

MULCAHY ANSWERS

for Community Associations

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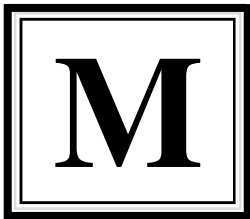
Published by Mulcahy Law Firm, P. C. for clients and friends.

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Did You Know?



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Beware – Use of E-mail by Board Members Can Lead to Open Meeting Law Violations!

by Beth Mulcahy

Over the past decade, the use of e-mail has dramatically increased. Association directors use it as a means of communication with other directors, the association's manager, association vendors and the association's attorney. This form of technology and its ease of use have created issues regarding potential violations of the Arizona open meeting law pertaining to community associations.

Arizona Open Meeting Law for Associations

Under Arizona law (A.R.S. Section 33-1804 for planned communities and A.R.S. Section 33-1248 for condominiums), notwithstanding any provision in the declaration, bylaws or other documents to the contrary, *all meetings of the association and the board of directors are open to all members of the association or their representatives (who have been designated as such in writing) and all members or their representatives so desiring shall be permitted to attend, listen and speak (at appropriate times) during deliberations and proceedings.* However, the board may place reasonable time restrictions on those persons speaking during the meeting, but must permit a member, or their designated representative, to speak before the board takes formal action on an item under discussion in addition to any other opportunities to speak.

In addition, under Arizona law, any portion of a meeting may be closed *only* if that closed portion of the meeting is limited to consideration of one or more of the following subjects: (1) legal advice from an attorney for the board or the association; (2) pending or contemplated litigation; (3) personal, health or financial information about an individual member of the association, an individual employee or 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 contractor of the association who works under the direction of the association.

Finally, under Arizona law, unless otherwise provided in an association's documents (typically an association's articles or bylaws), 48 hours notice of board meetings must be given (by newsletter, conspicuous posting or any other reasonable means) to association members stating the date, time and place of the meeting (however, there is an exception to this notice requirement for emergency meetings).

Is it a Violation?

It is my opinion that Arizona law does not prohibit one director from discussing with another director association business via e-mail without a duly called and noticed board meeting (unless two directors constitute a quorum). However, if a quorum of directors participates in an internet "chat room" where each director could log on and chat with other directors at the same time, it is my opinion that this would be a violation of the open meeting law. In addition, if a quorum of the board is discussing association issues and/or conducting votes via e-mail regarding association business, it is my opinion that the association's board is in violation of the Arizona open meeting law. The purpose of the open meeting law is to allow members of an association to be present (if they so chose) when there is discussion and/or voting by a quorum of the board regarding association issues.

There are **exceptions** to the use of e-mail by board members in Arizona. First, if there is an emergency situation, it is my opinion that a quorum of the board can use e-mail (for this limited purpose only) for discussion and/or voting. Second, board members can use e-mail to communicate with each other regarding general information (i.e. the date and place of meetings, information to prepare for a board meeting such as financials, bids, etc.)

continued

Please visit our website located at www.mulcahylawfirm.net

Beware - Use of Email *continued*

as long as there is no discussion/voting regarding association business by a quorum of the board via e-mail.

Trends:

Many in the community association industry predict that if boards use e-mail to contradict open meeting laws, the

Arizona legislature will respond by placing limits on the use of e-mail by board members.

Therefore, it is *important* to note that overuse and misuse of e-mail may result in legislative limits on the use of e-mail by association board members and potential liability for violations of open meetings laws.

Answers

Bankruptcy Filings Soar in Arizona

What Can Associations Do to Protect Themselves When Owners File Bankruptcy?

by Kristen Rosenbeck

According to a recent article in *The Arizona Republic*, bankruptcy filings by Arizonians in October, 2007 increased sixty-three (63) percent from bankruptcy filings in October, 2006. In fact, in October, 2007 alone, 1,117 Arizona consumers and businesses sought bankruptcy protection according to the U.S. Bankruptcy Court for the District of Arizona.

Our firm is often asked what rights and remedies at law does an association have when an association owner files bankruptcy? Typically, an owner who files bankruptcy also owes the association money in delinquent assessments. When a homeowner files bankruptcy and lists an association as a creditor in the bankruptcy, the bankruptcy court puts an "automatic stay" in place. The stay prohibits the association from proceeding forward with collection activities (such as demand letters, liens and lawsuits) against the owner until the bankruptcy is dismissed and a lift of stay is granted to the association or the bankruptcy is terminated. Therefore, a bankruptcy owner's file should be clearly marked so that no actions (proceeding forward may result in strict and costly penalties) are taken in violation of the stay.

