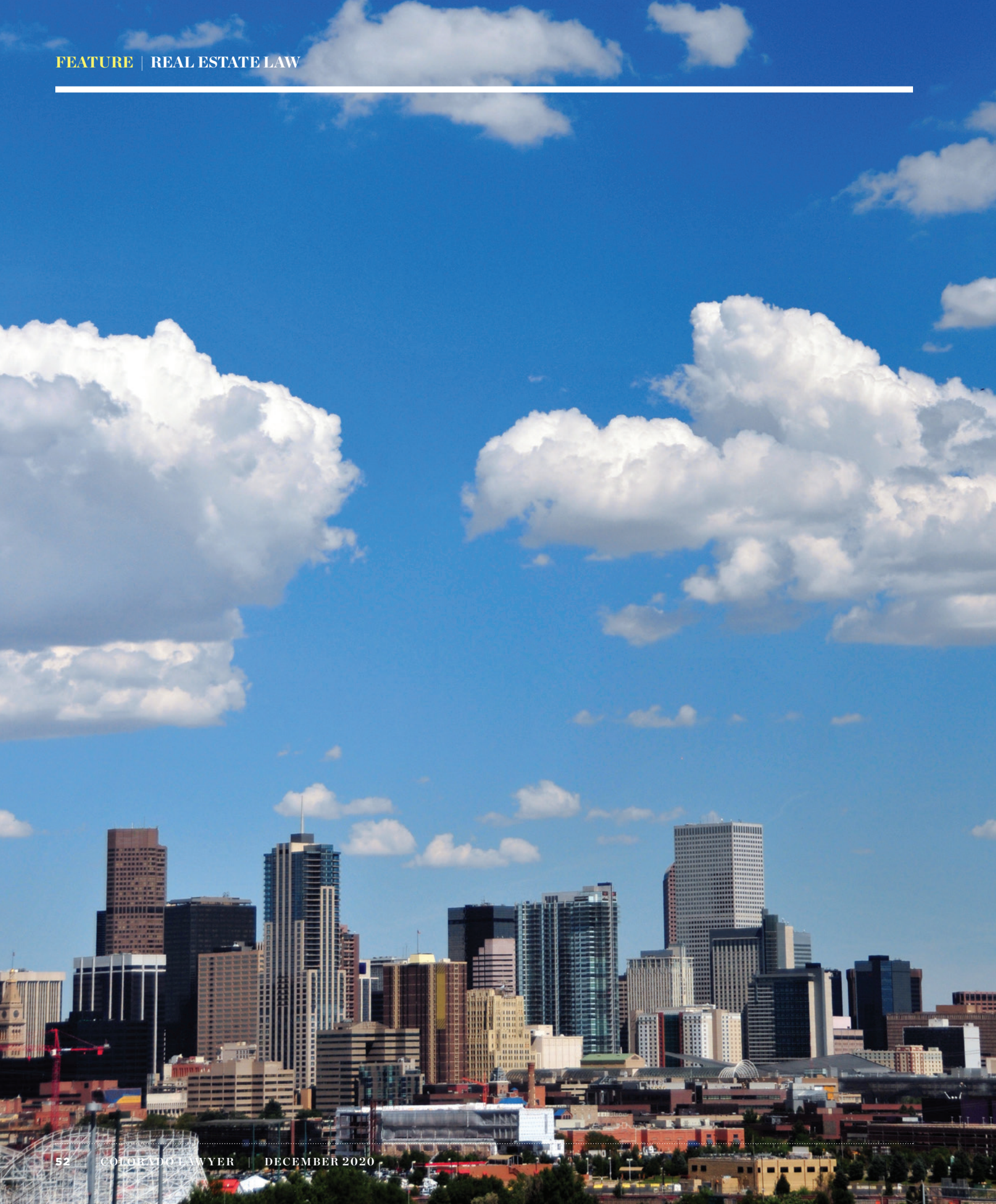

A Block of Blue Sky

Small Planned Communities in Colorado

BY BEN DOYLE AND SUZANNE LEFF

This article discusses common interest community development, with a focus on small planned communities.

Your real estate developer client wants to market vertically stacked units that are yet-to-be-developed airspace—a block of blue sky. Is this possible under Colorado law? It is, but only in limited circumstances. This article discusses the legal framework for common interest communities and factors to consider when analyzing which legal structure is the best option for a real estate project. It focuses on common interest communities formed as "small planned communities" (SPCs), with an emphasis on their utility as compared to condominiums.

