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The Top 10

Things You Need To Know About Community Association Law

MULCAHY Community Association Cheat Sheet

BRINGING ANSWERS
TO COMMUNITY
ASSOCIATIONS

This publication discusses significant points of law as they apply to community associations and is not intended to offer specific legal advice or responses to individual circumstances or problems.

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1. THE ARIZONA OPEN MEETING LAW A.R.S. 33-1804/CoNnoA.R.S. 33-1248

Pursuant to Arizona law, all meetings of an association, board of directors and regularly scheduled committee meetings are required to be open to all association members or their representatives (who have been designated as such in writing) and held in the State of Arizona.

Members or their designated representatives are allowed to attend and speak at an appropriate time during the deliberations and proceedings of all association meetings, board of directors and regularly scheduled committee meetings. The board may place reasonable time restrictions. However, the board must permit a member or a member's designated representative to speak before the board takes formal action on an item under discussion in addition to any other opportunities to speak. The board shall provide for a reasonable number of persons to speak on each side of an issue.

Any portion of a meeting may be closed if that closed portion of the meeting is limited to consideration of one or more of the topics in the list below. Before entering the executive session, the board shall identify the section below that authorized the board to close the meeting: 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 for the association; 4. matters relating to the job performance of, compensation of, health records 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; and 5. 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.

Additionally, A. the agenda must be available to all owners attending any meeting; B. the reasons for an emergency meeting must be included in the meeting minutes and the meeting minutes must be read and approved at the next regular board meeting; C. a quorum of the board (or any board member who cannot attend in person) may meet by telephone if there is a speaker phone available in the meeting room that allows board members and unit/lot owners to hear all parties who are speaking during the meeting; D. any quorum of the board that meets informally to discuss association business, must comply with open meeting and notice provisions, regardless of whether any action is taken; and E. interpretation of the Open Meeting statute is to be construed in favor of open meetings.

Homeowners are permitted to tape and/or video record open board meetings, subject to reasonable rules and regulations adopted by the board, but such rules shall not preclude such tape recording or videotaping by those attending. Boards can no longer require advance notice of audio or videotaping open board meetings. The board can pass a rule precluding those attending from audiotaping or videotaping an open board meeting if the board audio or videotapes the open meeting, makes the unedited videotapes available to members on request without restrictions on its use as evidence in any dispute resolution process.

2. SOLAR ENERGY DEVICES A.R.S. 33-1816 / A.R.S. SECTION 33-439

Arizona law strictly prohibits planned communities from prohibiting the installation or use of a solar energy device. However, planned community associations may adopt rules regarding the placement of these devices so long as these rules do not effectively prevent installation, impair the device's ability to function or adversely affect the cost of the device.

Planned Communities and Condominiums—Pursuant to A.R.S. Section 33-439, association documents (such as CC&Rs, architectural review committee guidelines, rules and regulations, etc.) cannot "effectively prohibit" the use or installation of any solar energy device.

3. MAIL – IN BALLOTS/ABSENTEE BALLOTS A.R.S. 33-1812 / CONDO A.R.S. 33-1250

Proxy voting is only allowed while the association is under developer control (time during which the developer may elect or appoint the board of directors). After termination of developer control, proxy voting is prohibited. Votes by members may now be cast in person AND by mail-in ballot, absentee ballot, email and fax for special meetings and annual meetings of the membership.

There are several requirements for mail-in ballots/absentee ballots:

1. The ballot must set forth each proposed action;
2. The ballot must provide an opportunity to vote for or against each proposed action;
3. The ballot is valid only for one specified election or meeting of the members and expires automatically after the completion of the election or meeting;
4. The ballot must specify the time and date by which the ballot must be delivered to the board of directors in order to be counted, which must be at least seven days after the date the board delivers the un-voted mail-in ballot to the member; and
5. The ballot should specify how many ballots must be returned to achieve a quorum and what percentage of approval is required to approve the action, other than for an election of directors.

6. The completed ballot must contain the name, address and signature of the owner. The ballot cannot authorize another person to cast votes on behalf of the member. Votes cast by ballot are valid for purposes of a quorum.

4. ANNUAL AUDIT A.R.S. 33-1810 / CONDO A.R.S. 33-1243

A board of directors is required to conduct an annual financial audit, review or compilation of the association's books. The annual audit, review or compilation must be completed no later than 180 days (6 months) after the end of each fiscal year and made available upon request to the members within 30 days of its completion. If the association's documents require an annual audit by a certified public accountant, then the association must hire a certified public accountant to conduct the audit. Otherwise, the association can hire an accountant, or have the books reviewed by a committee appointed by the board of directors.

5. FORECLOSURE LIMITATIONS A.R.S. 33-1807 / CONDO A.R.S. 33-1256

Associations can only foreclose its lien if assessments are delinquent for a period of one (1) year or if the owner owes \$1,200 or more in assessments (whichever occurs first).

6. REMOVAL OF DIRECTORS & BOARD MEMBERS A.R.S. 33-1813 / CONDO A.R.S. 33-1243

Removal of Directors from Office: This procedure does not apply to board members appointed by the developer and supersedes any other provisions in the association's documents pertaining to removal of members:

