there is no other real estate where the owners of a unit would be obligated to pay for real estate taxes, insurance premiums and other common expenses typical of a condominium form of ownership. When the new building is constructed and divided into units, a new declaration and map would be required.[27] For these reasons, this author believes the project probably would not retain its pre-CCIOA status. This author also believes that failure to retain pre-CCIOA status should not be a deterrent to implementing a Plan for demolition and redevelopment for several reasons. Notwithstanding some initial apprehensions about CCIOA's being overly burdensome when it was enacted over 25 years ago, CCIOA is well established, and there are few, if any, meaningful benefits to pre-CCIOA status. Plus, the initial apprehensions about CCIOA's being unduly onerous have for the most part proven to be unfounded.

Financing

Where a new condominium building is to be built, construction financing will most likely be necessary. The collateral for the construction loan would typically be the land and ultimately the finished

new condominium units. With Plans for Obsolescence, there will often be 30 or 40 years of appreciation on the value of the land, and the lender's as-built appraisal should consider the prices for which the new condominiums would sell,[28] which may constitute sufficient collateral to obtain the new loan. Because the existing units will be demolished, the existing units cannot serve as collateral and a lender may insist on a first and only lien on the land that was formerly the condominium building as well as all necessary access, utility and other easements or right-of-ways.

As early as possible, the Association should commence discussions with potential lenders to identify issues to be resolved to secure construction financing and so that any identified issues can be addressed in the redevelopment plans. For example, there may be existing financing on some or all of the units that will have to be paid off (or collateral substituted) with liens released before units can be demolished. In such cases, the construction lender might agree to finance the cost of paying off existing loans and roll the payoff amount into a new purchase money loan based on the presumably more valuable new units. The construction loan will also likely finance some or all of the soft costs and all hard costs associated with the demolition of the existing buildings and construction of the new buildings. Existing owners should be expected to pay upfront some of the seed money for the project. Owners and the Association would almost always prefer the loan to be a non-recourse loan based on the value of the collateral. To make the loan more attractive to a lender, and to increase the likelihood of a lender approving a non-recourse loan, the owners and Association should consider providing the lender with: (i) binding re-sale contracts, where existing owners have committed to buy back the new units and have paid earnest money deposits which could serve as additional collateral; (ii) limited guarantees from purchasers of new units; and/or (iii) evidence that the redeveloped project will include the construction of additional units that can be sold to third parties. Other creative financing structures may emerge as time goes by. More details about financing are outside the scope of this article but should certainly be a consideration in any plan for the redevelopment of an obsolete project.

<u>Due Diligence</u>

Redevelopment of older condominiums may require significant due diligence before construction plans can be finalized.[29] For example, in older projects, asbestos or lead dating back to the original construction may be present. If a project was constructed many years ago, it is possible that no testing was performed for environmental conditions such as mine tailings or groundwater contamination. In addition to environmental conditions, testing of soils for any new foundation system will also be required.

Construction Defects

In Colorado, negligence by construction professionals gives rise to an independent tort claim in favor of an initial buyer and even a subsequent owner as to latent defects.[30] The question arises as to what duty is owed by a development entity composed of owners of the pre-demolition units where the same owners buy back new units. This author believes that such a developer still owes an independent duty to the purchasers of new units. Further, this independent duty would be owed by: (i) the developer to the extent additional units are developed and sold off to buyers that were not original owners and (ii) all other construction professionals to purchasers of units whether or not they were original owners.[31] The developer entity should obtain insurance covering construction defect claims, and policy exclusions should be reviewed carefully to make sure there is coverage where the developer entity and purchaser of the new units are so closely related.[32]

Conclusion

It is inevitable that as the years go by real estate practitioners will deal with Obsolescence more and more frequently. The passage of time, unforeseen market conditions, changing tastes and requirements of 21st-century owners, renters and purchasers may cause owners and other stakeholders of older projects to take a hard look at major upgrades, redevelopment, or de-conversion. Any particular project seeking to redevelop (and, to a lesser extent, de-convert) will need legal counsel in various roles such as drafting and adoption of a Plan, due diligence, de-annexing fewer than all buildings from a multi-building project, obtaining entitlements from governmental authorities, organizing a new development entity, contracting for pre-sales, agreements with construction professionals, negotiation of financing

documents, preparation of new condominium documents when construction is sufficiently complete to prepare a condominium map, closing on the sale of the new units. Legal counsel will also need to consider what representations are to be made in pre-sale contracts or how statutory or implied new home warranties could be enforced where the buyer and seller are so interrelated.

Real estate practitioners should be mindful of potential conflicts of interest in dealing with Obsolescence. There may be a need to have different legal counsel for the various parties involved. For example, the interests of the Association may not be aligned with redevelopment of only one building in a multi-building project. If the owners of one building create a separate development entity for that building, the development entity will need legal counsel separate from the Association's legal counsel. Going forward more and more real estate practitioners may be called upon to address the issues touched upon in this article.

Author's Note: The author's practice is concentrated on properties located in the mountain region of Colorado. Condominium projects in urban settings may present different or additional considerations than those addressed in this article.

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[1] CRS §§ 38-33.3-307 & 38-33.3-313(9) (the association is responsible for upkeep and maintenance of the common elements).