Common Interest Community Basics

Development of any real estate project that includes residential units or may involve shared property requires analysis of how the Colorado Common Interest Ownership Act (CCIOA)[1] may apply. CCIOA defines a "common interest community" as "real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration."[2] With few exceptions,[3] all common interest communities formed on or after July 1, 1992 must comply with CCIOA.

Colorado statutes recognize three types of common interest communities: condominiums, cooperatives, and planned communities. These types of common interest communities may be marketed as single-family homes, townhomes, townhouses, patio homes, "zero lot line" homes, or some other name. Regardless of the label, condominiums, cooperatives, and planned communities are the only legal frameworks for common interest communities in Colorado.

While many for-sale single-family home communities with detached dwelling units are formed as planned communities and most vertically stacked, attached, for-sale units are

formed as condominiums, the physical layout of project improvements does not tell the full story about the legal structure of the common interest community. A development's status as a condominium, cooperative, or planned community depends on its distinct characteristics and the recorded declaration and plat or map.

Condominiums

In Colorado, condominiums are creatures of state statute, not common law. With limited exceptions, CCIOA governs the formation, operation, and termination of condominiums.[4] CCIOA defines a condominium as a

> common interest community in which portions of the real estate are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate ownership portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.[5]

Simply put, in a condominium community the unit owners own their units along with an undivided interest in the common elements. A CCIOA owners association (Association) for a condominium project does not hold title to the common elements.

A typical condominium includes one or more buildings divided into multiple units. Each unit owner owns an undivided fractional interest in and shares nonexclusive, joint possession with all other unit owners of certain improvements, such as the roof, exterior facades, underground parking, stairwells, elevators, hallways, HVAC and other mechanical systems, structural components, and recreational facilities such as a pool. Condominium projects may include vertically stacked units, side-by-side units, or even stand-alone structures. Regardless of the configuration or residential or commercial nature of the project, if the elements of the project meet the CCIOA definition of "condominium," CCIOA's provisions governing condominiums apply.

Cooperatives

A cooperative Association owns real property, and cooperative members are entitled to exclusive possession of a portion of that property by virtue of their membership.[6] Cooperatives are seldom used in Colorado, and this article does not focus on them.

> "In both Association SFD and Association Townhomes, purchasers acquire a fee simple interest in the property bounded by the lot lines and extending 'from the center of the earth to the heavens above,' subject to mandatory membership rights in and obligations to the Association and, in the case of Association Townhomes, a party wall agreement."

Planned Communities

CCIOA defines a planned community as "a common interest community that is not a condominium or cooperative."[7] Perhaps the most familiar example of a planned community is a large single-family detached home subdivision with an Association that owns and operates common elements such as a pool or clubhouse (hereinafter Association SFD). Ownership of common elements is key: this same community would be classified as a condominium if each owner owned an undivided fractional interest in the common elements.

Another example of a planned community is a "townhome"[8] project that's structured like an Association SFD but with attached residences sharing party walls and a pool owned and operated by the townhome owners association (hereinafter Association Townhomes). In both Association SFDs and Association Townhomes, purchasers acquire a fee simple interest in the property bounded by the lot lines and extending "from the center of the earth to the heavens above,"[9] subject to mandatory membership rights in and obligations to the Association and, in the case of Association Townhomes, a party wall agreement. In both Association SFDs and Association Townhomes, the units are divided by vertical boundaries.

What is a Small Planned Community?

CRS § 38-33.3-116(2) defines SPCs as planned communities that contain no more than 20 units and are not subject to any development rights:

> If a . . . planned community created in this state on or after July 1, 1998 . . . contains no more than twenty units and is not subject to any development rights, it is subject only to sections 38-33.3-105 to 38-33.3-107, unless the declaration provides that this entire article is applicable.

Because communities that meet the SPC criteria are automatically exempted from all but CRS §§ 38-33.3-105 to -107, the recorded covenants need not state that CCIOA does

not apply,[10] but an express statement in the covenants helps avoid confusion on this point.

By default, most of the burdens of CCIOA do not apply to an SPC. Likewise, most of the benefits of CCIOA do not extend to an SPC. At the same time, an SPC continues to meet the definition of "common interest community," which means that owners share some maintenance obligations or other expenses for real estate they do not own. These circumstances can lead to unique development arrangements, lengthier recorded covenants that restate statutory provisions, and more mechanisms for payment and enforcement than may apply to traditional CCIOA communities. While SPCs may seem, at a glance, like a typical modern homeowners association arrangement, they can function differently from other CCIOA communities because so many CCIOA statutory provisions do not apply. As with any CCIOA common interest community, the true nature of ownership rights and obligations is defined by the formation documents.

