

# Issues & Answers

## REAL ESTATE ALERT

### *Summary of 2003 Legislative Bills*

Fennemore Craig has reviewed the bills introduced in this Arizona legislative session and has prepared a summary of several bills of interest to the real estate community. The deadline for bill introduction has passed, though bills can replace existing legislation, called a strike-all, and amendments can be added. This list is by no means comprehensive. If you have any questions concerning one of these bills, please contact one of the following:

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#### **Senate Bill 1271      Local Building and Use Permits; Adjacent Property**

*by Don Miner and Chad Fuller*

#### *Description of Bill:*

This bill would amend A.R.S. § § 9-462.05 and 11-808 to allow municipalities and counties to enact ordinances permitting denial of building or use permits if existing uses of adjacent property are not compatible and if existing uses of adjacent property are not the same as the current zoning of the area.

#### *Analysis:*

This bill was drafted in response to the location of a Castle Boutique adult emporium near a local high school. As written, the bill is somewhat vague in that it does not provide a definition of the terms “compatible” or “adjacent property.” This would result in additional subjective discretion in favor of city and county zoning authorities that does not now exist to deny issuance of

building or use permits where it is perceived that: (1) the existing uses of property adjacent to the proposed site are not compatible **and** (2) the existing uses of the adjacent property are not the same as the current zoning of the area, notwithstanding that such uses may be permitted under the applicable zoning classification.

While industrial, commercial and residential uses are likely to continue as the broad categories of uses, it is unclear what standards determine what is or is not compatible with the current zoning of a given area. Similarly, the bill does not define whether adjacent property is limited to property that borders the proposed site or if the term might include properties within the immediate neighborhood.

By avoiding the definition of these terms the bill would allow city and county zoning authorities greater discretion to deny building and use permits deemed incompatible with existing neighborhoods. With this additional authority, city and county governments could more readily shape and influence real estate development in their respective areas. In contrast, a real estate developer would face less certainty as to whether its proposed use might be deemed incompatible with adjacent property zoning and uses, notwithstanding compliance with the applicable zoning ordinance, until the developer actually received the building permit.

*Status of Bill:*

The bill was assigned to the Senate Government Committee, which has not yet heard the bill. It is unlikely to get a hearing, which will mean the bill dies.

**House Bill 2307      Homeowners' Associations; Judgment Liens**  
*by George Cole and Kristopher Harman*

*Description of Bill:*

This bill changes the way homeowners' associations obtain and enforce liens for unpaid assessments, late charges, penalties and other monetary amounts imposed upon an owner. Amounts attributable to unpaid assessments and late fees, and attorneys' fees accruing from the unpaid assessments, would continue to be a lien on the owner's property, but could not be foreclosed for seven years after a notice of the lien is recorded. Any other amounts imposed by a homeowners' association on an owner, including penalties and interest, would not become a lien until a judgment is entered and a lien is recorded. Even then, the homeowners' association could not foreclose the lien and could only collect the unpaid amounts when the property is sold. In addition, the bill conflicts with existing statutes, which say that a lien for unpaid assessments expires if an action to enforce it is not commenced within three years after the lien is due.

*Analysis:*

This bill is a response to recent situations reported in the news media regarding homeowners' associations. In these instances, the homeowners' associations have been perceived as imposing unfair penalties on owners, resulting in the foreclosure of the owners' property. Some other states prohibit liens for fines and items other than assessments. Although this bill probably would not prevent homeowners' associations from acting unfairly, the removal of the immediate enforcement mechanism for even regularly scheduled assessments would hurt the ability of homeowners' associations to fund their activities in a community.

*Status of Bill:*

HB 2307 passed the House 35-25 and is awaiting a committee hearing in the Senate.

