



## New Legislation Pertaining to Homeowners Associations - 2008

During this year's session, the Legislature passed several laws pertaining to homeowners associations. They became effective on September 26, 2008, with the exception of House Bill 2726, which will become effective January 1, 2009. Here is a summary of the new legislation.

### **Pre-1986 Condominiums and the Condominium Act (HB 2726)**

This new law, which goes into effect January 1, 2009, eliminates the exception in the Condominium Act for pre-1986 condominiums. Under the new law, *all* condominiums will be subject to the Condominium Act, regardless of when the condominium was formed. This means that after the end of this year the Condominium Act will apply to all condominiums, including those formed before 1986.

This new law will have wide-ranging effects on a pre-1986 condominium association. Under the old law, the Condominium Act only applied to condominiums created before January 1, 1986 to the extent the Act did not conflict with the declarations, articles or bylaws of the condominium. In other words, if a pre-1986 condominium documents conflicted with the Condominium Act, the association could safely ignore the Condominium Act with respect to the conflict. The new law basically says that a pre-1986 condominium association can no longer ignore the Condominium Act if it conflicts with the association's governing documents.

So, how exactly will HB 2726 impact a pre-1986 condominium now that the association must follow all of the Condominium Act? Unfortunately, because the documents of pre-1986 condominiums vary so dramatically, there is no quick answer to this question. Simply put, the association should have a qualified attorney review its documents for compliance with the Condominium Act. With that disclaimer, however, here is a rundown of potential changes facing many condominiums formed before 1986.

#### 1. Declaration Amendments

One major way a pre-1986 condominium may be affected is in the declaration amendment process. Many pre-1986 condominium declarations provide that the declaration can be amended by 51% of the members. Under the Condominium Act, however, a declaration may only be amended by the approval of members holding at least 67% of the votes in the association.<sup>1</sup>

Thus, if a pre-1986 condominium association is contemplating an amendment to its declaration in the near future and the association's declaration provides that amendments can be adopted by 51% of the members, the association should ensure that such amendment is approved by 51% of the members and recorded prior to January 1, 2009.

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<sup>1</sup>This is often a problem in post-1986 condominiums, where the governing docs were written not in compliance with the law. Even if the association's governing documents have a lesser requirement for amending the declaration, the association must obtain the approval of owners holding at least 67% of the votes in the association.

## 2. Use of Proxies

An association's pre-1986 declaration may also allow for member votes to be cast by proxy; however, the Condominium Act prohibits the use of proxies. Accordingly, as of January 1, 2009, the association must provide for votes to be cast in person or by absentee ballot pursuant to A.R.S. § 33-1250(C), even if the declaration allows proxies.

## 3. Securing Loans

Under the old law, a pre-1986 condominium could secure a loan if the declaration or bylaws expressly allowed for such action. Under the new law, the association will need to comply with A.R.S. § 33-1242(A)(14). This statute states that an association may only assign its right to future income, including the right to receive common expense assessments, to the extent its declaration so provides.

## 4. Budget Approval

Under the old law, a pre-1986 condominium board of directors could adopt and amend budgets unless the declaration required member ratification. Starting January 1, 2009, the opposite will be true. Under A.R.S. § 33-1243(D), unless the board of directors is expressly authorized to adopt and amend budgets from time to time, any budget or amendment will need to be ratified by members in accordance with the Condominium Act.

## 5. Directors: Number, Qualifications, Removal

Under A.R.S. § 33-1243(G), a condominium board must contain at least three members, at least a majority of whom must be unit owners. Starting January 1, 2009, a pre-1986 condominium will need to comply with these requirements, even if the declaration provides otherwise.

Likewise, under A.R.S. § 33-1243(H), a condominium's unit owners may remove any member of the board of directors with or without cause by a majority vote of members entitled to vote. The removal vote must be at a meeting of the members that follows the requirements of the statute and at which a quorum is present. Starting January 1, 2009, this statute trumps any contrary provision in the pre-1986 condominium's declaration or bylaws.

## 6. Common Elements: Insurance and Damage

As of January 1, 2009, a pre-1986 condominium will also have to meet the detailed insurance requirements of A.R.S. § 33-1253. To take just one example, the association will need property insurance on its common elements in an amount (after application of any deductibles) not less than 80% of the actual cash value of the insured property. Further, the association will need to follow a very specific process if any insured property is damaged or destroyed. These are only a few of the many requirements the condominium will now have to meet with respect to its common elements.

