



SHAW & LINES, LLC
COUNSELORS TO COMMUNITY ASSOCIATIONS

PRESENTS

**THE COMMUNITY ASSOCIATION
BOARD MEMBER MANUAL
and
GUIDE TO THE 2011 CHANGES
IN THE LAWS AFFECTING
COMMUNITY ASSOCIATIONS**

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is doing *better* what is
already *being done.*

Shaw & Lines, LLC, focuses its practice to General Real Estate Law and Community Association Law. The Firm represents Community Associations, Developers of Community Associations, Developers of Professional Office Condominiums, Professional Office Condominium Associations and Timeshare Associations.

The Firm was founded and continues to operate on the goal of promising and providing efficient, competent and quality legal services to its clients. Shaw & Lines, LLC, distinguishes itself by efficiently and effectively “doing better what is already being done.” Shaw & Lines, Arizona’s Counselors to Community Associations.

FORWARD

The Community Association Board Member Manual is designed to aid Board Members in understanding the basic concepts regarding community associations and their responsibilities as Board Members.

The Manual is designed to be a basic training guide for new Board Members and those Board Members who have not received basic training concerning community associations. Using the Manual as a quick reference guide, the Manual will be of great use in answering simple day-to-day questions that come up.

This document is intended to provide general information. It does not and cannot provide specific legal advice. For additional information or answers to questions, you may contact Augustus H. Shaw IV, Esq. of Shaw & Lines, LLC at 480-456-1500 or send questions to ashaw@shawlines.com.

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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. Homeowner 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 basic types, which are Planned Communities¹ and Condominiums².

B. Condominiums.

A “Condominium,” under Arizona Revised Statutes § 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 are vested in the unit owners.” In essence, a Condominium is an association in which the individual member/owners own an undivided interest in the common area, the property to be equally enjoyed by the members of the association.

C. Planned Communities.

A “Planned Community” under Arizona Revised Statutes § 33-1802, is defined as a “real estate development which includes real estate owned and operated by a nonprofit corporation or unincorporated association of owners, created for the purpose of managing, maintaining or improving 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, the property to be equally enjoyed by the members of the association, is owned by the association, rather than the members/owners.

D. Cooperative.

A corporation owns the property that makes up the cooperative. This property is typically a building. The owner purchases a shared interest in the

1 Arizona Revised Statutes § 33-1801 *et seq.*

2 Arizona Revised Statutes § 33-1201 *et seq.*

corporation. With that purchase they have the right to occupy a portion of the building. This portion is usually called an apartment. Anything outside the apartment becomes the common area maintained by the corporation.

E. Townhomes, Patio Homes, Cluster Housing.

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

II. DOCUMENTS THAT GOVERN HOMEOWNER ASSOCIATIONS

A. Types of Governing Documents.

Governing documents of homeowner associations are divided into two basic types, documents that restrict the use of the property or the behavior of residents concerning the property and 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 known 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. Resolutions of the Board of Directors.

B. Declaration of Covenants, Conditions and Restrictions.

The Declaration of Covenants, Conditions and Restrictions, commonly known as the “CC&Rs,” is a document that creates the scheme of enforceable covenants and restrictions that run with the property. As a document that places restrictions on property, the CC&Rs must be with the applicable county recorder.

CC&Rs typically discuss:

1. The restrictions on the use of property;
2. Assessment collection and the Assessment lien;

3. Required association Insurance;
4. Maintenance of the common areas;
5. Member's rights concerning the common areas; and
6. Enforcement of the restrictions.

C. Rules and Regulations and Architectural Guidelines.

Most association CC&Rs allow associations to draft reasonable Rules and Regulations that explain the restrictions found in the CC&Rs. The Rules and Regulations normally are developed by the association's board of directors and have the same enforceability as the CC&Rs, even though the Rules and Regulation, 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 to the property not found in the CC&Rs. If Rules and Regulations conflict with the CC&R's, then they are generally unenforceable.

D. Architectural Guidelines.

Architectural Guidelines also derive their authority from the CC&Rs of an association. The Architectural Guidelines usually provide a framework for the decision making process of the Architectural Committee. The Architectural Guidelines have the same enforceability as the CC&Rs, even though they, for the most part, are 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 as found in the Arizona Non Profit Act.³ The Articles of Incorporation constitute the corporate charter and is filed with the Arizona Corporation Commission. Typical Articles of Incorporation include provisions that:

1. Create the non-profit corporation embodying the homeowners association;
2. Provide the legal name of the association. It is very important to use this name consistently when discussing the association, even if there are different marketing names for the community. Please make sure that your homeowners

³ Arizona Revised Statutes §§ 10-3101 through 10-11702.

know the name of the association. Otherwise owners call the management office and become frustrated, as we may not know all of the various marketing names in a large master planned community;

3. Provide the principle office of the association;
4. Identify the statutory agent. Who do you want to receive notice of any certified mail, lawsuits, etc;
5. Discuss the purpose and the character of the business;
6. Discuss who shall be members of the association;
7. Create the initial Board of Directors’;
8. Create the initial officers of the Board of Directors;
9. Limit the liability of the directors and officers;
10. Discuss how the association can be dissolved.

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. Typical Bylaws also:

1. Designate the fiscal year.
2. Must have an indemnification clause for the Board of Directors, management company and any employees of the Association.
3. State when the annual meeting will take place. Must have a time reference for the first annual meeting.
4. State how to call a Special Meeting.
5. Notice of Meetings tells very clearly what the rules are for notifying Members of meetings.
6. Establish quorum requirements for annual and membership meetings.

III. STATE STATUTES AND REGULATIONS THAT GOVERN HOMEOWNER ASSOCIATIONS

A. Arizona Planned Community Statutes - A.R.S. §§ 33-1801 *et seq* defines “planned community”, “association”, “community (governing) documents” and “declaration”. The planned community statutes also have provisions that deal with assessment increases, penalties, open meetings, disclosure of association records, resale disclosure and assessment liens.

