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| **COLORADO SUPREME COURT**  2 East 14th Avenue Denver, Colorado 80203 | **▲ COURT USE ONLY ▲** |
| Certiorari from the Court of Appeals, 2014CA1154 District Court, Arapahoe County, 2013CV32022 |
| **Petitioner:**  VALLAGIO AT INVERNESS RESIDENTIAL CONDOMINIUM ASSOCIATION, INC.,  **v. Respondents:**  METROPOLITAN HOMES, INC., a Colorado Corporation; METRO INVERNESS, LLC, a Colorado Limited Liability Company; GREG KRAUSE, individually; PETER KUDLA, individually, |
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| **BRIEF OF AMICUS CURIAE THE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF THE PETITIONER** | |

Amicus Curiae Community Associations Institute (CAI), through its undersigned counsel, submits this Amicus Curiae Brief in support of the Petitioner Vallagio at Inverness Residential Condominium Association, Inc., as to why the decision of the Court of Appeals should be reversed.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with all requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) because it contains 2,288 words. The brief also complies with the requirements set forth in C.A.R. 32.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: Jeffrey P. Kerrane, Esq. (#34546)

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# STATEMENT OF INTEREST

For over twenty years, the Colorado Common Interest Ownership Act (“CCIOA” or the “Act”) has allowed homeowner (unit owner) associations to amend their declarations and other operational documents upon their members’ written agreement. Colorado law and public policy favoring community associations’ self- governance strongly support this right. For these reasons, CAI and its members have a strong interest in the issues presented here and ask this Court to uphold the district court’s ruling.

CAI is a national organization dedicated to fostering vibrant, competent, and harmonious community associations. Founded in 1973, CAI is the leading provider of education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI’s members include volunteer community leaders, professional managers, attorneys, contractors, developers, and others who provide community association products and services.

Colorado has about 9,200 community associations comprised of homes to over 1.8 million residents. CAI has two Colorado chapters and sponsors a statewide legislative action committee to represent its Colorado members’ interests regarding legislative, regulatory, and judicial activities relevant to creating and operating community associations.

In 1991, CAI was instrumental in drafting CCIOA and advocating for its passage in the General Assembly. Since then, CAI has been regularly involved with CCIOA amendments. Those include amendments provided for in Senate Bill 100 (2005) and clean-up legislation the following year in Senate Bill 89 (2006). Those amendments granted associations greater flexibility and power to amend their declarations. SB 100 established a public policy limiting the supermajority required to amend declarations to 67%. SB 89 only excused this requirement under narrow circumstances not present here.

CAI’s involvement in the development of the statutes governing and limiting declarant rights makes it uniquely suited to assist the Court in understanding the policies underlying the CCIOA provisions at issue here. Because some of this case’s central arguments turn on CCIOA’s interpretation, CAI is especially suited to assist this Court as an *amicus curiae* under C.A.R. 29 concerning both CCIOA’s intent and the negative effect that the Court of Appeal’s decision is having and would continue to have on Colorado community associations.

# SUMMARY ARGUMENT OF THE COMMUNITY ASSOCIATIONS INSTITUTE

The district court correctly held that the declarant’s purported veto power over declaration amendments contained in section 16.6(h) of the Association’s Declaration is void under CCIOA, C.R.S. §§ 38-33.3-104 and 38-33.3-302(2). The district court’s order comports with Colorado public policy, as described in CCIOA’s statutory declaration, which grants developers certain limited rights that extend only through the end of the transition to owner control. *See* C.R.S. §§ 38-33.3-102(1)(c) and (d). These limitations are consistent with Comment 2 to §1-104 of the Uniform Common Interest Ownership Act (“Uniform Act”) which prohibits declarants from using any means to evade unit owner voting authority and power. The district court noted that this Uniform Act “is nearly identical” to §38-33.3-104. The district court’s order also follows from C.R.S. § 38-33.3-305(1)(b), which allows an association’s executive board to terminate contracts between the association and the declarant. Moreover, including a declarant-veto provision in an association’s declarations is a violation of the declarant’s fiduciary duties to the association’s owners.

# ARGUMENT

## A. INTRODUCTION

A community association’s declaration is that non-profit corporation’s governing document. Unlike a standard contract, a declaration is highly regulated: it is designed and intended to be amended by the community association’s members as their needs and preferences change over time. In fact, when the Colorado General Assembly adopted CCIOA, it expressly stated that one of the Act’s purposes is to preserve this flexibility for homeowner associations:

[I]t is the policy of this state to promote effective and efficient property management through defined operational requirements that preserve flexibility for such homeowner associations;

C.R.S. § 38-33.3-102(1)(d) (emphasis added).

The Legislature made clear that any rights a developer might have relative to the communities they create ***end*** when community governance transitions to owner control:

[I]t is the policy of this state to give developers flexible development rights with specific obligations within a uniform structure of development of a common interest community that extends through the transition to owner control; \*\*\*

C.R.S. § 38-33.3-102(1)(c) (emphasis added). When homeowner association governance transitions to the unit owners, the declarant’s rights expire, and the community begins its self-governance. Several CCIOA provisions elaborate on and reinforce this right to self-governance, as well as its timing.

## B. AS A MATTER OF PUBLIC POLICY, C.R.S. § 38-33.3-305(1)(b) GRANTS ASSOCIATIONS THE POWER TO UNILATERALLY TERMINATE ANY CONTRACTS BETWEEN THE ASSOCIATION AND THE DECLARANT.