**Senate Bill 1151      Homeowners' Associations; Condominiums; Amendments**  
*by George Cole and Kristopher Harman*

*Description of Bill:*

This bill changes many provisions relating to the operation and governance of condominium associations and homeowners' associations, including the specification of who can challenge the actions of the board of directors, what types of records must be made available for review by members, and what voting percentage is required to amend the associations' documents. In addition, the bill requires that certain legal actions between an owner and the association be heard in a justice court, allows an owner to appeal the imposition of monetary penalties in front of an appeal committee of the association, and specifies when a developer's control over the governance of the association terminates.

*Analysis:*

Like HB 2307, the purpose of this bill is to prevent associations from acting unfairly, although it addresses many other issues affecting associations. Many of the provisions would not affect the operations of associations, as many modern associations already have rules that are substantially similar to the bill's statutory framework. The bill would reduce the flexibility that a developer currently enjoys when creating a community, including the flexibility to determine when a turnover of the association to the members would occur and the types of contracts that would be binding upon the association after a turnover. The bill's restrictions would impact higher priced communities more than those that must comply with FHA/VA and FNMA requirements because those requirements are already similar to many of the bill's provisions.

*Status of Bill:* SB 1151 failed 2-7 in Senate Government Committee Tuesday, February 25, which means that it is dead in its present form.

**House Bill 2459      Archaeological Sites: Private Land**  
*by Robert P. Robinson and Dawn G. Meidinger*

*Description of Bill:*

HB 2459 would make it a felony to undertake activities on private land that would alter known or discovered archaeological, historical or cultural sites without first notifying the Arizona State Museum (ASM) and consulting, for a period that could extend for a year, with the Director of the ASM regarding protection for the site. This bill would also require municipalities to amend their general plans to adopt policies to protect and conserve historic sites and cultural resources.

*Analysis:*

This bill appears to attempt to impose the existing requirements of the National Historic Preservation Act (NHPA) and the Arizona Antiquities Act (AAA) on private property. Generally, the NHPA requires federal agencies to consider the impact of funding, permitting and/or assisting undertakings on historic properties that are included in or eligible for inclusion

in the National Historic Register. The AAA prohibits the collection of archaeological or paleontological specimens and the excavation in or on any historic or prehistoric ruin, burial ground or site on state land without a permit.

In contrast to those statutes, this proposed legislation regulates private property by defining archaeological, paleontological, historical or cultural sites as:

“any site, building or location of archaeological, paleontological, historical or cultural interest, including those pertaining to prehistoric or historic American Indians as well as archaeological sites of every character located in, on or under the surface of any [private] land located in this state.”

Utilizing this definition, a potentially lengthy consultation would be required for virtually every land-disturbing activity on private land where such items are known to exist or are discovered during activities that alter the land. The bill is devoid of meaningful standards, does not acknowledge existing federal and state laws, disregards the role of Arizona’s State Historic Preservation Office and fails to recognize the fact that the ASM is not adequately staffed or funded to take on the role contemplated in the legislation.

*Status of Bill:*

Legislative leadership has prevented this bill from moving forward, but it could resurface in another form.

**House Bill 2225      Property Valuation New Construction**  
*by Jay S. Kramer and Josh Forest*

*Description of Bill:*

HB 2225 is a repeat effort to change the last date for tax assessors to enter new construction values (or other changes to values due to additions, deletions or other circumstances) from September 30 to December 31. The original bill defeated in 2002 was HB 2197. This property valuation bill was defeated, in part, because the current statutory methods for valuation were deemed to better comply with the truth in taxation requirements.

*Analysis:*

If HB 2225 is passed, it will affect real property owners in three distinct ways: First, in an effort to increase tax revenues, A.R.S. § 42-15105 will be amended to lengthen the time for tax assessors to value new construction and add that increased value to the assessed value of the property from September 30 to December 31 for the following calendar year. The three-month window to begin new construction without tax ramifications will be eliminated. Second, a corresponding change in the valuation appeal period found in A.R.S. 42-16165 is contemplated. The proposed change would extend the period for valuation appeals to the County or State Board of Equalization from the third Friday in November until the third Monday in February. This will shorten the time for property owners to complete their appeal before taxes become due and or delinquent. Third, the value of any property that is subject to a pending appeal on February 10 will not be included in the certification submitted by the county assessors to the state property tax oversight commission and the governing bodies of political subdivisions for purposes of

determining the primary and secondary property tax rates, amending A.R.S. 42-17052. This will uniformly increase tax rates used to compute the levy limit.

