

THE KAMAN REPORT



AN UPDATE ON CURRENT TOPICS AND ISSUES AFFECTING
OHIO HOMEOWNER ASSOCIATIONS

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OHIO REVISED CODE SECTION 5312 OHIO'S NEW HOMEOWNER ASSOCIATION LAW

By David W. Kaman



Using current condominium law as a guide, the Ohio legislature has enacted Senate Bill 187, which is effective September 10, 2010. This law, now labeled Ohio Revised Code Chapter **5312**, applies to every non-condominium "planned community" which is defined as:

"A community comprised of individual lots for which a deed, common plan, or Declaration requires any of the following:

- that owners become members of an owners association that governs the community;
- that owners or the owners association holds or leases property or facilities for the benefit of the owners;
- that owners support by membership or fees, property or facilities for all owners to use."

In Ohio, "planned communities" often have different names. Most planned communities are referred to as "homeowner associations" while others call themselves "townhome associations," "cluster home associations," "recreation associations," "master associations," and even "PUDs" (Planned Unit Developments). Now all of these associations fall into the definition of a "planned community" and as a result are subject to the new law.

The law inserts an entirely new chapter into the Ohio Revised Code

and the new Chapter is **5312**, following the condominium law which is Chapter 5311. A copy of Ohio Revised Code Chapter **5312** is available under the "Resources" tab on our website ohiohoalaw.com. Some highlights of the new law include:

5312.01 - Sets out definitions of the main terminology of the law.

5312.02 - Bylaws, also known as a "Code of Regulations," is the document that defines and describes the internal operation of an association. Up to now there was no requirement that a developer record the Bylaws of an association. While the requirement has long been in the condominium law, homeowner association developers have often skipped this important duty, and as a result, numerous versions of Bylaws could exist.

Now, the law requires that no person shall establish a planned community unless that person files and records a Declaration (declares the deed restrictions) and Bylaws for that planned community in the office of the recorder of the county or counties in which the planned community is located.

More importantly, no board of directors of the owners association of a planned community that is currently in existence shall pursue any civil action

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against any person based upon any provision of the Bylaws of that planned community or upon any amendments to the Bylaws until the Bylaws or amendments are filed and recorded.

As a result of this provision, any association that does not currently have its Bylaws recorded should IMMEDIATELY AUTHORIZE OUR OFFICE TO RECORD THE BYLAWS.

5312.03 - Mandates that the board be elected "from among the owners" and permits the election of "spouses" of owners to the board and further mandates that "the owners association shall be organized as a non-profit corporation."

5312.04 - This section mandates at least one meeting of the owners per year while also permitting board meeting attendance by speaker phone. In addition, it states that no owner other than a director may attend or participate in any discussion or deliberation of a meeting of the board of directors unless the board expressly authorizes that owner to attend or participate. This section also permits remaining board members to fill vacancies on the board that arise outside of the annual election meeting.

5312.05(A) - Permits the owners to amend the Declaration or Bylaws with seventy-five percent (75%) approval of the owners unless a different percentage is currently specified in the Declaration or Bylaws. If there is already a procedure in place for amendments, the board must follow the original procedure.

5312.05(B) - States that in order to dissolve a planned com-

munity there must be unanimous consent of the owners.

5312.06(A) - Mirrors the condominium law MANDATING reserves to avoid special assessments but ELIMINATES THE REFERENCE TO TEN PERCENT (10%) RESERVES. This section mandates that "any budget shall include reserves in an amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assess-

This new law on reserves is about information first and money second. The law forces a board to obtain and keep updated information on reserves and repair/replacement costs but provides the board an option as to whether or not to fund reserves. Information is necessary, money is not. The reserves law did NOT change or increase the cost of repairs and/or replacements. The changes in the law simply:

Board members in an association responsible for capital items should immediately review the booklet entitled "Reserves – What Every Board Member Needs to Know" that Kaman & Cusimano provided to you when you were elected to the board.

This booklet answers most questions and provides sample letters to the owners and, if necessary, waiver ballots.

ments, unless the owners, exercising not less than a majority of the voting power of the owners association, waive the reserve requirement annually."

Depending on which items the association is required to maintain, this provision is either very significant or very insignificant. If the association does NOT maintain the exterior of the homes or any streets or any other capital items, this reserve requirement has very little impact. On the other hand, if the association is responsible for roofs, siding, foundations, roadways, drainage systems or other capital items, these items must now be "reserved" for in each annual budget and saved for "without the necessity of special assessments."

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A) Mandates that the board plan ahead and budget for these costs;

OR

B) Are for consumer protection and mandates that the board disclose the future repair/replacement cost information to the owners and requires the board to obtain a reserve fund waiver from a majority of the owners.

TO AVOID LITIGATION, THE CHOICES ARE CLEAR AND THE LAW IS SIMPLE:

EITHER

Do a reserve study and budget accordingly;

OR

Do a reserve study, share its content with the owners, and obtain a written reserve fund waiver each year from a majority of the owners.

5312.06(C) - Mandates that an association keep:

1. Correct and complete books and records of account that specify the receipts and expenditures relating to the common elements and other common receipts and expenses;

- 2. Records showing the collection of the common expenses from the owners;
- 3. Minutes of the meetings of the association and the board of directors;
- 4. Records of the names and addresses of the owners.

