

# HOA OPEN MEETINGS IN ARIZONA

Prepared and Compiled by the Borowsky Law Group, PC

**POINTS AND AUTHORITIES: THE HOA OPEN MEETING LAWS**

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## THE ARIZONA OPEN MEETING LAW vs. THE HOA OPEN MEETING LAW

*Each year, the attorney general's office division in charge of enforcing the state's general open meeting laws fields a large number of calls from people asking whether or not the state's open meeting laws in A.R.S. §38-431.01 - 431.09 are applicable to homeowners associations. HOAs, while often considered to be quasi-governmental bodies in other contexts, have their own meeting statutes and are accordingly not subject to the state's broader open meeting law, although HOAs are encouraged to trend towards transparency.*

**2006 ATTORNEY GENERAL BULLETIN, TERRY GODDARD** App. 1

*HOAs are not subject to the Arizona Open Meeting Law.*

**1997 ATTORNEY GENERAL OPINION, GRANT WOODS** App. 2

*HOAs are not public bodies within the context of the state's open meeting law. The staff of the Attorney General's office is not available to enforce the HOA meeting laws. Informal meetings of the board are still subject to the HOA open meeting law to avoid encouraging boards to subvert the law by "crystallizing decisions [in informal meetings] to a point just short of ceremonial acceptance."*

## THE LAW

### OPEN MEETING LAW FOR PLANNED COMMUNITY HOAs

#### 33-1804. Open meetings; exceptions

A. Notwithstanding any provision in the declaration, bylaws or other documents to the contrary, all 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. 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:

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.
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.

B. Notwithstanding any provision in the community documents, all meetings of the association and the board shall be held in this state. A meeting of the association shall be held at least once each year. Special meetings of the association may be called by the president, by a majority of the board of directors or by members having at least twenty-five per cent, or any lower percentage specified in the bylaws, of the votes in the association. Unless otherwise provided in the articles or bylaws of the association, not fewer than ten nor more than fifty days in advance of any meeting of the members the secretary shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address for each lot, parcel or unit owner or to any other mailing address designated in writing by a member. The notice shall state the time and place of the meeting. A notice of any special meeting of the members shall also state the purpose for which the meeting is called, including the general nature of any proposed amendment to the declaration or bylaws, changes in assessments that require approval of the members and any proposal to remove a director or an officer. The failure of any member to receive actual notice of a meeting of the members does not affect the validity of any action taken at that meeting.

C. Unless otherwise provided in the articles or bylaws of the association, for meetings of the board of directors that are held after the termination of declarant control of the association, notice to members of meetings of the board of directors shall be given at least forty-eight hours in advance of the meeting by newsletter, conspicuous posting or any other reasonable means as determined by the board of directors. An affidavit of notice by an officer of the corporation is prima facie evidence that notice was given as prescribed by this section. Notice to members of meetings of the board of directors is not required if emergency circumstances require action by the board before notice can be given. Any notice of a board meeting shall state the time and place of the meeting. The failure of any member to receive actual notice of a meeting of the board of directors does not affect the validity of any action taken at that meeting.

## THE LAW

### OPEN MEETING LAW FOR CONDOMINIUM HOAs

#### 33-1248. Open meetings; exceptions

A. Notwithstanding any provision in the declaration, bylaws or other documents to the contrary, all 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 a 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. Any portion of a meeting may be closed only if that portion of the meeting is limited to consideration of one or more of the following:

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.
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.

B. Notwithstanding any provision in the condominium documents, all meetings of the association and the board shall be held in this state. A meeting of the association shall be held at least once each year. Special meetings of the association may be called by the president, by a majority of the board of directors or by unit owners having at least twenty-five per cent, or any lower percentage specified in the bylaws, of the votes in the association. Unless otherwise provided in the articles or the bylaws of the association, not fewer than ten nor more than fifty days in advance of any meeting of the unit owners, the secretary shall cause notice to be hand delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting of the unit owners shall state the time and place of the meeting. The notice of any special meeting of the unit owners shall also state the purpose for which the meeting is called, including the general nature of any proposed amendment to the declaration or bylaws, any changes in assessments that require approval of the unit owners and any proposal to remove a director or officer. The failure of any unit owner to receive actual notice of a meeting of the unit owners does not affect the validity of any action taken at that meeting.

C. Unless otherwise provided in the articles or bylaws of the association, for meetings of the board of directors that are held after the termination of declarant control of the association, notice to unit owners of meetings of the board of directors shall be given at least forty-eight hours in advance of the meeting by newsletter, conspicuous posting or any other reasonable means as determined by the board of directors. An affidavit of notice by an officer of the association is prima facie evidence that notice was given as prescribed by this section. Notice to unit owners of meetings of the board of directors is not required if emergency circumstances require action by the board before notice can be given. Any notice of a board meeting shall state the time and place of the meeting. The failure of any unit owner to receive actual notice of a meeting of the board of directors does not affect the validity of any action taken at that meeting.