The tax partners at Fennemore Craig are of the opinion that this bill is intended to increase taxes at the expense of a fair appeals process and it violates the truth in taxation requirements. Fennemore Craig has joined in the successful efforts to defeat this bill in its previous incarnations.

*Status of Bill:*

The House Ways & Means Committee debated this bill, but the sponsor of the bill held it due to the opposition expressed. It could be revived in another form, so this is one to watch.

**House Bill 2380      Amending Section 32-1159, Arizona Revised Statutes;  
Relating to Contractors**

*by Roger T. Hargrove and Alexander Arpad*

*Description of Bill:*

HB 2380 would make changes to the statute governing indemnity agreements in private sector construction and architect-engineer contracts. The amendment is based in large part on a similar bill covering public sector construction contracts, codified in A.R.S. § 34-226. The amendment would expand the coverage of the statute in two ways:

- The current statute invalidates agreements to “indemnify, to hold harmless or to defend” another person. This bill would add the word “insure” to that list, which is not included in the public sector construction contract statute, A.R.S. § 34-226.
- The current statute applies to “liability for loss or damage resulting from the *sole* negligence” of the person being indemnified. This bill would delete the word “sole,” making the types of negligence covered potentially much broader, but consistent with A.R.S. § 34-226.

The amendment also includes certain exceptions or limitations to the general rules described above. The statute would not invalidate indemnification for injuries that result from “fault” of the person providing indemnity; a principal’s obligation to indemnify a surety; or “an insurer’s obligation to its named insureds.” The statute would not apply to “project specific insurance” or leases.

*Analysis:*

Supporters of the bill, primarily design and construction subcontractors, have indicated that the purpose of the bill is to allocate liability based on fault arising out of each party’s work, consistent with the additional insured endorsement language used by insurance companies, rather than based on contractual indemnity provisions that generally favor the general contractor or owner. Supporters argue that contractors, subcontractors, suppliers and architects are often named as defendants in litigation that does not arise from such party’s work on a project and such persons (or their insurance companies) are required to pay the cost of defense even if the litigation is ultimately dismissed against such defendant. This bill may reduce the likelihood that

parties not at default are named in construction defect litigation. Supporters also argue that this statutory liability scheme would help insurance companies better determine the risks associated with the work done by different contractors, thus leading to lower insurance rates.

Opponents of the bill are skeptical that this bill would lead to lower insurance costs. The bill appears to favor “project specific” or so-called “wrap” insurance policies that may impose additional costs on developers or may not be readily available in the marketplace. Opponents argue that contracting parties should be free to negotiate the allocation of liability and insurance costs as part of their contract allocation of risk and that the marketplace, rather than government, is better suited to address issues of risk allocation. Opponents also suggest that the language of the bill is confusing, and would cause additional litigation until the new limitations on indemnity have been resolved by the courts.

Making the private sector statute applicable to “negligence” instead of just “sole negligence” would be consistent with the statute covering public sector construction contracts, A.R.S. § 34-226. Even before the passage of these two statutes, Arizona courts placed limits on indemnification for a party’s own negligence. Case law interpreting the two statutes is almost non-existent, so questions remain about how Arizona courts would apply the distinction between active and passive negligence, and the legal principle of non-delegable duties, in the context of this amendment.

*Status of Bill:*

HB 2380 and SB 1313 are identical. HB 2380 passed House Financial Institutions & Insurance Committee 8-1 and is awaiting hearing in Judiciary Committee; SB 1313 is scheduled for a Senate Finance Committee hearing on Friday, February 28. Even if these bills die in committee, expect them to resurface in another form, as they are being pushed aggressively.

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