

From: **joelle miller** <joelle@goinghigh.com>

Date: Tue, Feb 12, 2013 at 9:27 PM

Subject: Failure to produce complete records under Colorado Revised Statute Title 38. 38-33.3-317

To: "Meek, William" <bjm1919@aol.com>, "Meek, William" <wmeek@sedgwick.gov>

Cc: susan <susan@mountainmanagers.com>, judy <judy@mountainmanagers.com>, phil@mountainmanagers.com, "Allen, Herb" <allenhj@msn.com>, Ethan Gibson <ethangibson@hotmail.com>, Smith <sdsmith4u@hotmail.com>, Pete <ptp100@comcast.net>, "Lembke, Bob" <boblembke@unitedwaterdistrict.com>, "Ponds, Scott" <sponds@yahoo.com>, "Cacace, Don" <dcacace@chatfieldconsulting.com>, artburger1@msn.com

Dear Mr. Meek,

As the President of Mountain Side Condominium Association, Colorado HOA-24048 and the responsible individual who owes a fiduciary duty to its owners and members, we are requiring the response to the following directly from you.

This correspondence is in follow up to our request for production of records under Colorado Revised Statute Title 38, 38-33.3-317. As you know, we have reviewed the records that were made available on the Mountain Managers HOA website and reviewed the hard copy records that were made available by the HOA in person today relative to our request for production of records under Colorado Revised Statute Title 38. 38-33.3-317. Also as you know, the records made available to us were not complete. Specifically, the following records have not been provided:

- Financial Records files for 01/2013 and prior to 2010
- Annual meeting information prior to 2012 (proxies received; attendance; election tally) Code inspection findings, evidence (i.e. pictures, written statements); code violations correspondence; code violation outcome/resolution. (all years)
- Service agreements (prior to 2012)
Management agreements (only 2008 was available)
- Board member list (2012 is included; list for prior years and list of members serving on various committee not included (all years)
- HOA monthly meeting minutes: emailed comments/requests from owners regarding agenda items are not included.
- Legal services: owners and/or Phil Well's written correspondence that generated a legal service charge.
- General Owners and board members/Mountain Managers email/written correspondence exchanges.
- Entry into Mountain Side units by board members and/or Mountain Managers employees: logs, dates, purpose, etc (all years).

We demand you respond personally and directly by close of business on February 13, 2013 advising whether these records:

- 1.) Have not been maintained or
- 2.) Are not being made available to owners

Thank you.

Joelle and Terry Miller

G-206, E-279 and D-317

From: **noah@thekluglawfirm.com** <noah@thekluglawfirm.com>
Date: Wed, Feb 20, 2013 at 9:59 AM
Subject: Mountain Side Records
To: "joelle@goinghigh.com" <joelle@goinghigh.com>
Cc: "Meek, William" <wmeek@sedgwick.gov>, "phil (phil@mountainmanagers.com)" <phil@mountainmanagers.com>, "hadley (hadley@mountainmanagers.com)" <hadley@mountainmanagers.com>, "tricia@mountainmanagers.com" <tricia@mountainmanagers.com>, "Steve Smith (sdsmith4u@hotmail.com)" <sdsmith4u@hotmail.com>

Please reference the attached letters.

Noah Klug

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February 20, 2013

Ms. Joelle Miller

Via e-mail to joelle@goinghigh.com

Re: Mountain Side Records

Ms. Miller:

I represent Mountain Side Homeowners' Association, Inc. ("Mountain Side"). I am in receipt of the e-mail you sent to Mountain Side's president, Bill Meek, dated February 12, 2013, with the subject "Failure to produce complete records under Colorado Revised Statute Title 38. 38-33.3-317." Please consider this Mountain Side's response.

Preliminarily, let's remember that Mountain Side is a nonprofit corporation and the board members are generously donating their time for the benefit of the owners. Under Colorado law, the board members of a condominium association (except those appointed by the developer) do not owe fiduciary duties to the owners and cannot be liable to the owners except in rare circumstances not implicated here. Mr. Meek encourages you to raise any concerns with him, but it is not appropriate for you to threaten Mr. Meek or make demands of him personally.