Analyzing Whether an SPC is a Suitable Legal Structure

Understanding the options for common interest community development helps identify the legal structure that best meets the developer's goals and creates a functional community for future owners. Practitioners should consider the following questions when analyzing the suitability of an SPC for a project.

Will the Project Divide Property with Portions Owned Individually and the Balance Owned in Common?

If the property is divided such that individuals own portions and the balance is owned in common and used for shared facilities or improvements, the project likely fits the definition of a common interest community under CCIOA.

If the project does not involve common ownership of shared facilities or improvements as described above and owners are not required to be members in an association, CCIOA does not apply.[11] For example, consider the owner of a tract of land who subdivides it through the county or municipal regulatory process and develops it into a community of detached single-family homes, where no lot owner is obligated by a recorded declaration of covenants to pay for real estate taxes, insurance premiums, maintenance, or improvement of other community real estate. In this type of subdivision (No Association SFD), with no shared amenities, mandatory assessments, or membership in an Association, CCIOA does not apply.[12] The developer of this subdivision can sell each lot with no vertical improvements constructed, subject to the recorded subdivision plat and subdivision improvements agreement.[13] As with Association SFDs or Association Townhomes, each purchaser acquires a fee simple interest in the property described by the lot lines, from the center of the earth to the heavens above. Of course, other title documents may affect what rights the purchaser acquires, for example mineral rights, which may have been severed long ago.

Even if the project involves what appear to be shared facilities, such as a private shared alley behind a row of attached townhomes, CCIOA still may not apply. Each townhome can sit on its own subdivided lot with the residential structure situated on the front of the lot, the shared walls on the lot lines, and the shared alley crossing the back of each lot in the townhome project. The developer can subject all townhome owners to a party wall agreement governing construction and use of the shared walls between each unit. Either in the party wall agreement or in a separate cross-easement agreement, each owner can grant to each other owner an access easement across the portion of the alley located on such owner's lot, specifying the cost-sharing agreement for maintenance and repair of the alley.[14]

In this type of project—a "cross-easement community"—the developer can sell subdivided lots with no improvements constructed. As with Association SFDs, Association Townhomes, and No Association SFDs, in a cross-easement community each purchaser acquires a fee simple interest in property described by the relevant lot lines and extending from the center of the earth to the heavens above, subject to any locally required subdivision plat and the party wall and cross-easement agreement.

There are several variations of declarations commonly used to create cross-easement communities. Some declarations for a cross-easement community state (or imply) that the project is entirely exempt from CCIOA. The basis for such a declaration appears to be that the project is not a common interest community because a fee simple interest in each townhome lot is sold subject merely to the burden of an easement running along a portion of the back of the lot, along with the benefit of an easement across neighboring townhome lots. Therefore, the developer does not form an Association because CCIOA does not apply.

Other declarations for a cross-easement community state that the project is subject to CCIOA, presumably because the drafter intends that the declaration subject the property to a regime under which a person, by virtue of such person's ownership of property, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in the declaration. But such declarations also state that the project falls within the SPC exemption and, because CRS § 38-33.3-301 does not apply to SPCs, no Association is required.

In yet a third variant, some declarations for a cross-easement community state that the community is subject to CCIOA and falls within the SPC exemption, and that an Association will be formed to own and manage the common elements. This structure makes sense legally if the drafter wants to make it clear that the project satisfies one of the defining characteristics of the traditional CCIOA planned community: common elements owned by an Association. A deed for the common elements from the declarant into the Association will further support this position. This structure also makes the most practical sense to some declarants, in that an Association is a well-understood vehicle to manage shared amenities.

Those writing covenants recorded against more than one property that mandate that an owner share costs arising out of shared rights to property owned by another should analyze and, where appropriate, affirmatively state whether the project is entirely exempt from CCIOA; is subject to CCIOA but eligible to claim a partial exemption, such as the SPC exemption; or is subject to all of CCIOA.

Does the Developer Want to Sell Vertically Stacked Airspace Units?

In the examples above, the property is divided into side-by-side estates with vertical boundaries used to divide property on the horizontal plane. What about a developer who wishes to create and convey vertically stacked airspace units? Picture the ubiquitous mixed-use development with residences above retail or other ground floor commercial space.

