

TEXAS HOA EDUCATION SEMINAR

2011 Legislative Reforms

What You Need To Know • How To Implement It

2011 Legislative Session

During the 2011 Legislative Session, the Texas Legislature enacted the most significant landmark reforms concerning HOA law since the enactment of the Texas Uniform Condominium Act in 1993.

Most of the reforms consist of adding new provisions or modifying existing provisions of Chapter 209 of the Texas Property Code, which does not apply Condominiums.

Accordingly, these new laws affect primarily only HOAs that govern subdivision developments (aka "Subdivision HOAs").

Scope of Activities Affected by 2011 Legislative Reforms

The changes in Texas HOA law effected by the 2011 reforms can be generally categorized by the affect they will have on the following activities:

1. Recording and Publication of Dedicatory Instruments
2. Amendment of Declarations
3. Transition of Control of the HOA
4. Election of Board Members and Board Member Eligibility
5. Open Board Meetings
6. Calling Meetings of the HOA's Membership

Scope of Activities Affected by 2011 Legislative Reforms

7. Membership Voting Eligibility
8. Membership Voting Procedures
9. Association Records
10. Producing Resale Certificates
11. Transfer Fees
12. Collection of Assessments
13. Enforcement of Restrictive Covenants concerning flags, rain barrels, religious displays, solar panels, and roof shingles

I.

**RECORDING AND PUBLICATION
OF DEDICATORY INSTRUMENTS**

Dedicatory Instruments: Recording in Official Public Records

Since 1999, all HOAs have been required to record all “Dedicatory Instruments” in the Official Public Records of each county in which it is located.

However, there was no express consequence if a Dedicatory Instrument was not recorded.

Now there is.

A Dedicatory Instrument has no effect until it is recorded.

- This new law applies equally to Subdivision and Condominium HOAs.
- It takes effect January 1, 2012.

Dedicatory Instruments: Online Publication

In addition, all HOAs are now also required to make copies of their applicable Dedicatory Instruments available on the HOA's website if:

1. the HOA has a publicly accessible website; or
2. the HOA's management company maintains a publicly accessible website on behalf of the HOA.

Unlike the obligation to record Dedicatory Instruments, there is no express consequence if a Dedicatory Instrument is not published online.

This new law takes effect on January 1, 2012.

II.
AMENDMENT OF
DECLARATIONS

Amendment of Declarations: Reduced Approval Requirement

Pursuant to the new Section 209.0041, a Declaration may now be amended by a vote of no greater than 67% of the total votes allocated to lot owners in the Subdivision HOA (in addition to any governmental approval required by law).

If the Declaration contains a lower requisite approval percentage, the percentage in the Declaration controls.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Amendment of Declarations: Reduced Approval Requirement

The new reduced approval requirement under Section 209.0041, however, doesn't apply if:

1. the Subdivision HOA is not a residential subdivision development in which lot owners are subject to mandatory membership in the Subdivision HOA;
2. the Subdivision HOA is subject to the Texas Public Information Act (aka "Open Records Act"); or
3. the amendment of a Declaration occurs during a "Development Period".

For purposes of Section 209.0041- "Development Period" means a period stated in a Declaration during which a declarant reserves:

1. a right to facilitate the development, construction, and marketing of the subdivision; and
2. a right to direct the size, shape, and composition of the subdivision.

Amendment of Declarations: Modification of Foreclosure Authority

In addition Section 209.0041, the Texas Legislature also enacted Section 209.0093, which also provides for a reduced approval requirement for amendments of Declarations associated with modification of the Subdivision HOA's foreclosure authority.

Pursuant to Section 209.0093, a Subdivision HOA's Declaration may be modified to either grant or remove authority of the Subdivision HOA to foreclose an Assessment Lien on lots in the subdivision development by a vote of only 67% of the total votes allocated to lot owners in the Subdivision HOA.

In addition, if presented with a petition calling for a vote to amend a Declaration so as to modify the Subdivision HOA's foreclosure authority that is signed by lot owners holding at least 10% of all voting interests in the Subdivision HOA, the Subdivision HOA must call a special meeting of the HOA's membership for the purpose of voting on such an amendment to the Declaration.

Unlike Section 209.0041, Section 209.0093 applies to all Subdivision HOAs both during and after a "Development Period".

Amendment of Declarations: No Bylaw End-Around

Section 209.0041 also makes clear that a Bylaw may not be amended in a manner so as to conflict with the Declaration.

III. TRANSITION OF CONTROL

Transition of Control of the HOA

The new Section 209.00591 now establishes mandatory timelines for requiring at least one of the members of the Board of Directors be elected by the lot owners of a Subdivision HOA.

There is a slightly similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Transition of Control of the HOA

Pursuant to Section 209.00591, on or before 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 a Declarant, at least one-third of the Board Members of the Subdivision HOA must be elected by lot owners other than the Declarant.

If the Declaration does not include the number of lots that may be created and made subject to the Declaration, at least one-third of the Board Members must be elected by lot owners other than the Declarant not later than the 10th anniversary of the date the Declaration was recorded in the Official Public Records of the county in which the subdivision development is located.

Important Note: lots conveyed to builders will count against the Declarant.

**IV.
ELECTION OF BOARD
MEMBERS AND BOARD
MEMBER ELIGIBILITY**

Election of Board Members

Pursuant to the new Section 209.00593, Board Members must be elected and may only be appointed for the purpose of filling a vacancy caused by resignation, death, or disability.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Election of Board Members

Notwithstanding any provision in a Dedicatory Instrument:

1. any Board Member whose term has expired must be elected by lot owners who are members of the Subdivision HOA.
2. a Board Member may be appointed by the Board only to fill a vacancy caused by a resignation, death, or disability.
3. a Board Member appointed to fill a vacant position shall serve the unexpired term of the predecessor Board Member.

Now, any Bylaw provision that calls for appointment of a director to fill a vacancy caused by an involuntary removal of such director is void.

The appointment of a Board Member in violation of Section 209.00593 is void.

In addition, Section 209.00593 authorizes the Board of Directors of a Subdivision HOA to amend its Bylaws to provide for elections to be held as required by such statute.

Election of Board Members

Section 209.00593, however, does not apply to:

1. a representative Board whose members or delegates are elected or appointed by representatives of a Subdivision HOA who are elected by members of such Subdivision HOA (also called “Delegate Voting”); or
2. the appointment of a Board Member during a “Development Period”.

For purposes of Section 209.00593, “Development Period” means a period stated in a Declaration during which a Declarant reserves:

1. a right to facilitate the development, construction, and marketing of the subdivision; and
2. a right to direct the size, shape, and composition of the subdivision.

Board Member Eligibility

New Section 209.00591 eliminates any eligibility requirement to run for election to the Board of Directors but creates a qualification requirement to serve on the Board of Directors.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Board Member Eligibility

Pursuant to Section 209.00591, any provision in a Dedicatory Instrument that restricts a lot owner's right to run for a position on the Board of a Subdivision HOA is void.

Notwithstanding, if the Board of Directors is presented with written, documented evidence from a database or other record maintained by a governmental law enforcement authority that a Board Member has been convicted of a felony or crime involving moral turpitude, the Board Member is:

1. immediately ineligible to serve on the Board of the Subdivision HOA;
2. automatically considered removed from the Board; and
3. prohibited from future service on the Board.

