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COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203 (720) 625-5150	
Appeal from Eagle County District Court Civil Case No.: 2014CV030259 Honorable Frederick Walker Gannett	
APPELLANT: TOWN OF VAIL, a Colorado home rule municipality v. **APPELLEES:** VILLAGE INN PLAZA-PHASE V CONDOMINIUM ASSOCIATION, a Colorado non-profit corporation; RICHARD L. LIEBHABER, an individual; STEVE CADY, an individual; ALFRED L. BAKER III, an individual; MARY H. BAKER, an individual; GRIFFIN DEVELOPMENT, LLC, a Texas limited liability company; CHRIS J. ANDERSON, an individual; JENNIFER A. ANDERSON, an individual; JOHN J. GLENN, an individual; LESLIE D. GLENN, an individual; VVI, LLC, a Colorado limited liability company; KARIN WAGNER, as Trustee for THE KARIN WAGNER REVOCABLE INTER VIVOS TRUST; POTAMUS BEAN, LLC, a Texas limited liability company; MEADOW DRIVE VENTURES, INC., a Colorado corporation; STAUFER COMMERCIAL, LLC, a Colorado limited liability company; and VAIL VILLAGE INN, INC., a Colorado corporation.	**▲COURT USE ONLY ▲** Case Number: 2019CA000109
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BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLEE VILLAGE INN PLAZA-PHASE V CONDOMINIUM ASSOCIATION

CERTIFICATE OF COMPLIANCE

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

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

- ☐ It contains 2,957 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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Amicus Curiae Community Associations Institute ("CAI") submits the following Brief in support of the Answer Brief of Appellee Village Inn Plaza-Phase V Condominium Association (the "Association").

I. INTRODUCTION AND STATEMENT OF INTEREST

The Community Associations Institute ("CAI") is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 40,000 members include homeowners, board members, association managers, community management firms and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 68 million homeowners who live in more than 380,000 community associations in the United States. This number constitutes over twenty-one percent (21%) of the population of the United States. Approximately 1.9 million Coloradans live in 730,500 homes within 9,500 community associations.

In 1991, CAI volunteers were instrumental in drafting what became the Colorado Common Interest Ownership Act, C.R.S. § 38-33.3-101 *et seq*. ("CCIOA"). The General Assembly enacted CCIOA to guide and protect

community associations, owners, homebuilders, lenders and management companies concerning creation and operation of common interest communities. For twenty-seven (27) years, CCIOA has provided a comprehensive and consistent legal framework for the benefit of owner associations, owners, developers (declarants), lenders, management companies and others concerning the creation and operation of common interest communities.

Because one of the central arguments in this case turns upon the interpretation of CCIOA, CAI is uniquely suited to advise this Court as *amicus curiae* under C.A.R. 29, concerning both the intent of this Act and the adverse effect that any reversal of the District Court's ruling would impose on other communities throughout the state.

II. POSITION OF THE COMMUNITY ASSOCIATIONS INSTITUTE

CAI requests that this Court affirm the District Court's ruling in this matter. Colorado protects its citizens' property rights. A real property owner has the right to use property within reasonable private restrictions set forth in private easements and covenants, as well as through public restrictions established by zoning ordinances and building codes.

Ownership of real property in the condominium form of ownership is a protected property right in Colorado. When it adopted CCIOA in 1991, the

General Assembly recognized the need to protect condominium properties by explicitly forbidding discrimination against the condominium form of ownership. Because the Town of Vail's ordinance at issue in this case discriminates solely on the basis of ownership of real property as a condominium, the District Court acted properly in dismissing Vail's Amended Cross Claim.

For these reasons, CAI respectfully urges this Court to affirm the District Court's ruling.

III. STATEMENT OF THE CASE

CAI adopts and incorporates the Association's statement of the case.

IV. ARGUMENT

A. Introduction

This is an important case for CAI, and for Colorado community associations, developers, and owners. A published decision in favor of the Town of Vail would impair protected property rights, condone discrimination against the condominium form of ownership, and harm condominium owners and community associations throughout Colorado. The public policy of Colorado, the legislative declaration for CCIOA, as well as specific CCIOA provisions, all prohibit the discriminatory legislation embodied by the Vail ordinance.