In many cases, CCIOA requires that the developer subject the property to a condominium regime. Where available, the SPC exception to this general rule allows for marketing and sale of a block of blue sky. The SPC exception is best understood by first examining the general rule.

To create a condominium, CCIOA requires that the developer, acting as declarant, record a declaration executed in the same manner as a deed, as well as a map.[15] In a condominium with vertically stacked units (i.e., with horizontal unit boundaries), before the declaration can be recorded, an independent licensed or registered engineer, surveyor, or architect must execute a certificate stating that "all structural components of all buildings containing or comprising any units thereby created are substantially completed."[16] When the developer deeds a unit in a vertically stacked condominium to a purchaser, the conveyance includes a fee simple interest in the condominium unit and a tenancy-in-common interest in the common elements. The common elements include the right for the building containing the condominium units to occupy the ground underneath the building.[17] In sum, CCIOA facilitates creation and conveyance of vertically stacked condominium units and associated airspace rights, but only once the condominium units are substantially structurally complete.

Turning to the SPC exception, if the project qualifies under CRS § 38-33.3-116(2), only CRS §§ 38-33.3-105 to -107 apply (assuming the declarant does not elect that all of CCIOA applies). The effect of this exemption from most of CCIOA is that the requirement for substantial completion of structural components under CRS § 38-33.3-201(2) does not apply unless the declarant elects to impose such a requirement on its project. Thus, the declarant can record a declaration and an initial map (usually based on the architectural drawings) *without* a certificate of completion from an engineer, surveyor, or architect and before any vertically stacked units have been built, and subsequently convey the units created by such declaration. The declarant or its successor owners can also pledge their interest in the units as collateral for a loan.

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Is Title Insurance Available for a Block of Blue Sky?

In the wake of the Great Recession of 2008, many title companies no longer insure "development rights" in the form they once did. An SPC policy issued before any improvements are constructed within the units, with reference to a declaration that sets out what kind of improvements are permitted in each unit (but not reserving "development rights" as CCIOA defines the term), amounts to a limited exception to this underwriting trend.

Title companies generally treat an SPC as they do a condominium. Two aspects of title insurance often need special attention, however, when working with the title company on an SPC: the legal description of the insured property, and the endorsements.

It's critical that the legal description matches the language used in the declaration and the map. Typically, the SPC declaration will include a form of legal description, such as "Unit _____, Terrific Townhomes, according to the Planned Community Declaration recorded on _____, 2020, in the office of the Clerk and Recorder for Blue Sky County, Colorado, at reception no. _____." (Note the intentional omission of a clause referring to "an undivided interest in the common elements" because this is a planned community, not a condominium.[18]) A title searcher should be able to refer to the SPC map and easily determine the horizontal and vertical boundaries of each unit. As with condominiums, a deed, deed of trust, or any other document recorded against title to the SPC unit can simply refer to the unit without the need to also mention the underlying subdivision plat or metes-and-bounds description of the land on which the unit is located.[19]

As to endorsements, usually some revisions to the standard "condominium" and "same as

survey" endorsements are necessary. After reviewing the SPC formation documents, most title companies are willing to issue a custom "planned community" endorsement rather than a condominium or planned unit development endorsement on owner's and lender's policies.[20]

Likewise, the "same as survey" endorsement, such as the American Land Title Association (ALTA) 25-06, is typically available in an SPC policy, but will likely refer to the three-dimensional map rather than a two-dimensional ALTA survey of the "land." In some cases, third parties such as investors and lenders may require an ALTA survey in addition to the SPC map. The SPC map will not include all "Table A" items that can be shown on an ALTA survey, but will show all three dimensions of each unit and its location relative to other units. A modified same-as-survey endorsement could then read:

> The title company insures against loss or damage sustained by the Insured by reason of the failure of the Land as described in Schedule A to be the same as that identified as the Apartments Unit and the Retail Unit on the Planned Community Map for Cielo Azul recorded _____, 2020 under Reception No. _____ and being a portion of the land identified on the survey made by Sam Surveyor dated _____, 2020, and as designated Job No. _____.

While this article focuses on airspace units created under SPC regimes that are exempted from most of CCIOA, from a title standpoint, it's important to note that CRS §§ 38-32-101 et seq. separately recognize "estates, rights, and interests in areas above the surface of the ground," dictating that such estates be treated in the same manner as other estates in land. This statutory recognition is not confined to condominiums.

How Does a Surveyor Measure a Block of Blue Sky When Creating the Initial SPC Map?

