**Talking Points for HOA Resale Disclosure**

**Proposed Legislation**

1. When buying a home in a HOA or Condo there are two distinct but inseparable contracts that you must enter in that process. The first is the contract to purchase the home and the second is the contract with the association to pay assessments and live under the covenants that run with the land, when you close the first contract on that home. The signing of the first offer contract with the seller commits you to both buy the house and enter into the mandatory second contract with the association.
2. The first contract is a totally free entry contract, the buyer can see the house and the neighborhood and can make an offer based on that and what they are willing to pay to purchase that home. Any material deficiency discovery identified after contract signing can be resolved by either seller repairs of price adjustments to compensate for the deficiency, as negotiated freely between the buyer and seller.
3. Under current law the buyer does not have a totally free entry contract with the association, because he is prevented from seeing any of the governing or other disclosure documents of the association until after he has already entered into the contract to buy the home. He has no opportunity to see the terms and conditions under which he must live in that home after he closes on the home, until after the contract to buy the home is signed. This is no different than if the buyer of a home was required to sign a contract with the bank for the mortgage loan without any prior knowledge of the terms for the repayment of that loan.

* 1. He also has no opportunity to see the reports and details of the financial health of the association to which he is committing unconditionally to pay all their future expenses. If the association has been mismanaged in the past and does not have sufficient reserves to pay for the required long term maintenance and upgrades for the common property than that buyer will be required unconditionally to pay the special assessment that the association levies on all property owners when the maintenance becomes due. This could result in assessments of tens of thousands dollars that were not previously identified.
  2. He has no opportunity to assess the relationship between the association and its members based on recent litigation history and any current litigation that may have a direct financial impact on the buyer.
  3. He has no opportunity to compare associations based on the above facts when considering between multiple homes to make an offer on.

