

# MULCAHY ANSWERS

for Community Associations

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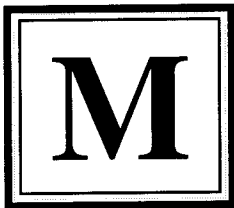
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## 2010 Legislative Update

by Beth Mulcahy

The Arizona 49th Legislature, 2nd Regular session ended on Thursday, April 29, 2010. During this session, the legislature passed and Governor Brewer signed three bills that will directly affect planned communities and condominium associations.

*These three laws become effective on July 29, 2010.*

### SUMMARY OF HOUSE BILL 2345 – OPEN HOUSE / FOR SALE, FOR LEASE AND OPEN HOUSE SIGNS (AMENDING A.R.S. SECTIONS 33-1261 AND 33-1808)

**Open House Hours:** Associations must allow open houses for real estate that is for sale or for lease within the association between the hours of 8:00 a.m. and 6:00 p.m.

**Open House Signs:** Associations can prohibit open house signs on association common areas/elements. Associations must allow temporary open house signs on that owner's property. The association cannot require the use of a particular open house sign and may not further regulate the use of open house signs that are industry standard size and that are owned or used by the seller or the seller's agent.

**For Lease Signs:** Associations must allow an owner's or an owner's agent's for lease sign on that owner's property unless an association's documents prohibit or restrict leasing of a unit or units. Associations shall not further regulate a for lease sign or require the use of a particular for lease sign other than the for lease sign shall not be any larger than the industry standard size sign (18 x 24 inches) and on or in that owner's property.

**For Sale Signs:** An association must allow the indoor or outdoor display of an industry standard for sale sign (not to exceed 18 x 24 inches) and a sign rider (not to exceed 6 x 24 inches) on or in that owner's property. The association cannot require the use of a particular for sale sign and may not further regulate the use of for sale signs that are owned or used by the seller or the seller's agent.

It is important to note that HB 2345 trumps an association's documents with any provisions that conflict with HB2345.

### SUMMARY OF HOUSE BILL 2768 TRANSFER FEES (CREATING A.R.S. SECTIONS 33-442)

In our firm's opinion, HB 2768 is one of the most confusing and complicated laws ever passed regarding community associations. Set forth below is our firm's interpretation of HB 2768.

**Transfer Fees:** 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:

1. the governing documents (typically the CC&Rs) grant authority for the fee and provides for a specified purpose for the assessment;
2. the fee being charged touches and concerns the land; and
3. the fee does not go to a third party (such as a management company) or 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.

This new law means that associations can continue to charge a transfer fee, capital

continued

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## 2010 Legislative Update continued

contribution fee or reserve assessment fee that becomes due at a close of escrow when: 1. the CC&Rs specifically allow this type of fee; and 2. the fee is paid to the association, management company or developer which is authorized in the CC&Rs to manage real property within the association or was part of an approved development plan.

Further, HB2768 also allows an association to charge any fee or charge that is imposed by a document and that is payable to a non-profit *corporation* (note: most associations in Arizona are non-profit corporations) for the sole purpose of supporting recreational activities within the association.

### **Can associations continue to charge Resale Disclosure Fees?**

*Yes.* HB 2768 does not affect an association's ability to charge a "resale disclosure fee" pursuant to A.R.S. Sections 33-1260 (C) or 33-1806 (C).

### **Can associations continue to charge transfer fees pursuant to the Arizona Non-Profit Corporation Act when an association's CC&Rs do not authorize a transfer fee?**

*Yes.* In our firm's opinion, HB 2768 does not affect an association's ability to charge a "transfer fee" pursuant to the Arizona Non-Profit Corporation Act [A.R.S. Section 10-3302(16)] when the transfer fee is consistent with the cost to transfer membership from one owner to another owner. Our firm suggests that a transfer fee pursuant to this section not exceed \$500.

### **HB2334 DOCUMENT COST RECOVERY - AMENDS A.R.S. 12-332**

HB2334 permits a court to award to the prevailing party, the cost of document preparation if: 1. The document was prepared by a certified preparer by the Supreme Court; and 2. The party seeking recovery filed a sworn affidavit of costs. *Answers*

*Reminder!*

Download all of the Mulcahy Cheat Sheets at [www.mulcahylawfirm.net](http://www.mulcahylawfirm.net) - click on the Publications tab.

## Condominium Associations Should Obtain FHA Certification

by Beth Mulcahy, Esq. and Kristen L. Rosenbeck, Esq.

On December 7, 2009 the Federal Housing Administration (FHA) made significant changes regarding mortgage insurance for condominiums. The bottom line of these changes is that condominium associations should seriously consider obtaining FHA certification so that potential owners can obtain FHA - backed mortgages (which require less money down for the buyer and can be more easily obtained than other loans).

Our firm has received a number of calls from condominium boards asking if the association should or has to obtain this FHA certification. These calls are usually prompted by owners trying to sell their units and buyers notifying the sellers that they cannot get conventional financing since the condominium association is not FHA certified.

It is our firm's position that all condominium associations would benefit by obtaining FHA certification, which would allow owners to sell their units in this difficult economic climate.