The developer should coordinate with the surveyor on creating an SPC map early in the process. While most surveyors have experience with condominium maps, not every surveyor has signed and sealed an SPC map. In particular, where the developer is creating "airspace units" —particularly vertically stacked units—with an initial SPC map and no improvements yet constructed, surveyors new to SPCs often request more information from the architect preparing the construction documents and the developer's counsel regarding the statutory basis in CCIOA that permits the recording of such a map without the units being substantially structurally complete, as is required for condominiums.

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If the SPC map is an initial map, provisions in the declaration and a general note on the first sheet can alert the reader that a final map will be recorded after the as-built survey is completed. This final map will supersede the initial map in its entirety. The initial SPC map can also state the number of units and the location of any common elements. As noted, dimensions shown on an initial map rely on the architectural and engineering plans, not improvements measured by the surveyor, and are therefore estimates only. A note to this effect clarifies the intent of the developer and assists readers, including the title company, in understanding the status of the project's completion.

Not every common element is plottable. For example, the SPC map may include a general note that "to the extent the real property located below the lowest horizontal plane fully or partially defining any unit and above the highest horizontal plane fully or partially defining any unit is owned by declarant, such property is included within this planned community and is designated as a general common element."

Title companies often require that surveyors confirm that horizontal planes are established by reference to a registered and accepted benchmark, preferably off site. The risk of referencing the elevation of the ground on site, on the top of a footer or some other element of the development project is that grading, paving, or other site work can alter or obscure that benchmark. This, in turn, can throw the precise location of the airspace unit into question, creating difficulties for title companies asked to issue endorsements that tie to the final SPC map. For example, a title company may need to reconfirm that the airspace unit does not encroach into a navigation or viewshed easement, or that the location of the airspace unit still aligns with the location of a transferable development right purchased by the developer to facilitate construction of a taller building than would otherwise be permitted.

The SPC declaration and the map will often include a note that the declarant does not reserve any development rights. This helps establish the basis for the CCIOA exemption. If the title company will rely on the SPC map to issue the same-as-survey endorsement instead of an ALTA land survey, it helps to alert the surveyor of the need to add the title company to the list of parties named in the surveyor's certification on the SPC map.

In addition to the typical language used for condominiums (e.g., "declarant owns the property depicted on the map"), the declarant's

certificate should state that the SPC map was prepared pursuant to, and in accordance with, the declaration and to submit the property to SPC ownership and use in accordance with CCIOA.

Other than the above-mentioned considerations, from the surveyor's standpoint, SPC maps are much like condominium maps, especially where all SPC units have been constructed and the surveyor can measure a building to create a final SPC map rather than refer to an architect's plans to create an initial SPC map.[21]

How do SPCs Interact with Local Subdivision Regulations?

Colorado localities do not regulate the formation of common interest communities per se. This stems in part from CCIOA's prohibition on a locality's use of zoning, subdivision, or other real estate use law, ordinance, or regulation to impose any requirement on a condominium or cooperative that it would not impose on a physically identical development under a different form of ownership.[22] Even though this statutory prohibition omits planned communities, the authors are unaware of any towns, cities, counties, or other localities that regulate based on the planned community form of ownership (as distinct from "planned unit development" regulations authorized by CRS § 24-67-101 through 108, an exceedingly common form of local land use regulation).

Nonetheless, to avoid later disputes with the planning department or the assessor, SPC developers must ensure compliance with local subdivision laws. Some localities may interpret their regulations to mean that formation of an SPC is a subdivision of property significant enough to trigger a minor subdivision, subdivision exemption, or other local approval process. Confirming early on in a project whether such local regulations apply will also help the developer understand any requirements for the formation of Associations to manage common areas.

What Special Provisions are Appropriate to Include in an SPC Declaration?

To aid future owners, lenders, title companies, tax assessors, association managers, mediators, arbitrators, judges, and other potential readers, the drafter of an SPC declaration should state that the common interest community created is an SPC, not a condominium or cooperative, and that the declarant intends to take advantage of the SPC exemption from the majority of CCIOA's requirements (assuming the declarant has not elected that all of CCIOA applies to the community). To maximize the likelihood that the project is deemed eligible for the claimed SPC exemption, the declaration should make clear why all the necessary elements are present.

