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LEGAL ASPECTS

OF

HOMEOWNERS ASSOCIATIONS

ABOUT THE PRESENTER

Augustus H. Shaw IV, affectionately known as the "HOA GUY" by his clients and friends, is a lifelong resident of Arizona and the founding attorney of Shaw & Lines, LLC. Augustus has a great deal of experience representing Community Associations, Developers of Community Associations, Developers of Professional Office Condominiums, Professional Office Condominium Associations and Timeshare Associations. His experience includes providing advice on document drafting, enforcement and amendment; assessment collection; general real estate and property tax matters; litigation support; and corporate formation, regulation and general corporate advice. Augustus also has experience representing clients in all aspects of general real estate law.

Augustus has published many articles and scholarly writings regarding Community Associations and their legal issues. He has written articles for the *Arizona Republic* and the *East Valley/Scottsdale Tribune*. Augustus is also a contributor to continuing legal education seminars.

Augustus served as co-host of **1100AM KFNX's HOA Today**. HOA Today is a call-in show where Community Associations can gain insight into the laws that apply to Community Associations.

Augustus has served the Community Association Industry by participating as an active member of the **Central Arizona and National Chapter of the Community Associations Institute** as well as being an active participant with the **Arizona Association of Community Managers**. Augustus is also the Vice President of **The Leadership Centre**, an organization sponsored by East Valley Cities dedicated to providing Communities with educational opportunities.

Augustus has served his Community at large through service as a member of the **Maricopa County Board of Adjustment, the Maricopa County Community Development Advisory Commission and the Maricopa County Merit Commission**.

Augustus is a graduate of the University of Arizona College of Law and licensed to practice law before the State Supreme Court of Arizona, the State Supreme Court of Nebraska, the United States District Courts of Arizona and Nebraska and the United States Tax Court. Augustus is also a member of the Maricopa County Bar Association and the American Bar Association.

I. WHAT IS A HOMEOWNER ASSOCIATION

A. General Definition.

A homeowner or community association (hereafter “association”) is a common-interest community consisting of landowners living in a residential neighborhood that has restrictive covenants placed on the property. Homeowner associations are unique in that they usually have property, known as “Common Area,” which is entitled to be used by the members of the association. Arizona law divides associations into two basic types, which are Planned Communities¹ and Condominiums².

B. Condominiums.

A “Condominium,” under Arizona Revised Statutes § 33-1202, is defined as “real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate portions. Real estate is not a condominium unless the undivided interests are vested in the unit owners.” In essence, a Condominium is an association in which the individual member/owners own an undivided interest in the common area, the property to be equally enjoyed by the members of the association.

C. Planned Communities.

A “Planned Community” under Arizona Revised Statutes § 33-1802, is defined as a “real estate development which includes real estate owned and operated by a nonprofit corporation or unincorporated association of owners, created for the purpose of managing, maintaining or improving property, and in which the owners of separately owned lots, parcels or units are mandatory members and are required to pay assessments to the association for these purposes.”

In essence, a Planned Community is an association in which the common area, the property to be equally enjoyed by the members of the association, is owned by the association, rather than the members/owners.

¹ Arizona Revised Statutes § 33-1801 *et seq.*

² Arizona Revised Statutes § 33-1201 *et seq.*

D. Cooperative.

A corporation owns the property that makes up the cooperative. This property is typically a building. The owner purchases a shared interest in the corporation. With that purchase they have the right to occupy a portion of the building. This portion is usually called an apartment. Anything outside the apartment becomes the common area maintained by the corporation.

E. Townhomes, Patio Homes, Cluster Housing.

These are all marketing names for different types of housing products. In order to know what type of community exists, it is necessary to know how the common area is structured.

II. DOCUMENTS THAT GOVERN HOMEOWNER ASSOCIATIONS

A. Types of Governing Documents.

Governing documents of homeowner associations are divided into two basic types, documents that restrict the use of the property or the behavior of residents concerning the property and documents that govern the corporate entity embodying the association.

Association documents that restrict the use of the property or the behavior of owners concerning the property are:

1. The Declaration of Covenants, Conditions and Restrictions, commonly known as the “CC&Rs”;
2. The Rules and Regulations; and
3. Architectural Guidelines.