Associations typically encounter two types of bankruptcies, Chapter 7 and Chapter 13. The notice of bankruptcy will identify the type of bankruptcy as well as the date of filing. The bankruptcy schedule will set forth if the association is a listed creditor in the bankruptcy.

Chapter 7 Bankruptcy

A Chapter 7 bankruptcy is generally, but not always, a no asset bankruptcy. If the owner has no assets, the notice of bankruptcy will state that a creditor should not file a proof of claim unless it receives a notice to do so. If the owner owes delinquent assessments, the association should file a notice of appearance ("NOA") to assure that the association receives all notices regarding the bankruptcy from the court. Unless the association receives notice to file a proof of claim ("POC"), generally, the association will only need to file the NOA and periodically monitor the status of the case.

If the debtor (owner) receives a DISCHARGE of his/her Chapter 7 bankruptcy, the debtor is no longer *personally liable* to the association for any pre-petition amounts (any amounts owed to the association prior to the date the debtor/owner filed for bankruptcy). The association should adjust the association's accounting ledger to reflect that the owner is no longer liable for the pre-petition amounts. However, if the debtor is still an owner within the association, the association is still a secured creditor of the debtor; therefore, the association still has a valid lien against the

debtor's lot/unit (note: the lien is valid for 3 years from the date the debt became due and owing). Accordingly, if the debtor sells/refinances his/her lot/unit in the future, the association may be paid in full (for the pre and post-petition amounts) through the sale proceeds.

Chapter 13 Bankruptcy

A Chapter 13 bankruptcy is called a "wage earners" bankruptcy because the party filing has a regular income and has assets from which to pay creditors. If a delinquent homeowner files a Chapter 13, the association should file a NOA and POC to secure the association's interests even if they are not listed as a creditor.

In every Chapter 13 bankruptcy, the debtor files a proposed plan to pay creditors the pre-petition debt. Under the plan, the individual creditors are paid their claims, based on the amount set forth in their POC. Secured claims have priority over unsecured claims and are generally paid in full. As long as the homeowner still owns the property (i.e. has not lost it at a trustee's sale during the term of the bankruptcy), the association is a secured creditor. After the debtor's plan is approved by the court, the association will receive payments from the bankruptcy trustee for the amount of its claim (or the amount of the claim approved in the order confirming the plan). Payments received from the trustee should be applied toward the pre-bankruptcy debt.

Homeowner's Responsibility for Post-bankruptcy Assessments

Pursuant to bankruptcy law, an owner is responsible for all assessments, late fees and other charges, including bankruptcy related attorneys' fees after the date of filing. If the owner is not staying current on his/her assessments after the date of billing, the association should send a letter to the owner's bankruptcy attorney regarding the post-bankruptcy delinquent assessments.

However, the association cannot initiate collection or threaten to cut off water or their services, etc. due to a owner's post-bankruptcy delinquent account. The automatic stay precludes such actions.

Lift of Stay

If the owner is not paying post-petition assessments and not responding to post-petition demand letters, the association can file a motion with the court requesting a relief of stay. The association should understand that this is costly, most debtors will object and the motion may not be granted by the bankruptcy court. However, if granted, the bankruptcy stay will not be in effect against the association and the association may proceed forward with collection,

including foreclosure. Our firm recommends that the association send post-petition letters inquiring on payment prior to initiating a motion for the lift of stay.

If the owner fails to pay his/her mortgage, the mortgage company will likely file a motion for the lift of bankruptcy stay. If granted, the mortgage company will be able to proceed forward with foreclosure through a trustee's sale.

Dismissal of Bankruptcy

In some cases a homeowner's bankruptcy will be dismissed. This is usually due to the homeowner's failure to pay fees to the court, file a plan or fund a plan. When a case is dismissed, it is treated as if it was never filed and the association is able to resume collections on the homeowner.

In conclusion, when an association receives a notice that a homeowner has filed bankruptcy it is important that the association halt collection activities and consult with an attorney regarding further proceedings. Answers

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 went into effect October 20, 2005.

