2018 SUMMARY OF ARIZONA COMMUNITY ASSOCIATION LAW

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I. WHAT IS A HOMEOWNER ASSOCIATION

a. General Definition

A homeowner or community Association (hereafter, "Association") is a common-interest community consisting of landowners living in a residential neighborhood that has restrictive covenants placed on the property. Associations are unique in that they usually have property known as "Common Area" which is entitled to be used by the members of the Association. Arizona law divides Associations into two (2) basic types: Condominiums[1] and Planned Communities.[2]

b. Condominiums

A Condominium under A.R.S. § 33-1202 is defined as "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners."

In essence, a Condominium is an Association in which the individual owners own an undivided interest in the common area. The common area is property to be equally enjoyed by the members of the Association.

c. Planned Communities

A Planned Community under A.R.S. § 33-1802 is defined as a "real estate development that includes real estate owned and operated by […] a nonprofit corporation or unincorporated Association of owners, that is created for the purpose of managing, maintaining or improving the property and in which the owners of separately owned lots, parcels or units are mandatory members and are required to pay assessments to the Association for these purposes."

In essence, a Planned Community is an Association in which the common area is owned by the Association rather than the owners.

d. Cooperative

A corporation owns the property that makes up the cooperative. Typically, the property is a building. The owner purchases a shared interest in the corporation and with that purchase, the owner has a right to occupy a portion of the building. This portion is generally called an apartment. Anything outside the apartment becomes the common area maintained by the corporation.

e. Townhomes, Patio Homes, and Cluster Housing

These are all marketing names for different types of housing products. To know what type of community exists, it is necessary to know how the common area is structured.

[1] Arizona Revised Statutes ("A.R.S.") §§ 33-1201, et seq.
[2] A.R.S. §§ 33-1801, et seq.

II. DOCUMENTS THAT GOVERN HOMEOWNER ASSOCIATIONS

a. Types of Governing Documents

Governing documents of homeowner Associations are divided into two basic categories: (1) documents that restrict the use of the property or the behavior of residents concerning the property; and (2) documents that govern the corporate entity embodying the Association. Association documents that restrict the use of the property or the behavior of owners concerning the property are:

1. The Declaration of Covenants, Conditions, and Restrictions (commonly referred to as the "CC&Rs");
2. The Rules and Regulations; and
3. Architectural Guidelines.

Association documents that govern the corporate entity embodying the Association are:

1. The Articles of Incorporation;
2. The Bylaws; and
3. Resolution of the Board of Directors.

b. Declaration of Covenants, Conditions and Restrictions

The Declaration of Covenants, Conditions, and Restrictions (hereafter, the "CC&Rs") is a document that creates a scheme of enforceable covenants and restrictions that run with a property. As a document that places restrictions on property, the CC&Rs must be recorded with the applicable county recorder.

c. Rules and Regulations

Most Association CC&Rs allow Associations to draft reasonable Rules and Regulations that explain the restrictions found in the CC&Rs. Arizona law allows Associations to draft reasonable rules and regulations governing the common property only.[3] The Rules and Regulations are usually developed by the Association's Board of Directors and have the same enforceability as the CC&Rs, even though the Rules and Regulations for the most part are not recorded with the county recorder.

Rules and Regulations may only explain regulations found in the CC&Rs. Rules and Regulations may not contradict provisions of the CC&Rs, nor may they add restrictions that are not found in the CC&Rs. If Rules and Regulations conflict with the CC&Rs, then they are generally unenforceable.

d. Architectural Guidelines

Architectural Guidelines also derive their authority from the Association's CC&Rs. The Architectural Guidelines usually provide a framework for the decision-making process of the

[3] *See* A.R.S. § 33-1242 (for Condominiums) and Restatement (Third) of Property (Servitudes) § 6.7(3) (2000) (for Planned Communities). Under *Wilson v. Playa de Serrano*, 211 Ariz. 511, 123 P.3d 1148 (Ariz. App. 2005), Community Associations may not place restrictions on the use of units or lots via reasonable rules and regulations unless the Community Association's CC&Rs provide the Association with the ability to develop rules that regulate activity in units or on lots.

Architectural Committee. The Architectural Guidelines have the same enforceability as the CC&Rs, even though they are usually not recorded with the county recorder.

e. Articles of Incorporation

The Articles of Incorporation establish the Association as a legal entity and must meet certain statutory criteria found in the Arizona Nonprofit Corporation Act.[4] The Articles of Incorporation constitute the corporate charter and are filed with the Arizona Corporation Commission.

f. Bylaws

The Bylaws of an Association set out the procedures for the internal government and operation of the Association. The Bylaws guide the Association concerning how owners may vote regarding corporate issues. The Bylaws also regulate the conduct of the Association's Board of Directors as well as outline how an Association's Board of Directors is elected.

III. STATE STATUTES THAT GOVERN HOMEOWNER ASSOCIATIONS

a. Arizona Planned Community Statutes: A.R.S. §§ 33-1801, et seq.

The Arizona Planned Communities Act defines: Planned Community, Association Community Documents, and Declaration.[5] The Planned Community statutes also include provisions that address assessment increases, penalties, open meetings, disclosure of Association records, resale disclosure, and assessment liens.

b. Arizona Condominium Act: A.R.S. §§ 33-1201, et seq.

The Arizona Condominium Act is patterned after the Uniform Condominium Act and is more extensive in scope and detail than the Arizona Planned Communities Act. It deals with, among other things, the creation, alteration, management and termination of the condominium, the imposition of monetary penalties, resale disclosure, assessment liens, and open meetings.

c. Arizona Nonprofit Corporations Act: A.R.S. §§ 10-3101 through 10-11031

All Associations that are incorporated are subject to the Arizona Nonprofit Corporations Act. The Arizona Nonprofit Corporations Act contains extensive provisions governing the formation and operation of nonprofit corporations.

IV. HOMEOWNER ASSOCIATION MEETINGS

There are four main types of Association meetings: (1) meetings of the Association's Board of Directors; (2) meetings of committees of the Association; (3) annual meetings of the Association; and (4) special membership meetings of the Association.

[4] A.R.S. § 10-120, et seq.
[5] A.R.S. § 33-1802. See also A.R.S. § 33-440(E)(1).

All Association meetings must be held in the State of Arizona.[6] This means that the origin of the meeting must be in Arizona. Teleconferences are still allowed so long as the call originates in Arizona.[7]

Also, except for limited circumstances that will be discussed below, Association meetings are open to all members of the Association or any person designated by a member in writing as the member's representative. Members or their designated representatives also have the right to speak at an appropriate time during the deliberations and proceedings of Association meetings.[8] The Board may place reasonable time limits restrictions on those persons speaking during the meeting but must permit a member or the member's designated representative to speak once after the Board has discussed a specific agenda item but before the Board takes formal action on that item.[9]

Recent changes to Arizona statutory law applicable to Associations also serve to establish the State Legislature's public policy belief that Associations meetings should be as open as possible to Association member attendance. HB 2411 revises A.R.S. § 33-1248(F) (Condominiums) and A.R.S. § 33-1804(F) (Planned Communities) outlines the Legislature's "public policy" belief that an Association should err on the side of open meetings instead of closed meetings. This means that the Board of Directors and management must do all they can to ensure that Associations only meet in executive session or have an emergency meeting when the applicable statutory allowance is at play.