Association documents that govern the corporate entity embodying the association are:

1. The Articles of Incorporation;
2. The Bylaws; and
3. Resolutions of the Board of Directors.

B. Declaration of Covenants, Conditions and Restrictions.

The Declaration of Covenants, Conditions and Restrictions, commonly known as the “CC&Rs,” is a document that creates the scheme of enforceable covenants and restrictions that run with the property. As a document that places restrictions on property,

the CC&Rs are universally recorded with the county recorder.

CC&Rs typically discuss:

1. The restrictions on the use of property;
2. Assessment collection and the Assessment lien;
3. Required association Insurance;
4. Maintenance of the common areas;
5. Member's rights concerning the common areas; and
6. Enforcement of the restrictions.

C. Rules and Regulations and Architectural Guidelines.

Most association CC&Rs allow associations to draft reasonable Rules and Regulations that explain the restrictions found in the CC&Rs. The Rules and Regulations normally are developed by the association's board of directors and have the same enforceability as the CC&Rs, even though the Rules and Regulation, for the most part, are not recorded with the county recorder.

Rules and Regulations may only explain regulations found in the CC&Rs. Rules and Regulations may not contradict provisions of the CC&Rs, nor may they add restrictions to the property not found in the CC&Rs. If Rules and Regulations conflict with the CC&R's, then they are generally unenforceable.

D. Architectural Guidelines.

Architectural Guidelines also derive their authority from the CC&Rs of an association. The Architectural Guidelines usually provide a framework for the decision making process of the Architectural Committee. The Architectural Guidelines have the same enforceability as the CC&Rs, even though they, for the most part, are not recorded with the county recorder.

E. Articles of Incorporation.

The Articles of Incorporation establish the association as a legal entity and must meet certain statutory criteria as found in the Arizona Non Profit Act.³ The Articles of Incorporation constitute the corporate charter and is filed with the Arizona Corporation Commission. Typical Articles of Incorporation include provisions that:

³ Arizona Revised Statutes §§ 10-3101 through 10-11702.

1. Create the non-profit corporation embodying the homeowners association;
2. Provide the legal name of the association. It is very important to use this name consistently when discussing the association, even if there are different marketing names for the community. Please make sure that your homeowners know the name of the association. Otherwise owners call the management office and become frustrated, as we may not know all of the various marketing names in a large master planned community;
3. Provide the principle office of the association;
4. Identify the statutory agent. Who do you want to receive notice of any certified mail, lawsuits, etc;
5. Discuss the purpose and the character of the business;
6. Discuss who shall be members of the association;
7. Create the initial Board of Directors’
8. Create the initial officers of the Board of Directors;
9. Limit the liability of the directors and officers;
10. Discuss how the association can be dissolved.

F. Bylaws.

The Bylaws of an association set out the procedures for the internal government and operation of the association. The Bylaws guide the association concerning how owners may vote regarding corporate issues. The Bylaws also regulate the conduct of the association’s board of directors as well as outline how an association’s board of directors is elected. Typical Bylaws also:

1. Designate the fiscal year.
2. Must have an indemnification clause for the Board of Directors, management company and any employees of the Association.
3. State when the annual meeting will take place. Must have a time reference for the first annual meeting.
4. State how to call a Special Meeting.

5. Notice of Meetings tells very clearly what the rules are for notifying Members of meetings.
6. Establish quorum requirements for annual and membership meetings.

III. STATE STATUTES AND REGULATIONS THAT GOVERN HOMEOWNER ASSOCIATIONS.

There are many aspects of community associations, both the formation and operation, that are controlled or mandated by statute and regulation. A discussion of all relevant statutes and regulations would be too lengthy for this seminar. Highlighted below are some that you should be aware.

A. Arizona Planned Community Statutes - A.R.S. §§ 33-1801 through 33-1814 defines “planned community”, “association”, “community (governing) documents” and “declaration”. The planned community statutes also have provisions that deal with assessment increases, penalties, open meetings, disclosure of association records, resale disclosure and assessment liens.

B. Arizona Condominium Act – The Arizona Condominium Act, A.R.S. §§ 33-1201 through 33-1270, is patterned after the Uniform Condominium Act and is more extensive in scope and detail than the planned community statutes. It deals with, among other things, the creation, alteration, management and termination of the condominium, the imposition of monetary penalties, resale disclosure, assessment liens and open meetings.

C. Nonprofit Corporations Act – All associations that are incorporated are subject to the Nonprofit Corporations Act, A.R.S. §§ 10-2301 through 10-2594. The Nonprofit Corporations Act contains extensive provisions governing the formation and operation of nonprofit corporations.