B. Arizona Condominium Act – The Arizona Condominium Act, A.R.S. §§ 33-1201 *et seq.*, is patterned after the Uniform Condominium Act and is more extensive in scope and detail than the planned community statutes. 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. Nonprofit Corporations Act – All associations that are incorporated are subject to the Nonprofit Corporations Act, A.R.S. §§ 10-2301 through 10-2594. The Nonprofit Corporations Act contains extensive provisions governing the formation and operation of nonprofit corporations.

IV. HOMEOWNER ASSOCIATION MEETINGS

A. How to Conduct a Board Meeting.

A hotly debated and often challenged aspect of community association board meetings is how the meetings should be conducted. Generally speaking, there is little statutory guidance or document-specific provisions governing how to conduct a board meeting.

The most important issue regarding conducting board meetings is to determine and utilize procedures that assist the board to effectively and efficiently run and control its meeting. Board meetings need to be organized, run smoothly, and effectively communicate the position of the association to the members while conducting the business of the association.

Preparing and Sticking to an Agenda.

Planning and conducting an effective board meeting starts with a good meeting agenda. The agenda is the “road map” of the meeting and is a powerful tool to keep both board members and members on issue and in control. A good agenda will facilitate a smooth, efficient and effective board meeting.

There is really no standardized form for a board meeting agenda. Finding a model agenda that meets the needs of any specific community is the key to establishing and conducting effective board meetings. The following is a suggested model agenda:

Executive Session Board Meeting.

The executive session may be held before or after the regular board meeting, or at another time not related to the regular board meeting depending

on the business needed to be discussed or the respective availability of your directors, attorney and/or any participating members.

Call to Order.

This is the informal, but official opening of the board meeting.

Ratify Last Board Meeting Minutes.

This is the time set aside to ratify the meeting minutes of the last board meeting. Additionally, the board may introduce and/or ratify any business that was conducted without a board meeting by unanimous consent.

Old Business.

The board may discuss unresolved or tabled items of business from the last board meeting(s).

New Business.

This is the time set aside to discuss new items presented to the board for discussion and vote. During this time the board may also discuss matters that are regularly discussed in board meetings (i.e., discuss and approve the budget or association financials). Members in attendance must be allowed time to address the board before any formal or final vote is taken on any business item on the agenda.

Member Open Forum.

Arizona community association statutes require that certain board decisions be made in “open” meetings that allow members to participate before final decisions are made. Members or their designated representatives must be provided an opportunity to speak at an appropriate time during the deliberations and proceedings of the board meeting. Some issues may not be set forth on the agenda or discussed by the board during the regular board business portion of the agenda. In open forum, members may be allowed to address the board with issues or matters requiring a vote. As stated above, time limitations may be utilized to ensure that the board meeting can be ended on time.

(NOTE: Some boards may choose to have an open forum meeting at the beginning of the board meeting, rather than the end. Pursuant to the open meeting laws in community associations, members or their designated representatives must be provided with an opportunity to speak at an appropriate

time during the deliberations and proceedings of the board meeting. Before the board can deliberate or vote on any issues not discussed in executive session, the board must allow members to address the issue. As such, open forums may be held directly after the call to order and before any other agenda item so that this “opportunity” is provided and the board can then conduct the remainder of the meeting without having to be interrupted with comments, issues or questions from members in attendance.)

Adjourn.

This is a formal call to end the board meeting and conclude all association business until the next meeting of the board.

Board Meeting Procedures.

There are many ways to conduct a Board meeting. Some Boards choose to follow *Robert's Rules of Order*. Some Board like to follow standard “Parliamentary Procedure”. Often times, associations have implemented rules or have restrictions in their governing documents requiring the board to follow a certain standard practice (i.e., strict use of parliamentary procedure, etc.). Boards generally have the ability to choose any procedure to conduct its board meeting. Moreover, even when rules and restrictions “require” the strict use of certain procedures (i.e., “In conducting a board meeting, the board must use parliamentary procedure”) most boards will apply a relaxed version of these procedures and will still meet its duty in conducting the meeting.

Robert's Rules of Order and “Parliamentary Procedure”.

It is common for boards to adopt some form of “parliamentary” procedure in conducting meetings and transacting business. Typically, utilizing parliamentary procedure, like *Roberts Rules of Order*, assists boards in conducting “business-like” board meetings with official sounding “motions” made by directors, which require a “second” vote before all the directors either vote “Aye” or “Nay” on the issue. However, even if *Roberts Rules of Order* is expressly adopted by the board, these rules of procedure do not control or override the Governing Documents. In other words, unless the CC&R's, bylaws or articles of incorporation specifically state that the board must conduct its business pursuant to *Roberts Rules of Order* or parliamentary procedure, the Board is only bound to conduct its meetings in accordance with the provisions of the governing documents. Generally speaking, the only limitation that is expressed in governing documents is that the board should simply conduct its board meetings in a “business-like” manner.

Even if an association’s governing documents expressly state that *Roberts Rules of Order* or “parliamentary procedure” is required, it is unlikely that the association’s board has truly been applying *Roberts Rules of Order* or parliamentary procedure in a strict sense. Unless a parliamentarian is a board member who can ensure that *Roberts Rules of Order* are implemented with strict compliance, it is likely that the board has not been strictly utilizing the parliamentary procedure in its meetings. These rules are complicated, complex and outdated. Many directors of boards believe they are applying *Roberts Rules of Order* in conducting business but would find otherwise if they closely scrutinized their actions in light of the rules. Therefore, it is likely that prior board business believed to be conducted pursuant to *Roberts Rules of Order* was not conducted in strict accordance to these rules.

Rather than worrying whether the board members are strictly complying with parliamentary procedure, directors should focus on conducting the board’s business in a “business-like manner” without attempting to preclude director’s votes or business for failure to strictly comply with parliamentary procedures.