B. CCIOA Applies to The Town's Attempts to Enforce the Vail Ordinance

In 1991, the Colorado General Assembly enacted the Colorado Common Interest Ownership Act, codified at C.R.S. § 38-33.3-101 *et seq*. ("CCIOA"). CCIOA is patterned after the Uniform Common Interest Ownership Act ("UCIOA"). Platt v. Aspenwood Condominium Association, Inc., 214 P.3d 1060, 1064 (Colo. App. 2009).

The Town of Vail argues at pages 20-26 of its Opening Brief that CCIOA does not apply to Vail's ordinance. However, as discussed below, this argument lacks support in either the statutory language or case law.

CCIOA contains a lengthy express legislative declaration which applies to all its provisions. C.R.S. § 38-33.3-102. The declaration emphasizes the need for statewide uniformity:

> The general assembly hereby finds, determines and declares, as follows: (a) That is in the best interests of the state and its citizens to establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities…; (c) That it 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…; (d) That it is the policy of this state to promote effective and efficient property management through defined operational requirements that preserve flexibility for such a homeowners associations… ."

Id. (Emphasis supplied.)

The General Assembly unambiguously articulated the interest of the entire state of Colorado respecting common interest communities by enacting a comprehensive statutory scheme for the development and management of these communities. The General Assembly recognized common interest communities could be precluded by the blind application of local ordinances, regulations or building codes. For example, no single multifamily structure or even row of townhouses could meet the sideyard and open space requirements of a subdivision ordinance if viewed on a unit-by-unit basis. Thus, CCIOA mandates that all such local ordinances, regulations or building codes be applied to a condominium structure exactly as it would to an identical project owned by a single owner. Allowing the application of local ordinances, regulations or building codes as written would otherwise undermine not only the uniform and statewide application of CCIOA, but also the mere ability to create condominiums. Therefore, to protect the property rights of those who chose to own homes in the condominium form of ownership, the General Assembly adopted C.R.S. § 38-33.3-106, which is titled "Applicability of local ordinances, regulations, and building codes":

> (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.

> (2) In condominiums and cooperatives, no zoning, subdivision, or other real estate use law, ordinance, or regulation may prohibit the condominium or cooperative form of ownership or impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership.

Similarly, although a local jurisdiction can regulate use through its zoning ordinance—distinguishing between hotel, motel or other hospitality uses on the one hand and residential use on the other—the Town of Vail is instead attempting to preclude residential use, which is permitted in the zone where Village Inn Plaza-Phase V Condominium is located, by precluding residential use if the project is owned under the condominium form of ownership. This improper discrimination clearly violates C.R.S. § 38-33.3-106 and is not permissible.

The General Assembly also recognized that supplemental general principles of law would apply to supplement CCIOA "…except to the extent inconsistent with this article." C.R.S. § 38-33.3-108. Thus the General Assembly clearly enunciated public policy for the entire state of Colorado which protects the condominium form of ownership from discriminatory local regulation. The Town of Vail's ordinance is a municipality's legislative judgment on how the land within the Town should be utilized. City of Greeley v. Ells, 527 P.2d 538, 542 (Colo. 1974).

In this instance, the occupancy restriction set forth in the Town of Vail ordinance does not regulate how land within the Town shall be used. Instead, it regulates how a particular form of real property ownership (a condominium) shall be utilized. In so doing, the ordinance runs afoul of, and is contrary to, the statewide legislative enactment and public policy. When interpreting a statute, the Court must look to "the entire statutory scheme to give consistent, harmonious, and sensible effect to all parts" and apply "words and phrases according to their plain and ordinary meaning." Pulte Homes Corp. v. Countryside Community Association, 382 P.3d 821, 826 (Colo. 2016). When read together, CCIOA Sections 102, 106 and 108 demonstrate the legislative declaration and enactments which forbid a local ordinance that undermines the statutory scheme.

The dispute is between Colorado's comprehensive and uniform exercise of its power over common interest communities and the Town of Vail's attempts to undermine that authority through a local ordinance. The General Assembly's statewide concern supersedes any local concerns advanced by the Town of Vail in the Occupancy Restriction.