IV HOMEOWNER ASSOCIATION MEETINGS.

A. HOMEOWNER ASSOCIATION BOARD MEETINGS.

Almost every community association has a board of directors. The board of directors is the executive body of the community association who makes decisions on its behalf. The board of directors develops association policy and procedures. It is also empowered to make decisions on behalf of the members of the association in order to smoothly operate the association and function as a corporate entity. In order to accomplish these tasks, the directors must meet regularly in board meetings. Generally, there are three types of board meetings: (1) regular board meetings; (2) emergency meetings; and (3) executive session meetings of the Board.

B. REGULAR BOARD MEETINGS OF THE BOARD OF DIRECTORS.

Regular board meetings are those meetings in which the community association conducts the general “day-to-day” business of the association. As representatives of the community members, the deliberations and decisions of the directors are made on behalf of the members and, therefore, their board meetings are generally open for members to attend. These “open meeting” discussions generally include board business decisions, the adoption of standard policies and procedures of the association, passing rules and discussing the budget and general corporate issues pertaining to the association.

1. Who may participate in Board Meetings, when and to what extent?

Arizona law requires that regular board meetings be “open” to all members of the Association. The open meeting laws for planned communities are found in Arizona Revised Statutes § 33-1804 and condominiums are governed by Arizona Revised Statutes § 33-1248. Although these board meetings are open to the attendance of community members (or their designated representatives), they are not membership meetings and should be limited to discussion among board members until an appropriate time is allotted for membership input. The community association open meeting statutes specifically provide:

[A]ll meetings of the association and board of directors are open to

all members of the association or any person designated by a member in writing as the member's representative and all members or designated representatives so desiring shall be permitted to attend and speak at an appropriate time during the deliberations and proceedings. The board may place reasonable time restrictions on those persons speaking during the meeting but shall permit a member or 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.

There are three (3) essential points to remember from this statute. First, members (or their representative identified in writing) are allowed to speak “at an appropriate time” during the board’s meeting and “before the board takes formal action on an item under discussion”. Although allowed to attend and participate, member input and participation is limited to a time when the board allows them to speak, but before the board makes any final decision on the issue discussed. This law allows the board to maintain control of its meeting. Important decisions could be delayed and taken far off track if members are permitted to chime in at any time about any subject. Keeping this restriction in mind, boards can very efficiently discuss and deliberate on the board’s business without interruptions from members. Before making any final decision, members may be allowed to express their opinions.

Also, the board determines the “appropriate time” for member input. If a board is struggling to conduct effective board meetings, free of interruptions from members, it should determine exactly when the members can express themselves. An “open forum” at the beginning of a board meeting, before any board business is discussed, can exhaust valuable time that could otherwise be used to conduct board business. Also, as the board discusses its business, many questions and issues of members may be resolved and, therefore, they may have no need to address the board once their questions have been addressed. An appropriate time for member input would be after the directors have had the opportunity to discuss the issue amongst them and before they make a final decision.

A second important point to remember is that the board is permitted to “place

reasonable time restrictions” on members who wish to address the board. This allows the board to avoid the homeowner who wants to take an hour or so to raise every possibly imaginable (and sometimes irrelevant) issue occurring within the community. Your state legislature recognizes that homeowner association board members are lay persons, volunteering their time away from family, personal activities and often work to serve their community. For this reason, directors are given the ability to restrict the amount of time a member may use to address the board.

Boards must use good judgment in determining how much time should be afforded. After serving in a community for any amount of time, managers and directors will come to know its members and their propensity for wanting to take too much time. If necessary, strict time restraints can be dictated by the board (i.e., 1 or 3 minutes per person) so as to control how long your meeting will last. Regardless, directors should use fair judgment in regulating membership input.

Finally, the board also has the ability to limit the number of people that may speak on any given subject. For example, if 53 members appear at a board meeting to support a certain rule that may be passed, and 54 other members appear to rally against the rule, the Board does not have to allow all 107 members to address the issue. (Even if limited to only 2 minutes each, the board meeting would last more than 3½ hours on this issue alone). The statute allows the board to “provide for a reasonable number of persons to speak on each side of an issue”. The board may ask each side to designate one or more “spokesperson(s)” to address the board on the issue. Again, this keeps time to a minimum, yet allows members to participate to the extent allowed by law.

