

GOLDSCHMIDT LAW FIRM

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Dear Directors & Property Managers:

Attached you will find a summary of the eleven Bills passed by our Arizona Legislature this session that affect Condominium and Planned Community Associations. This review is limited to the portions of each statute that were changed. Unless otherwise stated, the remaining portions of the relevant statutes are still valid. If you would like a copy of the full Condominium Act or Planned Communities Act, please contact my office. Copies of the legislation summarized here may be obtained online at www.azleg.state.az.us.

Each of these Bills, except House Bills 2478 and 2379, goes into effect 90 days after the close of this Legislative Session. Since the Session closed on May 26, 2004, the Bills go into effect on August 25, 2004. HB 2478 (political signs) takes effect on July 3, 2004, and HB 2379 (review of financial records) will not take effect until December 31, 2004.

Very truly yours,
Carolyn B. Goldschmidt
Carolyn B. Goldschmidt

LIST OF HOA BILLS FROM 2004 ARIZONA LEGISLATIVE SESSIONS

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| 1. | SB1125 | Requirement for Recorded Information Statement |
| 2. | SB1137 | Authority to Challenge Association Action |
| 3. | SB1311 | Prerequisite to Construction Defect Action |
| 4. | HB2177 | Records Inspection & Open Meeting Requirements |
| 5. | HB2368 | Increase in Homestead Exemption |
| 6. | HB2379 | Required Annual Financial Analysis & Reporting |
| 7. | HB2380 | Additional Disclosure to Prospective Buyer |
| 8. | HB2381 | Board Conflicts of Interest |
| 9. | HB2402 | Association Lien Rights |
| 10. | HB2478 | Political Signs |
| 11. | HB2492 | Parking of Public Service Vehicles |

GOLDSCHMIDT LAW FIRM

SENATE BILL 1125 **REQUIREMENT FOR RECORDED INFORMATION STATEMENT**

This Bill requires every Condominium and Planned Community to record an information statement at the County Recorder's Office, by adding a provision to both the Condominium Act (§33-1256(J)) and the Planned Communities Act (§33-1807(J)). The language added is identical in both statutes:

An Association must record a document stating: (1) the name of the Association or designated agent, or management company for the Association; (2) the Association's address (or the designated agent's or management company's address); (3) the Association's telephone number (or the designated agent's or management company's telephone number) ; (4) the name of the Condominium or Planned Community; (5) the date of recording of the Declaration of Covenants, Conditions and Restrictions (CC&Rs); and, (6) the Declaration's recorded instrument number, or book and page number, issued by the County Recorder. If any of the foregoing information changes, the new information must be recorded within 90 days of the change.

Paragraph (I) of each statute cited above also adds "Escrow Agent" to the list of parties (i.e. the lienholder, Unit or Lot owner, or designated agent of the Unit or Lot owner) to whom the Association must provide, within 15 days after receiving a written request, a statement detailing the amount of unpaid Assessments against a Unit or Lot.

SENATE BILL 1137 **AUTHORITY TO CHALLENGE ASSOCIATION'S ACTION**

This Bill amends a provision of the Arizona Nonprofit Corporation Act (§10-3304) dealing with the challenge by an Association Member in a non-profit corporation, to the validity of a corporate action on the ground that the Association lacks or lacked power to act.

A paragraph was added to this statute allowing any individual Association Member to challenge the Association's (i.e., the Board of Director's) authority to act by filing a lawsuit to prevent the Association (Board of Directors) from acting or to overturn an action that has been taken.

Prior to this amendment, this statute explicitly precluded an individual Member of Condominium and Planned Community Associations from having the power to challenge the validity of acts of the Board of Directors of an Association. Rather, previously, in order to file a lawsuit asking a court to reverse the action of a Board of Directors, approval of 10% of the Association's voting power, or at least 50 Members, was required.