As another preliminary matter, your e-mail was somewhat surprising because, when you left Mountain Managers last week after being provided with voluminous records for inspection, the management company understood that you were satisfied with what you had been provided. Thus, the aggressive tone of your e-mail seems unwarranted.

Turning now to your requests, Mountain Side has gone above and beyond to provide you with the records to which you are entitled under Colorado law (and many others as well). However, your right to receive records from Mountain Side is not unlimited and, in some cases, Mountain Side must simply decline to provide you with certain records. Specific responses to your requests are as follows:

Your Request	Response
Financial Records files for 01/2013 and prior to 2010.	Mountain Side is only required to maintain financial records for three years, which would not apply to documents prior to 2010. All other available records were provided to you. The financials for each month are available toward the end of the next month, so the January financials will be posted on the website toward the end of February.
Annual meeting information prior to 2012 (proxies received; attendance; election tally).	The requirement to maintain ballots, proxies, and other records related to voting by unit owners did not exist prior to January 1, 2013. Moreover, Mountain Side is only required to keep election records for one year, which would not apply to years before 2012 as you requested.
Code inspection findings, evidence (i.e. pictures, written statements); code violations correspondence; code violation outcome/resolution.	Mountain Side is not required to provide you with these records and must decline to do so.
Service agreements (prior to 2012).	Mountain Side is generally required to provide you with copies of every contract to which it is currently a party or for work performed for it in the previous two years. That would not apply to contracts prior to 2012. All active service agreements have or will be posted on the Mountain Side website.
Management agreements (only 2008 was available).	The same management agreement has been in effect since 2008 and the applicable record was provided to you.
Board member list (2012 is included; list for prior years and list of members serving on various committees not included (all years)).	Mountain Side is required to provide you with specified information about its "current" board members and it provided you with that information. It is not required to provide a list of members serving on committees and declines to do so.
HOA monthly meeting minutes: emailed comments/requests from owners regarding agenda items are not included.	Mountain Side is not required to provide you with these records and declines to do so.
Legal services: owners and/or Phil Well's written correspondence that generated a legal	Any payments made by Mountain Side for legal services are reflected in the financial

service charge.	documents that were provided to you. Specific communications between Mountain Side (including its management company) and an attorney are protected by the attorney-client privilege and not subject to disclosure.
General Owners and board members/Mountain Managers email/written correspondence exchanges.	Mountain Side is required to provide you with all written communications within the past three years to all unit owners generally as unit owners. That information was provided to you. Mountain Side is not required to provide you with general e-mail correspondence of the sort indicated in your e-mail and declines to do so. To the extent the board takes action without holding a meeting, Mountain Side is required to provide you with written communications between the board members relating to that action. The requirement was only effective January 1, 2013, and I understand that no action has been taken by the board without a meeting since that time.
Entry into Mountain Side units by board members and/or Mountain Managers employees: logs, dates, purpose, etc (all years).	Generally speaking, Mountain Side is not required to provide you with information relating to any units but your own. Even as relates to your unit, Mountain Side is not required to provide you with this particular information and declines to do so.

In sum, Mountain Side has acted in good faith to provide you with every record to which you are entitled under Colorado law.

I am aware that you apparently take issue with Mountain Side inspecting your units last year, which determined some of your units were in violation of a rule prohibiting washers and dryers. The rule has since been changed and washers and dryers are now permitted with approval of Mountain Side and the Town of Frisco. Mountain Side has not yet taken enforcement action against you for violating the rule and requests that you to promptly apply for consideration of your washers and dryers under the new rule. Without waiving the attorney-client privilege, Mountain Side has authorized me to provide you with the attached letter I prepared last year concerning its right to inspect units for covenant violations and damage to the common elements (such as the damage caused by installing washers and dryers). As you will see, inspecting your unit was fully compliant with the covenants and applicable law.