2. How HOA and government open meeting laws differ.

Many people confuse Arizona’s “Open Meeting Laws” applicable to community associations with those that regulate governmental meetings. Community associations are private entities and are not subject to governmental open meeting laws. However, members will frequently complain about boards allegedly violating the open meeting laws because of this simple misunderstanding.

The open meeting laws that apply to governmental bodies define a “meeting” as “the gathering, in person or through technological devices, of a quorum of members of a

public body at which they discuss, propose or take legal action.” Since a homeowners association is not a “public body”, A.R.S. §38-431 does not apply to homeowners associations.

3. E-mail discussions amongst Board Members

A.R.S. §33-1804 and A.R.S. §33-1248 provide: “the board of directors may permit any or all directors to participate in a regular or special meeting by or conduct the meeting through the use of any means of communication by which all directors participating may simultaneously hear each other during the meeting.” Therefore, unless the communication is simultaneously heard by those present, the directors are not legally conducting a “meeting”.

Regardless of this technical distinction, directors should be very careful not to “conduct business” with each other by email. Although board decisions can be made through email correspondence in certain circumstances, it is always best to avoid having any decision set aside or the accusations of violating the open meeting laws by conducting general board business without allowing the members to attend and participate as provided by Arizona law.

C. EXECUTIVE SESSION MEETINGS OF THE BOARD OF DIRECTORS.

Executive session meetings are meetings of the board that are closed to the members and held to discuss issues which, by statute, are not required to be discussed in a regular board meeting. These meetings occur “behind closed doors” or outside the presence of, and without participation from, the members. Executive session meetings do not have to be noticed to the members.

According to the community association statutes (A.R.S. §33-1248 for condominiums and A.R.S. §33-1804 for planned communities), the following topics should be discussed in the closed or executive session board meeting:

(1) Legal advice from an attorney for the board or the association. On final resolution of any matter for which the board received legal advice or that concerned pending or contemplated litigation, the board may disclose information about that matter in an open meeting except for matters that are required to remain confidential by the

terms of a settlement agreement or judgment;

(2) Pending or contemplated litigation;

(3) Personal, health or 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, including records of the association directly related to the personal, health or 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; and

(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.

These topics are reserved for closed-door meetings because of the sensitive nature of the matters discussed. For example, legal advice to a client (i.e., the directors of the association) must be given in confidence to protect the attorney/client privilege. Therefore, advice and conversations regarding pending legal action must be discussed without the members present. Also, delinquencies and violations of individual homeowners are considered “dirty laundry” that should not be aired to the public. As such, discussions regarding these personal matters should be discussed only in executive session.

It is not uncommon for these personal issues relating to particular homeowners or contractors to be brought up by members or directors during the course of a regular board meeting. If an executive session topic arises, board members or the manager in attendance should simply remind the remaining directors and the members in attendance that the matter discussed is not appropriate for a regular meeting and should be tabled for an executive session meeting.

Hearings requested by individual homeowners who wish to contest fines or violations should also be held in executive session because such hearings deal with the personal and financial information of an individual member, and because they are generally considered pending or contemplated legal action. The member may be invited

to participate in that portion of the executive session addressing the violation, but should be excused for the remainder of the executive session addressing any other issues.

D. DUTIES AND OBLIGATIONS OF BOARD MEMBERS.

Directors and officers of an association are charged with a “fiduciary duty” to the Association. Board members may be held personally liable for any damage caused to the Association as a result of a breach of this duty.

Directors have an obligation to exercise reasonable care in making decisions on behalf of the association. They must use good “business judgment” and will meet their duty if they work under the “business judgment rule”. This rule means a board member will be insulated from personal liability if the board member acts (1) in good faith, in a manner that he or she believes to be in the best interest of the Association, and (2) makes a decision that any other reasonable director would make in the same situation or circumstances.

The “business judgment rule” is found both in Arizona common law and in Arizona Revised Statutes §10-3830 of the Arizona Nonprofit Corporations Act. The statutes state that a board member will have met his or her duties when he or she acts “in good faith[,] with the care an ordinarily prudent person in a like position would exercise under similar circumstances [and] in a manner the director reasonably believes to be in the best interests of the corporation.”

This rule also protects board members from personal liability if they make their decision after relying on “information, opinions, reports or statements, including financial statements and other financial data,” received from “legal counsel, public accountants or other person as to matters the director reasonably believes are within the person’s professional or expert competence.” In other words, If the board’s decision ends with a bad result – even if the association suffers a financial loss as a result – the directors should be shielded from claims of personal liability if their decision was made on the advice of the association’s attorney.