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SENATE BILL 1311 **CONSTRUCTION DEFECT ACTIONS**

This Bill amends several provisions pertaining to construction defect actions in A.R.S. §12-1362 and §12-1363. Under current law, the Association must send the builder a list of defects at the time a lawsuit is filed. The builder then has 60 days to inspect the property and make an offer to settle the dispute. The Association then has 20 days to respond, and the builder subsequently has 10 days to make one final offer. The builder's final offer is used as a benchmark, and the party that gets better than that final offer at trial is entitled to recover attorney's fees and costs.

SB1311 requires this dispute resolution process to occur before a lawsuit is filed. Specifically, the Association must provide the basis for its claim 90 days before filing suit. Furthermore, if the builder provides a factual basis for its settlement offer, the Association must provide a factual basis for its response. Finally, the insurance carrier for the builder must treat the initial letter from the Association as a claim under the applicable policy.

HOUSE BILL 2177 **RECORDS INSPECTION & OPEN MEETING REQUIREMENTS**

Records Inspection. For any non-profit corporation that is a Planned Community or Condominium this Bill expands an Association Member's right: (1) to inspect an Association's financial and other documents, and (2) to speak during open Board of Director meetings. It also changes the instances in which a Board may hold a closed meeting.

The new statutes in the Planned Communities Act (§33-1805) and the Condominium Act (§33-1258) are identical. They allow an Association Member (or his/her designated agent), after having made a request in writing to the Association, to inspect all financial and other records (simply put, *all records*) of the Association, *except*:

- (1) Privileged communications between the Association and its attorney;
- (2) Records pertaining to pending or contemplated litigation involving the Association;
- (3) Meeting minutes or other records from a closed Board session (closed pursuant to A.R.S. §33-1804 and §33-1248, discussed below);
- (4) Personal, health, and financial records of an employee, employee of a contractor, or individual Member of the Association;
- (5) Employment records (including compensation, job performance, health, and specific complaints) of an employee or an employee of a contractor of the Association; or
- (6) If the disclosure of the records would violate state or federal law.

Significantly, the legislature did not include the previous requirement that a member's request must be for a "proper purpose" and made in "good faith" before certain records were open to Member's review. Thus, an Association must make reasonably available to any Member (or his or her designated agent), for whatever reason, any and all Association financial and other records,

GOLDSCHMIDT LAW FIRM

except those listed above, after receiving a Member's written request. A Member's representative may be designated in writing, by the Member, to have authority to act on his or her behalf to review records. The statute does not state whether the Association may charge for records production; therefore, it is a good idea to amend the Bylaws or adopt a Board resolution establishing reasonable charges for photocopies and clerical time to provide requested records. Since the statutes state that records must be made "reasonably available," such charges must be reasonable.

Open Meeting Law. This Bill also amends the Planned Communities Act (§33-1804) and the Condominium Act (§33-1248) with respect to required open meetings of a Board. The applicable provisions of these Acts are identical:

Previously, Members were allowed to attend an open Board meeting to hear the deliberations, but were not allowed to speak unless recognized by the Board. Now, a Member's designated representative (with written designation required) may also attend a Board meeting. In addition to any other opportunity to speak at a Board meeting (such as in a "call to the floor"), the Board is required to allow a Member's or a Member's designated representative to speak "at an appropriate time" during Board deliberations, but before the Board takes formal action on an item under discussion. The Board can place reasonable time restrictions on speakers, but must provide for a reasonable number of persons to speak on each side of an issue.

This statute also limits when a Board of Directors has the right to have a closed meeting. *Prior to the amendment*, the Board could close a meeting (or the portion of the meeting) related to discussion of any of the following:

- (1) Employment issues or personnel matters of employees of the Board or Association;
- (2) All legal advice from an attorney for the Board or the Association; or
- (3) Pending or contemplated litigation; or
- (4) Pending or contemplated matters relating to the enforcement of the Association's governing documents.

The revised statutes provides that a Board of Directors can only have a closed meeting (or a closed portion of a meeting) if it will be considering any of the following:

- (1) Legal advice from an attorney for the Board or the Association; however, the Board *may* (it is not required to do so) share the final result of any pending or contemplated litigation during an open meeting (unless the Board is precluded from doing so by the terms of the Settlement Agreement between the parties); or
- (2) Pending or contemplated litigation; or
- (3) Personal, health, and financial information about an employee of the Association, employee of a contractor, or individual Association Member; or
- (4) Employment information (including compensation, job performance, health, and specific complaints) for an Association employee or an employee of a contractor of the Association, who works under the direction of the Association.