In particular, the declaration must state that the community contains no more than 20 units and is not subject to any development rights. The prohibition on reservation of "development rights" means that the declarant cannot reserve the right to later add real estate to or withdraw real estate from the community; to create additional units, common elements, or limited common elements within the community beyond what the declaration originally created; or to subdivide units or convert units into common elements.[23]

For a good example of how one appellate court dealt with a developer's clever attempt to draft its way out of this prohibition, see *Arrabelle at Vail Square Residential Condominium Association, Inc. v. Arrabelle at Vail Square LLC*.[24] In *Arrabelle*, the declaration stated that the declarant, as owner of one of two purported SPC lots in a mixed-use community, "may, at its election, subject the [lot] to a condominium regime. . . ."[25] Affirming the district court, the Colorado Court of Appeals held that this constituted the reservation of a "development right," precluding the development from qualifying for the SPC exception. The *Arrabelle* Court found that, for purposes of the calculation of whether the development fit within the SPC exception, the number of units was the development's 66 individual for-sale residential condominiums plus the additional commercial lot owned by the developer, rather than the two lots described in the SPC declaration.[26]

Would the analysis and the result in *Arrabelle* have turned out differently if the 66 residential units were rental apartments owned by a single party instead of for-sale residential condominiums that could be owned by 66 different

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parties? Yes, in all likelihood, because the *Arrabelle* Court reasoned that subjecting one of the two purported SPC lots to construction of residential condominiums resulted in the sale of individual residential dwelling units to individuals, who then gained title to that property, which affected title of the development, and the declaration language thus allowed the declarant to increase the density of the project beyond the maximum of 20 units.

This is important because a number of SPCs have been formed recently with less than 20 SPC units in total, where each SPC unit is separately owned and financed, and where one or more of the SPC units includes more than 20 residential dwelling units. Thus, for example, a project could include three separate SPC units, with one affordable rental housing unit and two market-rate rental housing units, with a residential dwelling unit total among all three SPC units combined in the hundreds. The fact that the dwelling units are rental apartments and not individual for-sale units is key, as is the fact that there are no future development rights, which means the owner of an SPC unit cannot later convert the apartments to individual for-sale condominium units.

As a practical matter, most of the issues that CCIOA requires the declarant to address in a condominium declaration must still be addressed in an SPC declaration to properly define the project, even though CRS § 38-33.3-205, which prescribes the contents of a common interest community declaration, does not technically apply to an SPC. The boundaries, identifying number, location, and any use restrictions for each unit must be set forth. Limited common elements, if any, must be defined, along with common elements (sometimes defined as "general common elements") to be owned and operated by the Association, if one is formed. The declaration should allocate to each unit a fraction or percentage of the common expenses and, to the extent not allocated in the Association bylaws, a portion of the votes in any Association, and should state the formulas used to establish the allocations of interests.[27] Any easements or licenses to which the community is subject, whether for the benefit of third parties, reserved by the declarant, or related to owners' access to their units or the common elements, should be referenced. If there is an Association, the declaration should include provisions concerning the manner in which notice of matters affecting the SPC may be given to unit owners, assessment and lien rights, and how Association budget drafting and approval will work.

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Are There Unique Considerations for SPCs Regarding Property Taxation?

New taxable parcels are created when a declaration and map are recorded with the clerk and recorder. The declarant must deliver a copy of the declaration to the assessor of each county in which such declaration was filed, and the assessor will assign a tax identification number to each SPC unit.[28] When improvements are constructed in a specific SPC unit, the assessor updates the valuation using the same appraisal methodology as is typically used for a condominium unit or other common interest community unit.

Some assessors have struggled with SPCs because some SPC declarations do not specify who owns the land on which the units are located, unlike a condominium where the land is usually a common element and each unit owner owns a stated fractional interest in the common elements. This problem can be avoided if the SPC declaration and related formation documents make clear that the land is a common element and, where an Association is formed, the Association owns the common elements. CCIOA requires that the valuation of the common elements in an SPC be assessed "proportionately to each unit . . . in accordance with such unit's allocated common expense liability, set forth in the declaration, and the common elements shall not be separately taxed or assessed."[29]

Are There Any Special Considerations for Insurance in SPCs?

SPC documents need to address property and liability insurance responsibilities with specificity to minimize gaps in coverage for improvements and occurrences. If an Association will own or maintain portions of the project, the Association can obtain coverage for defined project components and risks, and the document drafter can look to CCIOA as a guide.[30] However, the drafter will find the CCIOA insurance provisions less applicable if no separate Association owns or maintains property. With these varying circumstances in mind, the drafter should consider insurance provisions that address replacement cost coverage or coverage with minimum limits, responsibility for the Association deductible when applicable, requirements that policies waive subrogation rights, and statements as to which policy provides primary coverage. SPCs without Associations may include proof of coverage requirements as part of the obligations imposed on unit owners in the declaration.