When making decisions on behalf of the association, board members should have a good faith belief that the decisions they are making are in the best interest of the corporation. When making decisions requiring expertise of professionals, the board can

and should rely upon attorneys, accountants, its management company, or other relevant professionals.

Board members should adhere to the following:

Understand general association business;

Attend and participate in meetings;

Register a dissent in the minutes when disagreeing with the Board's action; and

Be familiar with and gain a general understanding of the CC&R's, Articles of Incorporation, Bylaws and other association documents.

Another duty relating to the fiduciary responsibilities is a duty of loyalty. Directors should have undivided loyalty to the association. This duty prohibits directors from receiving a benefit for serving on the board at the expense of the association or its members. This duty of loyalty is breached when a board member acts in his or her own interest or with a conflicting interest. One example of board members breaching such a duty is if board members refuse to enforce the governing documents against other board members, or if the documents are enforced inconsistently. (Board members are not exempt from their obligations as homeowners and should receive no special treatment.) Another example of a breach of the duty of loyalty is when a board member has a financial interest in a transaction or decision before the board and fails to excuse himself from the decision. The Arizona Nonprofit Corporations Act discusses conflicting interests transactions beginning in Arizona Revised Statutes §10-3860. The Arizona legislature has also recently adopted additional provisions regarding conflicts of interest for planned communities in Section 23-1811.

Another example of breaching the duty of loyalty or fiduciary duty is to discuss with other members matters that are either protected by attorney/client privilege (i.e., correspondence, communications or advice from legal counsel) or matters that are reserved for executive session board meeting discussions provided in Arizona statutes. To avoid breaching this duty of loyalty board members should consider the following:

Enforce the governing documents equally, not selectively, and without regard to whether the owner is a neighbor, friend or relative;

Fully disclose any potential conflict prior to any deliberations;

Ask to be dismissed and do not participate in the decision making process for any issues where a conflict may exist;

Maintain accurate records; and

Keep confidences (i.e., attorney/client communications and results from executive session meetings).

Occasionally there will be factions and differences of opinions among members of the board. Diverse positions among board members can lead to progressive discussion and innovative administration. Board members, however, must understand that board decisions are made by majority vote. If the minority is out-voted on an issue, the minority should attempt to provide unified support, unless the action taken by the majority is unlawful. Since board members serve at the will of the members of each community, the general membership of each community has the ability to remove board members who the members believe are not taking action in accordance with the desires of the majority. As such, dissident board members should use caution when challenging a valid decision of the majority of the board.

E. ANNUAL MEETINGS OF THE MEMBERS.

Probably the most important meeting a community association is required to conduct is the Annual Meeting of the Members. Not only do most community association Governing Documents require community associations to conduct Annual Meetings, Arizona law, at Arizona Revised Statutes §10-3701, requires community associations to conduct an Annual Meeting at least once per year.

1. How Often Should Annual Meetings Be Held?

Pursuant to Arizona Revised Statutes §10-3701, community associations must hold an Annual Meeting at least once a year. Many community association Bylaws also contain requirements for conducting an Annual Meeting. As a rule of thumb, a community association should hold an Annual Meeting no less than 15 months subsequent to the community association's last Annual Meeting.

2. What Are the Notice Requirements for an Annual Meeting?

Annual Meeting notice requirements are usually discussed in the community association's Bylaws. If the community association's Bylaws are silent concerning notice

requirements for Annual Meetings, Arizona Revised Statutes §10-3705 states that a community association must provide at least ten (10) days notice of an Annual Meeting to the Membership.

3. Purpose of an Annual Meeting.

Annual Meetings are meetings of the Members. They are held to conduct the “business” of the Membership and allow the Membership to address their community association. In most community associations, Annual Meetings are conducted for three main purposes of, said purposes being:

1. To Conduct Member “Business”;
2. To Elect Members to the Association’s Board of Directors; and
3. To Allow the Members to Address their Association.

F. SPECIAL MEETINGS OF THE MEMBERS.

Special Meetings of the Members are another form of Member meeting. Special Meetings of the Members are unique because they vary depending on the purpose of the Special Meeting of the Members.

1. Who May Call A Special Meeting of the Members?

The question of who may call a Special Meeting of the Members is usually answered in the Governing Documents of the community association. Usually, the Board of Directors or a certain number of Members may call a Special Meeting of the Members.