## 7. Flag Display

Many pre-1986 condominium declarations prohibit flagpoles or the display of flags. On January 1, 2009, however, such a prohibition will be void if it conflicts with A.R.S. § 33-1261(A), which provides that condominiums must allow the outdoor display of certain flags, such as the American or Arizona flag. On the other hand, A.R.S. § 33-1261(B) allows the association to adopt rules and regulations regarding the placement and manner of display of the flags, as well as the location and size of the flagpole, if such rules are reasonable.

## 8. For Sale Signs

As with flags, many pre-1986 condominium declarations prohibit for sale signs. Under A.R.S. § 33-1261(C), however, an association cannot prohibit the indoor or outdoor display of a for sale sign or sign rider. Accordingly, even if the association's pre-1986 declaration prohibits for sale signs, the association will not be able to prohibit such

signs starting on January 1, 2009. Rather, the association must allow such for sale signs, so long as they comply with the law.

In sum, pre-1986 condominiums may face significant changes as of January 1, 2009, when they will join the rest of Arizona condominiums in their relationship to the Condominium Act. The good news is that the Legislature has given these associations until the end of the year to make sure they understand how the Condominium Act will affect their governance. Such associations should take full advantage of this time by having a qualified attorney review their governing documents for any areas, such as those described in this article, where their declaration may conflict with the Condominium Act.

#### **Circulation of Political Petitions (HB 2440)**

This law applies to both condominiums and planned communities and amends A.R.S. §§ 33-1261 and 33-1808. This new law will restrict associations from prohibiting the circulation of political petitions on property dedicated to the public within their communities, regardless of any provisions of an association's governing documents. Property dedicated to the public within an association typically includes public streets, sidewalks, and public parks. Qualifying petitions include those for nominating political candidates, supporting or opposing an initiative, referendum, or recall, or other political issue.

Associations are still permitted to reasonably regulate the circulation of these petitions. Any association that restricts vehicular or pedestrian access to the community is not required to comply with the new law. Furthermore, the new law does not apply to an association's common areas. Rather, it only applies to property dedicated to the public that is located within the association.

#### **Private Covenants (HB 2659)**

This law will create a new A.R.S. § 33-440. This new law will permit owners of real property to enter into private covenants contained only within the deed of that particular piece of property. For example, an owner could privately agree with their neighbor to limit what items can be placed in their adjoining backyards to preserve the privacy of both of them. Another example would be a developer placing additional restrictions in the deeds of the lots adjoining the monument signs at the entrance to the community.

Such private covenants shall be enforceable so long as the following requirements are met: (i) the private covenant is not otherwise prohibited by any existing private covenant or declaration affecting the real property; (ii) the private covenant does not violate any statute taking effect before § 33-440; (iii) the owner of the real property and any person who receives a liability or obligation under the private covenant have consented; and (iv) any consent requirements in the provisions of any existing private covenant or declaration have been met.

A valid private covenant shall not be deemed to constitute an amendment to any existing private covenant or declaration unless it expressly violates the provisions of those existing documents. This provision therefore modifies the holding of *Multari v. Gress*, 214 Ariz. 557 (App. 2008), in which the appellate court held that a private covenant contained in some of the deeds of homes in a community was an invalid amendment to the community's declaration.

#### **Timeshare Foreclosures (SB 1258)**

Timeshares have mandatory assessments just like planned communities and condominiums. If a timeshare owner does not pay these assessments, the owner's timeshare interest may be subject to an assessment lien that, if left unpaid, could result in the foreclosure of the timeshare.

This law adds A.R.S. § 33-2211 and will have a dramatic impact on timeshare foreclosures. Under the old law, a timeshare association was typically required to file a foreclosure suit to foreclose on liens arising from delinquent assessments. The new law will permit an association to notice a Trustee's Sale of a timeshare interest if the owner has

been delinquent for one year. A Trustee's Sale is a sale of property by a third party appointed by the association (the Trustee) to conduct the sale.

This is good news for timeshare associations. Trustee's Sales are generally quicker and less expensive than judicial foreclosures because they do not require the involvement of the court.

The new law, however, sets forth very specific notice requirements for a Trustee's Sale. For example, the association must (i) mail notice of the Trustee's Sale by certified mail to the owner's last known address and post notice in specific places, and (ii) record the notice in the county where the timeshare is located. If the owner does not object within 30 days from the day the notice was mailed, the Trustee may hold the Trustee's Sale to satisfy the association's assessment lien.

It is important to note that the new law does not permit a Trustee's Sale if the association's declaration expressly requires judicial foreclosure. Also, if the delinquent owner purchased the timeshare before January 1, 2009, the owner can prevent the sale by completing a special form and returning it to the association within 30 days of receiving notice of the sale.

This law does not apply to planned communities or condominiums.

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*If you have any questions regarding these changes, please do not hesitate to contact Curtis Ekmark at 480-922-9292.*