V.
OPEN BOARD MEETINGS

Open Board Meetings

In 2007, the Texas legislature amended the Texas Open Meetings Act and Texas Open Records Act to make such Acts applicable to certain limited Homeowners Associations in Harris County and counties adjacent to Harris County.

The amendment was for the purpose of addressing certain perceived misconduct by particular Homeowners Associations in the Clear Lake area of Harris County, including the failure to respond to Homeowners' information requests and the closing of formerly public meetings to prevent Homeowners from contributing to meetings.

During 2009 and 2011 Texas Legislative sessions, there were efforts made to expand the application of the Texas Open Meetings Act and Texas Open Records Act to all HOAs in Texas.

Open Board Meetings

In the 2011 Texas Legislative session, a compromise was reached whereby a lite-version of the Open Meetings Act and Open Records Act were made applicable to all Subdivision HOAs in Texas, other than those that are already subject to the Texas Open Meetings and Open Records Acts.

Condominium HOAs are already required to conduct their open Board Meetings, but the new “Open HOA Meetings” law and “Open HOA Records” law far exceed any similar law applicable to Condominium HOAs.

These new laws take effect on January 1, 2012.

Open Board Meetings: Application During Development Period

The new “Open HOA Meetings” law only applies to a Board Meeting conducted during a Subdivision HOA’s “Development Period” if the Board Meeting is conducted for the purpose of:

1. adopting or amending the governing documents, including declarations, bylaws, rules, and regulations of the association;
2. increasing the amount of regular assessments of the association or adopting or increasing a special assessment;
3. electing non-developer Board Members of the association or establishing a process by which those members are elected; or
4. changing the voting rights of members of the association.

In addition, the new “Open HOA Meetings” law does not apply to any Subdivision HOA that is already subject to the Texas Open Meetings Act (Chapter 551 of the Texas Government Code).

Open Board Meetings: Actions Constituting a Board Meeting

Under the new “Open HOA Meetings” law, a “Board Meeting” means a deliberation between a quorum of the voting Board Members of the Subdivision HOA, or between a quorum of the voting Board Members and another person, during which business of the Subdivision HOA is considered and the Board takes formal action.

A Board Meeting, however, does not include*:

1. the gathering of a quorum of the Board Members at a social function unrelated to the business of the Subdivision HOA; or
2. the attendance by a quorum of the Board Members at a regional, state, or national convention, ceremonial event, or press conference;

*So long as no formal action is taken by the Board Members and any discussion of Subdivision HOA business is incidental to the social function, convention, ceremonial event, or press conference.

Open Board Meetings: Conducting an Open Board Meeting

Under the new “Open HOA Meetings” law, regular and special Board Meetings must be open to lot owners, subject to the right of the Board to adjourn a Board Meeting and reconvene in closed executive session.

The Board may adjourn a Board Meeting and reconvene in closed executive session only for the purpose of considering actions involving:

1. personnel;
2. pending or threatened litigation;
3. contract negotiations;
4. enforcement actions;
5. confidential communications with the Subdivision HOA’s attorney;
6. matters involving the invasion of privacy of individual lot owners; and/or
7. matters that are to remain confidential by request of the affected parties and agreement of the Board.

Open Board Meetings: Following an Executive Session

Following an executive session, the Board of Directors must reconvene in the open Board Meeting.

If any decisions were made by the Board during the executive session, such decisions must be summarized orally and placed in the minutes, in general terms, without:

1. breaching the privacy of individual lot owners;
2. violating any legal privilege (such as attorney-client privilege); or
3. disclosing information that was to remain confidential at the request of the affected parties.

The oral summary must also include a general explanation of expenditures approved in executive session.

Open Board Meetings: Notice of Board Meetings

Under the new “Open HOA Meetings” law, all members of a Subdivision HOA are required to be given notice of the date, hour, place, and general subject of a regular or special Board Meeting, including a general description of any matter to be brought up for deliberation in executive session.

In short, lot owners must be given notice of the meeting and a copy of the meeting agenda.

If the Board recesses a regular or special Board Meeting to continue the following regular business day, the Board is not required to post notice of the continued meeting if the recess is taken in good faith and not to circumvent the new “Open HOA Meeting” law.

If, however, a regular or special Board Meeting is continued to the following regular business day, and on that following day the Board continues the meeting to another day, the Board must give notice of the continuation in at least one manner prescribed by the new “Open HOA Meeting” law within two hours after adjourning the meeting being continued.

Open Board Meetings: Notice of Board Meetings

A notice of a Board Meeting must be delivered to lot owners by one of the two following methods:

1. by mailing a notice to each property owner no later than 10 days before or earlier than 60 days before the date of the Board Meeting; or
2. providing notice of the meeting at least 72 hours before the start of the meeting by:
 - A. posting the meeting notice in a conspicuous manner reasonably designed to provide notice to the Subdivision HOA's members:
 - i. in a place located on the Subdivision HOA's common property or, with the property owner's consent, on other conspicuously located privately owned property within the subdivision development; or
 - ii. on any internet website maintained by the Subdivision HOA or other internet media; and
 - B. sending a copy of such meeting notice by e-mail to each lot owner who has registered an e-mail address with the Subdivision HOA.

Open Board Meetings: Notice of Board Meetings

It is a lot owner's duty to keep an updated e-mail address registered with the Subdivision HOA for purposes of receiving notices of Board Meetings.

Best Practices:

- If a meeting notice is to be physically posted in the community, it is recommended that a resolution designating the location be adopted and recorded.
- Subdivision HOAs now need to keep a registry of lot owners' email addresses and establish a method by which lot owners can register their email addresses with the Subdivision HOA.

Open Board Meetings: Location of Meeting

Except for a meeting held by electronic or telephonic means, a Subdivision HOA's Board Meetings must be held in a county in which all or part of the subdivision development is located or in a county adjacent to such county.

Open Board Meetings: Conducting Meeting Remotely

A Subdivision HOA's Board may meet by any method of communication, including electronic and telephonic, without prior notice to lot owners, if each Director may hear and be heard by every other Director.

This new law is similar to one already applicable to Condominium HOAs and conducting meetings by remote communications technology is already authorized by the Texas Nonprofit Corporation Law.

Open Board Meetings: Actions by Unanimous Written Consent

A Subdivision HOA's Board may take action by unanimous written consent to consider routine and administrative matters or a reasonably unforeseen emergency or urgent necessity that requires immediate Board action without calling a meeting or providing advance notice of such actions to the lot owners.

Any action taken by the Board without notice to lot owners must be summarized orally, including an explanation of any known actual or estimated expenditures approved at the meeting, at the next regular or special Board Meeting and documented in the minutes of such meeting.

The Board may not, however, without prior notice to lot owners consider or vote on:

1. fines;
2. damage assessments;
3. initiation of foreclosure actions;
4. initiation of enforcement actions, excluding temporary restraining orders or violations involving a threat to health or safety;

Open Board Meetings: Actions by Unanimous Written Consent

5. increases in assessments;
6. levying of special assessments;
7. appeals from a denial of architectural control approval; or
8. a suspension of a right of a particular lot owner before the lot owner has an opportunity to attend a Board Meeting to present the lot owner's position, including any defense, on the issue.