To implement its public policy beliefs, the Arizona Legislature has enacted a number of laws geared toward open Association meetings. The State's Planned Community Act and Condominium Act each state that agendas must be made available to all members prior to certain Association Board of Directors meetings.[10]

Since there are a number of State Statutes that cover the various types of Association meetings, it is important to discuss each type in more detail.

a. Board Meetings

There are three types of Board of Director meetings: (1) Regular Board Meetings; (2) Executive Session Board Meetings; and (3) Emergency Board Meetings. The most common type of Board of Director meeting is the Regular Board Meeting.

b. Regular Board Meetings

Regular Board Meetings are meetings in which the Association conducts general "day-to-day" business of the Association. Regular Board Meetings are usually held once a month or once per quarter. A Regular Board Meeting occurs whenever a quorum of the Board meets either formally or informally to discuss Association business.[11]

[6] A.R.S. § 33-1804(B) (Planned Communities) and § 33-1248(B) (Condominiums).
[7] A.R.S. § 33-1804(B) (Planned Communities) and § 33-1248(B) (Condominiums).
[8] A.R.S. § 33-1804(A) (Planned Communities) and § 33-1248(A) (Condominiums).
[9] A.R.S. § 33-1804(A) (Planned Communities) and § 33-1248(A) (Condominiums).
[10] A.R.S. § 33-1804(D) (Planned Communities) and § 33-1248(D) (Condominiums). See also Page 5 above.
[11] A.R.S. § 33-1804(D) (Planned Communities) and § 33-1248(D) (Condominiums).

Unless otherwise stated in the Association's Bylaws, the Association must provide at least 48-hours' notice to owners of meetings of the Board.[12] Said notice shall be by "newsletter, conspicuous posting or any other reasonable means as determined by the Board of directors."[13] Also, Regular Board Meetings are open to all members of the Association or any person designated by the member in writing as the member's representative.[14]

Agendas must be made available to all members prior to the start of an Association Board meeting.[15] Members or their designated representatives also have the right to speak at an appropriate time during the deliberations and proceedings of Regular Board Meetings.[16] Also, attendees of Regular Board Meetings have the right, subject to reasonable Association rules, to audiotape or videotape those portions of the meetings that are open to the members.[17]

c. Executive Session Board Meetings

Executive Session Board of Director Meetings are meetings of the Board that are exempt from the open meeting requirements. These meetings are closed to the members. Executive Session Board Meetings are held to discuss issues that are not required by statute to be discussed in a Regular Board Meeting. These meetings occur "behind closed doors" or outside the presence of, and without participation from, the members.

In addition, A.R.S. § 33-1248(C) (Condominiums) and A.R.S. § 33-1804(C) (Planned Communities) states:

> BEFORE ENTERING INTO ANY CLOSED PORTION OF A MEETING OF THE BOARD OF DIRECTORS, OR ON NOTICE OF A MEETING UNDER SUBSECTION D OF THIS SECTION THAT WILL BE CLOSED, THE BOARD SHALL IDENTIFY THE PARAGRAPH UNDER SUBSECTION A OF THIS SECTION THAT AUTHORIZES THE BOARD TO CLOSE THE MEETING.

The reference to "any closed portion of a meeting" in the Statute refers to executive session Board of Director meetings. There are five (5) issues that may be discussed in executive session:

1. Legal advice from an attorney for the Board or for the Association;
2. Pending or contemplated litigation;
3. Personal, health or financial information about an individual member of the Association, an individual employee of the Association or an individual employee of a contractor for the Association, including records of the Association directly related to the personal, health or financial information about an individual member of the Association, an individual employee of the Association or an individual employee of a contractor for the Association;
4. Matters relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of a contractor of the Association who works under the direction of the Association; and

[12] A.R.S. § 33-1804(C) (Planned Communities) and § 33-1248(C) (Condominiums).
[13] A.R.S. § 33-1804(C) (Planned Communities) and § 33-1248(C) (Condominiums).
[14] A.R.S. § 33-1804(A) (Planned Communities) and § 33-1248(A) (Condominiums).
[15] A.R.S. § 33-1804(D) (Planned Communities) and § 33-1248(D) (Condominiums).
[16] A.R.S. § 33-1804(A) (Planned Communities) and § 33-1248(A) (Condominiums).
[17] A.R.S. § 33-1804(A) (Planned Communities) and § 33-1248(A) (Condominiums). See also Page 4 above.

5. Discussion of a member's appeal of any violation cited or penalty imposed by the Association except on request of the affected member that the meeting be held in open session.

A.R.S. § 33-1248(C) (Condominiums) and A.R.S. § 33-1804(C) (Planned Communities) will make it critical that an Association's Board and managers understand when an Association may meet in executive session. Also, it is advisable to have an agenda available to hand out to the members regarding an executive session meeting. When providing notice of your executive session meetings, the notice should also include an agenda. An agenda could look like the following:

d. Emergency Board Meetings

An Emergency Board of Directors meeting may only be called to discuss business or take action that cannot be delayed for the 48 hours required for notice of a regular meeting of the Board of Directors. Thus, in order for the Board to conduct an emergency Board meeting, there must be a serious threat to life or property. Also, only "emergency matters" may be discussed at an emergency Board meeting.[18] The minutes of the Emergency Board Meeting must state the reason necessitating the emergency meeting. Also, the minutes of the Emergency Board Meeting shall be read and approved at the next regularly scheduled meeting of the Board.[19]

e. Association Committee Meetings

Association committees provide an opportunity for Association members to serve their community in specialized areas. They aid the Board of Directors in governing the Association. Association committees are functions of the Association's Board of Directors. Some common Association committees include Architectural Control, Landscaping, and "Welcome Wagon" committees.

Most Association committees meet on a regular basis. If an Association committee meets on a regular basis, the committee must meet in the State of Arizona.[20] Also, Association members or their designative representatives have the right to attend and speak at committee meetings.[21]

f. Annual Meetings of the Members

Arguably the most important meeting an Association is required to conduct is the Annual Meeting of the members. Not only do Association governing documents require Associations to conduct Annual Meetings, Arizona law requires Associations to conduct an Annual Meeting at least once per year.[22]

[18] A.R.S. § 33-1804(C) (Planned Communities) and § 33-1248(C) (Condominiums). See also page 7 above.
[19] A.R.S. § 33-1804(D) (Planned Communities) and § 33-1248(D) (Condominiums).
[20] A.R.S. § 33-1804(B) (Planned Communities) and § 33-1248(B) (Condominiums).
[21] A.R.S. § 33-1804(A) (Planned Communities) and § 33-1248(A) (Condominiums).
[22] A.R.S. § 33-1804(B) (Planned Communities) and § 33-1248(B) (Condominiums).

g. Purpose of Annual Meetings

Annual Meetings are meetings of the members. Annual Meets are held to conduct the "business" of the membership and allow the membership to address their Association. In most Associations, Annual Meetings are conducted for three (3) main purposes:

1. To conduct member business;
2. To elect members to the Association's Board of Directors; and
3. To allow the members to address their Association.

h. Conduct Member Business

Annual Meetings are forums where member business may be conducted. Member business can take many forms, including:

1. Approval of the previous year's Annual Meeting Minutes (see the Section on Annual Meeting Minutes below);
2. Amendment of the Association's governing documents; and
3. Authorization increases in the annual assessments or special assessments.

Arizona law and most Association documents allow Member business at Annual Meetings. The challenge, however, lies in statutory requirements concerning absentee ballots, which will be discussed below.

i. To Elect Members to the Board of Directors

The most important purpose of an Annual Meeting is to elect members to the Association's Board of Directors. Effectuating an election to the Board of Directors takes a great deal of forethought, especially in light of Arizona law.