D. This section does not apply to timeshare plans or associations that are subject to chapter 20 of this title.

THE LAW

ARIZONA'S GENERAL OPEN MEETING LAW

**(NOT Applicable to HOAs)**

38-431.01. Meetings shall be open to the public

A. All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.

B. All public bodies shall provide for the taking of written minutes or a recording of all their meetings, including executive sessions. For meetings other than executive sessions, such minutes or recording shall include, but not be limited to:

1. The date, time and place of the meeting.
2. The members of the public body recorded as either present or absent.
3. A general description of the matters considered.
4. An accurate description of all legal actions proposed, discussed or taken, and the names of members who propose each motion. The minutes shall also include the names of the persons, as given, making statements or presenting material to the public body and a reference to the legal action about which they made statements or presented material.

C. Minutes of executive sessions shall include items set forth in subsection B, paragraphs 1, 2 and 3 of this section, an accurate description of all instructions given pursuant to section 38-431.03, subsection A, paragraphs 4, 5 and 7 and such other matters as may be deemed appropriate by the public body.

D. The minutes or a recording of a meeting shall be available for public inspection three working days after the meeting except as otherwise specifically provided by this article.

E. A public body of a city or town with a population of more than two thousand five hundred persons shall:

1. Within three working days after a meeting, except for subcommittees and advisory committees, post on its website, if applicable, either:

- (a) A statement describing the legal actions taken by the public body of the city or town during the meeting.
- (b) Any recording of the meeting.

2. Within two working days following approval of the minutes, post approved minutes of city or town council meetings on its website, if applicable, except as otherwise specifically provided by this article.

3. Within ten working days after a subcommittee or advisory committee meeting, post on its website, if applicable, either:

- (a) A statement describing legal action, if any.
- (b) A recording of the meeting.

F. All or any part of a public meeting of a public body may be recorded by any person in attendance by means of a tape recorder or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting.

G. The secretary of state for state public bodies, the city or town clerk for municipal public bodies and the county clerk for all other local public bodies shall conspicuously post open meeting law materials prepared and approved by the attorney general on their website. A person elected or appointed to a public body shall review the open meeting law materials at least one day before the day that person takes office.

H. A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.

I. A member of a public body shall not knowingly direct any staff member to communicate in violation of this article.

J. Any posting required by subsection E of this section must remain on the applicable website for at least one year after the date of the posting.

## LEGISLATIVE UPDATE – 2010

**The following bills that touch and concern HOAs and Community Managers have been signed into law by the Governor and became effective July 29, 2010:**

**HB 2334** Award of Document Preparer Costs in Litigation [Amends A.R.S. §12-332]: A court may award to a prevailing party in a court action, the cost of document preparation if the document was prepared by a person, who has been certified by the Arizona Supreme Court as a document preparer. The party seeking recovery must file a sworn affidavit of costs.

*This bill only tangentially affects HOAs and Community Managers, and may ultimately have no practical effect. The new law states that a prevailing party in a lawsuit is entitled to the “costs of legal document preparation” by an AZCLDP, if the services of an AZCLDP were used in the lawsuit. AZCLDP (Arizona Certified Legal Document Preparer) is a paralegal licensure with which non-lawyer licensees may prepare documents for use in legal proceedings. They may also render limited legal and procedural advice.*

*AZCLDP’s are often asked to perform pro forma tasks such as uncontested divorces and bankruptcy filings, and many AZCLDPs are also perfectly capable of preparing and recording liens. Thus, if an HOA or Community Manager elects to record a lien utilizing the services of an AZCLDP, and the HOA ultimately prevails at a trial in the same matter, the Court is instructed to consider awarding the fees for utilizing the AZCLDP to the HOA.*

*The practical effect of this statute in the context of HOAs is likely nominal given the fact that HOAs are already statutorily entitled to have their reasonable fees, costs, and collection charges incorporated into the judgment.*

**HB 2345** Real Estate Signs (Amends A.R.S. §33-1261 of the Condominium Act and A.R.S. §33-1808 in the Planned Communities Act). This law adds new restrictions that further limit condominium and planned community associations’ power to prohibit real estate signs.