2. Notice Requirements for Special Meetings of the Members.

The notice requirements concerning a Special Meeting of the Members are usually found in the community association’s Governing Documents. If the community association Bylaws are silent concerning notice requirements, Arizona Revised Statutes §10-3705 states that an community association must provide at least ten (10) days notice of a Special Meeting of the Members to the Membership.

3. Common Purposes for Special Meetings of the Members.

Special Meetings of the Members may be called for a number of reasons, such as:

- i. To authorize a Special Assessment or Increase in the Annual Assessments.
- ii. To authorize amendment of the Association’s Governing

Documents.

iii. To Remove Members of the Association's Board of Directors.

i. Special Meeting of the Members to Authorize a Special Assessment or Increase in the Annual Assessments.

Generally, the community association's CC&Rs will dictate how Special Meetings of the Members may be called to vote on a special assessment or increase in the annual assessment of the community association. Voting and quorum requirements concerning this type of Special Meeting of the Members will also generally be found in the community association's CC&Rs. Additionally, any Special Meetings of the Members must be conducted using absentee ballots pursuant to Arizona Revised Statutes §33-1250 (Condominiums) and Arizona Revised Statutes §33-1812 (Planned Communities).

ii. Special Meeting of the Members to Amend the Association's Governing Documents.

Pursuant to most community association Governing Documents, Special Meetings of the Members may be called to vote amending certain provisions of the community association's Governing Documents. Voting and quorum requirements concerning this type of Special Meetings of the Members should also be generally found in the specific community association Governing Document that is being amended. Additionally, any Special Meetings of the Members must be conducted using absentee ballots pursuant to Arizona Revised Statutes §33-1250 (Condominiums) and Arizona Revised Statutes §33-1812 (Planned Communities).

iii. Special Meeting of the Members to Remove Members of the Association's Board of Directors.

Recent changes in Arizona law have changed the way Members of a community association's Board of Directors may be removed. Arizona Revised Statutes §33-1243 and Arizona Revised Statutes §33-1813 provides for the procedures concerning a Special Meeting of the Members to remove Members of the community association's Board of Directors.

It is important that a community association follow the quorum requirements of

Arizona Revised Statutes §33-1243 and Arizona Revised Statutes §33-1813. It is equally important that the community association carefully study Arizona Revised Statutes §33-1243 and Arizona Revised Statutes §33-1813 in order to abide by its provisions.

V. PRIMARY FUNCTIONS OF A HOMEOWNER ASSOCIATION

One of the primary duties of a homeowners association is to enforce the restrictions in the association's governing documents. In some circumstances, associations may have an obligation to enforce the restrictions found in the association's governing documents. It is important to understand how and when to properly enforce an association's governing documents.

A. Enforcement of Restrictive Covenants.

Restrictive covenants may be enforced in three basic ways:

1. Imposing fines;
2. Filing a lawsuit seeking injunctive relief; and
3. Exercising "Self-Help".

In selecting any one of these options, an association should rely on three main principles of enforcement:

1. What enforcement action is allowed by the association's governing documents;
2. Which contemplated method of enforcement is likely to gain compliance; and
3. Which method of enforcement is reasonable under the circumstances?

These principles will help an association safely navigate the complexity involved with enforcement of the CC&Rs. The above principles, along with the enforcement actions, are discussed in greater detail below.

B. Gaining Compliance by Imposing Fines.

Imposing a fine for the violation of restrictive covenants is the most common means of gaining compliance in associations. Under A.R.S. §33-1803 (the planned community statutes), an association may fine an owner who is in violation of the restrictions so long as the following criteria are met:

1. The fine is "reasonable";

2. The fine is imposed after notice and an opportunity to be heard; and
3. The notice of the fine must contain a statement regarding how the fine will be enforced and collected.

C. Violation Enforcement Through Filing a Lawsuit Seeking Injunctive Relief.

Restrictions found in association governing documents may also be enforced through the seeking of injunctive relief. Injunctive relief is the process in which an association petitions the Superior Court to issue an order requiring an owner who is in violation of the restrictions to comply with the restrictions. Because injunctive relief requires litigation, seeking injunctive relief is usually implemented in emergency situations or as a last resort.

Also, most association CC&Rs allow the association to recoup attorney's fees spent in obtaining injunctive relief if the association is the prevailing party. Any attorney fees incurred may be awarded to the association by the Court in the injunction action, subject to the judge's discretion; meaning a judge does not have to award the association all of its attorney's fees.

