

ELEVEN BILLS CHANGE HOA LAW IN ARIZONA

By Carolyn B. Goldschmidt, Esq.

The Second Regular Session of the 46th Arizona Legislature adjourned on Wednesday, May 26, 2004. The general effective date for all new legislative acts without a different specified date is August 25, 2004. Governor Napolitano signed into law eleven (11) bills that affect homeowners associations. The following is a brief summary of the new HOA laws.

1. **Recorded Information Statement (SB1125)**. All Condominium and Planned Community Associations must record at the Pima County Recorder's Office, 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. In addition, escrow agents have been added to the list of parties (i.e. the lienholder, Unit or Lot owner, or designated agent of the Unit or Lot owner) to whom an Association must provide, within 15 days after receiving a written request, a statement detailing the amount of unpaid Assessments against a Unit or Lot.

2. **Authority to Challenge Association's Action (SB1137)**. Any individual Association Member may 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. Previously, the approval of at least 10% of the Association's Members had to approve such an action.

3. **Prerequisites to Construction Defect Actions (SB 1311)**. Before a construction defect lawsuit can be filed., the claimant must send the builder a list of the defects at issue. The builder then has 60 days to inspect the property and make an offer to settle the dispute. The claimant 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.

4. **Records Inspection & Open Meeting Law (HB2177)**. An Association Member (or his/her designated agent), after having made a request in writing to the Association, may 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 (see discussion of new open meeting law 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. HOWEVER, this statute is not clear as to whether the applicable provisions of the Non-Profit Corporation Act would

This Bill also amends the open meeting laws that pertain to associations. A Member's designated representative (with written designation required) may now attend Board meetings. 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 law also changes the instances in which a Board of Directors has the right to have a closed meeting to the consideration of the following: (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 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. Pending or contemplated rules enforcement can no longer be discussed in closed session unless one of the other exceptions to the open meeting requirement applies.

5. Increase in Homestead Exemption (HB2368). 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. A lien foreclosure by an Association is not subject to the protection of a homestead exemption.

6. Requirement for Financial Reporting (HB2379). An 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.

This law does not become effective until December 31, 2004. If an Association's governing documents already requires an annual audit by a CPA, then this requirement overrides the new law.

7. Additional Disclosure to Prospective Purchasers (HB2380). The following statement must be signed by the Purchaser and returned to the Association within 14 calendar days after disclosure information is received by the Purchaser:

"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."

8. Board Member's Conflict of Interest (HB2381). 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.

9. Association Lien Rights (HB2402). A lien for delinquent 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, and may still be foreclosed like a mortgage within 3 years of the due date of the assessment. 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 if they are included in a Court judgment (Justice Court has jurisdiction of claims for less than \$10,000), that is recorded at the office of 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 fees 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 a viable option for Associations.

10. Political Signs (HB2478). This law takes effect on July 3, 2004, and affects only Planned Communities, which are defined as subdivisions that requires mandatory membership in an Association, a mandatory assessment obligation and has common area owned by the Association. In other Associations, the CC&Rs would still apply. Despite any sign restrictions in applicable CC&Rs, Political Signs may be placed on a private lot in a Planned Community 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. (Pima County and City of Tucson Political Sign Regulations can be found in the longer article on the new laws on the Chapter website.)

11. Parking of Public Service Vehicles (HB2492). In a Planned Community, regardless of any provision in the CC&Rs prohibiting or limiting vehicle parking, an Association may *not* prohibit driveway or on-street parking of a vehicle if: Category #1: as a condition of employment, the resident is required to park the vehicle at his/her residence at designated times; and, either the resident is a

public service employee; is employed by a corporation regulated by the Arizona Corporation Commission; and is required to be available on an emergency basis relating to natural gas pipelines and infrastructure; and, the vehicle: weighs less than 20,000 lbs; is owned or operated by the public service corporation; and bears an official emblem, seal, or design of the corporation; OR Category #2: the resident is employed by a public safety agency, such as: police or fire service for a federal, state, local, or tribal agency; or a registered private fire or ambulance service; and the vehicle weighs less than 10,000 lbs; and 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 work-related vehicle in his/her driveway or on the street, in accordance with its governing documents.

Carolyn B. Goldschmidt has been certified as a real estate specialist by the State Bar of Arizona. She owns the Goldschmidt Law Firm, which focuses on all aspects of community association law. Carolyn was a member of Arizona's CAI Legislative Action Committee this term and also served as Secretary on the Board of Directors for the Southern Arizona Chapter of CAI.