GOLDSCHMIDT LAW FIRM

HOUSE BILL 2368 INCREASE IN HOMESTEAD EXEMPTION

This Bill increases the amount of the Homestead Exemption from \$100,000 to \$150,000, and applies to all residential property in Arizona.

The Homestead Exemption protects a homeowner's equity in his/her primary residence from forced sale by a creditor, and applies to a condominium unit, townhome, single family residence or mobile home. A person may claim only one homestead exemption. A lien foreclosure by an Association is not subject to the protection of a homestead exemption.

HOUSE BILL 2379 REQUIREMENT FOR ANNUAL FINANCIAL ANALYSIS & REPORTING

This Bill requires annual financial analysis and reporting by an addition to both the Condominium Act (§33-1243(H)) and the Planned Communities Act (§33-1810). The language added is identical in both statutes:

If an Association's governing documents require that the Association (1) have an audit, (2) performed annually, (3) by a Certified Public Accountant (CPA), then the Association must comply with its governing documents.

If the governing documents do not contain these exact requirements, then the Association must: (1) have a financial audit, review, or compilation, (2) performed annually, (3) completed no later than 180 days after the end of the Association's fiscal year. It is my opinion that if a financial audit or review is undertaken, this will have to be done by a CPA. A compilation does not need to be done by a CPA, but should be completed by an experienced bookkeeper or accountant. After the audit, review or compilation is completed, (1) the Association must make a copy available to an Association Member, (2) upon request (not specified if request must be in writing or can be oral), (3) within 30 days of completion.

Unlike the other Bills, this one does not become effective until December 31, 2004.

In a compilation, the Association's financial statements and year-end adjustments are presented. There should be ongoing analysis and confirmation of balances by the Treasurer, which is presented to the Board; however, this information does not have to be presented in the compilation.

In a review, a CPA investigates record-keeping and accounting practices and analyzes the statements, preparing disclosures on abnormal activity or unexplained trends.

GOLDSCHMIDT LAW FIRM

In an audit, a CPA performs the most comprehensive examination of an Association's financial statements. An audit may include confirming bank balances, making physical inspections, and tracing transactions to invoices and evidence of payments.

HOUSE BILL 2380 **ADDITIONAL DISCLOSURE REQUIREMENT**

This Bill adds a provision to the Disclosure Statement provided to a prospective purchaser as required in both the Condominium Act (§33-1260) and the Planned Communities Act (§33-1806). The language added is identical in both statutes.

The new provision in the statutes calls for the addition of the following statement, which must be accompanied by a signature line for the purchaser, and the statement must be returned to the Association within 14 calendar days:

“I hereby acknowledge that the Declaration, Bylaws, and Rules of the Association constitute a Contract between the Association and me (the Purchaser). By signing this Statement, I acknowledge that I have read and understand the Association's Contract with me (the Purchaser). I also understand that by accepting this Contract, I may be giving up my rights to the homestead exemption protection regarding a lien of the Association.”

HOUSE BILL 2381 **BOARD CONFLICTS OF INTEREST**

This Bill adds a provision to both the Condominium Act (§33-1243) and the Planned Communities Act (§33-1811) establishing a conflict of interest for Board members in specified transactions. The language added is identical in both statutes.

This new provision explains that any contract that might be entered into by or on behalf of the Board of Directors, which would benefit (financially or otherwise) any member of the Board or his or her immediate family (parent, grandparent, child, spouse, sibling, and in-laws), is considered a prohibited conflict of interest for that particular Board member.

If such a conflict of interest arises for a Board member, he or she must so advise the Board of Directors during an open Board of Directors meeting *before* the Board takes action on the contract. After making his or her conflict known, the individual Board member may still vote on the issue or contract. The new law also provides that a contract, which is entered into by the Board without knowledge that one of the Board members has a conflict, is void and unenforceable.