This new law is similar to one already applicable to Condominium HOAs.

This new also appears to restrict the taking of action by less than unanimous written consent, which is authorized under the Texas Nonprofit Corporation Law in certain circumstances.

Open Board Meetings: Keeping Minutes

Although most Boards already keep minutes of their meetings, the new “Open HOA Meetings” law now requires Boards to keep a record of each regular or special Board Meeting in the form of written minutes of the meeting.

The Board must also make meeting records, including approved minutes, available to a member of the Subdivision HOA for inspection and copying on the member's written request to the Subdivision HOA's managing agent at the address appearing on the most recently filed management certificate or, if there is not a managing agent, to the Board.

VI.
CALLING MEMBERSHIP
MEETINGS

Calling Membership Meetings

Written Notice of Election or Vote

Under the new Section 209.0056, Subdivision HOAs are now required to give advance written notice of an election or vote to:

1. each lot owner in the Subdivision HOA if it is an association-wide election or vote; or
2. each lot owner in the Subdivision HOA who is entitled to vote in a particular representative election under the Dedicatory Instruments if it is a vote that involves election of representatives of the Subdivision HOA who are vested under the Dedicatory Instruments with the authority to elect or appoint Board Members of the Subdivision HOA.

Calling Membership Meetings

Written Notice of Election or Vote

Notice of an association election or vote must be given to the appropriate lot owners no earlier than 60 days or later than 10 days before the date of the election or vote.

Section 209.0056 supersedes any contrary requirement in a Subdivision HOA's Dedicatory Instruments.

Section 209.0056, however, does not apply to a property owners' association that is subject to Texas Open Records Act (Chapter 552 of the Texas Government Code).

Calling Membership Meetings: Annual Meeting Required

New Section 209.014 now requires the Board of a Subdivision HOA to call an annual meeting of the Subdivision HOA's membership and establishes procedures for lot owners to call an annual meeting on their own if the Board fails to do so.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Calling Membership Meetings: Demand to Call an Annual Meeting

If the Board of a Subdivision HOA does not call an annual meeting of its membership, a lot owner may send a written demand to the Board demanding that a meeting of the membership be called within 30 days of the date of such written demand.

To be effective, the lot owner must:

1. make his or her demand in writing;
2. send a copy of the written demand by certified mail, return receipt requested, to the registered agent of the Subdivision HOA and to the Subdivision HOA itself at the address for it according to the most recently filed Management Certificate; and
3. send a copy of the written demand to each lot owner who is a member of the Subdivision HOA.

Calling Membership Meetings: Annual Meeting Election Committee

If the Board does not call an annual meeting of the Subdivision HOA's membership on or before the 30th day after the date of a written demand from a lot owner, three or more lot owners may form an election committee for purposes of calling an annual meeting of the Subdivision HOA's membership.

The election committee shall file written notice of the election committee's formation with the county clerk of each county in which the subdivision development is located.

Calling Membership Meetings: Annual Meeting Election Committee

A notice of the formation of an election committee under Chapter 209 filed by an election committee must contain:

1. a statement that an election committee has been formed to call an annual meeting of the lot owners who are members of the Subdivision HOA for the sole purpose of electing Board Members;
2. the name and residential address of each member of the election committee and be signed by each committee member; and
3. the name of the subdivision development over which the Subdivision HOA has jurisdiction under a Dedicatory Instrument.

Only one election committee may validly operate in a subdivision development at the same time.

If more than one election committee files a notice of election committee formation, the first election committee that files a notice of formation, after having complied with all other requirements required by Section 209.014, constitutes the valid election committee with the power to call an annual meeting of the Subdivision HOA.

Calling Membership Meetings: Annual Meeting Election Committee

The election committee may call meetings of the lot owners who are members of the Subdivision HOA for the sole purpose of electing Board Members.

Notice, quorum, and voting provisions contained in the Subdivision HOA's Bylaws still apply to any meeting called by the election committee.

If an election committee does not hold or conduct a successful election within four months after the date the notice of election committee formation was filed with the county clerk, the election committee is automatically dissolved by operation of law. An election held or conducted by a dissolved election committee is ineffective for any purpose under Section 209.014.

VII.
MEMBERSHIP VOTING
ELIGIBILITY

Membership Voting Eligibility

Pursuant to new Section 209.0059, any provision in a dedicatory instrument that would disqualify a lot owner from voting in a Subdivision HOA's election of Board Members or on any matter concerning the rights or responsibilities of the lot owner is void.

This means delinquent lot owners cannot be denied the right to vote.

Section 209.0059, however, does not apply to a property owners' association that is subject to Texas Open Records Act (Chapter 552 of the Texas Government Code).

There is no similar law applicable to Condominium HOAs.

This new law takes effect on September 1, 2011.

**VIII.
MEMBERSHIP VOTING
PROCEDURES**

Membership Voting Procedures

New Sections 209.00592 & 209.00593 Establish Two New Procedures For Conducting Membership Voting.

Section 209.0059, however, does not apply to a Subdivision HOA that is subject to Texas Open Records Act (Chapter 552 Of The Texas Government Code).

There is no similar law applicable to Condominium HOAs.

This new law takes effect on September 1, 2011.

Membership Voting Procedures

In addition to voting in person or by proxy at a Subdivision HOA's Membership Meetings, Subdivision HOAs may now conduct Membership voting by:

1. absentee ballots; and
2. electronic ballots.

An absentee or electronic ballot may also be counted as an owner present and voting for the purpose of establishing a quorum – but only for items appearing on the ballot.

Absentee or electronic ballots, however, may not be counted:

1. if the lot owner attends the Membership Meeting to vote in person; or
2. if the motion to approve such proposal was amended at the Membership Meeting and the language of the amended proposal is no longer identical to the exact language of the proposal identified on the absentee or electronic ballot.

Membership Voting Procedures: Absentee Voting

A solicitation for votes by absentee ballot must include:

1. an absentee ballot form that contains each proposed action and provides an opportunity for the lot owner to vote for or against each proposed action;
2. instructions for delivery of the completed absentee ballot, including the delivery location; and
3. the following language:

“By casting your vote via absentee ballot you will forgo the opportunity to consider and vote on any action from the floor on these proposals, if a meeting is held. This means that if there are amendments to these proposals your votes will not be counted on the final vote on these measures. If you desire to retain this ability, please attend any meeting in person. You may submit an absentee ballot and later choose to attend any meeting in person, in which case any in-person vote will prevail.”

Membership Voting Procedures: Electronic Voting

For the purposes of Section 209.00592 & 209.00593, “Electronic Ballot” means a ballot cast by:

1. e-mail;
2. facsimile; or
3. posting on an Internet website.

The electronic balloting system employed must ensure that electronic votes are cast in a manner in which:

1. the identity of the lot owner submitting the ballot can be confirmed; and
2. the lot owner receives a receipt of the electronic transmission and receipt of his or her ballot.

If an electronic ballot is posted on an Internet website, a notice of the posting must be sent to each lot owner that contains instructions on obtaining access to the posting on the website.

