



June 20, 2011

To: All POA Clients & Managers

Re: *New 2011 POA Reform Laws for Texas (Single-Family Subdivisions Only)*

Dear POA Clients:

Our legislative session is at an end, and there is a plethora of new laws that affect property owners associations. First and foremost (as this is always the first question asked), POAs did not lose their ability to foreclose. As it happened, the much-touted POA "omnibus" bill was chopped up into tiny pieces and tacked onto several other bills, which resulted in a majority of the measures passing in a piecemeal fashion. We have attempted to summarize the major highlights of the new legislation below; however, this is in no way an exhaustive review. Most of these new statutes go into effect September 1, 2011, although some are not effective until January 1, 2012. The full text of the various bills can be found online at [www.capitol.state.tx.us](http://www.capitol.state.tx.us), and I have included the bill numbers below.

**Assessment Collection (HB 1228, HB 2761, SB 101)**

- ***Payment Plans Required.*** POAs that have more than 14 lots are required to adopt and record a policy allowing owners to pay their delinquent balances in no less than three, nor more than 18 installments. Interest and reasonable costs associated with administering the plan may be charged, but nothing else. The POA does not have to enter into a payment plan with an owner who defaulted on a previous plan during the last two years.
- ***Application of Payments.*** Payments received from an owner must be applied to the owner's debt in the following order: (1) delinquent assessments, (2) current assessments, (3) attorney's fees for assessment collection efforts only (not for deed restriction enforcement attorney's fees); (4) all other attorney's fees; (5) fines; and (6) any other amounts. Exception: If the owner is in default under a payment plan, the POA is not required to apply the payment in the order specified (but fines still cannot be given priority).
- ***Notice Required for Assessment Collection.*** Before a POA can hold an owner responsible for legal fees (or fees of any third party agent), the POA must send a 30-day notice by certified mail that specifies each delinquent amount and the amount of payment required to bring the account current. This notice must also describe the options available to the owner to avoid the legal (or other third party agent) fees, including information regarding a payment plan.

- ***No More Contingent Fee Arrangements.*** An owner is not liable for fees of a collection agent or attorney if the obligation for payment by the association to the attorney or agent is in any way dependent or contingent on amounts recovered or if the agreement between the association and the association's agent or attorney does not require payment by the association of all fees for the action undertaken. (Note: Daughtry & Jordan, P.C. does not currently have any of these types of agreements with its clients).
- ***No Non-Judicial Foreclosure.*** Even if the POA's governing documents provide for it, single family residential subdivisions may not use non-judicial foreclosure. They may, however, use an "expedited" judicial foreclosure process, which will likely be similar to foreclosures on home equity loans. The procedure for that process has not yet been determined.
- ***Lien Filing.*** A lien or lien affidavit is a legal instrument affecting title to real property. Accordingly, the preparation and filing of a lien or notice of unpaid assessments by a non-attorney is most likely to be considered the unauthorized practice of law.

#### **POA Transparency & Accountability (HB 1821, HB 2761)**

- ***Publication of Dedicatory Instruments.*** In addition to being recorded with the County, any POA with either a website or a managing agent with a website must make its dedicatory instruments (Bylaws, guidelines, etc.) available to owners online.
- ***Records Production & Copying Policy.*** Numerous detailed additions were made to Chapter 209 of the Property Code which specify the required procedure for owner access to books and records of the Association. In addition to following the statute, the POA Board must adopt a policy that prescribes the costs that the association will charge for the compilation, production and reproduction of information requested. This policy must be recorded as a dedicatory instrument. If it is not recorded, then the POA may not charge the owner. Additionally, unless express written approval is given by the owner in question or a court orders it, a POA is not required to release or allow inspection of any books or records regarding an individual owner's assessment account history or individual violation history, contact information (other than address) or other personal information. (Author's note: Please read Section 209.008 carefully when dealing with records requests as it is much too lengthy for this summary.)
- ***Open Board Meetings.*** The new Section 209.0051 requires that board meetings must be open to all owners, subject to the right of the board to adjourn to closed executive session to consider actions involving personnel, pending or threatened litigation, contract negotiations, enforcement actions, confidential communications with POA attorney, matters involving privacy of individual owners or matters that are to remain confidential by request of the affected parties and agreement of the board. Following the executive session, any decision made must be summarized orally and placed in the minutes in general terms. The oral summary must include a general explanation of any expenditures approved. Notice of the board meetings can be posted on the POA's website, among several other options listed, as long as at least 72 hours' notice is given. This new statute