GOLDSCHMIDT LAW FIRM

HOUSE BILL 2402 **ASSOCIATION LIEN RIGHTS**

This Bill amends lien and lien foreclosure provisions of the Planned Communities Act (§33-1256) and the Condominium Act (§33-1807) with respect to monetary penalties. The amendments are identical in both statutes:

Under this law, a lien for Assessments, late fees for the Assessment, and attorney fees and costs incurred with respect to collecting the delinquent Assessment, still automatically attaches to a Unit or Lot, when an owner does not pay the Assessment, and may still be foreclosed like a mortgage within 3 years after the full amount of the assessments becomes due.

However, an Association's lien rights no longer extend to monetary penalties and associated late fees, attorney fees and costs, imposed after breach of the Association's governing documents, and after notice and an opportunity to be heard. Rather, an Association has a lien for such penalties and related costs only after they are included in a Court judgment (Justice Court has jurisdiction of claims for less than \$10,000), and the judgment is recorded with the County Recorder. The judgment lien *cannot* be foreclosed like a mortgage, but can only be collected when the owner who incurred the penalties conveys (sells, grants, gifts, etc) any interest in his or her Unit or Lot to another person. A penalty still may be imposed after notice and opportunity to be heard, but collection of the penalty is enforceable only if a Judge issues a judgment for the penalty, late charges, interest, and attorney fees¹ and costs. Alternatively, a Board still may authorize a lawsuit in Superior Court to obtain an injunction (court order) requiring an owner to comply with the governing documents. Thus, non-judicial enforcement is no longer an option for Associations.²

In summary, a lien for Assessments and related charges attaches upon the recording of the Declaration. Thus, in general, the lien for Assessments remains prior to all other liens except:

- (1) liens recorded prior to the Association's Declaration;
- (2) a recorded first mortgage;
- (3) liens for real estate taxes and other governmental assessments.

A lien for monetary penalties and related charges arises only upon the recording of a judgment issued by a Court. Thus, any other liens, including second and third mortgages, which are

1

In Arizona, attorney fees are awardable to the Association by the Court only if the CC&Rs state that the Owner is responsible for all attorney fees incurred by the Association or if the Association is the prevailing party in a contested action (i.e., not the prevailing party in an action by default).

2

This law does not explicitly state that the new statutory provisions are intended to supersede CC&Rs provisions that might provide that both assessment and penalties are secured by an automatic lien; however, the clear intention of the law is to do away with Association lien rights for penalties and associated charges. Thus, the path of least risk would be to assume that the law overrides any provision to the contrary in a community's CC&Rs.

GOLDSCHMIDT LAW FIRM

recorded *prior* to the date the judgment is recorded, will take precedence over the judgment.

HOUSE BILL 2478 **POLITICAL SIGNS**

This Bill addresses the issue of the permissibility of indoor and outdoor Political Signs on private property in Planned Communities (§33-1808) and overrides any provision in an Association's governing documents prohibiting such signs. This statute only applies to Planned Communities, not Condominiums and not Association that do not fall within the definition of "Planned Community³," which may still enforce sign restrictions in their CC&Rs.

A "Political Sign" is defined in this statute as a sign that attempts to influence the outcome of an Election, including but not limited to: (A) supporting or opposing a candidate running for political office; (B) supporting or opposing the recall of a public officer; and (C) supporting or opposing the circulation of a Petition for: (1) a ballot measure; (2) a ballot question, (3) a proposition; or (4) the recall of a public officer.

The new statute states that Political Signs may be in place on a private lot no more than 45 days before an election and no later than 7 days after an election. The size and placement of political signs may be regulated by an HOA, but can be no more restrictive than applicable city, county and township regulations, if any, that apply to residential property. If there are no such regulations, an Association must permit its residents to display at least one (1) political sign with a maximum size of two (2) square feet. In any event, political signs may not obstruct the view of vehicle operators or create a traffic hazard.

