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2011 Legislation affecting Property Owner Associations and Restrictive Covenants

When the regular session of the 82nd Texas Legislature adjourned on May 30, 2011, over forty revisions affecting restrictive covenants and property owner associations (herein referred to as “Associations” and “HOAs”) had been made to the Texas Property Code. In the wake of such extensive legislation, some commentators have declared it to be “a new day for Texas HOAs.” This bulletin summarizes the most significant legislation affecting HOAs and restrictive covenants, and outlines: (1) actions that HOAs must take to comply with the new laws, (2) possible amendments to restrictive covenants (also sometimes referred to as a “declaration”), (3) new laws aimed at increasing home owner participation in Association activities, and (4) other notable legislation. Except as otherwise noted, references to “Sections” are to sections in the Texas Property Code.

The majority of the new legislation applies only to subdivisions in which a majority of the property is restricted to single-family residential use, and that require membership in an Association that has the authority to impose regular or special assessments. Subdivisions that are primarily restricted to commercial use are generally not affected by the new legislation discussed in this bulletin.¹ In addition, few of the new laws affect condominium owner associations, which continue to be governed by the Texas Uniform Condominium Act set forth in Chapter 82 of the Texas Property Code. Certain provisions applicable to condominium owner associations are noted in this bulletin.

Part 1: Actions that Each HOA Must Take to Comply with the New Legislation²

To the extent applicable, Associations should take the following actions:

Record All Dedicatory Instruments. Effective as of January 1, 2012, all dedicatory instruments of an Association - including the declaration, bylaws, rules and regulations, etc., and including the dedicatory instruments of Associations governing condominiums - must be recorded in the real property records of each county in which the property is located per Section 202.006. **An instrument will have no effect until it is recorded.** In addition, if the HOA maintains a website (or if a management company

¹ For example, see Sections 209.002(9) and 209.003 for the applicability with respect to a particular subdivision of Chapter 209, which is the target of most of the new legislation discussed in this bulletin.

² Most of the new laws have at least one exception and the applicability of a particular law should be examined on a case by case basis. Many of the exceptions are for Mixed Use Master Associations, subdivisions with less than 15 lots, and subdivisions in counties or municipalities meeting specific population criteria.

maintains a website on behalf of an HOA), all dedicatory instruments relating to the subdivision or HOA must be posted on the website per Section 207.006.

The Following Policies Must Be Adopted and Recorded in the Real Property Records by January 1, 2012.

- *Payment Plan Policy (Section 209.0062).* An Association must adopt reasonable guidelines to establish an alternative payment schedule for delinquent assessments.
- *Records Production and Copying Policy (Section 209.005(i)).* An Association must adopt a records production and copying policy that establishes the costs the Association will charge for the compilation, production and reproduction of information requested by a member. Failure to adopt the policy prevents the Association from charging an owner for the compilation, production or reproduction of information requested.
- *Records Retention Policy (Section 209.005(m)).* An Association must adopt and comply with a document retention policy.

Non-Judicial Foreclosure of an Assessment Lien is No Longer Permitted. Starting on January 1, 2012, an Association must first obtain a court order in an application for expedited foreclosure in order to foreclose on an assessment lien per Section 209.0092. A provision in a declaration permitting non-judicial foreclosure of an assessment lien may be amended accordingly.

New Notice Required Before Exercising Remedies. Before an Association may exercise any remedies against a homeowner who is delinquent in paying assessments, the Association must comply with new notice requirements relating to the Servicemembers Civil Relief Act per Section 209.006(b).

New Disclosures Required in HOA Resale Certificates. Pursuant to Section 207.003, Associations (including condominium owner associations) must make additional disclosures in resale certificates. One significant change is that in addition to disclosing all litigation in which the Association is a *defendant*, the Association must disclose all litigation in which the Association is a *party (as plaintiff or defendant)*. The resale certificate must also disclose the purpose of any special assessment approved before and due after the resale certificate is delivered, and describe all transfer fees.

Part 2: Possible Amendments to Restrictive Covenants

Use Restrictions. New laws address restrictive covenants regulating the following activities within a subdivision:

- *Solar Energy Devices* - Section 202.010
- *Roofing Materials* - Section 202.011

- *Religious Items* - Section 202.018
- *Flags* - Section 202.011
- *Harvested Rainwater* - Section 202.007(d)

A subdivision's declaration may regulate these activities to a certain extent. If a declaration is silent with respect to these activities, owners will have the unrestricted right (subject to city ordinances and other applicable law) to install solar energy devices and harvested rainwater facilities, and to display religious items and flags within the subdivision. Provisions in a declaration that are inconsistent with these new laws are void.

Development Period. The Legislature introduced the concept of a Development Period, which is defined as "a period stated in the declaration in which the declarant reserves the right to (1) facilitate the development, construction and marketing of the subdivision and (2) direct the size, shape, and composition of the subdivision" (see, for example, Section 209.0041 and Section 209.0051(b)(2)). Notably, the Legislature did not tie the Development Period to the declarant's ownership of property in the subdivision or to a particular term of years. During the Development Period, certain laws relating to the election and appointment of Association directors, open Board meetings, amendment procedures, and certain use restrictions do not apply. If a declaration does not define the Development Period and reserve the rights described above, the requirements imposed by the new laws will apply.