The following points of the Act affect community associations:

- ◆ The court applies a means test against debtor's income regarding their ability to pay a percentage of their debtors. In application, because it is harder to qualify for Chapter 7 bankruptcy, more homeowners file Chapter 13 bankruptcy.
- ◆ 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 lot/unit. Prior to the amendment, lot/unit owners had to have possession of the lot for the post-petition assessment to be non-dischargeable.
- ◆ After a debtor receives a Chapter 7 discharge, he/she may not file again for **8 years** (instead of 6) and may not file for Chapter 13 for **4 years**. If a homeowner receives a Chapter 13 discharge, he/she may not file again for **2 years**.

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BULLETIN BOARD

Your Invitation is Enclosed

March 11, 2008

**Mulcahy Legal Seminar
for
Community Associations**

**Phoenix Public Library
Auditorium**

**Registration: 9:00 a.m.
Seminar: 9:30 a.m.**

Seating is limited and our spaces fill quickly so make your reservations today...

It is easy to register!
Complete the enclosed form and:

**Mail or FAX to:
Mulcahy Law Firm, P. C.
OR**

**Register on-line at
www.mulcahylawfirm.net**

A Reminder!

An archive of past **Answers Newsletters** and all of our

Mulcahy Cheat Sheets® are available on our website located at **www.mulcahylawfirm.net**

Beth Mulcahy is the founding attorney and partner of the Mulcahy Law Firm, P.C. Beth's legal practice focuses exclusively on the representation of over eight hundred (800) community associations throughout the State of Arizona.

After receiving a Bachelor of Arts degree in Political Science from Marquette University in Milwaukee, Wisconsin, Beth earned her *Juris Doctor* degree from Marquette University Law School where she was on the Dean's List and a member of the Marquette University Law Review. A native of Wisconsin, Beth is licensed to practice law in the State of Wisconsin and the State of Arizona.

As the former editor/author of a weekly question and answer column in The Arizona Republic, Beth addressed hundreds of questions on association governance. In her three years with the paper, she became known for providing information and answers that communicate a clear understanding of the subject matter. Beth's Answers publication and periodic legal seminars on community associations continue to provide education and information for the industry. She has also published articles in Managers Report magazine, Community Association Institute's (CAI) Journal of Community Association Law, Strictly Legal newsletter, Common Ground magazine and Arizona Community Association Journal. Beth is a member of the National and the Central Arizona Chapter of CAI, a nonprofit organization supporting the interests of community associations and the Arizona Association of Community Managers. Beth regularly speaks on the topic of community associations for seminars, conferences and workshops at state and national levels.

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Kristen L. Rosenbeck graduated from Valparaiso University with a Bachelor of Arts degree in Biology where she actively supported her school as the Student Body President. Kristen graduated in the top third of her law class receiving her *Juris Doctor* degree from Marquette University in Milwaukee, Wisconsin in 2001. She maintains licenses to practice law in both the State of Wisconsin and the State of Arizona.

Kristen's legal practice focuses on the interpretation and enforcement of association documents and guidance on state and federal laws. She represents associations in general counsel matters, bankruptcy, collection of delinquent assessments and enforcement actions. Kristen also provides representation to office condominiums. Kristen is experienced in litigation and transactional law.

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Elizabeth "Libby" Shillito is a native of Dayton, Ohio. Libby graduated from Indiana University with a Bachelor of Science degree in Sports Marketing and Management in May, 2003. While at Indiana, Libby was a student recruiting assistant for Indiana Football and had multiple internships with professional sports organizations including the Tampa Bay Devil Rays. Libby received her Juris Doctor and her Master of Business Administration from University of Toledo in May, 2006. Libby is licensed to practice law in the State of Arizona.

Libby is an associate attorney with Mulcahy Law Firm, P.C. and her practice focuses on the representation of community associations with an emphasis on litigation, enforcement of restrictive covenants and collection of delinquent assessments.

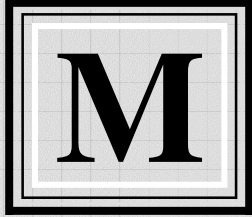
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Answers is not intended to offer specific legal advice or responses to individual circumstances or problems. If legal advice is required, please consult individually with the Mulcahy Law Firm, P.C.

Questions may be directed to Beth Mulcahy, Esq.

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Best Wishes for a Prosperous New Year!

ANSWERS

for Community Associations

MULCAHY LAW FIRM, P.C.

Did You Know?