D. Exercising Self-Help.

Self-help is a mechanism by which the association seeks to address a continuing violation of the restrictions by remedying the violation itself. The most common example of self-help is when an association pays a landscaper to maintain the yard of an owner who has not been maintaining the yard in violation of the restrictions. Self-help is usually available under an association's CC&Rs and the costs of self-help may unusually be recouped by the association. Before exercising self-help, an association should carefully review its CC&Rs to make sure it is allowed to do so.

E. Collecting Assessments.

Assessments are the lifeblood of an association. Without assessments, an association would be unable to function. An association's rights and abilities to collect assessments are provided in both the association's CC&Rs and Arizona statutes.

The Statutory Lien.

A.R.S. §33-1256 (the Arizona Condominium Act lien statute) and A.R.S. §33-1807 (the planned community lien statute) define what charges constitute an association’s lien and its rights to foreclose. The statutory liens for both condominiums and planned communities under Arizona statutes consist of the following:

1. Association assessments;
2. Charges for late payment of those assessments; and
3. Reasonable collection fees and reasonable attorney fees and costs incurred with respect to those assessments.

Charges not included in the statutory lien include fines (“monetary penalties”) and other charges not listed in A.R.S. §33-1256 (for condominiums) and A.R.S. §33-1807 (for planned communities). Finally, under these statutes, liens must be foreclosed within three (3) years.

In addition to the statutory lien, an association has a “consensual” or contractual lien pursuant to its Declaration of Covenants, Conditions and Restrictions (the “CC&Rs”). The CC&Rs are a contract under Arizona law, regardless of whether an owner reads or signs them. The contractual lien includes those fees and charges specifically listed in the CC&Rs.

VI. 2006 CHANGES IN THE LAWS AFFECTING HOMEOWNERS ASSOCIATIONS

A. NEW A.R.S. §33-1242(B) AND NEW A.R.S. §33-1803(C) – INVOLVING ENFORCEMENT DEMAND LETTER PROCEDURES;

***Quick Summary:* This change directly affects how associations enforce their restrictions. The law requires an association to send out an initial violation letter that provides the owner with certain information prior to the association “taking action”, including imposing fines or instituting a lawsuit.**

This law change provides additional procedures concerning an association's ability to enforce its CC&Rs and Rules and Regulations. Before the association may take any enforcement action, which likely includes the imposition of a fine or seeking legal action, the Association must accomplish the following:

1. Provide the owner with a written initial violation letter containing the violation and a description of the process the owner must follow to contest the initial violation letter. The process in which the owner must follow to contest the initial violation letter may include a meeting with the Association or a written response from the owner. The association's initial violation letter must now contain an address to which the owner may contact the Association in order to dispute the initial violation letter;

2. Inform any unit owner who receives an initial violation letter that he/she may provide the association with a written response concerning the initial violation letter by sending a certified letter to the address referenced in the initial violation letter within ten (10) business days after the date of the initial violation letter. This response letter must be sent by certified mail.

3. Within ten (10) business days after receipt of the owner's response letter, the association must respond to the unit owner with a written explanation of the violation. The association's written explanation must provide at least the following information (**UNLESS THE FIRST NOTICE FROM THE ASSOCIATION CONTAINED THE FOLLOWING INFORMATION**):

1. The provision restriction, rule or regulation that has allegedly been violated;
2. The date of the violation or the date first observed;

3. The first and last name of the person or people who observed the violation. (*Note: this requirement may be a troublesome for associations that initiate enforcement action based on owner complaints. When this law takes effect, an association may not enforce its restrictions based on an owner's complaint unless the complaining owner is willing to give his/her first and last name. Managers or enforcement personnel will also now have to provide their first and last names.*); and

4. The process the member must follow to contest the violation.

B. NEW A.R.S. §10-11602, §33-1242, §33-1803, §33-1805, §41-2198, §41-2198.01, §41-2198.02, §41-2198.03, §41-2198.04, AND §41-2198.05 INVOLVING THE RIGHT OF AN ASSOCIATION OR OWNER IN AN ASSOCIATION TO PETITION ADMINISTRATIVE LAW JUDGE CONCERNING ASSOCIATION DISPUTES.