Membership Voting Procedures: Casting Ballots

Pursuant to new Section 209.0058, any vote cast in an election or vote by a member of a Subdivision HOA must be in writing and signed by the member.

Electronic votes cast in accordance with Section 209.00592 constitute written and signed ballots.

Written and signed ballots, however, are not required for uncontested races in an association-wide election.

Membership Voting Procedures: Tabulating Ballots

New Section 209.00594 now imposes certain procedures and restrictions regarding the tabulation of and access to ballots.

The following persons are not allowed to tabulate or to have access to the ballots cast in a Subdivision HOA election or vote:

1. any person who is a candidate in such election or who is otherwise the subject of an association vote; and
2. any person related to such candidate:
 - A. within the third degree of consanguinity (which includes the candidate's *parents, children, siblings, grandparents, grandchildren, great-grandparents, great-grandchildren, parent's siblings, and sibling's children*); or
 - B. within the third degree of affinity (which includes the spouse of anyone related to the candidate within the third degree of consanguinity and anyone related to the candidate's spouse within the third degree of consanguinity).

Membership Voting Procedures: Tabulating Ballots

Any person other than a candidate or his or her relatives and in-laws may tabulate votes in a Subdivision HOA election or vote but such persons may not disclose to any other person how any individual lot owners voted.

Notwithstanding, any person, including a candidate or his or her relatives and in-laws, may be given access to the ballots cast in the election or vote as part of a recount process authorized by law if a recount of the ballots is requested.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on September 1, 2011.

Membership Voting Procedures: Compelling a Recount of Votes

New Section 209.0057 establishes procedures for Lot Owners to compel a recount of ballots from an election.

Section 209.0057, however, does not apply to a Subdivision HOA that is subject to Texas Open Records Act (Chapter 552 Of The Texas Government Code).

There is no similar law applicable to Condominium HOAs.

This new law takes effect on September 1, 2011.

Membership Voting Procedures: Compelling a Recount of Votes

To compel a recount of votes, a Lot Owner must submit a written demand for a recount of the vote within 15 days after the date of the meeting at which the challenged election was held.

The written demand for a recount must be submitted either:

1. by certified mail or by delivery by the U.S. Postal Service with signature confirmation service to the Subdivision HOA's mailing address as reflected on the most recently recorded management certificate; or
2. in person to the Subdivision HOA's managing agent as reflected on the most recently recorded management certificate or to the address to which absentee and proxy ballots are mailed.

Membership Voting Procedures: Compelling a Recount of Votes

If a Subdivision HOA receives a timely submitted written demand for a vote recount, the Subdivision HOA is required to hire an independent third-party, who is not a member of the Subdivision HOA or a relative or in-law of a member of the Subdivision HOA's Board, to conduct the recount of votes.

The independent third-party must be either:

1. a current or former: (a) county judge; (b) county elections administrator; (c) justice of the peace; or (4) county voter registrar; or
2. a person agreed on by the association and the persons requesting the recount.

The expense of the vote recount must initially be paid by the lot owner who demanded the recount of votes and the recount must be completed within 30 days from the date of the Subdivision HOA's receipt of the demand for a vote recount and payment of the associated expense.

Membership Voting Procedures: Compelling a Recount of Votes

The Subdivision HOA is required to provide the results of the recount to each lot owner who requested the recount.

If the recount changes the results of the election, the Subdivision HOA is required to reimburse the requesting lot owner for the cost of the recount.

Any action taken by the Board of Directors during the period between the initial election vote tally and the completion of the vote recount is not affected by any recount or change in the result.

IX.
ASSOCIATION RECORDS

Association Records

All Subdivision HOAs, other than those already subject to the Texas Open Records Act (Chapter 552 of the Texas Government Code) are now subject to the new Texas “Open HOA Records” law.

This is a lite-version of the Texas Open Records Act written specifically for Texas Subdivision HOAs.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Association Records

Right to Examine and Obtain Records

Under the modified Section 209.005, a Subdivision HOA must make the books and records of the Subdivision HOA, including financial records, open to and reasonably available for examination by a lot owner, or a person designated in a writing signed by the lot owner as his or her agent, attorney, or certified public accountant.

A lot owner is also entitled to obtain from the Subdivision HOA copies of information contained in its books and records.

Association Records: Exclusion of Attorneys Files

An attorney's files and records relating to the Subdivision HOA are not considered records of the Subdivision HOA and are not subject to inspection by a lot owner or production in a legal proceeding.

If a document in an attorney's files and records relating to the Subdivision HOA would be responsive to a legally authorized request to inspect or copy the Subdivision HOA's documents, such document shall be produced by using the copy from the attorney's files and records if the Subdivision HOA has not maintained a separate copy of the document.

Notwithstanding, invoices for an attorney's fees must still be produced to a requesting lot owner under Section 209.008(d) if the Subdivision HOA is seeking reimbursement of such fees from such lot owner.

Association Records: Request for Access or Information

The modified Section 209.005 establishes a new procedure for requesting access to or information from a Subdivision HOA's records.

To obtain access or information, a lot owner or his or her designated representative must submit a written request for access or information by certified mail to the mailing address of the Subdivision HOA or authorized representative as reflected on the most current management certificate for the Subdivision HOA.

The written request for access or information must:

1. describe the Subdivision HOA's books and records being requested with sufficient detail; and
2. contain an election either to inspect the books and records before obtaining copies or to have the Subdivision HOA forward copies of the requested books and records without any advance inspection.

Association Records: Inspection of Books and Records

If an advance inspection of the Subdivision HOA's books and records is requested, within 10 business days from the date the Subdivision HOA receives the written request, it must send to the requesting party written notice of dates during normal business hours that such party may inspect the requested books and records, to the extent those books and records are in the possession, custody, or control of the Subdivision HOA association.

The inspection of books and records shall take place at a mutually agreed on time during normal business hours.

If the requesting party wants to obtain copies of any of the inspected books and records, at the inspection the requesting party must identify the books and records for the Subdivision HOA to copy and forward to the requesting party.

Association Records: Production of Identified Records

If copies of identified books and records are requested with or without an advance inspection, within 10 business days from the date the Subdivision HOA receives the written request, it must, to the extent those books and records are in its possession, custody, or control, produce the requested books and records for the requesting party.

If the Subdivision HOA is unable to produce the books or records requested within such 10 business days, it must provide to the requesting party a written notice that:

1. informs the requesting party that the Subdivision HOA is unable to produce the requested information on or before the 10th business day after the date it received the request; and
2. states a date by which the information will be sent or made available for inspection to the requesting party, which may not be more than 15 business days after the date of such notice.

A property owners' association may produce books and records requested under this section in hard copy, electronic, or other format reasonably available to the association.

Association Records: Records Production and Copying Policy

The Board of Directors must adopt a “Records Production and Copying” policy that prescribes the costs the Subdivision HOA will charge for the compilation, production, and reproduction of information requested under the Open HOA Records law.

A Records Production and Copying Policy is considered to be a Dedicatory Instrument and must be recorded in the Official Public Records of each county in which the subdivision development is located.