A successful and legal election to the Board starts at least two (2) months prior to the Annual Meeting. This is due, in large part, to the requirements found in Arizona law.[23] Arizona law requires that Associations send ballots to all members of the Association.[24]

When drafting an absentee ballot, the Association must keep Arizona's statutory requirements in mind. Specifically, A.R.S. § 33-1812 (A) sets out the ballot requirements for Planned Communities and A.R.S. § 33-1250 sets out the ballot requirements for Condominiums. In relevant part, the statutes state:

Any action taken at an Annual, Regular or Special Meeting of the members shall comply with all of the following if absentee ballots are used:

1. The absentee ballot shall set forth each proposed action.
2. The absentee ballot shall provide an opportunity to vote for or against each proposed action.

[23] A.R.S. § 33-1812(A) (Planned Communities) and § 33-1250(A) (Condominiums).
[24] A.R.S. § 33-1812(A) (Planned Communities) and § 33-1250(A) (Condominiums).

3. The absentee ballot is valid only for one specified election or meeting of the members and expires automatically after the completion of the election or meeting.
4. The absentee ballot specifies the time and date by which the ballot must be delivered to the Board of directors in order to be counted, which shall be at least seven days after the date that the Board delivers the unvoted absentee ballot to the member.
5. The absentee ballot does not authorize another person to cast votes on behalf of the member.

If an Association provides for absentee ballots or ballots provided by some other form of delivery, the completed ballot must contain the name, address and signature of the person voting, unless the Association documents permit secret ballots, in which case only the envelope must contain name, address and signature. The ballots, envelopes and related materials must be retained and made available for unit owner or member inspection for at least one year after completion of the election.

If an Association chooses to permit electronic voting in addition to providing for votes to be cast in person and by absentee ballot, the Association must comply with the following:

1. The Association must provide **notice** to members that the vote will be conducted by electronic means;
2. The notice must include a "reasonable" procedure for members to obtain and cast a ballot through some other form of delivery, including U.S. Mail and fax transmission.
3. The online voting system must meet all of the following requirements:
    a. Authenticates the member's identity; and
    b. Authenticates the validity of each electronic vote to ensure that the vote is not altered in transit; and
    c. Transmits a receipt to each member who casts an electronic vote; and
    d. Stores electronic votes for recount, inspection and review purposes.[25]

e. To Allow Members to Address their Association

It is important to remember that the Annual Meeting is a meeting of the members, which means that the members should be provided with the opportunity to address their Board of Directors and other members of the Association.

Many Associations attempt to limit who may speak at an Annual Meeting. A good policy is to let all members who wish to speak have the opportunity to speak but limit how long they may speak. Shaw & Lines usually suggests no more than five (5) minutes per person, but this timeframe may be less depending on the number of members who desire to speak. We further suggest that, where a meeting becomes very adversarial, the Association strictly comply with all time limits, even bringing a stopwatch or other timer if necessary.

[25] A.R.S § 33-1812(A) (Planned Communities) and § 33-1250(C) (Condominiums) require that election materials, including electronic ballots and non-ballot-related material, are retained and made available to owners for at least one year.

j. Special Meetings of the Members

Special Meetings of the members are another form of member meetings. Special Meetings of the members are unique because they vary depending on the purpose of the Meeting of the members.

k. Who May Call A Special Meeting of the Members?

The question of who may call a Special Meeting of the members is usually answered in the governing documents of the Association. If the Association's governing documents are silent, Arizona statutory law requires that Special Meetings of the members may be called by the president, by a majority of the Board of Directors or by unit owners having at least twenty-five percent (25%), or any lower percentage specified in the Bylaws, of the votes in the Association.[26]

l. Common Purposes for Special Meetings of the Members

Special Meetings of the members may be called for a number of reasons, such as:

1. To authorize a Special Assessment or an increase in the Annual Assessments.
2. To authorize an amendment of the Association's governing documents.
3. To remove members of the Association's Board of Directors.
4. To vote on other issues pursuant to the Association's governing documents.

m. Special Meeting of the Members to Authorize a Special Assessment or Increase in the Annual Assessments

Generally, the Association's CC&Rs will dictate how Special Meetings of the members may be called to vote on a special assessment or increase in the annual assessment of the Association. Voting and quorum requirements concerning this type of Special Meeting of the members will also generally be found in the Association's CC&Rs. Additionally, any Special Meetings of the members must be conducted using absentee ballots pursuant to A.R.S. §33-1812 (Planned Communities) and A.R.S. § 33-1250 (Condominiums).

n. Special Meeting of the Members to Amend the Association's Governing Documents

Pursuant to most Association governing documents, Special Meetings of the members may be called to vote amending certain provisions of the Association's governing documents. Voting and quorum requirements concerning this type of Special Meetings of the members should also be generally found in the specific Association governing document that is being amended. Additionally, any Special Meetings of the members must be conducted using absentee ballots pursuant to A.R.S. § 33-1250 (Condominiums) and A.R.S. § 33-1812 (Planned Communities).

o. Special Meeting of the Members to Remove Members of the Association's Board of Directors

Recent changes in Arizona law have changed the way members of an Association's Board of Directors may be removed. A.R.S. § 33-1813 (Planned Communities) and A.R.S. § 33-1243

[26] See A.R.S. § 33-1804(B) (Planned Communities) and A.R.S. § 33-1248(B) (Condominiums).

(Condominiums) now trump any language in the Association's governing documents regarding Board member removal, and the statutes provide procedures concerning a Special Meeting of the members to remove members of the Association's Board of Directors.

It is important that an Association follow the quorum requirements of A.R.S. § 33-1813 and A.R.S. § 33-1243. It is equally important that the Association carefully study A.R.S. § 33-1243 and § 33-1813 in order to abide by its provisions. If one or less than a majority of the Board is removed, the member(s) vacant seat shall be filled as provided in the Association's documents. This means that prior to the removal meeting being effectuated, the Association must review the Association's documents to determine how the Board seat(s) will be filled if the recall is successful and inform the owners of how the seat(s) will be filled.

If the community documents do not discuss how to replace a removed director, the procedures discussed below will apply.

If a majority of the Board members or all of the Board of Directors are removed, then the Association must elect their replacements and a duly called special meeting of the members. The special meeting of the members must be held no later than thirty (30) days from the date of the recall meeting.

The Board of directors shall retain all documents and other records relating to the removal and replacement of the member(s) of the Board of directors for at least one year and shall permit members to inspect those documents and records.

Finally, a member of the Board of Directors who is removed is not eligible to serve on the Board again until after her original term has expired unless the governing documents require a longer period of time.

V. DUTIES AND OBLIGATIONS OF BOARD MEMBERS

Directors and Officers of an Association are charged with a "fiduciary duty" to the Association. The Board's "fiduciary duty" may be broken down into two distinct duties: (1) the duty of care; and (2) the duty of loyalty.

Directors have an obligation to exercise reasonable care in making decisions on behalf of the Association. This obligation is referred to as the duty of care. To meet the duty of care when making decisions concerning Association issues, the Association Board of Directors:

1. Must act in good faith, in a manner that he or she believes to be in the best interest of the Association and its members;
2. Must make decisions that any other reasonable director would make in the same situation or circumstances;
3. Must exercise discretion within the scope of their authority under relevant statutes, covenants and restrictions;
4. Must treat members equally and fairly; and
5. Must maintain and repair the Association's common property.[27]

[27] See *Tierra Ranchos Homeowners Ass'n v. Kitchukov,* 165 P.3d 173,178, 216 Ariz. 195, 204 (Ariz. App. 2007).