I. Political Sign Code for the City of Tucson

The Tucson City Code, Chapter 3, applies to Planned Communities within the Tucson city limits. The Tucson City Code (§3-14) defines a "Political Election Sign" as a sign that is not permanently installed in the ground or attached to a building, and one that relates to: (A) the election of a candidate to public office; (B) a political party; or (C) a matter to be voted upon at an upcoming election.

The Code (§3-63) further provides that political signs:

- (1) must be on private property with the permission of the property owner;
- (2) cannot cover more than six (6) square feet in area;
- (3) cannot exceed ten (10) feet in height;

According to A.R.S. §33-1801, a "planned community is one that has mandatory Association membership, mandatory assessment obligation, and owns common area.

GOLDSCHMIDT LAW FIRM

- (4) must be set back at least twenty (20) feet from the street (although this provision is not enforced by the City because many properties are not large enough to comply with the set back);
- (5) do not require a sign permit; and,
- (6) must be removed no later than fifteen (15) days after the election, except that the winners of a primary election need not remove their signs until fifteen (15) days after a general election.
- (7) cannot be posted or attached upon any street lamp post, street sign, traffic sign or signal, hydrant, tree, shrub, fence or utility pole.

There is no limit on the number of signs a resident can place on his/her property, and no permit is required for a resident to place a political sign on his/her property so long as the sign is being placed without input from a candidate or political committee.

II. Political Sign Code for Pima County

The Pima County Code, Chapter 18, applies to those Planned Communities within Pima County, but outside city limits. The Pima County Code (§18.79.020) defines a “Political Sign” as a temporary sign that is related to a political candidate, political party, or issue in a public election. A “Temporary Sign” is a sign that is not permanently installed and is intended to be displayed for a limited period of time.

The Pima County Code (§18.79.110(C) and (E)(15)) provides that political signs:

- (1) must be on private property with the permission of the property owner;
- (2) cannot cover more than sixteen (16) square feet in area;
- (3) cannot exceed ten (10) feet in height;
- (4) must be set back at least twenty (10) feet from the street;
- (5) may not be illuminated;
- (6) cannot have more than two (2) faces (i.e. a front and a back; 3 or more sided signs are not permitted);
- (5) do not require a permit;
- (6) cannot be erected more that thirty (30) days prior to the election; and,
- (7) must be removed no later than ten (10) days after the election, except that the winners of a primary election need not remove their signs until ten (10) days after a general election.

There is no limit on the number of signs a resident may post.

In summary, under this new statute, a Planned Community Association in Tucson or Pima County cannot prohibit its residents from posting political signs that conform with the applicable city or county codes, regardless of any sign restriction in the Community’s CC&Rs.

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HOUSE BILL 2492 **PARKING OF PUBLIC SERVICE VEHICLES**

This Bill broadens the Planned Communities statute (§33-1809) relating to the ability of a Planned Community resident to park a work-related public service vehicle in the driveway or on the streets of the Community.

Regardless of any provision in the Community's Declaration prohibiting or limiting vehicle parking, an Association may *not* prohibit driveway or on-street parking if:

- (1) as a condition of employment, the resident is required to park the vehicle at his/her residence at designated times; and, either
 - (a) the resident:
 - (I) is a public service employee; and
 - (ii) is employed by a corporation regulated by the Arizona Corporation Commission; and
 - (iii) the resident is required to be available on an emergency basis relating to natural gas pipelines and infrastructure; and,
 - the vehicle:
 - (iv) weighs less than 20,000 lbs; and
 - (v) is owned or operated by the public service corporation; and
 - (vi) bears an official emblem, seal, or design of the corporation.
- or: (b) the resident is employed by a public safety agency, such as:
 - (I) police or fire service for a federal, state, local, or tribal agency; or
 - (ii) a registered private fire or ambulance service; and
- The vehicle
 - (iii) weighs less than 10,000 lbs; and
 - (iv) bears an official emblem, seal or design of the agency.

If the resident does not meet the above requirements, the Association may prohibit the resident from parking his/her work-related vehicle in his/her driveway or on the street, in accordance with its governing documents.