

Penalties and Punishment Proposed on HOAs, Managers and Board Members – and More!

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Pending legislation would penalize and punish HOAs, Managers, Board members and others for violations determined by the executive director of the Division of Real Estate in the Department of Regulatory Agencies.

HB 1200 proposes a massive expansion of the State's HOA Information and Resource Center, turning that office into an investigative agency with extraordinary enforcement, quasi-judicial and police powers. This state office currently has two full-time employees (FTEs). The bill adds 20.5 FTEs to the State, 17.5 to this office. HB 1333 adds even more.

HB 1200 is sponsored by Rep. Titone (D) and Weismann (D). HB 1333 is sponsored by Rep. Titone.

Punishing the HOA, the Manager, Board Members and Others

The State, through the HOA Information and Resource Center (the "State Agency" or "State"), could penalize for violations of:

- the Colorado Common Interest Ownership Act
- the governing documents
- other state laws
- rules yet to be adopted.

Violations would be allowed a cure period and a penalty for failure to cure. The penalties can be up to \$5,000 per day—that's up to \$35,000 per week, \$150,000 for thirty days, or \$1,825,000 for a year!

As proposed, HOAs would be prohibited from paying the penalties for violations from assessments of owners.

The bill anticipates HOA insurance policies will pay the fines. However, D&O insurance policies exclude penalties from coverage.

The bill also provides that the HOA could not require a complainant to pay any part of a penalty.

Managers and Board members would also be personally liable for penalties.

State Agency Investigation and Review of HOAs, Managers, Board Members and Others' Actions

The bill would establish broad investigation, quasi-judicial and enforcement powers in a State agency - the HOA Information and Resource Center.

The State could investigate whatever it chose, from any complainant.

This bill would give the State authority to review and investigate actions or omissions of:

- HOAs
- Managers
- Board members
- Others

The State Agency will have limitless subpoena power over witnesses and evidence. This subpoena power extends to the Board, the Manager, the staff at the management company, advisers to the HOA (attorneys, CPAs, reserve specialists, etc.), vendors and other service providers to the HOA. Subpoena power also extends to owners, residents and more.

If the parties reach an agreement, the State may step back. If there is no agreement and a violation is found, the State Agency is to then issue a notice of violation. After a notice of violation, a cure period is allowed. If not cured, then penalties may be imposed.

The State Agency could also issue orders, including injunctions, cease and desist orders, orders to refund monies, orders to file documents and/or to take any other action required to correct the violation.

The authority of the State is not confined to penalizing or issuing orders to HOAs, Managers and/or Boards. The State Agency could issue orders to owners, residents, the staff at the management company, the advisers to the HOA (attorneys, CPAs, reserve specialists, etc.), vendors and other service providers to the HOA and more.

There appear to be no restrictions on the authority of the State to investigate, subpoena, make determinations and pursue enforcement on any complaints it receives under this bill.

The bill allows the State to become an "HOA czar."

Penalties on the HOA Would Be Liens on the Common Elements

To secure payment of penalties on HOAs the State may place a lien on the common elements.

Yet, the value of this common property is nominal as common elements are exempt from real property taxation in planned communities.

Common property is only of value to the owners and residents and is reflected in the worth of the owners' properties.

State liens for HOA penalties will cause significant problems for individual owners on resell or refinance.

A State lien on common property, co-owned by all residents in a condominium community, would effectively punish every owner, regardless of involvement or culpability. All condominium owners could end up paying the price, in one form or another.

Administrative Challenges to Violation Notices

HOAs, Managers, Board members or others found in violation may challenge the finding in a proceeding before an administrative law judge.

In that proceeding, the administrative law judge would then determine whether the violation is affirmed, reversed or sent back for further review.

Appeals from the order of the administrative law judge are allowed to the district court. Independent judicial review is also allowed.

This will complicate HOA enforcement of the assessment obligations of owners and covenant compliance.

HOAs Are Already Required to Have Dispute Resolution Procedures

Since 2006, HOAs have been required to adopt and publish procedures for dispute resolution between HOAs and owners. Many HOAs include this as a part of their “responsible governance policies,” as mandated by state statutes. Other HOAs have addressed dispute resolution in their governing documents.

These procedures frequently require discussion, such as mediation, between the parties before an arbitration or lawsuit can be filed. A complainant to the State should be required to follow the HOA’s existing processes before the State can begin an investigation.