A Subdivision HOA may not charge a requesting party for any costs associated with the compilation, production, or reproduction of information requested unless a Records Production and Copying Policy prescribing those costs has been adopted and recorded by the Subdivision HOA in the Official Public Records.

Association Records: Allowable Charges Under Policy

The prescribed charges for the compilation, production, and reproduction of requested information may include all reasonable costs of materials, labor, and overhead but may not exceed costs that would be applicable for an item under Title 1, Section 70.3 of the Texas Administrative Code.

Allowable charges:

Charge for standard paper copy (each side of a sheet that has recorded information is considered a separate page): \$0.10 per page

Charge for labor to process a request for information (includes the actual time to locate, compile, manipulate data, and reproduce the requested information): . . . \$15.00 per hour

A requesting party is responsible for costs related to the compilation, production, and reproduction of the requested information in the amounts prescribed by the Records Production and Copying Policy.

Association Records: Advance Payment of Charges

The Subdivision HOA may require advance payment of the estimated costs of compilation, production, and reproduction of the requested information, which must be estimated by using the amounts prescribed by the Records Production and Copying Policy.

If the estimated costs of compilation, production, and reproduction of the requested information are lesser or greater than the actual costs, the Subdivision HOA must submit a final invoice to the requesting lot owner on or before the 30th business day after the date the information is delivered to the lot owner or his or her designated representative.

Association Records: Estimate v. Actual Charges

If the estimated costs exceeded the final invoice amount, the lot owner is entitled to a refund, which must be issued to the lot owner no later than the 30th business day after the date the invoice is sent to the lot owner.

If the final invoice exceeds the estimated cost and additional amounts due from the lot owner, the additional amounts must be reimbursed to the Subdivision HOA no later than the 30th business day after the date the invoice is sent to the lot owner.

If a lot owner does not timely reimburse the Subdivision HOA the additional amounts due, such amounts may be added to the lot owner's account as an assessment.

Association Records: Protection of Individual Owner Records

Unless such information is included within meeting minutes of the Board or Membership, a Subdivision HOA is not required to release or allow inspection of any books or records that identify:

1. the restrictive covenant violation history of an individual lot owner;
2. a lot owner's personal financial information, including records of payment or nonpayment of amounts due the Subdivision HOA;
3. a lot owner's contact information, other than his or her address; or
4. information related to an employee of the Subdivision HOA, including personnel files.

Information can be released, however, in an aggregate or summary manner that would not identify an individual lot owner.

Association Records: Production of Individual Owner Records

Restricted information concerning an individual lot owner, however, must be released or made available for inspection if:

1. the express written approval of the lot owner whose records are the subject of the request for inspection is provided to the Subdivision HOA; or
2. a court orders the release of the books and records or orders that the books and records be made available for inspection.

Association Records: Document Retention Policy

All Subdivision HOAs consisting of at least 15 lots are required to adopt and comply with a “Document Retention” policy.

The Document Retention Policy must include, at a minimum, the following requirements:

1. Certificates of Formation (aka Articles of Incorporation), Bylaws, Restrictive Covenants, and all amendments to such documents must be retained permanently;
2. financial books and records must be retained for 7 years;
3. account records of current lot owners must be retained for 5 years;
4. contracts with a term of one year or more must be retained for 4 years after the expiration of the contract term;
5. minutes of Subdivision HOA’s Board Meetings and Membership Meetings must be retained for 7 years; and
6. tax returns and audit records for the Subdivision HOA must be retained for 7 years.

Association Records: Remedy For Failure to Produce Records

If a lot owner is denied access to or copies of a Subdivision HOA's books or records to which he or she is entitled to, such lot owner may file a lawsuit against the Subdivision HOA in the local Justice of the Peace Court ("Justice Court").

At least 10 business days before a lot owner can file a lawsuit against a Subdivision HOA for denial of access to books and records, such lot owner must send the Subdivision HOA a written notice of his or her intent to file a lawsuit for denial of access to books and records.

Such notice must:

1. describe with sufficient detail the books and records being requested; and
2. be sent by certified mail or registered mail to the mailing address of the Subdivision HOA or authorized representative as reflected on the most current management certificate.

Association Records: Remedy For Failure to Produce Records

If the Justice Court finds that the lot owner is entitled to access to or copies of the records, it may grant one or more of the following remedies to the lot owner:

1. a judgment ordering the Subdivision HOA to release or allow access to the books or records;
2. a judgment against the Subdivision HOA for court costs and attorney's fees incurred in connection with prosecuting such lawsuit; or
3. a judgment authorizing the lot owner or the owner's assignee to deduct the amounts awarded for court costs and attorneys fees from any future regular or special assessments payable to the Subdivision HOA.

If the Subdivision HOA prevails in such lawsuit, it is entitled to a judgment for court costs and attorney's fees incurred by it in connection with defending such lawsuit.

X.

RESALE CERTIFICATES

Resale Certificate: Notice to Buyer

The newly modified Section 5.012 now requires prospective purchasers of residential property to sign a “seller’s disclosure” that notifies them that they are entitled to receive a copy of all Dedicatory Instruments applicable to the prospective lot being sold and a Resale Certificate.

Section 5.012 applies to both Subdivision and Condominium Developments.

This new law takes effect January 1, 2012.

Resale Certificate: Obligation to Produce Resale Certificate

Upon request from a purchaser for a resale certificate, a HOA or its agent (ie., property manager) shall promptly deliver a copy of the most recent resale certificate issued for the property under Chapter 207 so long as the resale certificate was prepared not earlier than the 60th day before the date the resale certificate is delivered to the purchaser and reflects any special assessments approved before and due after the resale certificate is delivered.

If a resale certificate that meets such requirements has not been issued for the property, the seller shall request the HOA or its agent to issue a resale certificate under Chapter 207, and the HOA or its agent must promptly prepare and deliver a copy of the resale certificate to the purchaser.

Section 5.012 applies to both Subdivision and Condominium Developments, but it references only Chapter 207, which applies to Subdivision Developments only.

Resale Certificate: Payment For Resale Certificate

The purchaser is required to pay the fee to the HOA or its agent for issuing the resale certificate unless otherwise agreed by the purchaser and seller of the property.

The HOA may require payment before beginning the process of providing a resale certificate requested under Chapter 207 but may not process a payment for a resale certificate until the certificate is available for delivery.

The HOA may not charge a fee, however, if the certificate is not provided in the time prescribed by Section 207.003(a).

Section 5.012 applies to both Subdivision and Condominium Developments, but it references only Chapter 207, which applies to Subdivision Developments only.

Resale Certificate: Purchaser Request for Resale Certificate

Section 207.003 has been modified to vest purchasers and purchasers' agents with authority to order production of a Resale Certificate from a Subdivision HOA.

If a Subdivision HOA receives a request from a purported purchaser of property in a Subdivision Development or the purchaser's agent, the Subdivision HOA may require the purchaser or purchaser's agent to provide it with reasonable evidence that the purchaser has a contractual or other right to acquire property in the Subdivision Development before it begins the process of preparing a Resale Certificate or delivers the items required under Chapter 207 to the purchaser.