The above concept is also discussed in the "business judgment rule" which is found in both Arizona common law[28] and in A.R.S. § 10-3830 of the Arizona Nonprofit Corporations Act.[29] The business judgment rule states that a Board member will have met his or her duties when he or she acts "in good faith[,] with the care an ordinarily prudent person in a like position would exercise under similar circumstances, [and] in a manner the director reasonably believes to be in the best interests of the corporation."[30]

This rule also protects Board members from personal liability if they make a decision after relying on "information, opinions, reports or statements, including financial statements and other financial data," received from "legal counsel, public accountants or other person as to matters the director reasonably believes are within the person's professional or expert competence.[31]" In other words, if the Board's decision ends with a bad result – even a financial loss – the directors should be shielded from claims of personal liability if the decision was made pursuant to the advice of the Association's attorney.

Another duty relating to the fiduciary responsibilities of a member of an Association Board is a duty of loyalty. Directors should have undivided loyalty to the Association. This duty prohibits directors from receiving a benefit for serving on the Board at the expense of the Association or its members. This duty of loyalty is breached when a Board member acts in his or her own interest or with a conflicting interest.[32]

One example of a breach of the duty of loyalty is when a Board member has a financial interest in a transaction or decision before the Board and fails to properly follow Arizona law.[33] Another example of breaching the duty of loyalty or fiduciary duty is to discuss with other members matters that are either protected by attorney/client privilege (i.e., correspondence, communications or advice from legal counsel) or matters that are reserved for executive session Board meeting discussions provided in Arizona statutes. To avoid breaching this duty of loyalty Board members should consider the following:

1. Enforce the governing documents equally, not selectively, and without regard to whether the owner is a neighbor, friend or relative;
2. Fully disclose any potential conflict prior to any deliberations;
3. Ask to be dismissed and do not participate in the decision-making process for any issues where a conflict may exist;
4. Maintain accurate records; and
5. Keep confidences (i.e., attorney/client communications and results from executive session meetings).

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[28] See *Kitchukov,* 165 P.3d at 178, 216 Ariz. at 204.

[29] If the Community Association is a non-profit corporation.

[30] See A.R.S. § 10-3830 (Non-Profit Corporations Act).

[31] A.R.S. § 10-3830(B) and A.R.S. § 10-3830(D).

[32] A.R.S. § 33-1811 (Planned Communities) and A.R.S. § 33-1243(C) (Condominiums), which states: "If any contract, decision or other action for compensation taken by or on behalf of the Board of directors would benefit any member of the Board of directors or any person who is a parent, grandparent, spouse, child or sibling of a member of the Board of directors or a parent or spouse of any of those persons, that member of the Board of directors shall declare a conflict of interest for that issue. The member shall declare the conflict in an open meeting of the Board before the Board discusses or takes action on that issue and that member may then vote on that issue. Any contract entered into in violation of this [section/subsection] is void and unenforceable."

[33] See A.R.S. § 33-1811 (Planned Communities) and A.R.S. § 33-1243(C) (Condominiums).

Occasionally there will be factions and differences of opinions among members of the Board. Diverse positions among Board members can lead to progressive discussion and innovative administration. Board members, however, must understand that Board decisions are made by majority vote. If the minority is out-voted on an issue, the minority should attempt to provide unified support, unless the action taken by the majority is unlawful. Since Board members serve at the will of the members of each community, the general membership of each community has the ability to remove Board members who the members believe are not taking action in accordance with the desires of the majority. As such, dissident Board members should use caution when challenging a valid decision of the Board majority.

a. What is a Rogue Board Member?

A Rogue Board Member is a member of an Association's Board of Directors who displays the following types of behavior:

1. Conducts himself or herself uncivilly at meetings of the Board of Directors;
2. Seeks to enforce the restrictive covenants on his or her own;
3. Fails to keep confidential information;
4. Talks badly about other Board Members; and
5. Fails to thoughtfully consider the advice of experts (i.e. the Association's manager, attorney or other professionals).

Rogue Board Members can cause a number of practical problems for the Board and the Association. Rogue Board Members can interrupt the flow of Board meetings and make them more difficult to conduct. Additionally, Rouge Board Members can discourage other Members of the Association's Board from fully participating in Board Meetings.

b. Association Liability Concerning the Rogue Board Member

While there are a number of practical reasons why Rogue Board Members are not good for Associations, they also create a wide range of legal issues for an Association. To fully discuss the different types of potential liability, it is important to revisit the actual behaviors.

c. How to Handle a Rogue Board Member

Almost every Association has experienced a Rogue Board Member, a member who refuses to keep confidential information, interrupts meetings, or represents the Association without full Board approval. Rogue Board Members can cause a host of legal issues for an Association, the Board, and the Rogue Member. This section will discuss the legal liability facing Associations regarding Rogue Board Members and how Associations should address the situation as well as protect itself.

First, it is important to understand that not all Rogue Board Members have a nefarious intent. Most Rogue Board Members have a sincere desire to better the Association. Sometimes Rogue Board Members feel that their actions are in response to a perceived lack of action by the full Board of Directors. Typically, Rogue Board Members want to make their communities better but are simply not educated regarding the proper way to accomplish their goals.

While this document is meant to instruct Associations on how to identify and address a Rogue Board Member, this document may also serve as a reflection tool. Ensuring that Board Members do not become a Rogue Board Member.

d. How to Handle a Rogue Board Member

Addressing the behavior of a Rogue Board Member is a delicate matter. This is because, as stated above, the Rogue Board Member may not feel that their actions are harmful to the Association. Moreover, the Rogue Board Member may feel that they have no other choice but to engage in this type of behavior.

Prior to addressing a Rogue Board Member, it is important that the manager and other Board Members agree that the behavior of the Rogue Board Member is problematic. Also, the Association may want to obtain legal advice regarding whether the activities of the rogue Board Member present an imminent danger to the Association.

When formally addressing a Rogue Board Member, there are two main processes. There is the Informal Process and the Formal Process.

Informal Process

The first step of the informal process concerning the addressing of a Rogue Board would be, in an executive session meeting of the Board of Directors, to present the Rogue Board Member with a written list of the behaviors the Rogue Board Member is engaging in. This should be followed up with a discussion on how the behavior could harm the Association and ways to positively address the behavior.

If the Rogue Board Member continues to engage in damaging behavior, the next step would be to discuss the Rogue Board Member's actions in an open meeting of the Board of Directors. A document should be drafted detailing the areas of concern and ways the Rogue Board Member can address the behavior.