also allows for electronic meetings and includes a laundry list of actions which cannot be taken outside of a properly noticed meeting.

### **Elections, Voting & Board Qualifications (HB 2761, SB 472)**

- ***Elections.*** Written notice of any election or vote must be given between 10 and 60 days before the vote, regardless of what the POA's bylaws say. An owner may, not later than 15 days after the vote, demand a recount in writing. However, the owner requesting the recount must bear the expense of hiring a third party to perform the recount. This third party must not be a member of the association or related to a member of the association, and must be a current or former county judge, elections administrator, J.P., county registrar or other person agreed upon by the POA and the requesting owner. If the recount changes the result, the POA must reimburse the owner and notify the membership; however, any actions taken by the board in the interim is not affected. Also, there must be an annual meeting. If one is not called, a committee of owners can call a special meeting to elect directors. A candidate or relative of a candidate may not tabulate or otherwise be given access to the ballots.
- ***No Secret Ballots.*** All votes cast by the membership must be in writing and signed by the member (except in non-contested races), and can be electronic. The various acceptable means of electronic voting are listed in the statute.
- ***Everyone Gets to Vote.*** All owners get to vote in director elections or on any matter concerning the "rights or responsibilities" of the owners. Any provisions in the POA's governing documents which state that owners cannot vote if they have delinquent assessments or outstanding deed restriction violations are voided by the statute.
- ***Voting & Quorum.*** Votes may be cast in person, by proxy, by absentee ballot, by electronic ballot, or by any method of representative of delegated voting provided by the governing documents. There are many new requirements for what the ballots must say and the statute supersedes the governing documents. The new Section 209.00592 is very detailed and will go into effect beginning January 1, 2012. Please review carefully as it will change all annual meeting procedures for next year.
- ***Director Qualifications.*** When a director's term expires, he must stand for re-election. Vacancies may be filled by appointment, but only for the remainder of the term. Any owner may run for a director position, even if they are delinquent or have outstanding deed restriction violations. They can only be rendered permanently ineligible (or automatically removed if already seated) if there is documented evidence that the board member is been convicted of a felony or crime involving moral turpitude.
- ***Developer Control Limited.*** Regardless of the terms in the Declaration, when the developer sells 75% of the lots, then one-third of the board must be elected by owners (not Declarant). The declarant control period is limited to 10 years unless the declaration states the maximum number of lots to be created.

**Miscellaneous but Noteworthy**

- ***Resale Certificates & Transfer Fees (HB 1821, HB 8)***. Statute addresses cost of resale certificate and disclosure of transfer fees. POA has more time to issue resale certificate and the right to collect fees from home purchasers.
- ***Use of Property (HB 2779, HB 3391, HB 1279, HB 362, HB 1737, SB 498)*** These various new statutes address flags, rain barrels, display of religious items, roof shingles, solar energy devices, speed feedback signs and white tail deer.
- ***Owners in the Military (HB 1127)*** Additional notice requirements apply to owners who are serving on active military duty. The certified letter must contain specific language that the owner may have special rights under federal law. Please see the statute for specific language.

**We will need to prepare and record a payment plan policy and a records retention and production policy for all clients in order to comply with the new statutes. We will contact you regarding that effort.**

This letter is intended as a general overview/update of the events in the last legislative session. If you have questions regarding how any of these new laws will affect your association specifically, please contact us.

Very truly yours,

**Daughtry & Jordan, P.C.**



Trisha Taylor Farine

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