Resale Certificate: Production of a Resale Certificate

Within 10 business days from the date a written request for “Subdivision Information” is received from an owner or the owner's agent, a purchaser of property in a subdivision or the purchaser's agent, or a title insurance company or its agent acting on behalf of the owner or purchaser and the evidence of the requestor's authority to order a resale certificate is received and verified, the Subdivision HOA must deliver to the requesting party:

1. a current copy of the restrictions applicable to the Subdivision Development;
2. a current copy of the Bylaws and rules of the Subdivision HOA; and
3. a Resale Certificate prepared not earlier than the 60th day before the date the certificate is delivered.

The information required to be in a Resale Certificate has also been modified to require the disclosure of any applicable transfer fees.

XI.
TRANSFER FEES

Transfer Fees

New Section 5.202 prohibits the enforcement of a “Private Transfer Fee Obligation” against a subsequent owner or subsequent purchaser of an interest in real property created on or after June 17, 2011.

In short, Private Transfer Fee Obligations created after June 17, 2011 are unenforceable and void.

What is a Private Transfer Fee Obligation?

“Private Transfer Fee” means an amount of money, regardless of the method of determining the amount, that is payable on the transfer of an interest in real property or payable for a right to make or accept a transfer.

“Private Transfer Fee Obligation” means an obligation to pay a private transfer fee created under:

1. a recorded Declaration or other covenant;
2. a recorded contractual agreement or promise; or
3. an unrecorded contractual agreement or promise.

Transfer Fees

Section 5.202, however, excludes from the definition of “Private Transfer Fee Obligations” any dues, fees, charges, assessments, etc. . . that are:

1. required under a Declaration or other covenant or under law (including a fee or charge payable for a change of ownership entered in the records of a HOA or resale certificate issued under Section 207.003), so long as the money is paid to:
 - A. a Condominium HOA;
 - B. a Subdivision HOA; or
 - C. a property manager identified in a HOA’s Management Certificate; or
2. paid to a 501(c)(3) or 501(c)(4) organization, so long as the organization uses the payments to directly benefit the encumbered property by:
 - A. supporting or maintaining only the encumbered lot or unit;
 - B. constructing or repairing improvements only to the encumbered lot or unit; or
 - C. providing activities or infrastructure to support quality of life, including cultural, educational, charitable, recreational, environmental, and conservation activities and infrastructure, that directly benefit the encumbered lot or unit or community in which it belongs.

XII.
ASSESSMENT COLLECTION

Collection of Assessments

The effects of the 2011 Legislative Reform on collection of assessments can be further categorized.

- Mandatory Payment Plans
- Priority of Payment Schedule
- Foreclosure Procedures
- Costs of Collection

Collection of Assessments: Mandatory Payment Plans

Pursuant to the new Section 209.0062, Subdivision HOAs consisting of at least 15 lots are now required to allow lot owners to pay off delinquent amounts owed to the HOA under a payment plan.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Collection of Assessments: Mandatory Payment Plans

By January 1, 2012, Subdivision HOAs must adopt a “Payment Plan Guideline” and record a copy of it in the Official Public Records of each county in which all or a portion of the subdivision development is located.

The Payment Plan Guideline must establish reasonable guidelines by which lot owners may pay off delinquent regular or special assessments or any other amounts owed to the Subdivision HOA over a period of time.

Collection of Assessments: Mandatory Payment Plans

During the payment plan, the delinquent lot owner may not be assessed monetary penalties, but he or she may be assessed reasonable costs associated with administering the payment plan and interest.

Best Practices:

If administration costs and interest are to be imposed during a payment plan, then the amount of such costs and interest should be expressly stated in the Payment Plan Guideline.

Collection of Assessments: Mandatory Payment Plans

The Payment Plan Guideline can provide for multiple payment plan options, and the terms of such payment plans are generally left to the discretion of the HOA.

The only requirements are that:

1. A payment plan cannot be shorter than 3 months or longer than 18 months; and
2. A payment plan cannot require a lot owner to pay monetary penalties.

Collection of Assessments: Mandatory Payment Plans

A Subdivision HOA may only restrict eligibility to entitlement of a payment plan if a lot owner has previously failed to honor the terms of a prior payment plan and it has been less than two years since such lot owner's default under the prior payment plan.

Best Practices:

If a Subdivision HOA wants to impose such eligibility restriction, it should be expressly stated in the Payment Plan Guideline.

Collection of Assessments: Priority of Payment Schedule

The new Section 209.0063 establishes a "Priority of Payment" schedule, which dictates the order by which Subdivision HOAs must apply lot owners' payments.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Collection of Assessments: Priority of Payment Schedule

A payment received by a Subdivision HOA from a lot owner must now be applied to the lot owner's account in the following order of priority:

1. any delinquent assessment;
2. any current assessment;
3. any attorney's fees or third party collection costs incurred by the Subdivision HOA associated solely with assessments or any other charge that could provide the basis for foreclosure;
4. any other attorney's fees incurred by the Subdivision HOA;
5. any fines assessed by the Subdivision HOA; and
6. any other amount owed to the Subdivision HOA.

Collection of Assessments: Priority of Payment Schedule

There is a limited exception to the mandatory priority of payment schedule.

If, at the time the Subdivision HOA receives a payment from a lot owner, such lot owner is in default under a payment plan, the Subdivision HOA is not required to apply the payment in the order of priority required by Section 209.0063.

In such circumstances, however, the Subdivision HOA is still restricted from applying any portion of the payment towards fines before any of the other categories with a higher priority.

Best Practices:

The Payment Plan Guidelines should expressly state the priority of payment schedule that will be applied in the event of a default of a payment plan by a lot owner.

Collection of Assessments: New Pre-Foreclosure Procedure

The new Section 209.0091 now requires Subdivision HOAs to provide junior “Deed of Trust” lienholders with notice of a lot owner’s delinquency and a 60-day period in which to pay such delinquency before it can foreclose its Assessment Lien.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Collection of Assessments: New Pre-Foreclosure Procedure

This new pre-foreclosure procedure only applies if there is a recorded lien against the subject Lot that evidenced by a “deed of trust” (aka “Deed of Trust Lien”) and would be considered inferior or subordinate to the Subdivision HOA’s Assessment Lien.

In such event, the Subdivision HOA must provide the junior Deed of Trust Lienholder with written notice by certified mail, return receipt requested, at the address for such lienholder stated in the recorded Deed of Trust Lien, that:

1. States the total amount of the lot owner’s delinquency; and
2. Affords such lienholder an opportunity to cure the delinquency before the 61st day after the date he or she receives the notice of the lot owner’s delinquency.

Collection of Assessments: Notice of Assessment Lien

New Section 209.094 makes clear that a “lien, lien affidavit, or other instrument evidencing the nonpayment of assessments or other charges owed to a property owners' association and filed in the official public records of a county” is a legal instrument affecting title to real property and must be drafted by an attorney.

Section 209.094 applies only to Subdivision HOAs and there is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Best Practices:

There is no discernable difference between assessment liens recorded by Condominium and Subdivision HOAs. So this law should be interpreted as indirectly applying to Condominium Associations as well.

Collection of Assessments: Military Servicemember Advisory

Prior to foreclosing a contractual lien, all contractual lienholders (including banks and both Condominium and Subdivision HOAs) must send the lot owner a notice of the debt with a 20-day cure period and a notice of the foreclosure sale.