The Colorado Legislature correctly predicted that even though C.R.S. § 38-33.3-302(2) is intended to prevent declarants from self-dealing at the expense of the communities they create, there could be declarants who still attempt to take advantage of their communities by binding them to contracts before completing the transition to unit owner control. For this reason, Colorado adopted C.R.S. § 38-33.3-305(1)(b), which grants the associations the unilateral right to terminate any contract entered into by declarants. C.R.S. § 38-33.3-305(1)(b) provides:

The following contracts and leases, if entered into before the executive board elected by the unit owners pursuant to section 38- 33.3-303(7) takes office, *may be terminated without penalty by the association*, at *any time* after the executive board elected by the unit owners pursuant to section 38-33.3-303(7) takes office, upon not less than ninety days’ notice to the other party:

…

(b) Any…contract or lease between the association and a declarant or an affiliate of a declarant; or …

C.R.S. § 38-33.3-305(1)(b) (emphasis added). An association’s governing documents, such as its declarations and bylaws, are contracts. *See, e.g., Ass’n* *of Owners, Satellite Apartment, Inc. v. Otte*, 550 P.2d 894, 896 (Colo. App. 1976) (suit for violation of building restriction contained in bylaws is a suit for breach of contract).

Comment 1 to § 3-105 of the Uniform Act (§ 3-105 corresponds to C.R.S. § 38-33.3-305(1)(b)) specifically notes that this contract termination provision is intended to address the problem of self-dealing declarant-created contracts:

This section deals with a common problem in the development of condominium, planned community and cooperative projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem in two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts and omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

Uniform Act, § 3-105, cmt. 1 (emphasis added). Thus, like the CCIOA provisions cited in § A (above), the Legislature enacted C.R.S. § 38-33.3-305(1)(b) to protect associations from declarants who draft contractual provisions that benefit declarants at the association’s expense.

## C. THE COURT OF APPEALS’ OPINION IMPROPERLY GIVES UNLIMITED LICENSE TO DECLARANTS TO UNILATERALLY ADOPT PERMANENT, SELF-SERVING DECLARATIONS, IN CONTRAVENTION OF CCIOA AND THE SELF-GOVERNANCE PUBLIC POLICIES UNDERLYING THAT LAW.

Given the opportunity, declarants will draft self-serving declarations to serve the purpose of insulating themselves from liability. Examples of self-serving provisions and discussion appear in the Build our Homes Right Amicus Brief. CAI agrees with BOHR’s assessment.

## D. A DECLARANT’S RESERVATION OF A VETO POWER IN AN ASSOCIATION’S DECLARATIONS VIOLATES THE DECLARANT’S FIDUCIARY DUTY TO THE ASSOCIATION’S OWNERS.

As with any other corporation, a majority member of a community association owes a fiduciary duty to the corporation’s minority members:

In a close corporation, ‘the relationship between shareholders is akin to that between partners.’ Thus, majority shareholders and directors in close corporations owe the ‘highest degree of fidelity, loyalty, trust, faith and confidence’ to their shareholders, and are required to exercise their utmost good faith and ‘cannot use their corporate power in bad faith or for their individual advantage.’

*River Mgmt. Corp. v. Lodge Properties Inc*., 829 P.2d 398, 401 (Colo. App. 1991) (citations omitted). During the early stages of a community association’s development, the declarant owns the majority of the units and is the association’s majority member. As units sell, the purchasing owners become its minority members. The declarant typically retains the right to appoint executive board members (directors) and to amend aspects of the declarations until the declarant has sold 75% of the units. *See* C.R.S. § 38-33.3-303(5)(a)(I) (authorizing such appointment).

CCIOA recognizes this imbalance of power in community associations and codifies a fiduciary duty as a check on its exercise:

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

§ 38-33.3-303(2)(a). This fiduciary duty applies not only to the declarant’s appointees but to the declarant itself. See C.R.S. § 38-33.3-304(5)(b)(2)(C) (recognizing that a successor declarant would not be liable for “Breach of any fiduciary obligation by any previous declarant”). Because fiduciaries must exercise their utmost good faith and “cannot use their corporate power in bad faith or for their individual advantage,” *River Mgmt. Corp.,* 829 P.2d at 401, it would be improper for a declarant to insert self-serving declaration provisions in the first place. These self-serving provisions are exactly what Colorado’s Legislature sought to prevent by enacting C.R.S. § 38-33.3-302(2), which states:

The declaration may not impose limitations on the power of the association to deal with the declarant that are more restrictive than the limitations imposed on the power of the association to deal with other persons.

This CCIOA provision and others are all designed to prevent a declarant from treating the Association and its members unfairly.

# CONCLUSION

Wherefore, the Community Associations Institute respectfully asks this honorable Court to reverse Court of Appeals’ decision, affirm the district court’s original rulings, and hold that:

* + - 1. Any declaration provision created by a declarant that permits it to manage the community association’s affairs after the declarant control period ends, such as the veto/consent provision here, impermissibly violates the association’s statutory right to self- governance and is void.
      2. Any form of declarant veto power over an association’s ability to amend its own governing documents is void as against public policy because it violates the declarant’s fiduciary duties to the association in contravention of C.R.S. § 38-33.3-302(2).
      3. Any declaration provision that functions as a contract between the association and the declarant is voidable by the association pursuant to C.R.S. § 38-33.3-305(1)(b), and was voided by the Association’s actions here in disavowing the arbitration provision.

Respectfully submitted this 22nd of August, 2016.

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# CERTIFICATE OF SERVICE

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