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COMMUNITY ASSOCIATION LAW SUMMARY – 2005-06

EFFECTIVE UNTIL JULY 1, 2006

EVERYTHING IN THE 2004 SUMMARY REMAINS ACCURATE AND EFFECTIVE

OPEN BOARD OF DIRECTORS MEETINGS

A.R.S. § 33-1248(A) (condominiums) and § 33-1804(A) (planned communities) imposes the following requirements at any association or board meeting:

1. Association members “or any person designated by a member in writing as the member’s representative” must be allowed to attend and speak.
2. The member or representative must be legally permitted to speak “at an appropriate time during the deliberations and proceedings.” The board must also permit the member or designated representative to speak “before the board takes formal action on an item under discussion”.
3. The Board may place reasonable time limitations on persons speaking during the meeting, but must allow a “reasonable number of persons to speak on each side of an issue”.

CLOSED BOARD OF DIRECTORS MEETINGS

A.R.S. § 33-1248(A) (condominiums) and § 33-1804(A) (planned communities) provides four categories for closed board of directors meetings:

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

BOARD ACTION WITHOUT A BOARD MEETING

If a community association is a nonprofit corporation, A.R.S. § 10-3821 allows action by the board of directors without a meeting if the action is taken by all of the directors. The action must be evidenced by one or more written consents describing the action taken, signed by each director and included in the minutes filed with the corporate records reflecting the action taken.

BOOKS AND RECORDS ACCESS

A.R.S. § 33-1258 (condominiums) and § 33-1805 (planned communities) create the following categories of records that are exceptions to the statement that “all financial and other records of the association shall be made reasonably available for examination by any member or person designated by the member in writing as the member’s representative”:

1. Four of the categories are the same as the four categories appropriate for “Closed Meetings” under A.R.S. § 33-1248(A) and A.R.S. § 33-1804(A).
2. The fifth category consists of meeting minutes or other records of meetings not required to be open to the membership.

BOARD REMOVAL [NEW IN 2005]

New in 2005, A.R.S. § 33-1243(H) and (I) (condominiums) and A.R.S. § 33-1813 (planned communities) provide new rules for the removal of board members by the members.

If the Association has 1,000 members or fewer, a special membership meeting must be called and held within 30 days of the presentation to the Board of Directors of petitions calling for the removal of a director, directors or the entire Board of Directors signed by members holding 100 votes, or by members entitled to cast 25% of the votes in the Association, whichever is less. For example, if an Association has 900 units, and each unit has one vote, then a petition signed by owners entitled to cast 100 votes would be sufficient to require the membership meeting. If the Association has 80 members, then the petition would need to be signed by only 20 members [25% of 80 is less than 100].

If the Association has more than 1,000 members, a special membership meeting must be called and held within 30 days of the presentation to the Board of Directors of petitions calling for the removal of a director, directors or the entire Board of Directors signed by members holding at 1,000 votes, or by members entitled to cast 10% of the votes in the Association, whichever is less. For example, if an Association has 9,000 units, and each unit has one vote, then a petition signed by owners entitled to cast 1,000 votes would be sufficient to require the membership meeting. If the Association has 2,000 members, then the petition would need to be signed by only 200 members [10% of 2,000 is less than 1,000].

The number necessary to remove a director, directors, or the entire board of directors, with or without cause, is a simple majority of those voting, so long as a quorum is present. The quorum for the membership meeting called for the purposes of voting on the recall is 20% of the votes or 1,000 votes present, whichever is less.

If a lawsuit is filed, the winner will be awarded their attorneys’ fees from the loser. A community association is obligated to keep the records of the meeting and the petition for at least one year from the date of the special meeting.

A petition to remove a director can only be submitted once during that director’s term. If the removal is not successful, that director cannot be the target of a recall again for the remainder of his or her term.

PROXIES, ABSENTEE BALLOTS [NEW IN 2005]

New in 2005, A.R.S. § 33-1250(C) through (E) (condominiums) and A.R.S. § 33-1812 (planned communities) provide new rules for the use of proxies and absentee ballots for issues that come before the membership.

The use of proxies at condominium and planned community membership meetings is now prohibited. The Association must provide for votes to be cast by an absentee ballot and may provide for voting by some other form of delivery. The “other form of delivery” allows a community association to use a “mail ballot”, specifically authorized by A.R.S. § 10-3708, a provision of the Arizona Nonprofit Corporation Act.

The “Absentee Ballot” must:

1. Set forth each proposed action;
2. Provide a space to vote “for” or “against” each proposed action;
3. Specify the date and time for the ballot to be delivered to be counted [must be at least 7 days after the ballot is delivered to the owner]; and
4. Only be valid for one meeting.

The return of absentee ballots is sufficient to satisfy the quorum requirement. An absentee ballot cannot authorize any other person to cast votes on behalf of a member.

The requirements for a “written ballot” by mail pursuant to A.R.S. § 10-3708 are identical to the requirements for the absentee ballot with the exception that a mailed solicitation for a “written ballot” [the cover letter] must indicate the number of ballots that must be returned to meet the quorum requirement.