5312.06(D) - Empowers the board to:

- 1. Hire and fire managing agents, attorneys, accountants, and others that the board determines are necessary or desirable in the management of the property and the association;
- 2. Commence, defend, intervene in, settle, or compromise any civil, criminal, or administrative action or proceeding or threatened against, the association, the board of directors, or the property, or that involves two or more owners and relates to matters affecting the property;
- 3. Enter into contracts and incur liabilities relating to the operation of the property;
- 4. Enforce all provisions of the Declaration, Bylaws, covenants, conditions, restrictions, and articles of incorporation governing the lots, common elements, and limited common elements;
- 5. Adopt and enforce rules that regulate the maintenance, repair, replacement, modification, and appearance of common elements, and any other rules as the Declaration provides;
- 6. Grant easements, leases, licenses, and concessions through or over the common elements;
- 7. Levy and collect fees or other charges for the use, rental, or operation of the common elements or for services provided to owners;
- 8. Levy the following charges and assessments:
 - a) Interest and charges for the late payment of assessments;
 - b) Returned check charges;
 - c) Enforcement assessments for violations of the Declaration, the Bylaws, and the rules of the owners association;

d) Charges for damage to the common elements or other property.

9. Adopt and amend rules that regulate the collection of delinquent assessments and the application of payments of delinquent assessments;

10. Impose reasonable charges for preparing, recording, or copying the Declaration, Bylaws, amendments to the Declaration and Bylaws, resale certificates, or statements of unpaid assessments;

11. Authorize entry to any portion of the planned community by designated individuals when conditions exist that involve an imminent risk of damage or harm to common elements, another dwelling unit, or to the health or safety of the occupants of that dwelling unit or another dwelling unit;

12. Suspend the voting privileges and use of recreational facilities of an owner who is delinquent in the payment of assessments for more than thirty days;

13. Purchase insurance and fidelity bonds the directors consider appropriate and necessary.

5312.07 - Permits an owner to examine the "books, records and minutes" of the association while permitting the board to charge a "reasonable fee" for copying the documents. (See the article "Records Request - Must Owners Be Given Everything?" on our website. A sample "Records Request Policy" as well as a "Request to Inspect Records." can be found under the "Sample Forms" tab on our ATLAS website.)

This section clearly states that owners are not entitled to view personnel records, communications with legal counsel, confiden-

tial contracts or information related to enforcement matters unless the board so authorizes.

5312.08 - Unless otherwise provided in the Declaration, the association is required to maintain the common elements and the owner is required to maintain the owner's lot and the utility lines serving the dwelling.

5312.09 - Permits the board, on behalf of the association, to borrow money and/or sell common elements as long as the authority is contained in the Declaration or approved by a seventy-five percent (75%) vote of the owners.

5312.10 - Stipulates that unless otherwise provided in the Declaration, all costs of administration, operation, maintenance, repair and replacement of the common elements are common expenses. It also states that common expense liability will be allocated according to the Declaration but if the Declaration is silent, the expense will be allocated equally among the lots and requires this expense to be allocated annually.

5312.11 - Stipulates that when the association receives a payment it may apply the payment in the following order: First - interest owed; Second - administrative late fees or enforcement assessments; Third - collection costs including attorney fees; Fourth - to the oldest balance.

Significantly, this section also empowers the board to levy "enforcement assessments" for rule violations. (See the "Sample Forms" tab "Enforcement Procedures" on our ATLAS website. We not only provide an example "enforcement procedure" for your handbook but

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also provide sample forms of all letters and notices required by the law.)

5312.12 - This section contains one of the main reasons Kaman & Cusimano supported this legislation. For years, some lawyers representing owners have argued that the association had no statutory lien authority. Now, this argument is moot.

The association now has the clear authority to file a lien upon a lot for any unpaid assessment as well as unpaid interest, late charges, enforcement assessments, and collection costs including attorney fees. This section also permits the board to designate Kaman & Cusimano as having authority to execute liens. For safety reasons, this designation is important so that our name, not the name of the association's president or another board member, appears on the face of the lien. (See the article in

our "Guide for Board Members" entitled "Board Must Pass Motion Enacting a Collection Policy and A Separate Collection Procedure" for samples which include lien execution authority.) Be certain to notify our office in writing by providing a copy of the associations "Collection Procedure" so that we have evidence of our authority to sign liens.

5312.12(C)(1) - Entitles the association, in a foreclosure action, to the appointment of a receiver to collect rents and mandates that the monies collected by the receiver "shall be applied first to the payment of the common expenses."

5312.13 - Requires the owners to comply with any "covenant, condition, and restriction set forth in any recorded document" as well as the Bylaws and the rules of the association and provides for the award of court costs and attorney fees in the event a violation is found to exist.

5312.14 - Permits the association to sue or be sued.

5312.15 - This section is important as it deals with the applicability of this law. It states that:

"In the event of a specific conflict between this Chapter and express requirements or restrictions in such a governing document, the governing document shall control. This Chapter shall control if any governing document is silent with respect to any provision of the Chapter."

For several decades homeowner associations have operated using the condominium law as a guide. With the enactment of Ohio Revised Code Chapter **5312**, Ohio planned communities finally have their own law to operate under and rely on.

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