***Quick Summary:* The above changes provides owners and associations with the opportunity to take disputes before an Administrative Law Judge.**

The above changes in Arizona Law allow an owner or association to bring disputes concerning the association's governing documents or Arizona laws that apply to the association, before an Administrative Law Judge. **The new change does not require disputes to be brought before an Administrative Law Judge. It simply provides an opportunity for an owner or the association to bring disputes before an Administrative Law Judge.**

The new statutes also discuss the procedures required to file and action before an Administrative Law Judge and also provides the Judge with the power to set any applicable filing fee and impose penalties should the Judge determine a violation has occurred.

The new statutes allow an association's manager or Board member to represent the association before the Administrative Law Judge. Also, if an

association chooses to use an attorney, the new statutes do not provide for the recouping of attorney's fees.

**C. PROCEDURES CONCERNING RECORDS REQUESTS - REVISED
A.R.S. §33-1258(A), REVISED A.R.S. §33-1805(A) AND REVISED
A.R.S. §10-11602.**

***Quick Summary:* These new changes outline the procedures an association must follow when an owner requests to review records of the association. This new change also removes records requests concerning homeowners associations from the Non-Profit Corporations Act.**

When an owner requests to review records of the association:

1. The association may not charge a member or any person designated by the member in writing for making material available for review, even if the Association must spend money to prepare the records for review by the owner;
2. The association has ten (10) business days to fulfill a request by an owner to view association records; and
3. If an owner or his representative requests copies of documents, the association must provide copies of the requested records within ten (10) business days. An association may charge a fee for making copies of not more than fifteen cents per page. The association, however, is not required to mail copies to an owner, it simply requires the association to prepare the copies for pick-up by the owner.

**D. RECORDS THAT MAY BE WITHHELD FROM OWNERS -
REVISED A.R.S. §33-1258 (B) (2), A.R.S. §33-1258 (B) (4) AND
REVISED A.R.S. §33-1804(A) (2), A.R.S. §33-1804(A) (4).**

Quick Summary: These changes revise the specific records an association may withhold from an owner who has requested to view records of the association. The new statutes state that the association may not withhold records concerning “contemplated litigation”. An association may withhold records directly relating to the personal, health or financial information of members of the association, an individual employee of the association or an individual employee of a contractor for the association.

**E. EXECUTIVE SESSION MEETING REQUIREMENTS – REVISED
A.R.S. §33-1248(A) (3) AND NEW A.R.S. §33-1804(A) (3).**

Quick Summary: These amended statutes now allow Associations to meet in executive session to discuss the personal, health or financial information of a member of the association, an individual employee of the association or an individual employee of a contractor for the association. Additionally, an association may now meet in executive session to discuss the records of the association directly related to the personal, health or financial information of a member of the association, an individual employee of the association or an individual employee of a contractor for the association.

**F. LIEN FORECLOSURE - REVISED A.R.S. §33-1256(A) (CONDOS)
AND REVISED A.R.S. §33-1807(A) (PLANNED COMMUNITIES)**

***Quick Summary:* This new change proscribes when an association may foreclose on an owner for failure to pay assessments.**

These changes limit an association's ability to foreclosure for unpaid assessments. The owner must delinquent in the payment of monies secured by the lien, **excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments**, for a period of one (1) year or in the amount of one thousand two hundred dollars (\$1,200.00) or more, whichever occurs first.

**G. DISPLAY OF FLAGS IN COMMUNITY ASSOCIATIONS –
REVISED A.R.S. §33-1261 (CONDOS) AND REVISED A.R.S. §33-1808
(PLANNED COMMUNITIES)**

***Quick Summary:* The new change expands the types of flags that may be displayed in community associations. In addition to the flag of the United States, owners may also display the flags of the armed forces (Navy, Army, Air Force, Marines and Coast Guard), the POW/MIA flag, the State of Arizona flag and the flags of Arizona Indian Nations. Associations may still develop reasonable rules and regulations concerning the location and size of flagpoles, but shall not prohibit the installation of a flagpole.**

**H. THE PARKING OF CERTAIN PUBLIC SAFETY VEHICLES -
REVISED A.R.S. §33-1809 (PLANNED COMMUNITIES)**

***Quick Summary:* This law only applies to planned communities. The law**

expands the lists of vehicles that are exempted from an association's restrictions concerning on-street parking. The law adds municipal utility, electric and water emergency service vehicles to emergency service gas repair vehicles and public safety vehicles already exempt from association regulations concerning parking on the street of an association.