Formal Process

If the Rogue Board Member continues his/her behavior after the informal process, then the next step would be to conduct the Formal Process. The Formal Process begins with an official letter of censure to the Rogue Board Member. The censure letter should list out the areas of concern and should also list the ramifications if the Rogue Board Member continues their behavior. If the Rogue Board Member continues their activities after a formal censure letter has been issued, the Association has two (2) remaining options:

1. The calling of a special meeting of the Association to discuss the removal of the Rogue Board Member from the Board of Directors; or
2. Filing a breach of fiduciary duty lawsuit.

e. Uncivil Behavior at Meetings of the Board of Directors

When a Rogue Board Member acts uncivilly at Board meetings, the behavior can disrupt Board meetings and may lead to important issues not being fully discussed. In addition, other Board members

may feel deeply offended or intimidated by the Rogue Board Member's conduct. This in turn can lead to legal liability in the form of a harassment lawsuit both against the Rogue Board Members and the Association for failing to address the Rogue Board Member's conduct.

f. Enforcement of the Restrictive Covenants without Board Approval

A breach of the Association's policies on enforcement can occur when a Rogue Board Members seeks to enforce the restrictive covenants on their own. By acting outside the Association's normal enforcement policies and procedures, the Association can become subject to legal liability based on unequal enforcement and breach of the Association's own policies and procedures.

g. Failure to Keep Confidential Information

Every Association's Board of Directors discusses information that, for a number of reasons, should be kept confidential. It is important for Board members to keep confidential information confidential. Failing to do so could lead to legal liability based on harassment, liable, slander and misrepresentation. Divulging confidential information could also lead to a breach of the attorney client privilege and negatively affect legal action involving the Association.

h. Speaking Badly About Other Board Members

Speaking badly about a fellow Board member often leads to ill feelings and resentment, which can affect the efficient operation of the Board. Legally, it can lead to libel and slander liability if the statements are false or misleading.

i. Failure to Thoughtfully Consider the Advice of Experts (i.e. the Association's manager, attorney or other professionals)

Under Arizona Law, a Board member will not breach their fiduciary duty if they thoughtfully consider the advice of experts.[34] Rogue Board Members tend to believe that they are the expert in everything and hiring experts is not needed. Depending on the area of expertise foregone, this type of behavior can lead to a host of liabilities.

j. The Calling of a Special Meeting of the Association to Discuss the Removal of the Rogue Board Member from the Board of Directors

Most Association Bylaws allow either the president of the Association or a majority of the Board of Directors to call a special meeting of the members. This special meeting of the members can be held to discuss the removal of a member from the Association's Board of Directors. Calling a removal meeting should only be done in extreme circumstances. It is always advisable that prior to calling the removal meeting, the Association seek the advice of its attorney.

k. Filing a Breach of Fiduciary Duty Lawsuit

Filing a breach of fiduciary duty lawsuit is the last option an Association should take regarding a Rogue Board Member. It is the most drastic and before considering this option, the Association should consult with its attorney to determine whether this option may be effectuated.

[34] See A.R.S. §10-3830 (Planned Communities).

VI. PRIMARY FUNCTIONS OF THE HOMEOWNER ASSOCIATION

One of the primary duties of a homeowner's Association is to enforce the restrictions in the Association's governing documents.[35] In some circumstances, Associations may have an obligation to enforce the restrictions found in the Association's governing documents.[36] It is important to understand how and when to properly enforce an Association's governing documents.

Enforcement of Restrictive Covenants

Restrictive covenants may be enforced in three (3) basic ways:

1. Imposing fines;
2. Filing a lawsuit seeking injunctive relief; and
3. Exercising "Self-Help."

In selecting any one of these options, an Association should rely on three (3) main questions guiding the enforcement:

1. What enforcement action is allowed by the Association's governing documents;
2. Which contemplated method of enforcement is likely to gain compliance; and
3. Which method of enforcement is reasonable under the circumstances?

These principles will help an Association safely navigate the complexity involved with enforcement of the CC&Rs. The above principles, along with the enforcement actions, are discussed in greater detail below.

Also, prior to engaging in certain enforcement mechanisms, Associations must follow provisions of Arizona statutory law.

A.R.S. § 33-1242(B) and A.R.S. § 33-1803(C) state that before Association may take enforcement action other than sending an enforcement letter or "courtesy notice" (i.e. impose a fine or file an injunction lawsuit), the Association must inform any owner that he/she may provide the Association with a written response concerning the violation by sending a certified letter to the address referenced in the violation letter **within 21-calendar days after the date of the initial violation letter**.

A.R.S. § 33-1242(D) and A.R.S. § 33-1803(E) requires Associations provide written notice to an owner of the owner's option to petition for an administrative hearing on any enforcement action. Thus, in an enforcement action, an Association is required to notify an owner of the option to petition Arizona's Real Estate Department for a hearing on the matter.

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[35] See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 165 P.3d 173, 216 Ariz. 195 (Ariz. App. 2007), which states that among other duties, the Restatement imposes upon the Association the duty to act reasonably in exercise of its discretionary powers including rulemaking, enforcement, and design-control powers. *College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n.*, 225 Ariz. 533, 241 P.3d 897 (Ariz. App. 2010).

[36] *Gfeller v. Scottsdale North Townhomes Ass'n*, 193 Ariz. 52 (App. 1998); *Johnson v. Pointe Community Association*, 205 Ariz. 485 (Ariz. App. 2003).

Waiver of Enforcement

Many Associations struggle with the concept of waiver of enforcement. This concept addresses whether an Association may require remediation of long standing violations of the restrictions.

The above discussed waiver concept has been addressed by the Arizona Supreme Court in *Coll. Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 241 P.3d 897 (Ariz. App. 2010). The Court in *College*, stated:

> When CC&Rs contain a non-waiver provision, a restriction remains enforceable, despite prior violations, so long as the violations did not constitute a "complete abandonment" of the CC&Rs. *Id.* at 399, ¶ 26, 87 P.3d at 87. Complete abandonment of deed restrictions occurs when "the restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they were imposed[.]" *Id*. at 539, 903 (quoting *Condos v. Home Dev. Co.*, 77 Ariz. 129, 267 P.2d 1069 (1954).

Thus, the Arizona Supreme Court in *College*, held that so long as an Association has a non-waiver provision in its CC&Rs, the Association may enforce its restrictions against owners who are in long standing violation of the restrictions so long as the Association has not abandoned the CC&Rs.

In fact, the Court in *College,* suggests that the Association has a duty to enforce the long standing violation. The Court specifically declared:

> Similarly, we agree that applying a plainly worded non-waiver clause will not encourage discriminatory conduct by homeowners' Associations because they are constrained by principles of fairness and reasonableness. In *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, we adopted the Restatement (Third) of Property: Servitudes § 6.13, which includes the duty of an Association to "treat members fairly" and to "act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers." 216 Ariz. 195, 201, ¶ 25, 165 P.3d 173, 179 (App. 2007). "'Additionally, the failure of an Association to take appropriate action to enforce restrictive covenants may subject it to liability.' See, *e.g., Johnson v. Pointe Cmty. Ass'n Inc.*, 205 Ariz. 485, 489, ¶ 22, 73 P.3d 616, 620 (Ariz. App. 2003) (holding that an Association's interpretation of its own restrictive covenants in a dispute with a homeowner is not entitled to judicial deference; reversing trial court's dismissal of claim for breach of fiduciary duty). In our view, these considerations will discourage an HOA from engaging in selective enforcement of restrictive covenants." (emphasis added).

Mechanisms of Enforcement

Gaining Compliance by Imposing Fines

Imposing a fine for the violation of restrictive covenants is the most common means of gaining compliance in Associations. Under A.R.S. § 33-1803(B) (Planned Communities) and A.R.S. § 33-1242(A)(11) (Condominiums), an Association may fine an owner who is in violation of the restrictions so long as the following criteria are met:

1. The fine is "reasonable"; and
2. The fine is imposed after notice and an opportunity to be heard.

A recent landmark ruling in Arizona will have major implications with regard to the ability of Association to validly assess and collect monetary penalties and/or fines from owners.