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Administrative Law Judges

Under Arizona law, administrative law judges now have jurisdiction to decide complaints between owners and associations. For a dispute between an owner and an association, the owner or the association may petition for a hearing concerning a violation of the association's documents or state law. The administrative law judge may order any party to abide by Arizona law or the association's documents and may levy a civil penalty on the basis of each violation. As of January 1, 2008, a nonrefundable filing fee (\$550.00 for a single count and \$2,000 for multiple counts) must be paid by the petitioner.

To obtain more information go to www.dfbls.az.gov and click on "Administration" on the tool bar, then scroll down to "HOA Information" where you will find links for "Frequently Asked Questions" and the "HOA Petition Package".

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You are invited to a
Legal Seminar for Community Associations

presented by:
Mulcahy Law Firm, P. C.

Tuesday, March 11, 2008

Library Doors will open at 8:30 a.m.

Registration: 9:00 a.m. - 9:30 a.m.

Seminar: 9:30 a.m. - 11:00 a.m.

Question and Answer: 11:00 a.m. - 11:30 a.m.

**Phoenix Public Library Auditorium
First Floor
1221 N. Central Avenue
Phoenix, Arizona 85004
(map on reverse side)**

There is no charge for this seminar. Seating is limited. To reserve a place, please R.S.V.P. by Tuesday, February 26, 2008 by e-mailing, faxing or mailing the completed attached registration. You may also register online at www.mulcahylawfirm.net by completing and submitting the form found on the seminar tab.

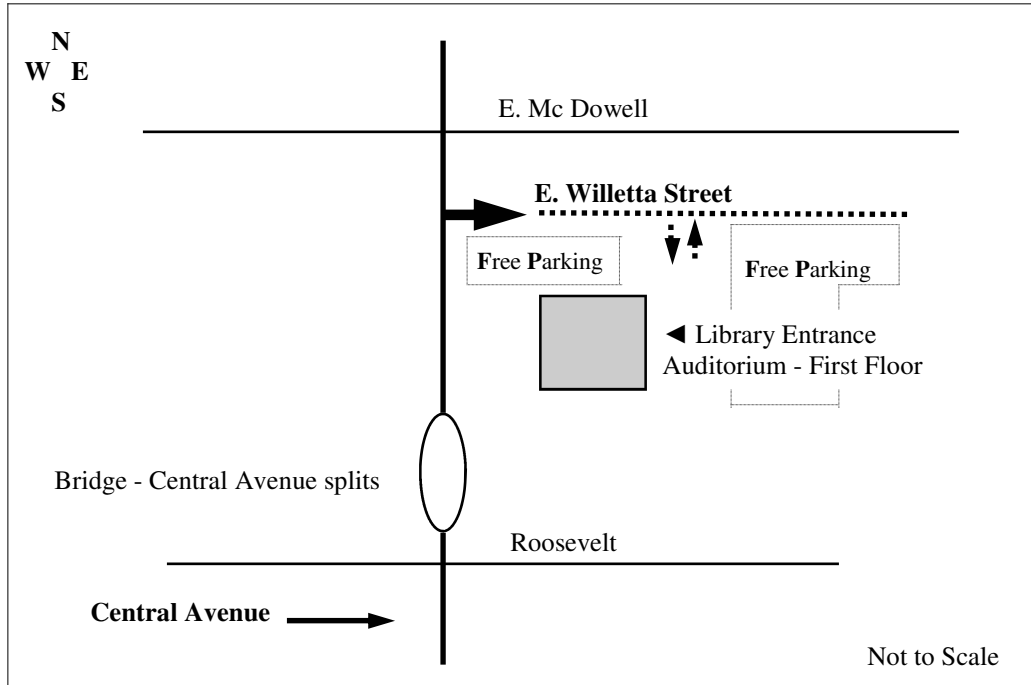
Seminar Topics

***What Board Members Need to Know About Arizona Community Association Law
How to Successfully Collect Delinquent Assessments
Planning for the Future with Reserve Studies***

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Registration form on reverse side

Please direct all questions to Mulcahy Law Firm, P. C., Phone: 602.241.1093



Registration Form

Please complete a registration form for each person attending (please copy the form below as needed) and fax, e-mail or mail by February 26, 2008 to the respective address listed below.

Alternatively, you can register online at www.mulcahylawfirm.net by submitting the registration form found on the seminar tab.

Name

Address

City Zip

Association Name

Phone Number E-mail Address

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