1. This last point is the prime reason for why the HOA industry opposes this legislation. In a totally free competitive market place, Associations that have done a good job at managing their physical and financial assets should have a competitive advantage over associations that have not. The same with the issue of the relationship between the association and the members, Associations that have addressed issues that arise in their communities without resorting to high cost litigation should have a competitive advantage over Associations that have not and the market value of homes in good associations should be higher than homes in bad associations. The associations, their management companies and the attorneys that represent them do not want the market to judge the effectiveness of their management of these communities, because that would direct impact their incomes and profits from these communities. The realtors do not want informed consumers to affect their potential incomes from the completed sales of homes in these communities. Full disclosure from a mismanaged association will negatively affect their ability to sell homes in these communities. **The current statutes totally suppresses this free and competitive market place for home in these communities.** Homeowners negatively impacted in their ability to sell their home become motivated to get more actively involved in their communities to change and improve the health and desirability of the community. This will result in better communities as a whole and increased market values for homes in those communities, in the long term.
2. The existing statutes requires the seller to disclose all the required information for any association of 50 properties or less. Even though only the association will have all the current and correct information about the association. This requirement is totally ridiculous and allows the association to totally abdicate any responsibility for association disclosures. The home seller is not authorized to represent the association and should assume no responsibility for providing information that he may or may not have. This requirement often results in the buyer getting inaccurate information simply because the seller is providing the information to the best of his knowledge. Only the association should provide the required disclosures to ensure that the buyer is making an informed decision based on accurate information. What is most egregious is that the association is allowed a $400 document preparation and delivery fee irrespective of the number of homes in the community and whether they provided the information or the seller provided that information.
3. If you look at the time line provided by the current statute and the Realtor contract. The seller has 5 days to request the information from the association, the association then has 10 days to provide that information to the buyer. The buyer then has 5 days to review the information and either continue with the purchase or walk away, without loss of earnest money. Since the statutes do not dictate calendar days or business days attorneys will interpret this in favor of the association and specify business days which could then extend this time sequence an additional 4 to 6 days. In the interim the buyer has paid for inspections and mortgage loan initiations and is consumed with the process of addressing inspection and disclosure deficiencies on the home, providing all the information and forms required for the loan application and preparing to move out of his existing home. The seller has taken the home off the market and awaits this final contingency to be satisfied to ensure that the sale goes thru. The buyer is finally provided hundreds of pages of documents from the association as late as 19 days after signing and 11 days prior to closing (assuming a normal 30 day closing condition). Since the buyer can do nothing about anything in the documents and all the financial and time pressures to continue with the purchase most buyers simply don’t read the disclosures or perform a superficial review, which is exactly what the realtors and the HOA industry want to happen. This process currently required by statutes constitutes mandatory entry into the contract with the association under financial and time pressure duress. These same industry trade groups will be the first to insist that the legislature do nothing to interfere with the fundamental principle of freedom to contract, while they have thru these current statutes established conditions that show total disregard to the freedom to contract without duress.
4. The proposed process for providing the necessary information to the buyer prior to contract signing provided in this proposed legislation, ensures that the required information is provided to the buyer without any time or monetary pressure to review the information. It ensures the buyer gets the most accurate information available to the association at the time the association initially prepares and presents this information. The buyer is free to request any update of that information either prior to contract signing or closing for additional nominal cost. Who actually pays this additional cost can be negotiated between the buyer and seller, freely. The buyer can use the information as necessary to make his decision to offer to buy this home or another home as appropriate and would eliminate the need for any contingency on the offer contract based on disclosure document review which will benefit all sellers.
5. The existing provision in subsection A.3.(b) relative to extinguishing liens as an enforcement tool is both inappropriately applied and inconsistent with the correct provisions stipulated in 33-1807 but is also totally ineffective as an enforcement tool. A very small percentage of home in these communities are sold with outstanding liens so to apply a penalty for non-compliance with this statute that is not applicable to the majority of homes sold in these communities simply allows association to violate these laws with impunity and without recourse. Our proposal simply allows for a civil penalty to be applied for non-compliance with the law as determined by a court of appropriate jurisdiction. This will apply an enforcement condition applicable to all sales of homes in these communities.
6. Relative to statement in current statutes (A.3. (e)) that allows an association to cite a buyer for a violation of a community restriction that they had not cited the previous owner, this provision is both unreasonable and totally inappropriate. The association has the duty to enforce the community documents, the home owner has the responsibility and duty to comply with the documents. If the association for whatever reason has never cited a homeowner for a violations of the community they have absolute no right to cite a new home buyer for a violation that pre-existed their purchase of the home. To assume in any way that the new home buyer can first understand the detailed nuances of the community documents and then have sufficient discernment to then recognize the fact that an existing condition violates the Community documents, after reviewing those documents for 5 days is again ridiculous. Especially when the association with intimate and detailed knowledge of the community documents and unlimited time to observe and cite any violation and does nothing about that violation prior to the sale of that home. An association can either, do its job and enforce any violations of the community documents based on the homeowner that committed that violation or forever waive its rights to enforce that violation on any subsequent and innocent home buyer. Without the current provision in statutes, this principle would be upheld in any court in Arizona.
7. While we believe that the entire acknowledgement statement provided in the existing section A.3.(h) is totally unnecessary and serves absolutely no purpose other than to state the obvious, it does at least provide a reminder to the buyer of his commitment and potential liability to foreclosure under the covenants. One could add to this disclosure that the association also has duties and responsibilities to its members within these same covenants, but that will be addressed in one of our other proposals. If any of that statement is to remain than it should also identify the fact that assessment liens in these communities are not allowed the protections granted to every other homeowner in this state under the homestead exemption of Chapter 8 of title 33. While that denial of protection makes little sense, CAI as a national organization has been very successful at crafting and ensuring that any similar protection for homeowners in all 50 states is made not applicable to HOA’s and Condominiums.
8. The new disclosure provisions added by subsections A. 9 and 10 provide to the new home buyer of important information on voting provisions of the community that they are buying into. Declarant’s often give themselves liberal voting provision of 3 votes for every lot that they own to ensure their superior voting power during the period of declarant control along with the power to elect on their own any and all board members for the association. This gives the declarant the ability to revise any of the community documents on their own as they see fit irrespective of the desires or interest of the individual home owners. While not to the same extent after the period of declarant control if an individual or entity owns multiple lots or units in a community they multiply their voting power by the number of lots that they own. This is a very important piece of information that must be provided to any potential homebuyer so they are fully aware of the risk this power may impose on them in the future.
9. Lastly, the new provisions of new section “D” are required to ensure that the fees charged either the buyer or the seller during the resale process are auditable and reviewable, they must be paid directly to the association. While a civil penalty is provided for violation of the allowed fees most if not all management company contracts with the associations require that the fees charged to buyers or sellers are paid directly to the management company. This contract provision is a ploy that allows management companies to charge fees in excess of these statutes because their financial records are not association records and are not subject to inspection or review by either the association or the members of the community. By having the fees paid to the association directly the fees charged would be directly auditable by the association and its members, and if they have contracted with the management company for all these fees to be paid to them then the association can pay the management company after the fact. By having the fees auditable and available to members the management company and the association can be held accountable to complying with the law.