The procedures adopted by HOAs have not been shown to be unworkable or unfair, so why are they now insufficient? Those procedures should be allowed to remain unaffected by this bill.

What About the HOA’s Pending Enforcement Actions?

The bill is silent on pending enforcement actions like unpaid assessments and covenant or rule violations, but a likely response to the HOA enforcement might be a complaint filed with the State Agency, resulting in two different proceedings on similar issues, with the further possibility of an administrative law judge or state judicial court challenge. This is wasteful and bureaucratic.

Ongoing HOA Registration with the State and Document Filing

Under this bill, the State Agency (which is set to expire, or “sunset”) remains in place, with continued requirements for HOAs to register with the State.

Additionally, the bill would require filing the name and address of the President of the HOA and any Manager, along with all relevant documents of an HOA. HOAs would be subject to a \$5,000 late fee for failing to register (or renew their registration) or file documents in a timely manner. In comparison, a business entity is only subject to a \$100 fine from the Colorado Secretary of State for failing to renew registration on time.

Other New Regulatory Authority Proposed in the Bill

Additionally, the bill would require the State Agency to:

- maintain a public database of complaints received on HOAs and Managers
- have a toll-free number for filing complaints and to take requests for information
- furnish educational materials on CCIOA and the processes established by the bill
- report the complaints received to the legislature annually

These tasks identify the large scope and expansion of the State Agency that would be authorized by this bill.

Fiscal Issues and Massive Expansion of a State Agency

All of the actions, investigations, reporting appeals and complications of this bill are proposed to be funded from registration fees of HOAs and penalties on HOAs, Managers and Boards. The registration fee is projected to be \$2.93 per unit in each community.

HOAs and their owners should not be the ones to fund the State's operations under this bill. If this bill is the appropriate public policy of the State, which it is not, public policy dictates that citizens of Colorado should. Budgeting all operational costs on registration fees and penalties paid by HOAs, Managers and Board members is inappropriate, disproportionate and too expensive for HOAs and their owners – all 2 million-plus of them.

Costs to Govern and Operate HOAs Will Increase under This Bill

Penalties will force HOAs to pass the costs on to owners through increased assessments. For what benefit? So that those who can't get elected in their community have a means to whipsaw their HOA over any issue they have?

If insurance defense is provided to an HOA under any of its insurance policies (though penalties are not covered by insurance) the premiums of that insurance will dramatically increase under this bill, comparable to high insurance costs suffered by HOAs and owners in Nevada under a similar regulatory scheme.

The costs of compliance with this bill will also reduce HOA funds, resulting in deferred maintenance and/or inability to pay for other ongoing operational costs – a catastrophe for many associations and the owners they serve.

1333 – Disclosure and Hyper-transparency

1333 would add disclosure and transparency requirements on HOAs.

Disclosure and hyper-transparency would be required by the following:

- a required HOA website with governing documents (current and complete)
- recording of some documents with the county clerk & recorder and filing of all others with the State
- disclosure of HOA fees and charges
- allowed unit owner election inspectors
- allowed recording of meetings
- prohibiting secret ballots, unless approved by 20% of the owners (here it is not clear this would change required secret balloting for contested board elections)
- mandating education for board members
- required reserve studies every 5 years
- budgets based on reserve studies – until annual funding of at least ½ of the projected need
- required annual audit by a CPA, unless board or owner (by a majority) approve otherwise
- required 3 bids for certain contracts
- shortens the periods of declarant control
- requires a seller provide certified copies of governing documents

Where Did These Bills Come From?

The bills arose out of a summer-into-fall legislative committee that held stakeholder meetings around the state. These stakeholder meetings were held at the direction of the Governor, after he vetoed Manager licensing legislation in 2019. Many of those who attended these stakeholder meetings came to complain and repeat their grievances. Just a small minority of HOA owners (less than .0001% of the 2 million-plus owners and residents) have complained, but they did get the attention of sponsors.

The HOA Information and Resource Center is also set to sunset. 1200 would renew this State Agency until 2025. State law requires a sunset report. That report is also a basis for 1200.

By 1200, the State's HOA Information Officer would become the dictator, or "HOA czar," over HOAs, Managers and Boards, determining right and wrong actions by the 15,000+ HOAs in Colorado.