C. The Ordinance Discriminates Against the Condominium Form of Ownership

The Association described the Town of Vail's ordinance in its Motion for Partial Summary Judgment dated June 17, 2015. (CF, pp. 1433-1445). The

ordinance only applies to units which have been converted to a condominium or received approval for conversion to condominium ownership. Restrictions must be included in the condominium declaration for condominium units therein created, and those condominium units are forced to remain in the short-term rental market. (CF, p. 1442, Motion at page 10). A condominium unit owner's personal use of the unit is restricted to only 28 days of the winter's "high season." If this occupancy restriction is violated, the owner is subject to a penalty assessment of three times the reasonable daily rental rate of the unit at the time of the violation. The Town of Vail can enforce the restriction of the condominium if the association fails to do so. (CF, p. 1442, Motion at page 10).

The occupancy restrictions contained in the ordinance are only imposed if existing structures containing lodge, accommodation or rental housing units are converted to condominiums. The restrictions are not imposed upon physically identical developments under a different form of ownership. Thus, the sole criterion for application of the use restrictions within the ordinance is changing the form of ownership of the property from lodge, accommodation and rental housing to condominium ownership. If a housing unit is not a converted accommodation, lodge or rental ownership, then the ordinance does not apply.

The Town of Vail argues at pages 13-14 of its Opening Brief that the ordinance is not discriminatory. This Court should reject that argument. C.R.S. § 38-33.3-106 provides that a building code or ordinance may not impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership.

But that is precisely what occurred here. If the form of ownership is a condominium, then there is a requirement which restricts the occupancy of that condominium unit owner. Because that requirement is not imposed on a housing unit which is an accommodation, lodge or rental ownership, the ordinance is discriminatory on its face and violates C.R.S. § 38-33.3-106. Consequently, the District Court made a correct conclusion of law in dismissing the Town of Vail's Amended Cross Claim.

Allowing enforcement of Vail's ordinance would defeat the concept of non-discrimination against condominiums and the express public policies underlying CCIOA that are the fundamental framework for all Colorado common interest communities. *See* C.R.S. § 38-33.3-102(1)(c).

D. CCIOA Is Unambiguous and There is No Basis for Relying Upon the Drafters' Comments

The Town of Vail seeks to have this Court rely upon legislative intent at pages 16-19 of its Opening Brief. Vail advances the argument based upon the

drafters' notes to UCIOA to suggest that C.R.S. § 38-33.3-106 is ambiguous. This argument lacks merit for several reasons.

First, the statutory provision is unambiguous, so the Court need not look any further than the language of the statute itself. Second, CCIOA's legislative declaration resolves all doubts concerning the statewide scope and application of CCIOA. Finally, if this Court determines to review and consider the drafters' comments, those comments actually support CAI's interpretation of the statute and the District Court's ruling.

The language of C.R.S. § 38-33.3-106 is simple, clear and unambiguous. Where the meaning of the statute is clear based on a plain reading of the language, the Court does not consult legislative history. Smith v. Executive Custom Homes, Inc., 230 P.3d 1186, 1190 (Colo. 2010). "Legislative history cannot render the plain and unambiguous language of [a CCIOA provision] ambiguous." Villagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc., 395 P.3d 788, 793 (Colo. 2017).

CCIOA includes a lengthy legislative declaration at C.R.S. § 38-33.3-102 which was discussed in Section IV.B at pages 5-6 of this Brief. That express, detailed legislative declaration supersedes any legislative history or legislative

intent possibly manifested by the comments from UCIOA. Platt v. Aspenwood Condominium Association, Inc., 214 P.3d 1060, 1064 (Colo. App. 2009).

To the extent this Court looks to legislative history, then it generally accepts the intent of the drafters of a uniform act as the General Assembly's intent when the act is adopted. Yacht Club II Homeowners' Association v. A.C. Excavating, 94 P.3d 1177, 1179-1180 (Colo. App. 2003) affirmed 114 P.3d 862 (Colo. 2015).

This Court has previously considered the comments of the drafters of UCIOA. Platt v. Aspenwood Condominium Association, Inc., 214 P.3d 1060, 1063 (Colo. App. 2009). CAI does not believe such a review is necessary in this instance. Nevertheless, to the extent this Court determines to do so, the UCIOA comments support the District Court's ruling. The text of UCIOA § 1-106 is already part of the record on appeal. (CF, pp. 2242-2261, Exhibit A to VIP Response to Vail's Motion to Reconsider). The Town of Vail quotes comments 1 and 3 in pages 18-19 of its Opening Brief, arguing that the 1987 Ordinance is not discriminatory because UCIOA allows for regulation of the use of the condominium, as opposed to its form of ownership.

