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Leader Summary of Legislation Affecting Non-Condo HOAs

Voting

(SB 472 – effective September 1, 2011)

- Owners may vote in person, by proxy, electronically, or via absentee ballot.
- All ballots must be in writing and signed by the owner casting the vote (i.e., no secret ballots), except in uncontested races. An electronic ballot is considered in writing and signed by the owner casting the electronic vote.
- An owner is at all times permitted to vote for Board positions and on issues affecting an owner's rights and responsibilities and may not be disqualified for any reason, including assessment delinquency.
- An owner may not be disqualified for a board election for any reason, except if the owner has been convicted of a felony or crime involving "moral turpitude".
- Except during a recount (discussed below), a person (and the person's relatives) running for election or otherwise subject of a vote is not permitted to access ballots.

Declaration Amendments

(SB 472 – effective September 1, 2011)

- Contrary provisions in the declaration notwithstanding and except during declarant control, a declaration may be amended by 67% of all votes allocated to owners, unless the declaration provides for a lower percentage.

Assessment Payment Plans

(HB 1228 – effective January 1, 2012)

- It is now mandatory for any HOA with more than 14 lots to offer a payment plan. The plan must be for a minimum term of 3 months and no longer than 18 months.
- HOAs must adopt a reasonable payment plan and must record the policy in the property records.
- If an owner has defaulted on a previous payment plan in the last 2 years, the HOA is not required to offer another payment plan to the owner.

Application of HOA Payments

(HB 1228 – effective January 1, 2012)

- An HOA must apply an owner's payments in the following order: (1) delinquent assessments; (2) current assessments; (3) attorney fees and collection costs associated with delinquent assessments; (4) other attorney fees; (5) fines; and (6) any other amounts.

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- If an owner is in default under a payment plan at the time the owner submits a payment, the HOA does not have to follow the priority of payments schedule.
- Fines can never be given priority over any other amount owed.

Third-Party Collections

(HB 1228 – effective January 1, 2012)

- If the HOA uses a collection agent and the collection agent's compensation is dependent on the amount recovered, or of the agreement between the HOA and the collection agent fails to require that the HOA pay the agent's fee, the owner is not liable for the fees incurred by the collection agent. In essence, contingent fee arrangements between an HOA and a collection agent are severely constrained, and probably not economically feasible.
- The HOA may not turn over an owner's account to a third-party "debt collector" without sending a 30-day notice via certified mail to a delinquent owner which notifies the owner of both the delinquency and the option to enter into a payment plan.
- The HOA may not sell or transfer an interest in the HOA's accounts other than as collateral for a loan.
- An assessment lien or other notice of non-payment filed in the public records is a legal instrument affecting title to real property. Hence, only licensed attorneys may file these instruments.

Elimination of Non-Judicial Foreclosure

(HB 1228 – effective January 1, 2012)

- Unless otherwise agreed to by an owner, all HOA assessment lien foreclosures are now required to go through an expedited judicial foreclosure process wherein a court must issue an order granting the right to foreclose.
- Approval by 67% of the votes in an HOA may either add or remove the foreclosure provisions in the governing documents. Owners representing at least 10% of all votes in the HOA may request a special meeting to vote on the foreclosure provisions.

Resale Certificates

(HB 1821 – effective January 1, 2012)

- Resale certificates cannot be prepared more than 60 days before the date of delivery and may be requested by either: (1) buyer; (2) seller; (3) either the buyer's or the seller's agent; or (4) the title company.
- An HOA may require a buyer or buyer's agent to provide evidence of the purchase contract or evidence that the buyer otherwise has a right to acquire the property.

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- An HOA must include a statement of any and all fees due upon sale, including the amount and description of each fee and to whom the fee is owed.
- Although an HOA may require upfront payment of any fee to initiate the resale certificate process, an HOA is not permitted to process such payment until the resale certificate is issued.

Online Posting of Documents
(HB 1821 – effective January 1, 2012)

- If either an HOA or its management company maintains an HOA website, all governing documents must be posted online, including the declaration, articles of incorporation/certificate of formation, bylaws, rules, polices, etc.

Association Records
(HB 2761 – effective January 1, 2012)

- By submitting a written request via certified mail to an HOA's mailing address, or authorized representative listed in the management certificate, an owner is entitled the access HOA records. The owner must list the records requested and whether the owner desires to inspect, or copy, the records.
- Within 10 business days from receipt of request, the HOA must either: (1) provide the copies to the owner; (2) provide available inspection dates; or (3) provide written notice that the HOA cannot produce the documents within the 10 days along with a date within an additional 15 days on which the records may either be inspected or by which the copies will be sent to the owner.
- Owners must pay for the costs associated with the inspection or copying of the records; however, copying costs may not exceed \$0.10 per copy.
- An HOA must adopt and record a record inspection and copying policy, which includes any fee schedule for copying costs as calculated pursuant to the Texas Administrative Code Section. An owner may be required to pay such fees up front to the HOA prior to copying.
- Certain HOA records may be kept confidential (such as personnel files, owner account or other personal information, except addresses, etc.) unless the owner provides a court order or written authorization from the person whose records are sought. An owner is entitled to JP Court remedies for denial of access to HOA records.
- An HOA with more than 14 lots must also adopt and record a record retention policy requiring the following retention of records: (1) Governing documents (no time limitation); (2) owner account information (5 yrs); (3) Board and annual/special meeting minutes (7 yrs); (4) tax return and HOA audits (7 yrs); (5) contracts for one year or more (4 yrs after the contract).