LIEN FOR FINES

Pursuant to A.R.S. § 33-1256 (condominiums) and A.R.S. § 33-1807 (planned communities) there are two categories of assessments. Assessments, late charges on assessments, and reasonable attorneys’ fees and costs related to the assessments, are in one category. The association can foreclose the most recent three year’s worth of assessments and the lien for the assessments is automatic. For all other charges, including monetary penalties, interest, and other charges, a condominium or planned community association will not have an automatic lien under the Condominium Act or the planned community statutes for those charges. A condominium or planned community association must first file suit against the unit owner for those charges, obtain a judicial judgment, and record that judgment with the appropriate county recorder. After recording the judgment, the condominium or planned community association will have a lien that will become “effective upon conveyance”. Presumably, those judgments will be paid from the proceeds of a close of escrow upon resale.

The statutes do not clearly and explicitly state that the 2004 statutory provisions regarding the lien are intended to supersede CC&R provisions that might provide that the continuing lien secures monetary penalties or other charges. Before taking this position, however, a legal opinion from a lawyer should be obtained to protect the Board and management company for the inherent risks associated with this position.

ASSESSMENT INCREASES

There is no limit in the Condominium Act on the permissible increase in assessments. If there are limits in the condominium’s governing documents, those limits control. If there are limits in a planned community’s governing documents, those limits control unless the limit is greater than 20%. If there are no limits in a planned community’s governing documents, or if the limit is greater than 20%, the planned community association cannot impose a regular assessment that is 20% greater than the immediately preceding fiscal year’s assessment without the approval of a majority of the members. A.R.S. § 33-1803(A).

APPLICATION OF PAYMENTS [NEW IN 2005]

New in 2005, A.R.S. § 33-1256 (K) (condominiums) and A.R.S. § 33-1807 (K) (planned communities) provide new rules for the application of payments made by owners. Unless designated by the owner, payments must first be applied to unpaid assessments, then to late fees, to collection fees, attorneys’ fees and attorney costs, then to unpaid fees, unpaid charges, and unpaid monetary penalties, then to interest, and then to late charges on unpaid fees, charges, fines, or interest.

LATE CHARGES

There is no limit in the Condominium Act on the permissible amount of a late charge in a condominium. If there is a cap on late charges in the condominium’s governing documents, that cap controls. If there is a cap and it is less than the statutory limit in a planned community’s governing documents, that limit controls; but if there is no cap or the cap in the governing documents is greater than the statutory limit, the statutory limit is the greater of \$15 or 10% of the unpaid assessment. A.R.S. § 33-1803(A).

PARKING – PLANNED COMMUNITIES

A.R.S. § 33-1809 forbids planned community associations from restricting the parking of a motor vehicle on a street or driveway in the planned community if the vehicle is required to be available at designated periods at the person’s residence as a condition of the person’s employment and either:

- (A) (1) the resident is employed by a “public service corporation” that is regulated by the Arizona Corporation Commission, (2) that is required to prepare for emergency deployment of personnel or equipment for repair and maintenance of natural gas pipelines and related infrastructure, (3) the vehicle is owned or operated by the public service corporation, (4) the vehicle has a gross vehicle weight rating of 20,000 pounds or less, (5) and the vehicle bears an emblem or other visible designation of the public service corporation. **OR**
- (B) (1) The resident is employed by a public safety agency [including police or fire service for a federal, state, local or tribal agency or a private fire service provider or an ambulance service provider that is registered pursuant to Title 36, Chapter 21.1], (2) the vehicle has a gross vehicle weight rating of 10,000 pounds or less, (3) and the vehicle bears an emblem or other visible designation of the agency.

A.R.S. § 33-1809 does not restrict a planned community association from restricting other work-related vehicles, and utility vehicles other than these vehicles. But a prerequisite to any regulation of any vehicle and where it is parked is authority in the governing documents of the planned community for restricting vehicles on the street or driveway.

CONFLICTS OF INTEREST

A.R.S. § 33-1242 (condominiums) and A.R.S. § 33-1811 (planned communities) set forth the rules on conflicts of interest and state that if a contract, decision or other action “for compensation” would benefit a member of the board, or a board member’s family, the board member must declare a conflict of interest, the declaration of conflict of interest must be in an open board meeting; and the declaration of conflict of interest must be made before the vote is taken on that issue.

Once the conflict of interest is declared, the statute says that a Board member with the conflict of interest can vote on the issue. These 2004 statutory provisions are in significant conflict with the Arizona Nonprofit Corporation Act. A.R.S. § 10-3860 through 10-3864 imposes strict requirements on directors who contemplate “conflicting interest transactions.” Therefore, directors who vote on “conflicting interest” transactions in violation of the Arizona Nonprofit Act will do so at significant risk. All directors who are involved in potential conflicting interest transactions would be prudent to recuse themselves from all discussions and votes on any issue that is a conflict of interest, despite the language in the condominium and planned community statutes.

ADDITIONAL COPIES OF THIS SUMMARY, SEMINAR OPPORTUNITIES, PREVIOUS SUMMARIES & ADDITIONAL RESOURCES AVAILABLE AT THE “PUBLICATIONS” TAB AT

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