Choosing a procedure that works for you.

The best procedure to use is the one that works the best for the board. As a baseline, it is always helpful to have a standard procedure regarding addressing and voting on issues. For example, if the Board is deciding to hire a landscaping contractor (“Greenacre Landscaping”), the board might use the following procedure:

Board President: Is there a motion to hire Greenacre Landscaping?
Board member 1: I make a motion to hire Greenacre Landscaping.
Board President: Is there a second?
Board member 2: I second.
Board President: Is there any discussion concerning this contractor before we take a vote?
Board President: Since there is no more to discuss concerning this issue, I call for a vote. All those in favor say “Aye”. All those opposed, “Nay”.
(Vote is taken among 5 board members: 3 Aye votes and 2 Nay votes.)
Board President: Motion passes.

Board Meeting Minutes.

Many association boards struggle with how to properly take board meeting minutes. Meetings minutes should be simple, concise and legible. They should only record action items that occur at the board meeting. The person taking the minutes does not need to record a verbatim recitation of every word that is said at a board meeting.

Good meeting minutes may be only one (1) page. For example, below is what typical board meeting minutes might look like:

Greenacre Homeowners Association Meeting Minutes of 9/14/06

1. Motion was made to begin Executive Session Board Meeting. Motion was seconded and carried unanimously.
2. Motion was made to adjourn Executive Session Board Meeting. Motion was seconded and carried unanimously.
3. Regular Board Meeting was called to order at 11:00 a.m.
4. Member Open Forum was held from 11:01am to 11:30am.
5. Motion was made to accept and ratify the Meeting Minutes for the Board meeting held on 8/14/06. Motion was seconded. Motion carried unanimously.
6. Motion was made to hire Greenacre Landscaping as a landscaper for the Association. Discussion held regarding potential conflict of interest with Greenacre. (No conflict exists.) Motion was seconded and discussion was entertained. Motion carried unanimously.
7. Motion made to adjourn the meeting. Motion was seconded and carried unanimously.

Again, this is simply an example of regular board meeting minutes. The form may be more detailed if a director requests that a meeting minute entry be more detailed. However, board meeting minutes may be as simple as the example minutes above.

Meeting minutes are simply to document and evidence the result of the business conducted. It is not necessary to transcribe every discussion that took place. Remember, they are simply “minutes” of your meetings, not a rehash of the “hours” that actually transpired. Good minute taking skills will help the association’s record keeping, business transactions and can even make or break a lawsuit against an association. Minutes should be both carefully recorded and reviewed before they are ratified at the following meeting.

B. ANNUAL MEETINGS OF THE MEMBERS.

Probably the most important meeting a homeowners association (hereafter, "HOA") is required to conduct is the Annual Meeting of the Members. Not only do most HOA Governing Documents require HOAs to conduct Annual Meetings, Arizona law, at Arizona Revised Statutes §10-3701, requires HOAs to conduct an Annual Meeting at least once per year.

Purpose of an Annual Meeting.

Annual Meetings are meetings of the Members. They are held to conduct the "business" of the Membership and allow the Membership to address their HOA. In most HOAs, Annual Meetings are conducted for three 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.

Conduct Member "Business".

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

- a. Approval of the previous year's Annual Meeting Minutes (see the Section on Annual Meeting Minutes below);
- b. Amendment of the Association Documents; and
- c. Authorizing Increases in the Annual Assessments of Special Assessments.

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

To Elect Members to the Board of Directors.

By far the most important purpose of an Annual Meeting is to elect Members to the HOA's Board of Directors. Effectuating an election to the Board of Directors takes a great deal of forethought, especially in light of recent changes in the laws affecting HOAs found at Arizona Revised Statutes §33-1250 (Condominiums) and Arizona Revised Statutes §33-1812 (Planned Communities).

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 of Arizona Revised Statutes §33-1250 (Condominiums) and Arizona Revised Statutes §33-1812 (Planned Communities). The Statutes require that the HOA send absentee ballots to all Members of the HOA. The Statutes state, in relevant part:

Notwithstanding any provision in the community documents, after termination of the period of declarant control, votes allocated to a unit may not be cast pursuant to a proxy. The association shall provide for votes to be cast in person and by absentee ballot and may provide for voting by some other form of delivery.

The difficulty in complying with Arizona Revised Statutes §33-1250 (Condominiums) and Arizona Revised Statutes §33-1812 (Planned Communities) and effectuating an election of the Board of Directors lies in the dilemma of producing the required absentee ballot. This is why it is important to begin the planning process for an Annual Meeting at least sixty (60) days prior to the Annual Meeting.

Effective planning of an election to the Board of Directors begins sixty (60) days from the date of the Annual Meeting with the production and sending of a “Board Member Nomination Form” to all members. The Board Member Nomination Form requests that Members nominate themselves or other Members to run for the Board of Directors. The Board Member Nomination Form also provides the Member with an opportunity to provide qualifications concerning their election to the Board.

The Board Member Nomination Forms should require that the Forms be returned by no later than thirty (30) days from the date they are sent. All names returned on the Board Member Nomination Forms should be included on the absentee ballot and the Board Member Nomination Forms should be sent with the absentee ballot.

Once the return time for the Board Member Nomination Forms has expired, the absentee ballot may be drafted. As stated above, the Board Member Nomination Forms should be sent with the absentee ballots in order to provide as much information concerning the candidates as possible.

When drafting an absentee ballot, you must keep the requirements of Arizona Revised Statutes §33-1250 (Condominiums) and Arizona Revised Statutes §33-1812 (Planned Communities) in mind. 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.
3. The absentee ballot is valid for only 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.

The absentee ballot should state that they may be either returned to the Association one business day prior to the Annual Meeting or the absentee ballot may be hand-delivered to the Annual Meeting of the Members.

