



2005 Legislative Update

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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EFFECTIVE DATE OF NEW LEGISLATION

Set forth below is a summary of new legislation regarding community associations. Unless otherwise indicated, these new laws went into effect on August 12, 2005 and will apply to both planned communities and condominiums.

REVISIONS TO LANGUAGE ON RESALE DISCLOSURE STATEMENT

In 2004, the legislature adopted a new law that required all purchasers of a resale lot/unit in an association to sign a statement, as a part of the resale disclosure package, acknowledging the existence of a contractual relationship between the purchaser and the association. In 2005, the legislature slightly modified the statement language.

Under the new law, an association is required to provide a purchaser with the following statement (including a signature line):

"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.

Signature: _____"

This statement must be signed by the purchaser and returned to the association within fourteen calendar days of the purchaser's receipt of the resale disclosure statement.

This law does not provide for any penalties in the event that the statement is not signed and returned to the association within the specified time period.

It is important to note that if there are *fifty* or more lots/units in an association, the *association* is required to provide a disclosure statement to the purchaser. If there are *forty-nine* or fewer lots/units in an association, the *seller* is required to provide a disclosure statement to the purchaser.

PROXY VOTING

The new legislation allows proxy voting only 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 may now be cast in person AND by mail-in/absentee ballot.

There are several requirements for mail-in/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);
5. The ballot must 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); and
6. The ballot does not authorize another person to cast votes on behalf of the member.

Votes cast by mail-in/absentee ballot are valid for purposes of a quorum. This new law does not apply to timeshares.

PROCEDURE FOR APPLYING PAYMENTS TO AN OWNER'S ACCOUNT

The new legislation specifies the order in which payments are to be applied to a member's account, unless the member specifies otherwise, as follows:

- (1) unpaid assessments; (2) unpaid late fees; (3) reasonable collection fees; (4) attorney fees and costs; (5) other unpaid fees, fines, and interest.

COLLECTION COSTS BY NON-ATTORNEYS CAN NOW BE INCLUDED IN LIENS

Reasonable collection costs (for example, costs charged by a management company, certified legal document preparer or the association for liens, demand letters, etc.) can now be included in an assessment lien.

REMOVAL OF DIRECTORS

The legislature has adopted a new procedure for removing board members from office. This procedure does not apply to board members appointed by the developer. This procedure supersedes any other provisions in the association's documents pertaining to removal of board members:

1. Petition for Removal of Director Requirements:

(a) Associations with 1,000 or Fewer Members: If a petition is presented to the board for removal of a director that is signed by the number of persons who are entitled 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: If a petition is presented to the board for removal of a director that is signed by the number of persons who are entitled 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 shall 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 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 entitled to vote and voting on the matter at a meeting of the members called for the removal purpose. A quorum must be present.

5. Attorneys' Fees in the Event of a Lawsuit: If a civil action is filed regarding the removal of a board member, the prevailing party in the civil action shall be awarded its reasonable attorneys fees and costs.

6. 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.

7. 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.

8. Voting Districts: For an association in which board members are elected from separately designated voting districts, a member of the board, other than one appointed by developer, may be removed only by a vote of members of that voting district, and only the members from that voting district are eligible to vote on the matter or be counted for purposes of determining a quorum.

EXCESS PROCEEDS FROM TRUSTEE'S SALES

If an owner fails to pay his/her mortgage or first deed of trust, the mortgage or first deed of trust company will notice a trustee's sale of the owner's lot/unit. If a third party buys the lot/unit at a trustee's sale and excess proceeds (money) are generated, the association can make a claim for the excess proceeds in an amount equal to the amount owed to the association for unpaid assessments, late fees, reasonable collection fees and attorneys' fees.

The new legislation will make it easier and more cost effective for associations to file a claim for excess proceeds after a trustee's sale. Under the new legislation, the trustee may pay a claim by an association upon receipt of a written request without liability. If the trustee does not pay the association after the written request and the association is required to file an application or response with the court to recover the excess proceeds, the association may request an award of attorneys' fees and costs. Finally, the new legislation gives the association a higher priority in the distribution of excess proceeds.

THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was signed by President Bush on April 20, 2005, and will go into effect on October 17, 2005. Set forth below is a brief summary of the new Act:

◆ Courts will apply a means test against a debtor's income regarding whether they can pay back a percentage of their debts. In application, more homeowners will be filing Chapter 13 Bankruptcy (payment plan over a period of years) rather than Chapter 7 (discharge of debt - personal liability).

◆ 11USCA 523(a)(16) (Bankruptcy Code) was amended to state that a homeowner's post-petition assessments are not dischargeable for as long as the debtor or trustee has legal, equitable or possessory ownership interest in such unit. Prior to the amendment lot owners had to have possession of the lot for the post-petition assessment to be non-dischargeable.

◆ Debtors will need to wait a longer period of time after receiving a bankruptcy discharge to re-file a new bankruptcy.