### **A Summary of Requirements for FHA Loan Approval:**

All FHA Mortgage insurance requirements must be satisfied.

No loan can be insured until all required documents have been properly recorded and submitted.

Hazard Insurance: 1) Forward Mortgages where the master policy does not include interior unit coverage the borrower must obtain a "walls-in" coverage policy; 2) Reverse Mortgages/Equity Conversion, the borrower must obtain hazard insurance equal to the value of insurable property improvements. Flood Insurance: The Homeowners Association is responsible for obtaining and maintaining flood insurance if located within the Special Flood Hazard Area. This coverage must protect the borrowers who hold title to both individual units and common areas. The lender must certify that it reviewed and verified the condominium projects continued compliance regarding: investor ownership; percentage of owners in arrears for assessments; owner-occupied rate; FHA loan concentration rate; and FHA requirements. For projects that have already been approved (see "Project Eligibility Requirements").

### **A Summary of Project Eligibility Requirements:**

The project eligibility requirements are lengthy. A portion of what must be met in order to obtain Project Approval follows:

- 1) Minimum number of units;
- 2) Insurance Coverage;
- 3) Unless discriminatory, right of first refusal is permitted;
- 4) No more than 25 percent of the property's total floor area allowed for commercial purposes;
- 5) No more than 10 percent of the units may be owned by one entity;
- 6) No more than 15 percent of the total units can be in arrears of their condominium association fee payments;
- 7) Pre-sales: (temporarily) At least 30 percent of the total units must be sold with conditions on presales;
- 8) At least 50 percent of the units of a project must be owner-occupied;
- 9) FHA concentration is temporarily increased to 50% with exceptions, FHA concentration up to 100% are permitted if the project meets the basic condominium standards plus additional criteria;
- 10) Mortgagees must review the homeowners' association budget with specific guidelines.

*Answers*

**PLEASE CONTACT BETH MULCAHY, ESQ. AT (602) 241-1093 IF YOU WOULD LIKE ASSISTANCE ON OBTAINING FHA CERTIFICATION FOR YOUR CONDOMINIUM ASSOCIATION.**

Mortgage Letter 2009-46A and 2009-46B, issued by the U.S. Department of Housing and Urban Development were referenced and cited in the drafting of this material.

Share your copy of Answers with your association's board!

# The First Friday of Each Month - Your Opportunity for Free Legal Advice!

Call between 9 and 10 a.m. on the First Friday of each month to have your question answered. Examples of two recent questions follow:

## Can an HOA publish a directory with owners names, addresses and phone numbers?

Many associations have owner directories with the names, on-site addresses, off-site alternate addresses, phone numbers and emails of owners. Associations may offset the cost to prepare the owner directories by allowing vendors to advertise in the directories.

However, before an owner's personal information is published by the association in a directory format, all owners who are listed in the directory must either: (1) consent in writing to the publication of their personal information or (2) object in writing to the publication of their personal information, which must be done within a reasonable timeframe after notification by the association of intent to publish.

I recently invited friends to my home for a social occasion and the topic of our association landscaper came up. There were two other board members there (we have 7 on our board) and we discussed obtaining bids from other companies. At the next board meeting another director told me that I had broken the law by discussing the landscaper. Did I break the law?

A meeting of the board is defined by a quorum of the directors discussing association related matters (4 constitutes a quorum of 7 directors). In the future, if you have board members at your home, you should: 1) NOT discuss association related matters if you have a quorum; or 2) notice the meeting pursuant to the Arizona Open Meetings law. Since you did not have a quorum of the board at your home you did not violate the open meetings law. However, you should remain mindful of your fiduciary duties which may include confidentiality on association business when discussing in a gathering other than a board meeting.

## MULCAHY LAW FIRM, P.C.

### BULLETIN BOARD

#### A Reminder:

#### First Fridays

Call our firm between  
9 - 10 a.m.

on the first Friday of the  
month to receive your **free**  
consultation regarding  
community association law.

August 6, 2010  
September 3, 2010  
October 1, 2010

phone: 602.241.1093

#### We have 5 New Mulcahy Cheat Sheets©

#### 2010 Legislative Update

#### Bidding and Contracting

#### Is Your Association in Good Health?

#### Secrets to Effective Collection of Delinquent Assessments & Available Legal Remedies

#### Trustee Sales & Bankruptcy

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www.mulcahylawfirm.net,  
on the Publications Tab scroll  
to and click on the title of the  
Cheat Sheet you wish to  
view.

**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 one thousand (1000) 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 Chapters of CAI, CAI's prestigious College of Community Association Lawyers 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.

Kristen is a member of the National and the Central Arizona Chapters of CAI, a nonprofit organization supporting the interests of community associations, and the Arizona Association of Community Managers.

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**Laura Pilar Mensah** graduated Magna Cum Laude with a Bachelors of Business Administration from the University of San Diego. She received her *Juris Doctor* degree from The University of Texas School of Law where she was an active member of several legal societies. Laura completed a graduate Portfolio Program in Dispute Resolution and is a certified mediator. Laura is licensed to practice law in the State of Arizona.

Laura 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. Laura is experienced in arbitrations, litigation and transactional law.

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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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