One other important thing to remember concerning absentee ballots is that the Association may only accept an absentee ballot from a particular owner. The Association may not accept a group of absentee ballots submitted by a single owner. Similarly, the Association may not accept a single ballot delivered to the Annual Meeting by a party other than the Member who executed the ballot.

To Allow Members to Address Their Association.

It is very important to remember that the Annual Meeting is a meeting of the Members; meaning that the Members should be provided with an opportunity to address their Board of Directors and other Members of the Association.

Many HOAs attempt to limit who may speak at an Annual Meeting. A good policy to have is to let all Members who wish to speak have the opportunity to speak but limit how long they may speak. I usually suggest no more than 5 minutes per person but this timeframe may be less depending on

the number of Members who desire to speak. I further suggest that, where a meeting becomes very adversarial, the Association strictly comply with all time limits, even bringing a stop watch or other timer if necessary.

Annual Meeting Do's and Don'ts.

Conducting an Annual Meeting can be a daunting task. If, however, the HOA is prepared, conducting an effective Annual Meeting can be relatively easy. Below are a few Do's and Don'ts concerning Annual Meetings.

Do Create An Annual Meeting Agenda.

Effective Annual Meetings start with the Annual Meeting Agenda. Annual Meeting agendas will vary depending on the HOA, but a standard Annual Meeting Agenda should contain the following:

- I. Call to Order;
- II. Approval of the Last Annual Meeting's Minutes;
- III. Introduction of the Board of Directors;
- IV. President's Report;
- V. Treasurer's Report;
- VI. Election of the Board of Directors;
- VII. Member Questions and Comments;
- VIII. Adjourn.

Do Take and Ratify Annual Meeting Minutes.

Arizona Revised Statutes §10-11601 requires HOAs to make a record of and keep annual meeting minutes. As such, it is important that HOAs take Annual Meeting Minutes. This should be done by the Secretary of the Association, or any other designated officer for the Board.

It is equally important that HOAs ratify Annual Meeting Minutes. Annual Meeting Minutes may only be ratified by the Members of the HOA. As such, most Annual Meeting Minutes will be ratified at the next Annual Meeting of the Members.

Do Not Restrict the Participation of Members at the Annual Meeting.

As stated above, the Members of the HOA have the right to address the HOA at the Annual Meeting. As such, it is important that time is reserved to allow the Members to address the HOA at the Annual Meeting.

Do Allow a Qualified Person to Conduct the Annual Meeting.

Whether it be the HOA President, HOA Manager or HOA Attorney, make sure that the Annual Meeting is conducted by someone who is qualified to conduct the Meeting. Annual Meetings are difficult to conduct and can get out of hand. Having someone who has conducted Annual Meetings in the past and who is well qualified to conduct the Annual Meeting will make the Annual Meeting run more smoothly.

C. SPECIAL MEETINGS OF THE MEMBERS.

Special Meetings of the Members are another form of Member meeting. Special Meetings of the Members are unique because they vary depending on the purpose of the Special Meeting of the Members.

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 HOA. Usually, the Board of Directors or a certain number of Members may call a Special Meeting of the Members.

Common Purposes for Special Meetings of the Members.

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

- i. To authorize a Special Assessment or Increase in the Annual Assessments.
- ii. To authorize amendment of the Association's Governing Documents.
- iii. To Remove Members of the Association's Board of Directors.
- iv. To Vote on other issues pursuant to the Association's Documents.

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

Generally, the HOA's CC&R's 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 HOA. Voting and quorum requirements concerning this type of Special Meeting of the Members will also generally be found in the HOA's CC&R's. Additionally, any Special Meetings of the Members must be

conducted using absentee ballots pursuant to Arizona Revised Statutes §33-1250 (Condominiums) and Arizona Revised Statutes §33-1812 (Planned Communities).

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

Pursuant to most HOA Governing Documents, Special Meetings of the Members may be called to vote amending certain provisions of the HOA's Governing Documents. Voting and quorum requirements concerning this type of Special Meetings of the Members should also be generally found in the specific HOA Governing Document that is being amended. Additionally, any Special Meetings of the Members must be conducted using absentee ballots pursuant to Arizona Revised Statutes §33-1250 (Condominiums) and Arizona Revised Statutes §33-1812 (Planned Communities).

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 a HOA's Board of Directors may be removed. Arizona Revised Statutes §33-1243 and Arizona Revised Statutes §33-1813 provides for the procedures concerning a Special Meeting of the Members to remove Members of the HOA's Board of Directors.

It is important that a HOA follow the quorum requirements of Arizona Revised Statutes §33-1243 and Arizona Revised Statutes §33-1813. It is equally important that the HOA carefully study Arizona Revised Statutes §33-1243 and Arizona Revised Statutes §33-1813 in order to abide by its provisions.

Confrontational Meetings

Thus far, we have discussed the technical and legal requirements for Annual and Special Meetings. From a practical perspective, one of the major problems facing HOAs is how to properly conduct a confrontational or highly adversarial meeting. The most typical context for confrontation and emotions is for special meeting to recall the sitting Board of Directors. The following is some suggestions concerning how to conduct a meeting in which tensions are high.

Allow the Property Manager or HOA Attorney to Conduct the Meeting

The Board of Directors, as residents of the Association, may face continued animosity from various members once the meeting ends. Debates at

an annual or special meeting may become personal disputes between neighbors. As a result, directors may be reluctant to control the meeting firmly or assert their position with the necessary conviction.

In contrast, both the property manager and the Association's attorney have less emotional investment in an association's business. As such, they can conduct the meeting fairly and professionally, while absorbing any personal attacks directed towards the directors. In using an independent party to conduct the meeting, directors can help preserve relationships within the association.

Prepare and Stick to the Agenda

As discussed above, preparing and sticking to an agenda is very powerful in allowing an association to conduct an efficient, business-like meeting. The more disorganized the meeting is, the more likely it is for a vocal minority of the membership to set the debate for an annual or special meeting, thereby creating unneeded conflict and confusion.