Why Might a Developer Want to Avoid Establishing an Owners Association?

CRS § 38-33.3-301 requires that an Association be organized no later than the date the first unit in the common interest community is conveyed to a purchaser and sets out the Association's

substantive rights and obligations. This section does not, however, automatically apply to SPCs.

Some developers prefer the ability to market units with a "no Association" description to draw purchasers who want to avoid the perceived cost and administrative burdens of Associations. In addition, in a small common interest community, it can be difficult to recruit enough volunteers to serve on the Association board of directors. Other developers view No Association SPCs as a way to mitigate construction defect exposure, because CCIOA provides specific procedures for Associations to bring construction defect claims against declarants, builders, and other contractors.[31] An Association operating under CCIOA may bring an action on behalf of two or more unit owners, subject to certain notice and vote requirements for construction defect claims.[32] But SPCs are excepted from those CCIOA provisions that allow Associations to bring claims on behalf of owners and establish the prerequisites to bringing defect actions. As such, the SPC model may offer developers flexibility to draft protections from construction defect actions that would not otherwise be permissible under CCIOA.

Indeed, some residential for-sale developers not subject to CRS § 38-33.3-301 go so far as to affirmatively prohibit the formation of an Association. Sometimes the covenants state that the prohibition terminates automatically after a defined period, such as the expiration of defect-related statutes of repose or limitation. While some practitioners are concerned that a prohibition on forming an Association violates the constitutional right to assemble, developer-declarants and Associations are private entities, not state actors, and Colorado courts recognize a strong state policy of freedom of contract.[33] In any event, the authors are not aware of any reported Colorado case law on this point.

What is the Risk of not Forming an Owners Association in an SPC?

Creating an SPC without a mechanism to administer assessment payments, contracts for services, and general business operations may seem desirable and even inconsequential for the developer. But the allure of homeownership free of an Association does not always outweigh the negative impacts of not having a stand-alone entity to handle common interest community business matters. The absence of an Association, which under CCIOA is typically formed as a nonprofit corporation or an LLC, may present challenges for owners over time, including property and income tax consequences; difficulty with collecting, saving, and disbursing assessments; lack of financial transparency and the potential for mismanagement; onerous owner voting and decision-making procedures; and personal liability under contracts related to common interest community property.

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Common interest communities typically rely on volunteers, with the help of professional management companies, to oversee common interest property matters. SPCs are no different. In most cases, some structure is needed to assist owners in managing their SPC's requirements. Here again, even though the entire CCIOA does not automatically apply to SPCs, its concepts remain relevant. SPC Associations may incorporate those practices that fit their specific needs. For example, an SPC Association could form as a nonprofit corporation with the unit owners as members yet avoid CCIOA mandates related to responsible governance policies, ratification of budgets, meetings notices, and making records available for member inspection. An SPC Association can act through an elected board in much the same way as a CCIOA community but with corporate documents and procedures better suited to a small group of owners. Such documents and procedures may better align with those of a typical nonprofit corporation than with those of a common interest community formed under CCIOA.

Conclusion

SPCs are a useful tool for customizing the formation of and the rules governing qualifying real estate projects. The potential to create, sell, and lien "blocks of blue sky" can facilitate development of projects that may not otherwise get off the ground under a condominium model. But the SPC approach requires careful consideration and document drafting to ensure that the project falls within the CCIOA definition, complies with the portions of CCIOA that still apply to SPCs, achieves the developer's goals, and creates a functional community for future owners. CL


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NOTES

1. CRS §§ 38-33.3-101 et seq.

2. CRS § 38-33.3-103(8) (emphasis added).

3. *See*, *e.g.*, CRS §§ 38-33.3-116 (exceptions for new small cooperatives and small and limited expense planned communities); 38-33.3-119 (exceptions for small preexisting cooperatives and planned communities); 38-33.3-121 (exceptions for planned communities where all units are restricted to nonresidential use).

4. CRS § 38-33.3-115 (CCIOA governs common interest communities created on or after July 1, 1992, as distinguished from the Condominium Ownership Act at CRS §§ 38-33-101 et seq.). *See also* CRS § 38-33.3-117 (detailing those sections of CCIOA applicable to common interest communities formed before July 1, 1992).