[2] https://seacolorado.org/docs/2016-Colorado-Design-Snow-Loads.pdf (April 2016).

[3] CRS §§ 38-33.3-209.5(1)(b)(IX) ("Associations must have a "policy" that addresses when a Reserve Study is going to be done, whether the financial analysis included a physical analysis, and a disclosure of any funding plan designed to pay for anticipated reserve expenses"), quoting https://www.reservestudy.com/legislation/ (7/15/2019).

[4] https://community.condoassociation.com/article/reserve-studies--lessons-learned.html (a vital planning tool to assist associations in forecasting maintenance costs and to be updated regularly).

[5] https://www.coloradopolitics.com/news/premium/cover-story-building-answers-to-colorado-s-mountain-housing-crisis/article_40581dee-347d-11e9-ba3e-471229db926a.html ("The town recently pumped $4.2 million into the teardown of 24 aging units at the Solar Vail condos owned by the Sonnenalp Hotel, allowing the ongoing reconstruction to increase capacity to 65 units of workforce housing").

[6] CRS §§ 38-33.3-103, *et seq.* (definitions of CCIOA).

[7] CRS § 38-33.3-217(1)(a)(I) (amendment of association declaration may be accomplished by a vote or agreement of owners not to exceed sixty-seven percent so as not to be declared void as contrary to public policy).

[8] CRS § 38-33.3-218 (termination of common interest community).

[9] Meltzer, "Time to Rehab the Aging Condominium Concept: Fixing Problems Uncovered by the Great Recession." *Practical Real Estate Lawyer*, vol. 33, no. 5, September 2017, pp. 37-46. HeinOnline. ("Title Issues" at pg. 44).

[10] Fenster, "Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity", 92 Cal. L. Rev. 609, 615 (2004) (describing "exactions" as an "essential deal-making tool" for local land-use regulators to keep the expense off of taxpayers).

[11] CRS § 38-33.3-205(1)(e) (contents of declaration).

[12] Garfield, "When Homeowner Associations Borrow: What Attorneys and Lenders Should Know," 44 *The Colorado Lawyer* 33 (December 2015).

[13] CRS § 31-12-107 (pertaining to petitions for annexation) & an example of a municipal annexation process at https://www-static.bouldercolorado.gov/docs/PDS/forms/203.pdf (May

2019) & an example of a municipal land use application packet at https://www.cityofaspen.com/DocumentCenter/View/1835/Land-Use-Application-Packet-2017 (November 2017).

[14] CRS § 30-28-111 (county zoning planning).

[15] *See* Fenster, at 611 ("Exactions are the concessions local governments require of property owners as conditions for the issuance of the entitlements that enable the intensified use of real property.").

[16] CRS § 38-33.3-218(10)(a) (determination of respective interests of unit owners).

[17] *See generally* "Exhibit A" at Canyon Club.

[18] CRS § 38-33.3-217 (amendment of declaration).

[19] *DA Mtn. Rentals, Ltd. Liab. Co. v. Lodge at Lionshead Phase III Condo. Ass'n*, 409 P.3d 564, 573 (Colo. App. 2016).

[20] *Id.* at 574.

[21] *Giguere v. SJS Family Enters.*, 155 P.3d 462, 468 (Colo. App. 2006).

[22] CRS § 38-33-104 (tax assessment of condominium in county where unit is located) & CRS § 38-33.3-105 (2) (constitutes for all purposes a separate parcel of real estate and must be separately assessed and taxed).

[23] CRS § 39-5-122(2) (remedies to correct real property valuation).

[24] *See generally* https://www.cityofaspen.com/DocumentCenter/View/230/Title-23-Taxation-1-2-3-PDF (Real Estate Transfer Tax [RETT] for City of Aspen).

[25] CRS § 38-33.3-218(5) (following termination title vests in the association as trustee).

[26] CRS § 38-33.3-117 (applicability to preexisting common interest communities).

[27] CRS §§ 38-33.3-201 (creation of common interest communities), -202 (defining unit boundaries) & -205 (contents of the declaration).

[28] *Bly v. Story*, 241 P.3d 529, 537 (Colo. 2010) ("Generally, valuation evidence based on the cost of construction appraisal method is important in determining the market value of new or relatively new improvements." (quoting THE APPRAISAL OF REAL ESTATE at 382)).

[29] COLORADO BUSINESS ORGANIZATIONS § 43A (2014) (a comprehensive checklist could be useful such as one which covers commercial buildings in order to include unique and complex considerations) & COLORADO BUSINESS ORGANIZATIONS § 43.3 (2014).

[30] CJI-CIV. 4th 30:54 (2018) (The elements for a claim of negligence are: (1) the homeowner incurred damages; (2) the builder breached an applicable duty of care; and (3) the builder's breach of care was a cause of the homeowner's damages).

[31] CRS § 13-20-802.5(4) ("Construction professional"means an architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property).

[32] CRS § 13-20-808 (insurance policies issued to construction professionals); *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272 (10th Cir. 2011) (because damage to property caused by poor workmanship is generally neither expected nor intended, it may qualify under state law as an occurrence, and liability coverage should apply).