Provide and Enforce Specific Time Limitations on Debate

Arizona law requires that members be given the opportunity to discuss pending Association business. With that said, the board may set reasonable time restrictions on debate. Thus, where a meeting may become confrontational, the board, prior to opening debate, should set the ground rules with respect to the time allowed for an individual member to speak. I further recommend bringing some type of timing device in order to enforce the time limits.

Be Firm but Professional

While difficult, directors must be able to firmly cut off debate, interrupting the speaker if necessary. It is important to be firm, but professional, without resorting to yelling or responding in kind to any personal attacks levied towards directors. It is this situation where allowing the property manager or attorney to run the meeting can be the most effective.

V. DUTIES AND OBLIGATIONS OF BOARD MEMBERS.

Directors and officers of an association are charged with a "fiduciary duty" to the Association. Board members may be held personally liable for any damage caused to the Association as a result of a breach of this duty.

Directors have an obligation to exercise reasonable care in making decisions on behalf of the association. They must use good "business judgment"

and will meet their duty if they work under the “business judgment rule”. This rule means a board member will be insulated from personal liability if the board member acts (1) in good faith, in a manner that he or she believes to be in the best interest of the Association, and (2) makes a decision that any other reasonable director would make in the same situation or circumstances.

The “business judgment rule” is found both in Arizona common law and in Arizona Revised Statutes §10-3830 of the Arizona Nonprofit Corporations Act. The statutes state 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.”

This rule also protects board members from personal liability if they make their 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.” In other words, if the board’s decision ends with a bad result – even if the association suffers a financial loss as a result – the directors should be shielded from claims of personal liability if their decision was made on the advice of the association’s attorney.

When making decisions on behalf of the association, board members should have a good faith belief that the decisions they are making are in the best interest of the corporation. When making decisions requiring expertise of professionals, the board can and should rely upon attorneys, accountants, its management company, or other relevant professionals.

Board members should adhere to the following:

1. Understand general association business;
2. Attend and participate in meetings;
3. Register a dissent in the minutes when disagreeing with the Board’s action; and
4. Be familiar with and gain a general understanding of the CC&R’s, Articles of Incorporation, Bylaws and other association documents.

Another duty relating to the fiduciary responsibilities 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. One example of board members breaching such a duty is if board members refuse to enforce the governing documents against other board members, or if the documents are enforced inconsistently. (Board members are not exempt from their obligations as homeowners and should receive no special treatment.) Another 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 excuse himself from the decision. The Arizona Nonprofit Corporations Act discusses conflicting interests transactions beginning in Arizona Revised Statutes §10-3860. The Arizona legislature has also recently adopted additional provisions regarding conflicts of interest for planned communities in Section 23-1811.

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).

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 majority of the board.

A. How to Handle the Rogue Board Member.

Every community association (or almost) has 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 document will discuss the legal liability facing community associations regarding Rogue Board Members and how community associations should address the situation and protect itself.

As a starting point, 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 community association. Sometimes Rogue Board Members feel that their actions are in response to a perceived lack of action by the full Board of Directors. Most Rogue Board Members want to make their communities better but are simply not educated regarding the proper way to accomplish their goals.

So, while this document is meant to instruct community associations on how to identify and address a Rogue Board Member; this document may also serve as a reflection tool to Board Members so that they may ensure that they do not become a Rogue Board Member.

What is a Rogue Board Member.

A Rogue Board Member is a member of a community association 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 community association. Rogue Board Members can interrupt the flow of Board meetings and make them more difficult to conduct. Additionally, Rogue Board Members can discourage other Members of the Association's Board from fully participating in Board Meetings.

Association Liability Concerning the Rogue Board Member.

While there are a number of practical reasons why Rogue Board Members are not good for community associations, there are more important legal reasons why Rogue Board Members should be addressed.

Rogue Board Members may be difficult to deal with, but they also create a wide range of legal issues for a community association. In order to fully discuss the different types of potential liability, it is important to revisit the actual behaviors.

Uncivil behavior at meetings of the Board of Directors

When a Rogue Board Member conducts himself or herself uncivilly at Board meetings, said behavior could disrupt the Board meeting 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.

The above could lead to legal liability in the form of a harassment lawsuit against the Rogue Board Members and a lawsuit against the community association for failing to address the Rogue Board Member's conduct.

Enforcement of the restrictive covenants without Board Approval

When a Rogue Board Members seeks to enforce the restrictive covenants on their own, this activity could lead to breach of the community association's policies on enforcement. When a Rogue Board Member takes enforcement action outside of the association's normal enforcement policies and procedures, this could subject the Association to legal liability based on unequal enforcement and breach of the association's own policies and procedures.

Failure to keep confidential information

Every community association board discusses information that, for a number of reasons, should be kept confidential. It is important for Board members to keep confidential information confidential. Rogue Board Members fail to keep confidential information confidential which 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 community association.

Speaking badly about other Board Members

Speaking badly about a fellow Board member can lead to ill feelings and resentment that can affect the efficient operation of the Board. Moreover, it could lead to liable and slander liability if the statements made by the Rogue Board Member are false or misleading.

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 be held to not breach their fiduciary duty if they thoughtfully consider the advice of experts. Rogue Board Members tend to believe that they are the expert in everything and hiring an expert is not needed. This type of behavior could lead to a host of liabilities depending on the area of expertise not sought.

How to Handle the 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 to, in an executive session meeting of the Board of Directors, 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 Members 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 remaining options, said options being:

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

The calling of a special meeting of the Association to discuss the removal of the Rogue Board Member from the Board of Directors

Most community 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 could be held to discuss the removal of a member from the Association's Board of directors.

Calling a removal meeting should be only done in extreme circumstances. It is always advisable that prior to calling the removal meeting, the Association seek the advice of its attorney.