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Board Meetings

(HB 2761 – effective January 1, 2012)

- All Board meetings must be open to members with some exceptions during developer control and for matters discussed in executive session.
- An HOA Board may convene in executive session and exclude members to discuss: (1) personnel matters; (2) attorney-client privileged communications; (3) litigation; (4) private owner information or matters involving an owner's request for confidentiality; (5) contract deliberations; or (6) enforcement actions.
- Any decisions made in executive session must be generally stated and noted in the meeting minutes. Minutes of all Board meetings must be kept in writing and made accessible to owners once approved by the Board.
- Notice of all Board meetings must be mailed to owners 10 days in advance of the meeting or by posting the notice in a conspicuous spot in the community (e.g., pool, clubhouse, HOA website) at least 72 hours prior to the meeting. If the notice is posted, it must also be sent via email to any owner who has provided the owner's email address to the HOA.
- Notice is not required if the board meets by phone, email or another alternative manner to consider "routine and administrative matters" or in the case of an emergency, but must notice must be provided if the Board will consider or vote on: (1) fines; (2) foreclosure or enforcement actions; (3) damage assessments; (4) assessment increases (including special assessments); (5) ACC appeals; or (6) owner suspension of privileges. Any Board action taken without prior owner notice must be summarized in the next Board meeting and included in the minutes.

Elections and Voting

(HB 2761 – effective January 1, 2012)

- Regardless of any contrary provision in the governing documents, an HOA must provide at least 10 days advance notice of any association election or vote.
- An owner is at all times permitted to vote and may not be disqualified for any reason, including delinquent assessments.
- An owner may not be disqualified for a board election for any reason, except if the owner has been convicted of a felony or crime involving "moral turpitude." Exceptions apply to during declarant control and for communities utilizing the representative system of voting for Board members.

Vote Recounts

(HB 2761 – effective January 1, 2012)

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- If, within 15 days of an election, any owner requests a recount of an election vote in writing via certified mail, the HOA must conduct a recount.
- An owner requesting a recount is responsible for all associated costs, including the costs of a neutral third party to conduct the recount unless the recount changes the election results.
- There are specific requirements on who may conduct a recount. In general, unless the requesting party and HOA agree otherwise, the party conducting the recount cannot be a member of the HOA, a Board member, or a relative of such person, and must be a county judge, county elections administrator, justice of the peace, or county voter registrar.
- Recounts must be conducted within 30 days from the date of the request; however, the current Board may act on behalf of the HOA during the recount.

Declarant Control Period
(HB 2761 – effective January 1, 2012)

- Contrary provisions in the declaration notwithstanding, at least $\frac{1}{3}$ of all Board members must be elected by the owners (non-declarant) no later than 120 days after 75% of the lots that may be created have been sold to non-declarant owners. If a maximum number of lots is not provided in the declaration, at least $\frac{1}{3}$ of all Board members must be elected by owners (non-declarant) on or before 10 years from the date the declaration was recorded.

Annual Meetings
(HB 2761 – effective January 1, 2012)

- The HOA is required to hold an annual meeting of the members.
- An owner may demand that a Board hold an annual meeting. If, after such demand, the Board fails to hold a meeting within 30 days after the demand, at least 3 owners may form an election committee to call an annual meeting and elect directors.

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Leader Summary of Legislation Affecting all HOAs

Religious Displays on Doors (HB1278 – effective NOW)

- The HOA must permit an owner to display religious objects on the front door or doorframe of the owner's home or unit unless the objects contain patently offensive language or symbols or the object is more than 25 square inches in size.

Transfer Fees (HB 8 – effective NOW)

- All private contractual transfer fees are now prohibited except fees payable to the HOA, a 501(c)(3) or (4) organization, or certain administrative or transfer fees payable to a management company.

Flags and Flagpoles (HB 2779 – effective NOW)

- An owner may display the United States, Texas and Military flags; however, the HOA may require that: (1) a flag or flagpole not be installed on common areas; (2) any permissible flag be properly displayed according to applicable requirements; (3) any freestanding flagpole or flagpole attached to a residence be constructed of durable materials; (4) the flag or flagpole comply with all setbacks, easements, and similar requirements; (5) the flag and the flagpole be kept in good condition and repair; (6) the size of a flag and the size, location and number of flagpoles be limited, as long as at least one flagpole per property is permitted with a maximum height of 20 feet.

Solar Devices/Roofing (HB 362 – effective NOW)

- Solar devices are permitted; however, the HOA may adopt regulations regarding installation. Generally, the HOA may require that: (1) the owner obtain prior approval from the HOA or the ACC prior to installation; (2) the device comply with applicable law; (3) the device not be installed on HOA property and/or common area; (4) the device be installed on the owner's roof, patio or within the owner's fenced yard; (5) the device not extend beyond the roofline; and (6) the device not be taller than the fence line.
- If a HOA has not adopted and recorded rules regulating the installation of solar devices, the owner has the right to install the device subject to existing ACC guidelines.
- An HOA must allow shingles which generate solar energy, are energy efficient or weather resistant as long as they are similar in appearance to other approved shingles, are high quality and durable and they match the aesthetics of neighboring homes.

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Rain Water Harvesting Systems
(HB 3391 – effective September 1, 2011)

- Rain water harvesting systems are permitted; however, the HOA may adopt regulations regarding installation. Generally, the HOA may require that: (1) the owner obtain prior approval from the HOA or the ACC prior to installation; (2) the system not be installed on HOA property and/or common area; (3) installation is prohibited between the front building line and the street; and (4) the system is the same color or consistent with the home's color scheme. In addition, the type, size, materials and shielding of the system may be regulated provided that the regulations do not limit the economic feasibility of installation.

Recordation of Governing Documents
(HB 1821 – effective January 1, 2012)

- The HOA must record all “dedicatory instruments.” Failure to record all dedicatory instruments renders such instruments unenforceable. This means all governing documents, must be recorded (declaration, articles of incorporation/certificate of formation, bylaws, rules, regulations polices, architectural guidelines, etc.)