In *Turtle Rock III Homeowners Association v. Fisher*, 243 Ariz. 294, 406 P.3d 824 (App. 2017), the Arizona Court of Appeals held that an Association must create and promulgate a separate schedule of fines to all owners prior to imposing such fines. The failure to have a schedule of fines is fatal – meaning – the absence of a schedule of fines is *per se* unreasonable under A.R.S. § 33-1803(B) and A.R.S. § 33-1242(A)(11), making any fines unenforceable. The Court of Appeals also held that "[a]d hoc fines" – fines that are imposed seemingly out of thin air – "are *per se* unreasonable". *Id.*, at ¶14, citing *Villas at Hidden Lakes Condos Assoc. v. Geupel Constr. Co*., 174 Ariz. 72, 81, 847 P.2d 117, 126 (Ariz. App. 1992).

Turtle Rock III also suggests that any such fines, in addition to being set forth in a published schedule of fines, must relate to some damage that the Association might suffer. "Without competent evidence of a fee schedule timely promulgated demonstrating the fine amounts and the appropriateness of such amounts, monetary penalties are *per se* unreasonable." *Id.*, at ¶17. The Association also has the burden of proving its damages in order to obtain a judgment for fines. "Even if a fine schedule existed, the HOA [still] had the burden to prove its burden"… that the fines were reasonable. *Id.*, at ¶18. **This aspect of *Turtle Rock III*, however, is currently under review by the Arizona Supreme Court.**

In a nutshell, the ruling in *Turtle Rock III* highlights the need for:

1. A comprehensive enforcement policy that encompasses all of the various statutory and case law requirements regarding the enforcement of restrictive covenants.

2. A subset of the comprehensive enforcement policy which contains a clearly articulated schedule of fines or fine policy that lists all potential violations and the corresponding fine attached to said violation; and

3. Proof that the comprehensive enforcement policy and articulated schedule of fines or fine policy has disseminated to all owners.

Violation Enforcement through Filing a Lawsuit Seeking Injunctive Relief

Restrictions found in Association governing documents may also be enforced through the seeking of injunctive relief. Injunctive relief is the process in which an Association petitions the Superior Court to issue an order requiring an owner who is in violation of the restrictions to comply with the restrictions. Because injunctive relief requires litigation, seeking injunctive relief is usually implemented in emergency situations or as a last resort.

When an actor becomes an owner of property located within a homeowner's Association, it agrees to the restrictions in the Declaration and it is "bound to (its) performance as effectively as if (it) had executed an instrument containing them." *Heritage Heights Home Owners Ass'n v. Esser*, 115

Ariz. 330, 333, 565 P.2d 207, 210 (Ariz. App. 1977). Furthermore, "enforcement of such restrictions is by means of an injunction." *Id.*

To assert a claim for injunctive relief, the Association must show that "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the Association and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Ebay Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Although most enforcement costs can be secured as an assessment lien under most CC&Rs, recent case law might invalidate such contractual language. The ruling in *Bocchino v. Fountain Shadows* (Ariz. 2018) suggests an Association might no longer be able to include pre-litigation attorneys' fees regarding enforcement in the Association's assessment lien.

Exercising Self-Help

Self-help is a mechanism by which the Association seeks to address a continuing violation of the restrictions by remedying the violation itself. The most common example of self-help is when an Association pays a landscaper to maintain the yard of an owner who has not been maintaining the yard in violation of the restrictions. Self-help is usually available under an Association's CC&Rs and the costs of self-help may usually be recouped by the Association. Before exercising self-help, an Association should carefully review its CC&Rs to make sure it is allowed to do so.

A. COLLECTING ASSESSMENTS

The most important function of an Association is the collection of special and annual assessments. Assessments are the financial life-blood of the Association and without assessments an Association would be unable to function. An Association's rights and abilities to collect assessments are provided in both the Association's CC&Rs and Arizona statutes.

By operation of law, Associations have automatic, statutory liens pursuant to A.R.S. § 33-1256(A) (Condominiums) and A.R.S. § 33-1807(A) (Planned Communities). They also have a lien under the restrictive covenants of the Association.

1. The Statutory Lien

The Arizona Condominium Act and Planned Communities Act define what charges constitute an Association's lien and its rights to foreclose. For example, A.R.S. § 33-1807 of the Planned Community Act, which, in relevant part mirrors A.R.S. § 33-1256 of the Condominium Act, provides:

> The Association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due. The Association's lien for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments may be foreclosed in the same manner as a mortgage on real estate but may be foreclosed only if the owner has been delinquent in the payment of monies secured by the lien, excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments, for a period of one year or in the amount of one thousand two hundred dollars or

more, whichever occurs first. Fees, charges, late charges, monetary penalties and interest charged pursuant to section 33-1803, other than charges for late payment of assessments are not enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment of the assessment becomes due. The Association has a lien for fees, charges, late charges, other than charges for late payment of assessments, monetary penalties or interest charged pursuant to section 33-1803 after the entry of a judgment in a civil suit for those fees, charges, late charges, monetary penalties or interest from a court of competent jurisdiction and the recording of that judgment in the office of the county recorder as otherwise provided by law. The Association's lien for monies other than for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments may not be foreclosed and is effective only on conveyance of any interest in the real property.

There are several differing portions of this statute to consider regarding the Association's lien:

- The lien arises when "the assessment becomes due." This does not necessarily coincide with when the delinquency arises. If you have an annual assessment "payable in installments, the full amount of the assessment is a lien from the time the first assessment installment becomes due."
- The assessment lien includes "assessments for charges for late payment of those assessments," and "reasonable collection fees" and "reasonable attorney fees and costs incurred with respect to those assessments" incurred in connection with collecting on the unpaid lien. These charges all comprise the lien and are, therefore, subject to foreclosure.
- The assessment lien may only be foreclosed "if the owner has been delinquent in the payment of monies secured by the lien, excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments, for a period of one year or in the amount of one thousand two hundred dollars [$1,200] or more, whichever occurs first."
- Subsection H of this statute mandates: "A judgment or decree in any action brought under this section shall include costs and reasonable attorney fees for the prevailing party." A frequent argument raised by defendants is that attorney fees are not recoverable unless and until a principal amount owing is reduced to judgment. From a practical standpoint, this argument does not make sense because subsection A provides that reasonable attorney fees and costs are a part and portion of the lien, which may be foreclosed. The statute does not say that the lien amount must be first adjudicated and attorney fees may only be awarded upon receipt of a final judgment. Following that argument, an Association would have no incentive or reason to conclude its foreclosure action short of securing a final judgment and would, therefore, be forced to incur additional attorney fees for which the homeowner would eventually be liable to pay, so long as such fees are reasonable. The apparent conflict between the language of these provisions seems to resolve in favor of a common sense understanding that fees are included in the lien without securing a judgment, but the fees are limited by a reasonableness standard. Arizona case law identifies the factors for determining the reasonableness of attorney fees. See *Schweiger v. China Doll Restaurant, Inc.*, 673 P.2d 927, 138 Ariz. 183 (Ariz. App. 1983). In *China Doll*, specific guidelines are enumerated for courts considering attorney fee applications in cases where the parties

have agreed, by contract, that the prevailing party is entitled to recover "reasonable" attorneys' fees.