Nevertheless, while comment 1 of the legislative intent of the Uniform Act allows for the regulation of the use of real estate in terms of zoning and planning, it states that the regulation of those practices should continue to have equal

applicability to common interest communities as they do to purely rental projects. (CF, pp. 2256-2261). The comments clearly reject any discriminatory regulation pertaining to the *use* of condominiums in addition to rejecting regulations in the *form* of ownership. Furthermore, use restrictions are limited to "long established zoning, building code and similar practices." Id. (Emphasis supplied). The Town of Vail has failed to show how its occupancy restriction is a long established practice used by the Town to regulate use of real estate within common interest communities as well as purely rental projects.

Comment 2 of UCIOA (omitted by the Town of Vail in its Opening Brief) clarifies the prohibition on the discriminatory application of building codes. The comment must be read in conjunction with "the concept described in comment 1," and clarifies that § 1-106(a) prohibits the application of requirements on a common interest community if said requirements would not be violated if all of the property were owned by a single owner. Id. Stated differently, would the ordinance restricting the occupancy of the condominium unit owner apply if all of the property constituting the common interest community were owned by a single owner? Given that the restriction is not imposed on other housing units which are operated as an accommodation, a lodge or as rental property, the 1987 Ordinance is

clearly discriminatory. It impacts and deters the condominium form of ownership, and is specifically the type of requirement prohibited by C.R.S. § 38-33.3-106(2).

Comment 3 of UCIOA clarifies that the purpose of subsection (a) is to prevent "discrimination against all forms of common interest communities under building codes." Id. The comment goes on to allow for regulation of a planned community form of ownership, in addition to including a clear directive that such regulations may not discriminate in the creation of newly constructed condominiums or the conversion of existing buildings into condominiums. Id.

The Town of Vail uses this comment to argue for the Court to limit C.R.S. § 38-33.3-106, by applying it to prohibit only those regulations which limit the creation of newly constructed condominiums or the conversion of existing buildings into condominiums, allowing for other cities in Colorado to have free reign to regulate use even if it is discriminatory. This is a misconstrued reading of the UCIOA comments and a failure by the Town of Vail to consider the comments as a whole.

The UCIOA comments repeatedly prohibit any and all discrimination pertaining to the *use* of real estate as well as to its *form* of ownership. While some regulation of use is allowed, it must be within the confines of long established zoning, building code and similar practices. Even under such regulation, it cannot

be discriminatory. Regulation as to form of ownership is preempted by state enactment and may not be regulated by a municipality. Id. Therefore, the Town of Vail does not have the ability to regulate the form of ownership, which is what the 1987 Ordinance seeks to do.

To avoid state preemption, the Town of Vail attempts to frame the issue as a matter of local concern under a home-rule argument. However, CCIOA is a statute created to establish statewide uniformity in the operation of common interest communities and to provide a uniform framework for the development and operation of those communities. CCIOA expressly forbids local ordinances such as these occupancy restrictions. Comment 1 of UCIOA clearly states that ". . . this Act, as a state enactment, preempts the field and accordingly, except as provided in the Act, the municipality may not regulate the form of ownership, as opposed to the use of that real estate." Id.

The Town of Vail's 1987 Ordinance seeks to regulate the form of ownership in a common interest community. Consequently, the ordinance is discriminatory against the form of ownership, i.e. a condominium and violates C.R.S. § 38-33.3-106.

V. CONCLUSION

CAI advocated for the passage of CCIOA in 1991 because the Act conferred important rights in Colorado and established a uniform legal framework for its operation. CAI respectfully urges the Court to affirm the Trial Court's orders and judgments.

Respectfully submitted this 25th day of June, 2019.

ALTITUDE COMMUNITY LAW P.C.

/s/ William H. Short
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Printed copy with original signatures
on file in accordance with C.A.R. 30

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2019, a true and correct copy of the foregoing will be served via CCEF on the following:

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