Declarant Control Period. In addition to the Development Period, a declaration may also provide for a "period of declarant control" during which the declarant, or persons designated by the declarant, may appoint and remove Board members and officers of the Association per Section 209.00591. Regardless of the period of declarant control provided by the declaration, at least one-third of the Board members must be elected by owners other than the declarant on or before: (a) the 120th day after the date 75% of the lots that may be created and made subject to the declaration are conveyed to owners other than the declarant, or (b) if the declaration does not include the number of lots that may be created and made subject to the declaration, not later than the 10th anniversary of the date the declaration was recorded.

Application of Payments and Third Party Collection Costs. The new laws impose new restrictions. Section 209.0063 outlines the order in which all payments received by an HOA from an owner must be applied (i.e., first to delinquent assessments, second to current assessments, third to attorney fees or third party collection costs, lastly to fines and any other amounts owed to the Association). Section 209.0064 now restricts third party collection costs that an Association can pass on to owners. While a declaration need not restate these provisions, it should be reviewed to ensure that its provisions do not conflict with these new restrictions.

Amending the Declaration. Pursuant to Section 209.0041, a declaration cannot require approval of more than 67% of the total votes allocated to property owners in the Association in order to amend the declaration (lower percentages set forth in the

declaration are acceptable). This requirement does not apply to amendments during the Development Period.

Part 3: Legislation Aimed at Increasing Home Owner Participation in Association Activities

A significant focus of the new laws is increasing home owner participation in Association activities. As a result, new legislation affects several aspects of an HOA's operations. Relevant provisions in the declaration and bylaws should be reviewed and possibly revised to ensure compliance with the new laws.

Voting Rights. Pursuant to Section 209.0059, no dedicatory instrument may disqualify a member from voting in an election of directors or on any matter concerning the rights or responsibilities of such member. Provisions calling for the suspension of a member's voting privileges should be revised accordingly.

Election of Board Members. Neither the declaration nor the bylaws may include a provision restricting an owner's right to run in an election for a position on the Board per Section 209.00591. However, a director who has been convicted of a crime involving moral turpitude is automatically (a) ineligible to serve on the Board, (b) removed from the Board, and (c) prohibited from future service on the Board.

Open Board Meetings. Regular and special Board meetings must be open to members, subject to the right of the directors to meet in closed executive session to consider certain actions, such as personnel, pending or threatened litigation, contract negotiations, and enforcement actions per Section 209.0051. Members must be notified of Board meetings as set forth in Section 209.0051(e), which allows for notice to be posted on an Association's website no later than 72 hours before the meeting.

Notice of Member Election or Vote. Members must be given no less than 10 days nor more than 60 days notice of an Association-wide election or vote per Section 209.0056. Notice of an election in which members are entitled to vote must be given in person, or by mail, fax or email, and is not effective if it is only posted on an Association's website.

Mandatory Election Required After Failure to Call a Regular Member Meeting. Pursuant to Section 209.014, if a Board fails to call an annual meeting of the members, an owner may demand a meeting. If the meeting still does not occur by the 30th day after the date of any such demand, three or more owners may form an election committee, which may call a meeting for the sole purpose of electing Board members.

Right to Vote by Proxy and Ballots. No dedicatory instrument may prohibit a member from voting in person or by proxy at a meeting of the Association per Section 209.00592. Any vote cast by a member must be in writing and signed by the member per Section 209.0058. Electronic votes constitute written and signed ballots. Written and signed ballots are not required for uncontested races.

Part 4: Other Notable Legislation

New Private Transfer Fees are Void. Pursuant to Section 5.202, a private transfer fee established after June 16, 2011 that is passed through to a third party designated or identifiable in a declaration is void. Private transfer fees established prior to that date may be “grandfathered” if notice is filed in the real property records no later than January 31, 2012, and re-filed every three years. An Association may continue to charge a fee (which may be payable to a management company) relating to updating the Association’s records or preparing resale or estoppel certificates. There are several other exceptions, including consideration paid relating to the waiver of a purchase option or right of first refusal affecting the property, among others.

Development of Land Originally Used as Golf Courses. Section 212.0155 of the Local Government Code provides that before a developer can replat and redevelop open space that was initially used for a golf course or country club within a residential subdivision, the replat must be subject to public notice and a hearing. The applicability of this law has been expanded to certain additional counties based on population.

Conclusion and Disclaimer

The 82nd Legislature significantly amended laws relating to HOAs and restrictive covenants. While most HOAs should take certain actions described above, other actions, including amendments to restrictive covenants and bylaws, should be considered on a case by case basis after carefully reviewing the Association’s governing documents and the applicability of each statute on the subdivision. **This bulletin is intended to provide general information to select audiences and should not be relied on for definitive legal advice.** Should you have any questions or need assistance with any of the matters discussed in this bulletin, please do not hesitate to contact the following attorneys:

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