2. The Contractual Lien

In addition to the statutory lien, an Association has a "consensual" or contractual lien pursuant to its CC&Rs. The CC&Rs are a contract under Arizona law, regardless of whether an owner reads or signs them. The contractual lien includes those fees and charges specifically listed in the CC&Rs. For example, fees and charges could include assessments, late fees, collections costs, attorney's fees and costs of enforcement. Normally, one may determine what fees are included in the CC&Rs contractual lien by looking at the assessments section of the CC&Rs.

3. Lien Priority

In Arizona, an Association's lien is second in priority to the following liens:

1. Liens and encumbrances recorded prior to the recordation date of the CC&Rs;
2. Recorded first mortgages or contracts for sale;
3. Liens for real estate taxes and other governmental assessments directly related to the property; and
4. Property taxes.

Mechanics' and materialmens' liens and liens of other Associations are exceptions from this priority scheme.[37]

4. Collection of Association Assessments - Enforcement of Association Liens

When an owner in an Association fails to pay Association assessments, the Association has several means to effectuate collection of the delinquent assessment. Some collections options are based on the fact, as discussed above, that the Association has a lien regarding the assessments.

Initial Collection Demand Letter

The Association, or the Association's managing agent, may send owners an initial collection demand letter when owners are delinquent in paying their assessments. Most Associations send an initial collection demand letter when owners are more than thirty (30) days delinquent in paying their assessments. Please note that a collection demand letter is subject to the provisions of the Federal Fair Debt Collections Practices Act ("FDCPA") and Associations (or its agent) should familiarize itself with the requirements of the FDCPA.

In addition to sending an initial collection demand letter, an Association may also impose a late fee for late payment of assessments. Pursuant to A.R.S. § 33-1803 (Planned Communities) "[A] payment by a member is deemed late if it is unpaid fifteen or more days after its due date, unless the community documents provide for a longer period. Charges for the late payment of assessments are limited to the greater of fifteen dollars or ten percent of the amount of the unpaid assessment." And, A.R.S. § 33-1242 (Condominiums) provides an Association with the ability to impose late fees but

[37] See A.R.S. § 33-1256(C)(Condominiums) and A.R.S. § 33-1807(C)(Planned Communities).

does not limit the amount of late fees. As such, condominiums must look toward their CC&Rs to determine the amount of the late fee.

Subsequent Collection Demand Letters

The Association may send subsequent collection demand letters if it so desires. The Association, however, must determine whether subsequent demand letters are effective versus other collections tools.

5. The Filing of a Notice of Claim of Lien

Although Arizona law does not require an Association to record a lien or "Notice of Claim of Lien," filing a "Notice of Claim of Lien" is nonetheless a widespread practice and an effective collections tool. An Association's lien arises automatically and is deemed "recorded" as of the recording date of the CC&Rs. However, recording a "Notice of Claim of Lien" when a delinquency arises does not adversely affect the automatic lien and does provide some additional benefits. For instance, recording a "Notice of Claim of Lien" provides notice to title companies insuring transfers of title. Additionally, a recorded ensures that any payoff requests will be supplied to the proper address.

Some older CC&Rs require 30 days' notice before acting to enforce a lien or may require the Association to first send a "notice of intent to lien letter". CC&Rs should be carefully examined for these procedural requirements before commencing with any lien enforcement action.

6. Personal Money Judgments Lawsuits

If the collection letter does not resolve the dispute, the Association may seek to collect the debt through court action. Under general CC&R provisions, an owner is personally liable for unpaid assessments and the Association may file a lawsuit against the owner to collect the delinquency. For collection of relatively small delinquencies (i.e., less than $10,000.00), many Associations choose to file personal judgment lawsuits in Justice Court. Justice Court can provide a less expensive and more efficient means of obtaining a personal money judgment against an owner, as opposed to the more costly route of filing in Superior Court.

Once the personal judgment lawsuit is filed and served, the defendant has twenty (20) days (or 30 days if served out of state) to file an answer. If the defendant fails to file an answer, the Association may file an Application for Entry of Default. The defendant then has ten (10) business days from the date the Application for Default was filed to respond with an answer or responsive pleading. If no answer is filed within this timeframe, "default" is automatically entered in the case and the Association may then request a default judgment in the Association's favor. In the event of default, judgment can generally be obtained in as little as two to three months. If the defendant appears and contests the personal judgment lawsuit, the Association can often prevail on a Motion for Summary Judgment. In rare circumstances, a trial may be necessary.

Personal judgment actions are generally less expensive than a foreclosure suit because of the differing level of complexity. With that said, an Association is entitled to recover its reasonable attorney fees and costs in the case and therefore, an Association should not rule out a foreclosure action based solely on increased legal expenses.

Once a judgment is obtained and recorded, it becomes a lien on any real property (not just the property located within the Association) owned by the defendant in any county in Arizona where the judgment is recorded. This "judgment lien" may be subject to the statutory homestead exemption and is generally dischargeable in bankruptcy. An Association may, however, utilize the money judgment to pursue wage garnishments and bank garnishments to collect on the judgment. Additionally, if the Association finds its collection efforts on the money judgment unfruitful, it is not precluded from proceeding with foreclosure.

7. Foreclosure Lawsuits

As discussed above, unpaid assessments are secured by a lien against the owner's property, which may be foreclosed upon in the same fashion as a mortgage on real estate.[38] In Arizona, Associations do not have the "power of sale" to conduct foreclosures in the same way that mortgages are foreclosed (i.e., through a "trustee's sale"). An Association must proceed with "judicial foreclosure." In other words, the Association must file a lawsuit in Superior Court seeking a judgment on foreclosure.

Because the lawsuit affects title to the property, a "Notice of *Lis Pendens*" must be filed and recorded. This notice informs any potential buyer or transferee that he/she will take the property subject to the pending foreclosure lawsuit and any final judgment entered in that case, unless the litigation is satisfied and a "Release of *Lis Pendens*" is recorded. This also notifies title companies that may be handling a sale or refinance of the property that the lien must be cleared before transferring title.

Unlike a personal money judgment lawsuit, a foreclosure lawsuit may typically name several defendants, including the record title owners and any junior lien holders (i.e., a second mortgage, judgment liens, liens for unpaid income taxes, etc.). If the Association has reason to believe that the record owners are deceased, the unknown heirs and devisees should also be named.

The Association's lawsuit would seek a judgment foreclosing all interests in the property that are junior to the Association's lien interest in the property. (See "lien priority" above.) It is not unusual for a junior lien holder with a sizable interest in the property (such as a second mortgage) to contact the Association and pay the full balance of the delinquency, including attorney fees and costs, to protect its interest from the threat of foreclosure.

Similar to the money judgment lawsuit, a default judgment may be secured if the defendants fail to appear and contest the lawsuit. If a defendant appears and answers, the matter is generally resolved promptly on a Motion for Summary Judgment in the Association's favor. Very few cases require a trial and, therefore, Associations generally secure judgments on foreclosure if the case is not resolved by payment in full or settlement. The judgment will generally include an award of the principal amount of unpaid assessments, together with the attorney fees and costs incurred and interest.

Once a judgment is obtained, the county Sheriff's office may be instructed to sell the property to satisfy the judgment to recover the delinquency. A "writ of special execution" is issued by the Court instructing the Sheriff to conduct the sale. After posting and publishing notice of the sale, the property is auctioned off to the highest bidder at the Sheriff's offices, or any other place designated in the notice.