Filing a breach of fiduciary duty lawsuit

This is absolutely the last option an association make take regarding a Rogue Board Member and the most drastic. Before considering this option, the association should consult with its attorney to determine whether this option may be effectuated.

VI. PRIMARY FUNCTIONS OF A HOMEOWNER ASSOCIATION

One of the primary duties of a homeowners association is to enforce the restrictions in the association's governing documents. In some circumstances, associations may have an obligation to enforce the restrictions found in the association's governing documents. It is important to understand how and when to properly enforce an association's governing documents.

A. Enforcement of Restrictive Covenants.

Restrictive covenants may be enforced in three 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 main principles of 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.

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 (the planned community statutes), 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";
2. The fine is imposed after notice and an opportunity to be heard; and
3. The notice of the fine must contain a statement regarding how the fine will be enforced and collected.

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.

Also, most association CC&Rs allow the association to recoup attorney's fees spent in obtaining injunctive relief if the association is the prevailing party. Any attorney fees incurred may be awarded to the association by the Court in the injunction action, subject to the judge's discretion; meaning a judge does not have to award the association all of its attorney's fees.

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 unusually 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.

B. Collecting Assessments.

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

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. See A.R.S. §33-1256(C) and A.R.S. §33-1807(C).

Pre-attorney Collection Options:

i. Association 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.

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 per cent of the amount of the unpaid assessment." Regarding late fees for condominiums, A.R.S. §33-1242 provides an association with the ability to impose late fees but 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.

ii. 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.

iii. 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 can be an effective collection tool. Recording a “Notice of Claim of Lien” also provides additional notice to title companies insuring transfers of title and providing contact information for lien payoff requests.

Recording the notice of claim of lien is also an effective tool for ensuring 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.

Attorney Collections Options:

i. Pre-Litigation Demand Letter;

Pre-Litigation Demand Letters are sent when an owner’s account is generally three to four or more months delinquent or when directed by the association’s Board of Directors. Pursuant to the U.S. Federal Fair Debt Collection Practices Act, the delinquent owner must be given thirty-five (35) days to either pay their account in full, set up some sort of payment agreement or dispute the debt.

ii. Personal Money Judgments Lawsuits;

If the Pre-Litigation Demand Letter does not result in payment of the debt owed or the institution of a payment arrangement between the association and the debtor, 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 \$1,000.00), many associations choose to file personal judgment lawsuits in Justice Court, which has a jurisdictional limitation for disputes of less than \$10,000. 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) 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 must then prosecute the lawsuit to conclusion by either filing a Motion for Summary Judgment or, in rare circumstance, proceeding with a trial.

Personal judgment actions are generally less expensive than a foreclosure suit in both attorney fees and costs because of the differing level of complexity. However, an association is entitled to recover its reasonable attorney fees and costs in the case.

A judgment is an official declaration by the Court that the money is owed. Once recorded, the judgment becomes a lien on any real property (not just the property located within the association) 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. However, an association may 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.

iii. Foreclosure Lawsuits:

In addition to the owner’s personal responsibility, unpaid assessments are secured by a lien against the owner’s property, which may be foreclosed. 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*” (literally meaning “a suit pending”) must be filed and recorded. This 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 record owners are possibly deceased, the unknown heirs and devisees may also be named and would be served by publication. 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, the defendants must appear and file an answer within 20 (or more) days after they are served. 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.

After a judgment has been awarded, in order to recover the delinquency, the county Sheriff's office may be instructed to sell the property to satisfy the judgment. 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. If no one bids on the property, the association will take title to the property for the amount of its bid. With title to the property, the association may sell the property in an effort to satisfy the amounts owing.

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 an 8% penalty. Following the owner's redemption period, junior lien holders in their order of priority may also redeem the property and secure title to the property 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.

Unforeseen Collections Issues

First Mortgage Holder Foreclosure.

As a result of the economic downturn, a number of community associations are experiencing an increased number of homes being foreclosed upon by banks and other holders of first mortgages. This phenomenon, unfortunately, is beginning to affect not only a community association's ability to collect delinquent assessments, but the community association's ability to provide vital services to its clients.

The first question that comes to mind concerning first mortgage holder foreclosures is "when does a community 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 community 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 a community association) in the property.

Once the association has received the Notice of Trustee Sale, the community association should determine whether the owner is delinquent in their assessments. If the owner is delinquent in their assessments, the community

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, a community association's lien for delinquent assessments is second in priority to that of the first mortgage holder, any excess proceeds should go to the community association to satisfy any delinquent assessments and other statutorily collectible amounts owed.

In order to secure excess proceeds, the community 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 community 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 community 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 community association, the community 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 after the Trustee Sale there are no excess proceeds 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 the previous homeowner in justice court by obtaining 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 will 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.

2011 CHANGES IN THE LAWS AFFECTING COMMUNITY ASSOCIATIONS

I. INTRODUCTION

This Community Association Guide to the 2011 Changes in the Laws Affecting Community Associations provides a summary of the recent revisions to the Arizona Planned Community Act, the Arizona Condominium Act and other relevant Statutes that affect Arizona Community Associations. This Guide is also available for download from our website www.shawlines.com.

PLEASE NOTE THAT THE BELOW CHANGES WILL TAKE EFFECT ON JULY 19, 2011.

II. CHANGES IN THE LAWS REGARDING BOARD MEETINGS, COMMITTEE MEETINGS AND OTHER ASSOCIATION MEETINGS.

A. **Changes in the law concerning the videotaping and audio taping of Board Member Meetings – HB 2245 Revised A.R.S. § 33-1804 (Planned Communities) and Revised A.R.S. § 33-1248 (Condominiums).**

House Bill 2245 adds new provisions to A.R.S. §33-1804(A) (Planned Communities) and A.R.S. §33-1248(A) (Condominiums) regarding the audio taping and videotaping of Board Meetings. The new law states that individuals attending Board Meetings may audio tape or videotape those portions of the meetings of the Board of Directors and meetings of the members (such as annual meetings or special meetings of the members) that are open (meaning executive session meetings may not be recorded).