Now one or both of such letters must include the following advisory of military servicemember rights:

“Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.”

This law is indirectly applicable to both Condominium and Subdivision HOAs.

This new law takes effect on September 1, 2011.

Collection of Assessments: Foreclosure of Assessment Lien

Pursuant to Section 209.0092, Subdivision HOAs are:

NOW BARRED FROM CONDUCTING NON-JUDICIAL FORECLOSURE OF ASSESSMENT LIENS WITHOUT FIRST OBTAINING A COURT ORDER.*

* That is unless the lot owner agrees in writing at the time the foreclosure is sought to waive the new “Expedited Judicial Foreclosure” requirement.

There is no similar law applicable to Condominium HOAs and Condominium HOAs may still do so.

This new law takes effect on September 1, 2011.

Collection of Assessments: Foreclosure of Assessment Lien

A Subdivision HOA may not foreclose its assessment lien unless it first obtains a court order through a new judicial procedure called an “Application For Expedited Foreclosure”.

Unfortunately, we don’t know for certain yet what those procedures are just yet because the Legislature directed the Texas Supreme Court to create the new procedures and gave them until January 1, 2012 to do so.

But the Legislature did direct to the Supreme Court to model the new procedures after the procedures established for foreclosure of home equity loans.

Collection of Assessments: Foreclosure of Assessment Lien

Briefly, those procedures are:

1. Subdivision HOA files a verified application with District Court and serves lot owner by certified and first class mail.
2. Lot owner has approximately 45 days to file a response.
3. If lot owner fails to file a response, District Court is required to issue order granting application.
4. If lot owner files a response, District Court must conduct a final hearing on the merits within 10 business days from a request for a hearing.
5. No discovery is permitted.
6. Subdivision HOA has burden of proof, which may be met by affidavits and evidence presented at the hearing.

Collection of Assessments: Foreclosure of Assessment Lien

A Subdivision HOA may not foreclose its Assessment Lien if the debt securing the lien consists solely of:

1. fines assessed by the Subdivision HOA;
2. attorney's fees incurred by the Subdivision HOA solely associated with fines assessed by it; or
3. unpaid costs associated with the compilation, production, or reproduction of requested information added to a lot owner's account as an assessment under the new Open HOA Records Law.

Collection of Assessments: Costs of Collection

The new Section 209.0064 establishes new rules concerning reimbursement of a Subdivision HOA's costs of collection and alienation of a lot owner's debt account.

There is no similar law applicable to Condominium HOAs.

This new law takes effect on January 1, 2012.

Collection of Assessments: Collection Agent

Section 209.0064 introduces a new term of art: “Collection Agent.”

“Collection Agent” means a debt collector, as defined by Section 803 of the Federal Fair Debt Collection Practices Act (“FDCPA”).

In most cases, management companies are not considered “Debt Collectors” under the FDCPA, only debt servicers.

Attorneys retained to collect debt on behalf of HOAs, however, are considered “Debt Collectors” under the FDCPA and constitute “Collection Agents” under Section 209.0064.

Collection of Assessments: Costs of Collection Agent

Under Section 209.0064, a Subdivision HOA cannot hold a lot owner owner liable for fees of a Collection Agent retained by the Subdivision HOA unless the Subdivision HOA first provides written notice to the lot owner by certified mail, return receipt requested, that:

1. specifies each delinquent amount and the total amount of the payment required to make the account current;
2. describes the options the lot owner has to avoid having the account turned over to a Collection Agent, including information regarding availability of a payment plan under the Subdivision HOA's Payment Plan Guidelines; and
3. provides a period of at least 30 days for the lot owner to cure the delinquency before further collection action is taken.

Collection of Assessments: Costs of Collection Agent

In addition, a lot owner is not liable for fees of a Collection Agent retained by Subdivision HOA if:

1. the obligation for payment by the Subdivision HOA to its Collection Agent for fees or costs associated with a collection action is in any way dependent or contingent on amounts recovered from the lot owner; or
2. the payment agreement between the Subdivision HOA and its Collection Agent does not require payment by the Subdivision HOA of all fees to a Collection Agent for the action undertaken by the Collection Agent.

Collection of Assessments: Alienation of Homeowner Debt Account

Section 209.0064 imposes two new additional rules related to alienation of a lot owner's debt account:

1. The agreement between a Subdivision HOA and its Collection Agent may not contain any provision prohibiting a lot owner from contacting the Subdivision HOA's Board of Directors or property manager regarding the lot owner's delinquency.
2. A Subdivision HOA is prohibited from selling or otherwise transferring any interest in the Subdivision HOA's accounts receivables to a third-party, unless it is as collateral for a loan.

XIII.
RESTRICTIVE COVENANT
ENFORCEMENT

Restrictive Covenant Enforcement: Protection of Military Servicemembers

The newly modified Section 209.006 now requires additional advisories to lot owners before the Subdivision HOA can suspend a lot owner's right to use common areas, charge a lot owner for property damage, fine a lot owner or sue a lot owner to enforce a restrictive covenant.

In addition to advising a lot owner of a his or her right to request a hearing in front of the Board, a notice under Section 209.006(b) must also advise the lot owner that he or she **may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act (50 U.S.C. app. Section 501 et seq.), if the lot owner is serving on active military duty.**

Restrictive Covenant Enforcement: Flags and Flag Poles

Under the new Section 202.011, a HOA may not, except as provided in Section 202.011, adopt or enforce a Dedicatory Instrument provision that prohibits, restricts, or has the effect of prohibiting or restricting an owner from the display of:

1. the flag of the United States of America;
2. the flag of the State of Texas; or
3. an official or replica flag of any branch of the United States armed forces.

Section 202.011 applies to both Condominium and Subdivision Developments.

This new law took effect on June 20, 2011.

Restrictive Covenant Enforcement: Flags and Flag Poles

A HOA, however, may adopt or enforce reasonable Dedicatory Instrument provisions that require:

1. the flag of the United States be displayed in accordance with 4 U.S.C. Sections 5-10;
2. the flag of the State of Texas be displayed in accordance with Chapter 3100, Government Code;
3. a flagpole attached to a dwelling or a freestanding flagpole be constructed of permanent, long-lasting materials, with a finish appropriate to the materials used in the construction of the flagpole and harmonious with the dwelling;
4. the display of a flag, or the location and construction of the supporting flagpole, to comply with applicable zoning ordinances, easements, and setbacks of record; and
5. a displayed flag and the flagpole on which it is flown be maintained in good condition and that any deteriorated flag or deteriorated or structurally unsafe flagpole be repaired, replaced, or removed.

Restrictive Covenant Enforcement: Flags and Flag Poles

A HOA may also adopt or enforce reasonable Dedicatory Instrument provisions:

1. that regulate the size, number, and location of flagpoles on which flags are displayed, except that the regulation may not prevent the installation or erection of at least one flagpole per property that is not more than 20 feet in height;
2. that govern the size of a displayed flag;
3. that regulate the size, location, and intensity of any lights used to illuminate a displayed flag;
4. that impose reasonable restrictions to abate noise caused by an external halyard of a flagpole; or
5. that prohibit a property owner from locating a displayed flag or flagpole on property that is either: (A) owned or maintained by the HOA; or (B) owned in common by the members of the HOA.