[38] See A.R.S. § 33-1256 and A.R.S. § 33-1807. Also see, *Cypress on Sunland Homeowners Ass'n v. Orlandini.* 227 Ariz. 228 (Ariz. App. 2011), which states "a lien may be foreclosed in the same manner as a mortgage on real estate but may be foreclosed only if the owner has been delinquent in the payment of monies secured by the lien."

If no one bids on the property, the Association will take title to the property for the amount of its bid. The Association may then dispose of the property as it sees fit.

If a purchaser outbids the Association at the auction, the purchaser must deliver cash or a cashier's check to the Sheriff's office within five (5) days from the sale. Upon receipt of the sale price, the Sheriff will issue payment to the Association in the amount of its judgment, interest and costs incurred in connection with the sale. The Association is also responsible for payment of a commission to the Sheriff for successfully selling the property and satisfying the delinquency.

After the sale, the owner's interest is foreclosed, but he/she still has time to redeem the property. The owner has a statutory redemption period (generally six (6) months unless the property is abandoned, then thirty (30) days) in which the owner can redeem the property and regain full title to the property by paying the total amount of the sale price, plus interest and a penalty. Following the owner's redemption period, junior lien holders in their order of priority may also redeem the property and secure title by payment of the full redemption amount. The redemption payoff is generally provided by and handled through the Sheriff's office that conducted the sale. If the property is redeemed within the redemption period, the owner takes back all rights and interest in the property as if the foreclosure and sale never occurred; however, the Association is paid in full.

If the owner or any junior lien holder fails to redeem the property within the redemption period, the purchaser (including the Association if it was the successful bidder at the sale) may then request and the Sheriff must issue a "Sheriff's Deed" to the purchaser, subject to any liens that were not foreclosed through the foreclosure process or liens that may have attached during the redemption period. With a recorded Sheriff's Deed in hand, the purchaser is generally considered to hold good and marketable legal title as owner of the property.

8. Unforeseen Collections Issues:

First Mortgage Holder Foreclosure

The first question that comes to mind concerning first mortgage holder foreclosures is "when does an Association know a house is being foreclosed by a first mortgage holder?" Pursuant to law, first mortgage holders, prior to conducting a trustee sale (which is where the property will be foreclosed and sold to remedy the delinquent mortgage), must send the Association a "Notice of Trustee Sale." The Notice of Trustee Sale must also be recorded in the county where the property is located. The Notice of Trustee Sale must be sent to anyone who has a recorded interest or lien (such as an Association) in the property.

Once the Association has received the Notice of Trustee Sale, the Association should determine whether the owner is delinquent in their assessments. If the owner is delinquent in their assessments, the Association may make a claim to the Trustee for any excess proceeds if the property is sold at a Trustee's sale. Excess proceeds are monies obtained by selling a property at a Trustee Sale that are over and above the amount owed to the first mortgage holder. Since, in most cases, an Association's lien for delinquent assessments is second in priority to that of the first mortgage holder, any excess proceeds should go to the Association to satisfy any delinquent assessments and other statutorily collectible amounts owed.

In order to secure excess proceeds, the Association, pursuant to A.R.S. § 33-812 must make a written claim to the Trustee (whom is the person who will be holding the money once the Trustee Sale takes place) requesting that the Trustee release any excess proceeds gained to satisfy the owner's delinquency with the Association. The letter should include:

1. The amount of the delinquency and proof of the delinquency (a customer ledger will usually suffice as proof of the delinquency);
2. A statement as to the Association's lien priority;
3. A statement showing the Association is entitled to excess proceeds (reference to the CC&Rs or appropriate statute regarding the assessment lien of the Association should suffice).

If the Trustee, after receipt of the above notice letter, fails to deliver any excess proceeds to the Association, the Association's right to collect attorney's fees should it have to institute legal action to collect the excess proceeds will be saved. It is because of this that the above notice letter is so important and should be sent upon receiving a Notice of Trustee sale.

In the event that there are no excess proceeds after the Trustee Sale and the property has reverted to a third party, then the Association's lien will be extinguished. Consequently, the Association would not be entitled to collect any assessments or attorney fees incurred prior to the date of the Trustee Sale from the new owner. Nonetheless, the Association may still pursue a money judgment in the hope that the homeowner will obtain future assets that the Association could garnish in order to recover what it is owed.

Bankruptcy

Another unexpected collections issue occurs when an owner declares bankruptcy and ceases paying their assessments. Upon the receipt of a Notice of Petition for Bankruptcy (typically a Chapter 7 filing or a Chapter 13 filing), an Association should prepare a statement of the declaring owner's account. Once the statement has been prepared, it should be sent to the Association's attorney.

At this point, the Association's attorney will intervene on behalf of the Association by filing a Notice of Appearance with the Bankruptcy Court informing the Court that the attorney is representing the Association. The attorney may also file a Proof of Claim with the Bankruptcy court that substantiates the debt owed by the owner to the Association.

If the owner files a Chapter 7 bankruptcy and decides to keep their home, the Association may petition to lift the bankruptcy stay of collections enforcement and foreclose on the property should the owner not pay the delinquent assessments.

If the owner files a Chapter 13 bankruptcy, the Association may petition the court to include the Association's delinquency in the payment plan created by the bankruptcy court.

Bankruptcy is a complicated matter. Because of this, it is important that the Association rely on the advice of its attorney to aid in navigating the process.

B. PROTECT AND MAINTAIN THE COMMON PROPERTY

Arizona statutory law[39] and Arizona case law[40] assert that Associations have a duty to protect and properly maintain the common property to which the Association, either through ownership or exclusive control, has the power to solely maintain or otherwise control. The duty to maintain the safety of common property applies not only to physical conditions on the land but also to dangerous activities on the land.[41]

VII. THE 2018 CHANGES IN THE LAW

Unless otherwise indicated, the below changes are generally effective date August 2, 2018.

HB2240: JUDGMENT RENEWAL; TIME PERIOD

HB 2240 revises A.R.S. § 12-1551, A.R.S. § 12-1611, A.R.S. § 12-1612, A.R.S. §12-1613 and A.R.S. § 33-964 to state that a judgment may be renewed any time within 10 years of the date of the Judgment.

HB2262: CONDOMINIUMS; TERMINATION; APPRAISALS

HB 2262 revises A.R.S. § 33-1228 (Condominiums) to discuss the procedures for reimbursement of condominium unit owners when the condominium is terminated.

SB1043: COUNTY RECORDER; RECORDING FEES - Effective July 1, 2019

SB 1043 revises A.R.S. § 11-475, A.R.S. § 11-475.01, A.R.S. § 11-1132 and A.R.S. § 27-208 to increase the filing fees of documents filed with the various county recorders as follows: $30 for recordings required or authorized by law plus 50 cents for each additional page and $15 for recordings to which a government entity is the requesting party plus 50 cents for each additional page.

SB1465: SOBER LIVING HOMES

SB 1465 revises A.R.S. § 9-500.39, A.R.S. § 9-500.40, A.R.S. § 11-269.17, A.R.S. § 11-269.18, to require the Arizona Department of Health Services to adopt rules to establish minimum standards and requirements for the licensure of "sober living homes." **Once the Arizona Department of Health Services adopts standards, sober living facilities must be licensed.** A failure to be licensed will result in a fine.

[39] A.R.S. § 33-1247(A) (Condominiums) and A.R.S. §33-1802(1) (Planned Communities).
[40] See *Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.*, 189 Ariz. 206, 941 P. 2d 218 (Ariz. 1997).
[41] See *Woodmar*, 189 Ariz. 206, 941 P. 2d 218.