



DISCLOSURE FEES & TRANSFER FEES ARE DIFFERENT

There is confusion in the community association industry regarding the difference between a “disclosure fee” and a “transfer fee”. Mulcahy Law Firm, P.C. is frequently asked whether an association can charge a disclosure fee and/or a transfer fee, and, if so, how much. This cheat sheet will explain the differences between disclosure fees and transfer fees and will assist associations with making good decisions on how to implement these fees in compliance with Arizona law.

It is the opinion of our firm that there is a legal difference under Arizona law between a “disclosure fee” and a “transfer fee” at the time of the transfer of a lot/unit to a new owner.

DISCLOSURE STATEMENT

An association may charge a “**disclosure fee**” to compensate the association for the costs incurred in the preparation of a disclosure statement furnished by the association pursuant to A.R.S. Section 33-1806 (planned community)/33-1260 (condo).

Requirements for a Disclosure Statement

A brief summary of the requirements for a disclosure statement pursuant to these sections follows:

For planned communities or condos with fewer than fifty units, a member shall mail or deliver to a purchaser or a purchaser’s authorized agent within ten days after receipt of a written notice of a pending sale of the unit and for planned communities and condominiums with fifty or more units, the association shall mail or deliver to a purchaser or a purchaser’s authorized agent within ten days after receipt of a written notice of a pending sale that contains the name and address of the purchaser all of the following in either paper or electronic format:

1. A copy of the declaration, bylaws and the rules of the association and a copy of the current operating budget of the association, most recent annual financial report of the association and the most recent reserve study of the association, if any.
2. A dated statement containing:
 - The telephone number and address of a principal contact for the association, which may be an association manager, an association management company, an officer of the association or any other person designated by the board of directors.
 - The amount of the common regular assessment and the unpaid common regular assessment, special assessment or other assessment, fee or charge currently due and payable from the selling member.
 - Whether a portion of the unit is covered by insurance maintained by the association.
 - The total amount of money held by the association as reserves.
 - If the statement is being furnished by the association, whether the records of the association reflect any alterations or improvements to the lot/unit that violate the declaration. Note: The association is not obligated to provide information regarding alterations or improvements that occurred more than six years before the proposed sale. Further, nothing in this section relieves the seller of a lot/unit



from the obligation to disclose alterations or improvements to the unit/lot that violate the declaration, nor precludes the association from taking action against the purchaser of a lot/unit for violations that are apparent at the time of purchase and that are not reflected in the association's records.

- If the statement is being furnished by the unit/lot owner, a statement as to whether the unit/lot owner has any knowledge of any alterations or improvements to the Unit that violate the declaration.
- Case names and case numbers for pending litigation with respect to the lot/unit filed by the association against the member or filed by the member against the association.
- A statement summarizing any pending lawsuits, except those relating to the collection of assessments owed by unit/lot owners other than the selling unit/lot owner, in which the association is a named party, including the amount of any money claimed.
- A statement that the purchaser must sign and return to the association within fourteen calendar days stating: "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 as a matter of Arizona law, if I fail to pay my association assessments, the association may foreclose on my property."

Associations Have Ten Days to Provide Statement to Owner Upon Request:

A.R.S. Sections 33-1256 and 33-1807 reduces the number of days the association has to provide a statement of assessments upon written request from an owner, lien holder or escrow agent from fifteen (15) to ten (10) days. Failure to provide the statement within ten (10) days would result in the association's lien for unpaid assessments being extinguished.

Delivery of Resale Disclosure Fee:

A.R.S. Sections 33-1260 and 33-1806 permit the association to deliver the resale disclosure statement, in either paper or electronic format, to either the purchaser or the purchaser's authorized agent.

Cap on Resale Disclosure Fee, Rush Fee and Document Update Fee:

A.R.S. Sections 33-1260 and 33-1806 place a cap on the resale disclosure fee at an aggregate of \$400. In addition, the association may charge a rush fee of no more than \$100 if the rush services are required within 72 hours of the request. Finally, the association may charge a document update fee of no more than \$50 if at least 30 days have passed since the date of the original disclosure statement or documents were delivered.

It is important to note that associations cannot charge \$400 for the resale disclosure fee if the fee on January 1, 2010 was less than \$400 except the fee can increase up to 20% per year to the cap of \$400.

These fees shall be collected no earlier than at the close of escrow and may only be charged once to a unit/lot owner for that transaction between the parties. An association that charges or collects fees in violation of Sections 33-1260 and 33-1806 would be subject to a civil penalty of no more than \$1,200.



It is important to note that a disclosure fee cannot be charged in the following instances: (1) a sale in which a public report is issued pursuant to sections 32-2183 and 32-2197.02 or a sale pursuant to section 32-2181.02 and (2) timeshares or associations subject to chapter 20 of this title.

Finally, effective August 2, 2012, an escrow agent was excluded from the definition of ‘unit owner’ under A.R.S. 33-1260 and A.R.S. 33-1806.

TRANSFER FEES

A “**transfer fee**,” on the other hand, is paid to the association for a *specified purpose*, such as funding the association’s reserves or contributing to the association’s working capital fund. Transfer fees are sometimes also referred to as capital contribution fees, working capital fees, and/or reserve contribution fees. Pursuant to A.R.S. Section 33-442, an association can charge a transfer fee, capital contribution fee or reserve assessment fee that becomes due at a close of escrow when the following requirements are met:

- The governing documents (CC&Rs) grant authority for the fee and provides for a specific purpose for the fee;
- The fee being charged touches and concerns the land; and
- The fee does not go to a third party (such as a management company) or a developer unless the third party or developer is authorized in the governing documents (CC&Rs) to manage the real property within the association or was part of an approved development plan.

Further, an association can charge any fee or charge that is imposed by the document (CC&Rs) and that is payable to a non-profit corporation for the sole purpose of supporting recreational activities within the association.

However, A.R.S. Section 33-442(E) specifically prohibits associations from charging a transfer fee for any conveyance of property between parties, and under circumstances, that are set forth in A.R.S. 11-1134(B)(3) or (7). Examples of conveyances for which transfer fees would be prohibited under this statute are:

- 1) a transfer of residential property between certain family members for which only nominal consideration is paid (e.g., \$1), or
- 2) a transfer between certain related entities/individuals for which no, or nominal, consideration is paid.

The statute does allow associations to charge service fees “authorized in any document to manage real property within the association,” e.g., for the administration of association records authorized in a managing agent contract with the association.



Finally, pursuant to the Arizona Nonprofit Corporation Act [A.R.S. Section 10-3302(16)], an association can charge a transfer fee. A transfer fee under this section, in our firm's opinion, may only be used to compensate an association for the cost to transfer the membership paperwork from one owner to another owner.

This statute may conflict with A.R.S. Section 33-442 and this conflict has not yet been tested in court. If a non-profit association wishes to charge a transfer fee pursuant to this section, our firm suggests that the transfer fee be set at a minimal amount.