5. CRS § 38-33.3-103(9).

6. CRS § 38-33.3-103(10).

7. CRS § 38-33.3-103(22).

8. Colorado statutes do not define "townhome." This colloquial term could apply to a planned community, as in this example, or a community formed as a condominium.

9. *See, e.g.*, *People v. Emmert*, 597 P.2d 1025 (1979) (citing CRS § 41-1-107, which states: "The ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft.").

10. CRS § 38-33.3-116(2).

11. *See Hiwan Homeowners Ass'n v. Knotts*, 215 P.3d 1271 (Colo.App. 2009) (finding a common interest community where the declaration required membership in an association and payment of an assessment for architectural enforcement despite no ownership of common property).

12. For the sake of simplicity, this example assumes that the local subdivision approval process did not include any conditions that common areas such as parks or open space be owned and maintained privately, typically by an Association—not a safe assumption in these times of tight local budgets.

13. *See, e.g.*, CRS § 30-28-137(4) (any purchaser of a lot in a recorded plat has authority to bring an action for injunctive relief to enforce any plat restriction, plat note, plat map, or provision of a subdivision improvements agreement and for damages arising out of failure to adhere to the same).

14. Under this approach, the hope is that cooperative neighbors will be inclined to band together to complete all such required maintenance at the same time through a contract with a single vendor, which may be managed by one volunteer owner on behalf of the others. But this approach steers clear of CCIOA's definition of common interest community: "real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is *obligated* to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration." CRS § 38-33.3-103(8) (emphasis added).

Note that some developers prefer to avoid mandating cost-sharing in a recorded document, instead requiring that each owner maintain the portion of the alley on his or her own property, to avoid classification as a common interest community subject to CCIOA.

15. CRS §§ 38-33.3-201(1) and -103(19.5).

16. CRS § 38-33.3-201(2).

17. *See* CRS § 38-33.3-204 (defining the elements of a unit's legal description).

18. Even in condominiums, almost invariably the declaration provides that common elements pass with title to a unit where only the unit is mentioned in the deed's legal description.

19. *See* CRS § 38-33.3-105(2) ("[E]ach unit that has been created . . . constitutes for all purposes a separate parcel of real estate . . ."). Note that the legal description for an SPC formed by a ground tenant under a ground lease can be more complicated. Often title companies want to include a reference to a "leasehold estate" somewhere in Schedule A of the title policy so it's clear that owners of an interest in a unit are subject to the terms of the ground lease in addition to the declaration, map, and other SPC documents, such as Association articles and bylaws.

20. *See, e.g.*, Colorado Endorsement 115.1 (Condominium, Encroachment, Restrictions) and Colorado Endorsement 115.2 (PUD, Easement, Encroachment, Restrictions).

21. *See* CRS § 38-33.3-209 (requirements for CCIOA plats and maps).

22. *See* CRS § 38-33.3-106(2). *See also* CRS § 38-33.3-106(1) ("[a] building code may not impose any requirement upon any structure in a common interest community which it would not impose upon a physically identical development under a different form of ownership; except that a minimum one hour fire wall may be required between units.").

23. CRS § 38-33.3-103(14).

24. *Arrabelle at Vail Square Residential Condo. Ass'n, Inc. v. Arrabelle at Vail Square LLC*, 382 P.3d 1275 (Colo.App. 2016) (holding that a statement in a declaration that declarant, as owner of particular lot, "may, at its election, subject the [lot] to a condominium regime" constituted the reservation of a development right, precluding a mixed-use development from qualifying for the SPC exception, and affirming the trial court's reformation of the declaration).

25. *Id.* at 1277.

26. *Id.* at 1283–84.

27. *See* CRS § 38-33.3-207.

28. "In a . . . planned community with common elements, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate and must be separately assessed and taxed." CRS § 38-33.3-105(2).

29. *See id.*

30. *See generally* CRS § 38-33.3-313.

31. *See* CRS § 38-33.3-303.5.

32. *See* CRS § 38-33.3-302(1)(d).

33. *E.g.*, *Ravenstar, LLC v. One Ski Hill Place, LLC*, 401 P.3d 552, 555 (citing cases). *See* Levine, "This Is My Castle: On Balance, the Freedom of Contract Outweighs Classifying the Acts of Homeowners' Associations As State Action," 36 *Nova L. Rev.* 555, 585–88 (2012) ("In undertaking the purchase of real property, the individual homebuyer is in the best position to determine which rights he or she wishes to acquire and forego, and in the absence of extreme overriding considerations, the law should refrain from interfering with one's freedom of choice.").