Restrictive Covenant Enforcement: Rain Barrels

Section 202.007(d) has been modified to require a HOA to permit a rain barrel or rainwater harvesting system to be installed in or on property unless:

1. the property is owned by the HOA;
2. the property is owned in common by the members of the HOA;
3. the property is located between the front of the lot owner's home and an adjoining or adjacent street;
4. the barrel or system is of a color other than a color consistent with the color scheme of the property owner's home; or
5. the barrel or system displays any language or other content that is not typically displayed by such a barrel or system as it is manufactured.

Restrictive Covenant Enforcement: Rain Barrels

A HOA, however, may adopt or enforce reasonable Dedicatory Instrument provisions that regulate the size, type, and shielding of, and the materials used in the construction of, a rain barrel, rainwater harvesting device, or other appurtenance that is located on the side of a house or at any other location that is visible from a street, another lot, or a common area if:

1. the restriction does not prohibit the economic installation of the device or appurtenance on the property owner's property; and
2. there is a reasonably sufficient area on the property owner's property in which to install the device or appurtenance.

Restrictive Covenant Enforcement: Religious Displays

Pursuant to new Section 202.018, all HOAs are now barred from enforcing or adopting a restrictive covenant that prohibits a property owner or resident from displaying or affixing on the front entry of the property owner's or resident's dwelling one or more religious items, the display of which is motivated by the property owner's or resident's sincere religious belief.

This law is intended to protect the display of mizuzahs.

A mezuzah is prayer scroll enclosed within a case that is affixed to the doorframe of Jewish homes.

Section 202.018 applies to both Condominium and Subdivision Developments.

This new law took effect on June 20, 2011.



Restrictive Covenant Enforcement: Religious Displays

A HOA may still, however, enforce or adopt restrictive covenants that, to the extent allowed by the US and Texas Constitutions, prohibit the display or affixing of a religious item on the entry to a property owner's or resident's dwelling that:

1. threatens the public health or safety;
2. violates a law;
3. contains language, graphics, or any display that is patently offensive to a passerby;
4. is in a location other than the entry door or door frame or extends past the outer edge of the door frame of the owner's or resident's dwelling; or
5. individually or in combination with each other religious item displayed or affixed on the entry door or door frame has a total size of greater than 25 square inches.

Section 202.018 also authorizes a HOA to remove an item displayed in violation of any such permitted restrictive covenant permitted.

Restrictive Covenant Enforcement: Religious Displays

Section 202.018 only protects the display of religious items.

It does not authorize use of material or color for an entry door or door frame of the property owner's or resident's dwelling that is prohibited by the applicable restrictive covenants.

It also does not authorize the property owner or resident to make an alteration to the entry door or door frame that is not allowed by the applicable restrictive covenants.

Restrictive Covenant Enforcement: Protection of Solar Panels

Pursuant to the new Section 202.010, all HOAs are now prohibited from adopting or enforcing a provision in a Declaration that prohibits or restricts a property owner from installing a Solar Energy Device:

1. on the roof of the home or of another structure allowed on his or her Lot or Unit; or
2. in a fenced yard or patio owned and maintained by the Homeowner.

*provided the installation of such solar energy device:

1. conforms to certain installation requirements;
2. is approved by the Architectural Committee for the HOA; and
3. it is post-“Development Period” (During the “Development Period”, the Declarant may still prohibit or restrict a property owner from installing a solar energy device).

A provision of a Declaration that violates Section 202.010 is considered void and unenforceable.

Restrictive Covenant Enforcement: Non-Protected Solar Panels

A HOA, however, may still adopt or enforce a restrictive covenant provision that prohibits a solar energy device that:

1. a court has determined is a threat to the public health or safety or a violation of law;
2. is located on common area or common element;
3. is located in an area on the property owner's property other than on the roof of the home or of another structure allowed under the applicable Dedicatory Instruments or in a fenced yard or patio owned and maintained by the property owner.

Restrictive Covenant Enforcement: Solar Panel Installation Requirements

If a solar energy device is mounted on the roof, it must be installed in a manner that:

1. does not extend higher than or beyond the roofline;
2. is not located in an area other than an area designated by the property owners' association (unless the alternate location increases the estimated annual energy production of the device by more than 10 percent);
3. conforms to the slope of the roof and has a top edge that is parallel to the roofline;
and
4. has a frame, a support bracket, or visible piping or wiring that is silver, bronze, or black tone in color.

If a solar energy device is located in a fenced yard or patio, it cannot be taller than the fence line.

Restrictive Covenant Enforcement: Solar Panel Installation Requirements

In addition, no solar energy device may be installed:

1. in a manner that voids any material warranties; or
2. without prior approval of the Architectural Committee.

The Architectural Committee, however, may not withhold approval for installation of a solar energy device if all of the installation requirements are complied with, unless it determines in writing that placement of the device as proposed by the property owner constitutes a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.

For purposes of making a determination under this subsection, the written approval of the proposed placement of the device by all property owners of adjoining property constitutes prima facie evidence that such a substantial interference condition does not exist.

Section 202.010 applies to both Condominium and Subdivision Developments.

This new law took effect on June 20, 2011.

Restrictive Covenant Enforcement: Roof Shingles

Pursuant to new Section 202.011, all HOAs are now restricted from enforcing restrictions that would prohibit property owners from installing weather-resistant or energy-generating roof shingles.

Section 202.011 applies to both Condominium and Subdivision Developments.

This new law took effect on June 20, 2011.

Restrictive Covenant Enforcement: Roof Shingles

Under 202.011, a HOA may not adopt or enforce a provision in a Declaration that prohibits or restricts a property owner, who is otherwise authorized to install shingles on the roof of his or her home, from installing shingles that:

1. are designed primarily to:
 - A. be wind and hail resistant;
 - B. provide heating and cooling efficiencies greater than those provided by customary composite shingles; or
 - C. provide solar generation capabilities; and
2. when installed:
 - A. resemble the shingles used or otherwise authorized for use on property in the subdivision;
 - B. are more durable than and are of equal or superior quality to the shingles required under the Declaration; and
 - C. match the aesthetics of the property surrounding the property owner's property.

XIV.

Additional Powers Of HOA

Additional Powers of HOA: Installation of Speed-Feedback Signs

Pursuant to the new Section 430.002 of the Transportation Code, a “Property Owners Association” may install a speed-feedback sign on a road, highway, or street in its community.

A speed-feedback sign is a sign equipped with a radar device that displays a vehicle’s speed as it approaches the sign.

Section 430.002 incorporates the definition of “Property Owners Association” from Chapter 204 of the Property Code which applies only to Subdivision HOAs in Harris Counties and its adjacent counties.

This new law took effect on June 20, 2011.



Additional Powers of HOA: Installation of Speed Feedback Signs

Under Section 430.002, the “Property Owners Association” must:

1. obtain the consent of the governmental agency that maintains the road, highway, or street for the placement of the speed-feedback sign; and
2. pay for the installation of the speed-feedback sign.

The Property Owners Association is also responsible for the maintenance of the speed-feedback sign.

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