*More specifically, the following signs cannot be prohibited or otherwise regulated:*

- (a) Temporary open house signs or a unit owner’s “for sale” sign on his/her property.*
- (b) Temporary “open house” or “for sale” signs that are industry standard size and that are owned or used by the seller or his/her agent.*
- (c) “For Lease” signs (unless the governing documents prohibit or restrict leasing.)*
- (d) An Association cannot require the use of a particular type or style of “For Lease” or “For Sale” sign, but may require the use of industry standard size signs (For Sale signs: 18" x 24" with a one rider that is 6" x 24"; For Lease signs: 18" x 24").*

*An HOA is not able to limit the hours for an open house, but can insist that no open house be held before 8:00 a.m. or after 6:00 p.m. and may also prohibit open house signs on a condominium’s common elements or a planned community’s common areas.*

**HB2768** Transfer Fee Covenants (A.R.S. §33-442 is added to the interpretation rules in the laws pertaining to Arizona real property conveyances and deeds). The complete text of the statute follows:

**33-442. Prohibition on transfer fees; exceptions; definitions**

A. A provision in a declaration, covenant or any other document relating to real property in this state is not binding or enforceable against the real property or against any subsequent owner, purchaser, lienholder or other claimant on the property if it purports to do both of the following:

1. Bind successors in title to the specified real property.  
2. Obligate the transferee or transferor of all or part of the property to pay a fee or other charge to a declarant or a third person on transfer of an interest in the property or in consideration for permitting such a transfer. Regularly scheduled fees or charges shall not be considered payable on transfer of an interest if the fees or charges will be payable by the owner of the property regardless of whether or not the property is transferred, even if the obligation to pay does not commence until the trustee, declarant, builder or developer first conveys the property to a retail purchaser.

B. A transfer fee provision prescribed by subsection A is unenforceable whether or not recorded and does not create a lien right and any lien purportedly arising out of an unenforceable provision prescribed by subsection A is invalid and unenforceable.

C. This section does not apply to any of the following:

1. Any provision of a purchase contract, option, mortgage, security agreement, real property listing agreement or other agreement that obligates one party to the agreement to pay the other party as full or partial consideration for the agreement or for a waiver of rights under the agreement if the amount to be paid is:

(a) A loan assumption fee or similar fee charged by a lender that holds a lien on the property.

(b) A fee or commission paid to a licensed real estate broker for brokerage services rendered in connection with the transfer of the property for which the fee or commission is paid.

2. Any provision in a deed, memorandum or other document recorded for the purpose of providing record notice of an agreement prescribed in paragraph 1, subdivision (a) of this subsection.

3. Any provision of a document that requires payment of a fee or charge to an association to be used exclusively for the purpose authorized in the document if both of the following apply:

(a) The fee being charged touches and concerns the land.

(b) No portion of the charge or fee is required to be passed through to a third party or declarant designated or identifiable by description in the document or in another document that is referenced in the document unless the third party is authorized in the document to manage real property within the association or was part of an approved development plan.

4. Any rent, reimbursement, charge, fee or other amount payable by a lessee to a lessor under a lease, including any fee payable to the lessor for consenting to an assignment, sublease, encumbrance or transfer of the lease.

5. Any consideration payable to the holder of an option to purchase an interest in the real property or to the holder of a right of first refusal or first offer to purchase an interest in real property and paid for waiving, releasing or not exercising the option or right on transfer of the property to another person.

6. Any fee, charge, assessment, dues, contribution or other amount relating to the purchase or transfer of a club membership related to the real property owner by the transferor.

7. Any fee or charge that is imposed by a document and that is payable to a nonprofit corporation for the sole purpose of supporting recreational activities within the association.

8. Any fee, tax, assessment or other charge imposed by a governmental authority pursuant to applicable laws, ordinances or regulations.

9. Any consideration payable by the transferee to the transferor for the interest in real property being transferred including any subsequent additional consideration for the property payable by the transferee based on any subsequent appreciation, development or sale of the property.

D. Notwithstanding any provision in the document or purported lien, a transfer fee covenant or other document prescribed by subsection A or a lien purporting to secure payment under a transfer fee covenant or document prescribed by subsection A that is executed after the effective date of this section is not binding or enforceable. This section shall not be construed to imply that a transfer fee covenant or other document prescribed by subsection A that is executed before the effective date of this section is enforceable or valid.

E. For the purposes of this section:

1. "Association" means a nonprofit mandatory membership organization that is created pursuant to a declaration, covenant or other applicable law and that is comprised of the owners of homes, condominiums, cooperatives or manufactured homes or any other interest in real property.

2. "Transfer" means the sale, gift, conveyance, assignment, inheritance or other transfer of an interest in real property located in this state.

*This law is indisputably confusing, and generalized advice is of little value here. Currently, the consensus among attorneys is that this statute does not prohibit Resale Disclosure Fees generated pursuant to A.R.S. §33-1806. Whether a not any other particular "transfer fee" is authorized under the statute is determined by an analysis of the amount of the fee, the specific nature of the fee and whether it "touches and concerns the land", as well as the specific language in the pertinent provisions of the association's CCRs. We encourage you to call the Borowsky Law Group, PC to schedule a consultation at your earliest convenience to discuss compliance with the new statute.*

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<sup>1</sup> \$100.00 flat fee includes all necessary services for general counsel and collections representation. Court costs, process server costs, courier costs, and related third party costs are not included and must be paid monthly by the association or community manager.

**APPENDICES**