Tyranny of One Owner or Resident

Perhaps the biggest, nastiest problem of 1200 is that it allows one owner or resident to bring the power of the State against their neighbors (with their HOA as the conduit) without any cost or consequences to the complainant.

Time has shown that if an owner or resident has an issue with an HOA, the easiest solution may be for that person to join the board of directors. HOA Board positions are not highly sought out by owners and are typically available for the taking by a rational, reasonable candidate.

Where an owner is not rational or reasonable, or is unelectable, the bill becomes their means to punish and penalize their HOA.

1200 empowers that owner to put the HOA, its Manager and/or the Board through an administrative process of consequence. Due to the penalty potential and personal exposure these parties will seek to defend their actions vigorously, presumably with attorneys. 1200 makes nothing better for anyone in an HOA. It makes all HOA operations and budgets more complicated and expensive and to serve what purpose or end?

Reactions Across the State

Board members across Colorado are objecting to these bills. Many volunteer Board members – perhaps all – have indicated that they would resign if 1200 is approved as introduced. Who will govern these communities if it's too hazardous to serve?

HOAs are focused on their communities – seeking to preserve and embrace values. How they do that is sometimes objected to by an owner or resident. Based on these bills, HOAs are concerned with their liability and costs to their owners.

HOAs are troubled separately and collectively about both bills. Particularly, if a Board's decision making will be reviewed and a determination made by a state employee on whether that decision is appropriate, or one that the HOA could be penalized for.

Managers are anxious about their personal exposure under 1200 and are also wondering if the indemnification provisions in the contract that their management company has entered into with an HOA will be extended to them.

Management companies are disturbed by the terms of both bills, including Manager personal liability for penalties and by the broad reach into the day-to-day operations of common interest communities and the HOAs that govern and operate these communities.

Owners are concerned about costs.

Status of 1200 and 1333 as of Today

1200 was set for a hearing on February 26th, but that hearing was cancelled due to initial objections from those that closely follow the legislature.

Now 1200 is set to be heard at a legislative committee meeting on Wednesday, March 18, 2020, at 1:30pm.

1333 is also set for hearing on March 18th at 1:30pm, before a separate legislative committee.

These hearings allow little time for HOAs, Managers, Board members, owners and other interested citizens to express your opposition.

What Does It All Mean?

Investigation, cost, punishment and penalties of HOAs, Managers and Boards of directors will be allowed through the State by complaining persons.

1200 allows anyone who takes issue with an HOA, its Manager or the Board, to launch an inquiry. Currently, 1,152 annual complaints are projected. Peculiar to 1200, the HOA, Manager and Board cannot retaliate, but anyone who has a quarrel with them can, simply by filing a complaint with the State Agency, instigating a costly and needless investigation.

If the State Agency determines that retaliation has occurred by the HOA, it can assess a penalty of up to \$10,000. No similar protections are provided to HOAs, Managers or Board members. Who will protect HOAs, Managers or Board members from frivolous, abusive or repetitive complaints?

From past experience with the State's investigations of complaints of Managers and management companies under prior, now repealed, licensing law, the State is ill-prepared and unaware of the operations of governance of HOAs, the terms of the governing documents, the roles and actions of Boards of directors (as elected by owners), the Manager, owners and residents.

The Division of Real Estate, which includes the HOA Information and Resource Center, has shown no expertise, care, efficiency or aptitude in the initiation and administration of manager licensing.

Manager licensing could have been a good thing, but was rolled out poorly, with an excessively difficult law test for Managers and a backwards approach to vetting, administering and investigating complaints.

To give that office decision-making authority on violations of CCIOA and the rules of the community is only asking for the same mess that they made before, which resulted in the premature sunseting of licensing and the veto of last year's modest manager licensing revival bill.

Seek to Have These Bills Defeated!

While objections to these bills are pouring into the legislature as awareness builds, amendments are apparently underway. What are the amendments? It is unknown. Time will tell.

As introduced, and even amended, these bills are the wrong public policy of the State. They would usurp the power of owners to elect a Board to operate and govern a private community. 1200 will turn a state official into a czar or dictator, undermining HOA Board decisions, replacing the business judgment rule and abrogating standards of care well established in the Colorado Revised Nonprofit Act and case law.

It is recommended that you oppose these bills.

Don't punish and penalize Boards, HOAs, and Managers.