board 1. Petition for Removal of Director

Requirements: (a) Associations with 1,000 or Fewer Members: A petition must be presented to the board for removal of a director that is signed by the number of persons who are eligible to cast at least 25% of the votes in the association or one hundred votes in the association, whichever is less; (b) Associations with over 1,000 Members: A petition must be presented to the board for removal of a director that is signed by the number of persons who are eligible to cast at least 10% of the votes in the association or one thousand votes in the association, whichever is less; 2. Special Meeting: The special meeting has to be called, noticed and held within 30 days after receipt of the petition for removal; 3. Quorum: A quorum for the removal meeting purpose is met if the number of owners who are eligible to vote at the time the person attends the meeting are equal to at least 20% of the votes, or one thousand votes, whichever is less, are present at the meeting in person or as otherwise permitted by law; 4. Percentage Required to Remove Director: A member of the board can be removed from office with or without cause by a majority vote of the members eligible to vote who are voting on the matter at a meeting of the members called for the removal purpose. A quorum must be present; 5. Retention of Documents: The board must retain documents related to proposed removal for at least one year after the special meeting and shall permit inspection of these records by members; 6. Only One Removal Attempt Per Term: A petition for removal of the same member of the board shall not be submitted more than once during each term of office for that member. 7. On removal of at least one but fewer than a majority of the members of the board of directors at a special meeting of the membership called pursuant to this subsection, the vacancies shall be filled as provided in the association's documents. On removal of a majority of the members of the board of directors at a special meeting of the membership called pursuant to this subsection, or if the association documents do not provide a method for filling board vacancies, the association shall hold an election for the replacement of the removed directors at a separate meeting of the members of the association that is held not later than thirty days after the meeting at which the members of the board of directors were removed. A member of the board of directors who is removed pursuant to this subsection is not eligible to serve on the board of directors again until after the expiration of the removed board member's term of office, unless the association's documents specifically provide for a longer period of ineligibility.

7. DISPLAY OF FLAGS A.R.S. 33-1808 (A) (B) / CONDO A.R.S. 33-1261

Under Arizona law (A.R.S. 33-1261 and 33-1808), a condo or HOA cannot prohibit the display of any of the following flags: 1. The American flag or an official or replica of a flag of the uniformed services of the United States (however, the flag(s) must be displayed in a manner consistent with the Federal Flag Code); 2. The POW/MIA flag; 3. The Arizona State flag; 4. An Arizona Indian Nations flag; 5. The Gadsden flag; 6. A First Responder flag (A First Responder flag may incorporate the design of one or two other first responder flags to form a combined flag. A combined flag can be in many forms such as an American flag with a blue line, or a flag that includes both a firefight symbol and a paramedic symbol); 7. A Blue Star service flag or a Gold Star service flag (these are military flags that represent a family member activity serving in the military or a family member that died while serving in the armed forces).

Arizona HOAs and condos must adopt reasonable rules and regulations regarding the placement and manner of display of the flags. HOA and condo association rules may also regulate the location and size of flagpoles but cannot prohibit installing a flagpole.

An HOA may also limit the owner to no more than two flags at once and may limit the height of the flagpole to not more than the height of the rooftop of the owner's home.

Owners should review their association's CCRs or rules regarding any additional flag restrictions or rules (however, any flag restrictions or rules in an association's documents cannot violate A.R.S. 33-1261 and 33-1808).

8. FINES & PENALTIES A.R.S. 33-1803 (B) A.S.S. 33-1807 / CONDO A.R. S. 33-1242 TURTLE ROCK III HOMEOWNERS ASSOCIATION VS. LYNNE A. FISHER

After notice and an opportunity to be heard, an association or its board of directors, may impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association. A 2017 Court of Appeals decision will have a major impact on a community association's ability to validly assess and collect monetary penalties/fines.

In this case, the Arizona Court of Appeals found that (1) attempting to levy monetary penalties/ fines without a properly adopted file schedule, which demonstrates the fine amounts and appropriateness of those fines, is per se unreasonable; and (2) even if a community association has a validly adopted fine schedule, the community association still has the burden of providing its damages.

As such, a community association must now meet the following minimum requirements in order to validly assess monetary penalties//fines:

(1) the owner (or occupant/guest) must be in violation of the declaration, bylaws and/or rules; (2) the community association must provide the homeowner with notice and opportunity to be heard prior to levying the monetary penalty/fine; (3) the monetary penalty/fine must be reasonable; (4) a valid monetary penalty/fine schedule must be properly adopted prior to imposition of the monetary penalty/fine; and (5) the community association must prove damages to obtain a judgment against the owner (note: it may be difficult for an association to prove that it has been "harmed" by the violation and thus is entitled to damages).

Associations no longer have the right to record a lien against the lot/unit for unpaid fines and penalties. Associations can enforce payment of these fines by: 1. filing a lawsuit against the owner; 2. obtaining a judgment against the owner; AND 3. recording the judgment with the county recorder's office. After the judgment is recorded, the association has a lien that is effective upon the conveyance of the property or paid at the time of the sale of the unit/lot. Alternately, the association can collect the judgment through garnishing wages, rent or any bank account held by the owner against whom the association has a judgment.

9. FOR SALE SIGNS A.R.S. 33-1808 / CONDO A.R.S. 33-1261

Notwithstanding any provision in the association's documents, an association shall not prohibit or charge a fee for the use or placement of the indoor or outdoor display of a "for sale" sign and sign rider by a unit/lot owner on that owner's property, including a sign that indicates the unit/lot owner is offering the property "for sale by owner."

10. INSPECTION OF ASSOCIATION BOOKS & RECORDS BY MEMBERS A.R.S. 33-1805 / CONDO A.R.S. 33-1258

All financial and other records of the association must be made reasonably available for examination by any member or any person designated by the member in writing as the member's representative. Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to any of the following:

1. Privileged communication between an attorney for the association and the association; 2. Pending litigation; 3. Meeting minutes or other records of a ses-

sion of an executive session board meeting; 4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association; and 5. Records 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.

New legislation in 2006 entitles owners to see association books and records pertaining to "contemplated" litigation. An association cannot charge a member for making books and records available for review, but can charge \$.15 per page for copies of records requested. An association has 10 business days from the date of receipt of a request by an owner or an owner's designated agent to make the records available or to provide copies of the requested records.

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