The Board of Directors of the Association may adopt reasonable rules governing the audio taping or videotaping of open portions of the above listed meetings; however, any rules created shall not preclude such audio taping or videotaping by those attending.

Thus, while the Association may create rules, the Association must keep in mind that if a rule is too intrusive, it may be struck down by a court. Reasonable Rules concerning audio taping or videotaping could include:

1. A Rule requiring that anyone desiring to record a meeting inform the Association at least 48 hours prior the meeting detailing whether they will audio tape or video tape the meeting;

2. A Rule requiring that owners provide the Association with a copy of the recording made within 48 hours of the meeting;
 3. A Rule stating that the audio or video recording of a meeting may not be intrusive or otherwise interfere with the conducting of the meeting.
- B. Changes in the law concerning the conducting of Association Meetings – HB 2609 - Revised A.R.S. § 33-1804 (Planned Communities) and Revised A.R.S. § 33-1248 (Condominiums).**

House Bill 2609 adds several new provisions to A.R.S. §33-1804 (Planned Communities) and A.R.S. §33-1248 (Condominiums) as listed below.

i. Location of Association Meetings.

House Bill 2609 now requires that all Association meetings be held within the State of Arizona. This means that the origin of the meeting must be in Arizona. Teleconferences are still allowed so long as the call originates in Arizona.

ii. Committee Meetings Must Be Noticed, have an Agenda and Members must be allowed to attend and participate.

House Bill 2609 now requires that Associations provide members with notice of regularly scheduled committee meetings (i.e. architectural review committee, landscape committee, etc.) and provide members with the right to address the Committee after the Committee has discussed an item on the agenda for the meeting but prior to the Committee voting on the item.

iii. Prior to Board Meeting – The Requirement for an Agenda.

House Bill 2609 requires that an agenda be prepared prior to Board meetings and “shall be available to all owners attending.” The requirement to have an agenda also means that an Association must stick to the agenda and not deviate from it.

iv. During the Board Meeting - Members must be allowed to attend and participate.

House Bill 2609 now requires the Association to provide members with the right to address the Board of Directors after the Board has discussed an item on the agenda for the meeting but prior to the Board voting on the item.

v. During the Board Meeting – Board quorum and what is a Board Meeting.

House Bill 2609 states any quorum of the board of directors that meets informally to discuss association business, including workshops, shall comply with the open meeting and notice rules without regard to whether the board votes or takes any action on any matter at that informal meeting.

Therefore, House Bill 2609 now defines any gathering of a quorum of Board members where Association business is discussed to be a Board Meeting that must be properly noticed and have an agenda prepared.

vi. During the Board Meeting - Executive Session Meetings – Addition of Executive Session Topic.

House Bill 2609 also adds an additional topic that may be discussed in executive session, which is a closed meeting of the Board. House Bill 2609 states that the following may be discussed in executive session:

Discussion of a unit owner’s appeal of any violation cited or penalty imposed by the association except on request of the affected unit owner that the meeting be held in an open session.

vii. During the Meeting – Emergency Board Meetings.

House Bill 2609 also provides new rules regarding emergency meetings of the Association. The new law states that an emergency meeting of the board of directors may be called to discuss business or take action that cannot be delayed until the next regularly scheduled board meeting. The minutes of the emergency meeting shall state the reason necessitating the emergency meeting. The minutes of the emergency meeting (yes, minutes must now be taken at emergency board meetings) shall be read and approved at the next regularly scheduled meeting of the board of directors.

viii Public Policy Regarding Open Board Meetings.

House Bill 2609 also 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 must do all they can to ensure that they only meet in executive session or have an emergency meeting when the applicable statutory allowance is at play.

III. CHANGES IN THE LAWS REGARDING SIGNS IN THE ASSOCIATION.

A. **HB 2609 – For Sale, For Rent and For Lease Signs – Revised A.R.S. § 33-1808 (Planned Communities) and Revised A.R.S. § 33-1261 (Condominiums).**

HB 2609 now restricts Associations from charging a fee for the installation or placement of a for sale, a for lease, or a for rent sign. Additionally, failure by the Association or its managing agent to abide by all regulations regarding for sale, for lease and for rent signs would result in the Association potentially losing its Association lien on the affected property for six months. However, the Association may restrict the use of non-commercially produced for sale, for lease and for rent signs.

B. **HB 2609 & SB 1540 (Caution, these new laws conflict) – Political Signs – Revised A.R.S. § 33-1808 (Planned Communities) and Revised A.R.S. § 33-1261 (Condominiums).**

HB 2609 & SB 1540 both discuss political signs and have conflicting provisions. Therefore, we discuss the most conservative interpretation of the two new laws.

This new law states that Associations shall not prohibit the indoor or outdoor display of a political sign by an association member on that member's property, except that an association may prohibit the display of political signs earlier than seventy-one days before the day of an election and fifteen days after an election day.

An Association may regulate the size and number of political signs that may be placed on a member's property if the Association's regulation conforms to any applicable city, town or county ordinance that regulates the size and number of political signs on residential property. If the city, town or county in which the property is located does not regulate the size and number of political signs on residential property, the Association shall not limit the number of political signs, except that the maximum aggregate total dimensions of all political signs on a member's property shall not exceed nine square feet. All types of political signs, both commercially made and handmade, are allowed.

C. SB 1540 - Political Solicitation – Revised A.R.S. § 33-1808 (Planned Communities) and Revised A.R.S. § 33-1261 (Condominiums).

This new law allows for the door-to-door solicitation regarding political candidates and causes on property within the Association “normally open to visitors within the association,” except that an Association may:

1. Restrict or prohibit door to door political activity regarding candidates or ballot issues from sunset to sunrise.
2. Require the prominent display of an identification tag for each person engaged in the activity, along with the prominent identification of the candidate or ballot issue that is the subject of the support or opposition.