Mountain Side Homeowners' Association, Inc.
February 20, 2013
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Please let me know if I can address any questions or concerns,

Very truly yours,

A handwritten signature in black ink, appearing to read 'Noah Klig', with a long horizontal flourish extending to the right.

Ec: Mountain Managers

Encl: Letter dated December 4, 2012

The

Klug Law Firm, LLC

Noah Klug
Attorney & Counselor at Law

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December 4, 2012

Mountain Side Homeowners' Association, Inc.
c/o Phil Wells, Manager

Via e-mail to Phil@MountainManagers.com

Re: Inspection of Units

Dear Phil:

You asked me to advise Mountain Side concerning whether it can conduct annual inspections of units to look for covenant violations.

Unit owners' associations generally enjoy a right of access as is reasonably necessary for maintenance, repair, and replacement of the common elements. For newer associations, this right exists by statute¹ and for older associations, such as Mountain Side, it is generally found in the recorded covenants. In this case, the Mountain Side covenants specifically contemplate that some of the common elements are "located within a Unit or may be conveniently accessible only through a Unit" and grants the association, each owner, and the manager, a right of access to each unit "from time to time, during such reasonable hours as may be necessary for the maintenance, repair or replacement" of the common elements.² To the extent that the common elements may be damaged (whether by an owner or otherwise), this provision gives Mountain Side the power to repair the damage. It is a logical extension that Mountain Side also has the power to inspect for such damage in the first place.

The covenants and applicable law give Mountain Side any powers necessary for the governance and operation of the association.³ The power to inspect units for legitimate association purposes likely falls within this general grant of power.

While there is no Colorado case law on the subject, at least one court from another jurisdiction has found that unit owners' associations such as Mountain Side have an inherent

¹ COLO. REV. STAT. § 38-33.3-307(1); *see* COLO. REV. STAT. § 38-33.3-117.

² Condominium Declaration for Mountain Side Condominium, Section 13(d).

³ COLO. REV. STAT. § 38-33.3-302(1)(q) *as applied by* COLO. REV. STAT. § 38-33.3-117(1)(i); Condominium Declaration for Mountain Side Condominium, Section 16(a) and (c).

Mountain Side Homeowners' Association, Inc.
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power to inspect units for covenant violations implied in their governing documents.⁴ This decision fits in a line of cases in which courts have spoken broadly that unit owners relinquish certain privacy rights when they voluntarily submit to the condominium form of ownership.⁵ In keeping with these authorities, I believe any court would support Mountain Side's right of inspection in this case. It bears mentioning that an owner filed a trespassing complaint the last time Mountain Side conducted such inspections and, after I discussed the applicable law with a detective from the Frisco Police Department, she refused to pursue any charges.

I conclude that Mountain Side has the power to inspect units for covenant violations. It is advisable for Mountain Side to adopt a rule or policy concerning such inspections and promulgate it to the owners. The rule or policy could provide for reasonable safeguards such as prior notice, a requirement for a supervisor of some sort to be present during the inspection, and a limitation on the inspection hours.

Please let me know if I can be of further assistance.

Very truly yours,



Noah Klug

⁴ *Cohan v. Riverside Park Place Condominium Ass'n*, 123 Mich. App. 743, 333 N.W.2d 574 (1983); see *Chin v. Coventry Square Ass'n*, 270 N.J. Super. 323, 637 A.2d 197 (1994); *Right of condominium association's management or governing body to inspect individual units*, 41 A.L.R.4th 730 (Originally published in 1985).

⁵ See, e.g., *River Terrace Condo. Ass'n v. Lewis*, 33 Ohio App.3d 52, 514 N.E.2d 732 (1986); *Seagate Condo. Ass'n v. Duffy*, 330 So.2d 484 (Fla. 4th DCA 1976); *Hidden Harbour Estates, Inc v. Norman*, 309 So.2d 180 (Fla. 4th DCA 1975).