D. SB 1326 – Addition of Gadsden Flag to Allowed Flags – Limitation on Number of Flags and Flag Pole Height – Revised A.R.S. § 33-1808 (Planned Communities) and Revised A.R.S. § 33-1261 (Condominiums).

This new law allows members to fly the Gadsden flag in addition to the other flags allowed by the statute. Moreover, the Association’s rules may limit the member to displaying no more than two flags at once and may limit the height of the flagpole to no higher than the height of the rooftop of the member’s home.

The Association may no longer prohibit the installation of a flagpole in the front yard or backyard of the member’s property.

IV. CHANGES IN THE LAWS REGARDING RESALE AND DISCLOSURE STATEMENTS AND OTHER ASSOCIATION STATEMENTS.

A. SB 1149–Requirement to provide status of owner account - Revised A.R.S. § 33-1807 (Planned Communities) and Revised A.R.S. § 33-1256 (Condominiums).

This new law requires the Association to process and respond to a request for an owner’s statement of account within 10 days after receipt of a written request by an owner, his representative or a lien holder. Failure to provide this information within 10 days will result in the lien being extinguished regarding the requesting property. Any information is binding upon the Association. As such, it is important that the statement of account be accurate.

B. SB 1149 – Requirement regarding resale and disclosure statements- Revised A.R.S. § 33-1806 (Planned Communities) and Revised A.R.S. § 33-1260 (Condominiums).

This new law adds new requirements to the resale and disclosure process. The new law allows a purchaser or their authorized agent to engage in the resale and disclosure process. The new law also allows the Association to respond to a request in either paper or electronic format.

In addition to the current required resale and disclosure information, Associations must now also provide a statement summarizing any pending lawsuits, except those suits relating to the collection of assessments owed by members other than the selling member, in which the association is a named party, including the amount of any money claimed. This requirement would include enforcement actions.

Failure to provide the required resale and disclosure information within the 10 day timeframe will result in the extinguishing of any lien for any unpaid assessment then due against that property.

Also, the new law limits what may be charged to process a resale and disclosure request. The new law states that an Association may charge the member a fee of no more than an aggregate of four hundred dollars (\$400.00). An Association may charge a rush fee of no more than one hundred dollars (\$100.00) if the rush services are required to be performed within seventy-two hours after the request for rush services, and may charge a statement or other documents update fee of no more than fifty dollars (\$50.00) if thirty days or more have passed since the date of the original disclosure statement or documents were delivered.

Additionally, the new law states that if the aggregate resale and disclosure fee is less than four hundred dollars (\$400.00) on January 1, 2010, the fee may increase at a rate of no more than twenty per cent per year based on the immediately preceding fiscal year's amount not to exceed the four hundred dollar aggregate fee.

Finally, an association that charges or collects a fee in violation of this section is subject to a civil penalty of no more than one thousand two hundred dollars (\$1,200.00).

V. CHANGES IN THE LAW CONCERNING ADMINISTRATIVE LAW JUDGE HEARINGS – SB 1148 - REVISED A.R.S. § 44-2141.

Senate Bill 1148 purports to bring back the Administrative Law Judge procedures recently held unconstitutional. The new Arizona Law allows an owner or association to bring disputes concerning the association's governing documents or Arizona laws that apply to the association, before an Administrative Law Judge. The new change does not require disputes to be brought before an Administrative Law Judge. It simply provides an opportunity for an owner or the association to bring disputes before an Administrative Law Judge.

The new statutes also discuss the procedures required to file an action before an Administrative Law Judge and also provides the Judge with the power to set any applicable filing fee and impose penalties should the Judge determine a violation has occurred.

The new statutes allow an Association's manager or Board member to represent the association before the Administrative Law Judge. Also, if an Association chooses to use an attorney, the new statutes do not provide for the recouping of attorney's fees.

LEGAL SERVICES

GENERAL CORPORATE COUNSEL

Advising developers and community associations on forming corporations, funding reserves, compliance issues, voting elections and other general counsel matters.

COLLECTING ASSESSMENTS

Applying efficient, fair and effective collection strategies proven to recoup unpaid assessments, including collection demand letters, litigation, overseeing payment agreements, recording liens, wage and bank garnishments and foreclosures.

ENFORCING RESTRICTIONS

Employing tactical approaches to remedy violations and enforce restrictions, including violation demand letters, architectural compliance, advice concerning the alternative collection options, conciliation and mediation efforts and enforcement litigation.

DRAFTING, INTERPRETING AND AMENDING DOCUMENTS

Our attorneys are experienced in drafting and amending association documents that are easy to read, understand and apply. We also assist you in analyzing and interpreting provisions of association documents to help you better understand their meaning and application.

LITIGATION AND BANKRUPTCY

Providing competent and assertive representation for community associations in court on matters typically involving assessment collection, enforcing restrictions, foreclosure, defending community associations in lawsuits and protecting rights in bankruptcy.

CONTRACT NEGOTIATION AND REVIEW

We help review, interpret and negotiate contracts between vendors.

PROPERTY TAXATION

Assisting planned community associations in reducing tax liability for common area property tax liens.

CONSTRUCTION AND LAND DEVELOPMENT

Advising developers of community associations concerning applicable city ordinances, planning restrictions and similar land use issues.

GENERAL REAL ESTATE LAW

A multifaceted real estate practice offering clients a wide range of services for issues pertaining to zoning regulations, ordinance violations, land use and other general real estate and legal matters.

INSURANCE DEFENSE

Representing Insurance Companies in defending claims against their insured.

EDUCATING COMMUNITIES

Offering the Lunch & Learn Lecture Series and the Community Association Desk Reference Set for community association professionals to “be in the know” concerning changes in the law and effectively managing community associations.



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