

HOMEOWNER ASSOCIATIONS IN 2012:

An Education on Recent Changes in HOA Legislation

by Autumn Rhea Carpenter

Our nation's estimated 350,000 homeowner associations (HOAs) might not exist today if it wasn't for the U.S. Clean Water Act (CWA) of 1977. Such law required all real estate developments to detain storm water so that the water flow to neighboring properties was no greater post-development than in pre-development. Since these water detention facilities served several residences and required ongoing maintenance, real estate developers began designating such facilities as "common areas" and establishing HOAs to own and maintain them on behalf of the development.

Though initially an unintended consequence of the U.S. Clean Water Act, over time developers began using HOAs to also provide amenities and services to make their developments more marketable and desired by homebuyers, such as walking trails, golf courses, pools and tennis courts. Today, HOAs can also provide services that were once handled by local governments, including street lighting, landscaping, sidewalk maintenance and trash pick-up, and have become an integral part of most communities.

According to **Gregory Cagle** of Savrick, Schumann, Johnson, McGarr, Kaminski, & Shirley, L.L.P. and author of *Texas Homeowners Association Law: The Essential Legal Guide for Texas Homeowners Associations*

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and Homeowners, academic studies have shown that a well-run HOA has a positive effect on the market value of homes in its community. While living in an association-governed community is not for everybody, "It is often more attractive to those homeowners who are willing to forgo certain freedoms to do whatever they want to at their home in exchange for ensuring that their neighbors are equally restrained from engaging in actions that might disrupt their peaceful enjoyment of their home or negatively affect the market value of their home," said Cagle.

While all condominium developments created on or after January 1, 1984 are governed by the Texas Uniform Condominium Act (TUCA), a comprehensive statute that regulates nearly every aspect of condominium development and their HOAs prior to 2011, HOAs that oversee single-family subdivisions were subject to very few statutory regulations under Chapter

209 of the Texas Property Code (entitled "Texas Residential Property Owners Protection Act"), the statutory counterpart to TUCA for subdivision HOAs. The 2011 Texas Legislature changed that by enacting the "most significant reforms to the laws governing HOAs in the last 20 years, most of which imposed new comprehensive regulations on subdivision HOAs that are governed by Chapter 209," said Cagle.

With an estimated 4.8 million Texans living in HOA-governed subdivisions, the property rights of nearly 20 percent of Texans were affected by the laws enacted by the Texas Legislature last session. The diligent efforts of the Texas Association of REALTORS® (TAR) eventually led to the current state laws. This legislation altered how HOAs are governed, changed home associations' rights regarding penalties and foreclosures and now provides additional freedoms to property owners in using their own property.

MEETINGS, ELECTIONS AND DIRECTORS

Subdivision HOAs are now subject to newly created light versions of the open meetings and public information acts that required Board of Directors meetings to be open to owners and require owners to be provided notice of upcoming meetings, including the date, hour, place and general issues to be discussed, as well as those issues to be discussed in executive session, at the Board of Directors meeting. In addition, the HOA board must take written minutes of each regular and special meeting and provide owners access to those approved minutes.

During elections, owners may not be disqualified from voting for any reason. Secret ballots are prohibited, and any vote cast in an election or vote by an owner must be in writing and signed by the owner, unless it is an uncontested election or electronic ballot. The new laws also authorize subdivision HOAs to use absentee and electronic ballots for voting and quorum purposes if certain requirements are met.

The new laws also authorize owners to demand a recount of ballots and establish procedures for having the recount performed by independent third parties, including current or former judges or election officials.

The new laws remove any eligibility restrictions on the right of owners to run for election to the HOA board, but impose a new law that automatically disqualifies a director from service on a board if the board is presented with governmental records establishing that such director has been convicted of a felony or a crime of moral turpitude. The new laws also require directors to

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be re-elected when their term expires and restricts the circumstances when a vacancy on the board may be filled by appointment of the Board.

ASSESSMENTS, LIENS AND FORECLOSURES

HOAs with more than 14 lots must adopt and record payment plan guidelines that allow owners to payoff delinquent assessments under installment payment plans, and must apply payments received from owners to the owner's account in a specific order, beginning with delinquent and current assessments and followed by attorney's fees and fines.

The new laws impose restrictions on the ability of HOAs to hold owners liable for attorney's fees incurred by HOAs in the collection of unpaid assessments and require a new notice be sent to junior deed of trust lienholders before an HOA can foreclose its assessment lien. Before an HOA can non-judicially foreclose its assessment lien, it must now obtain a court order through a new expedited judicial process. In addition, the new laws now authorize owners to amend their governing documents to remove an HOA's right to foreclose its assessment lien by an affirmative vote from 67 percent of the owners.

DOCUMENTS AND RECORDS

Under the new laws, only governing documents that have been recorded are enforceable against owners.

Subdivision HOAs consisting of more than 14 lots must now adopt a document retention policy that provides for the retention of certain HOA records for required time periods.

In addition, subdivision HOAs are now subject to new laws that govern the rights of owners to inspect and copy HOA records and that limit how much an HOA can charge to make copies of records. If an HOA refuses to allow inspection or to provide copies of its records, an owner is now authorized to file a lawsuit in a justice court against the HOA to obtain a court order compelling the HOA to comply with the law.

HOME SALES AND REALES

The Texas Legislature also enacted new laws that significantly restrict the enforceability of most private transfer fees, but leave in place fees for the creation of resale certificates and private transfer fees paid directly to and for the benefit of HOAs. Private transfer fees are just one more obstacle that could come between REALTORS® and a closing. According to TAR, the fees could create a source of liability for REALTORS®, which could lead to title problems and litigation.

RESTRICTIONS REMOVED

Under the new laws, owners can no longer be prevented from installing

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roof shingles that are wind or hail resistant, solar generating or energy efficient if quality and appearance

meet the community's standards. Rain barrels may also be installed so long as they comply with certain architectural and aesthetic rules that HOAs may adopt.

Certain religious items can now be posted on the entry doors of homes, as long as the items satisfy the criteria established by the new laws and owners may now freely fly the United States, Texas or military service branch flags, so long as it is done in compliance with limited regulations regarding number, size or flagpole location that may be adopted by an HOA.

According to Cagle, "in many ways, HOAs have become the fourth level of government underneath the federal, state and local governments. As the 'local-local government' HOAs enforce restrictive covenants, which are in effect private ordinances, and have the authority to foreclose on homeowner's property for unpaid assessments in much the same way taxing entities have the right to foreclose for unpaid property taxes." He further explained, "Unlike governmental entities that are regulated by the United

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States and Texas Constitutions, HOAs are private organizations, and until 2011, Texas HOAs overseeing subdivisions

were governed primarily by only their governing documents." In recognition of the growing importance HOAs play in the lives of Texans, Cagle added, "The new laws enacted by the 2011 Texas Legislature seek to impose regulations on HOAs that balance the rights of private organizations to govern themselves and the rights of homeowners whose ownership and use of their own homes are governed by such organizations."

MORE INFORMATION

These new rules can be daunting. To get legal advice about the new HOA rules, call the Texas Association of REALTORS® Legal Hotline at 800-873-9155. For more in-depth information regarding these new property code statues, visit www.statutes.legis.state.tx.us and select "Property Code" from the Code drop-down menu. To get more information about or purchase a copy of *Texas Homeowners Association Law: The Essential Legal Guide for Texas Homeowners Associations and Homeowners*, Second Edition (2012), visit www.txhoalaw.com.

numbers have added to a decline in vacancies in Austin. The Bureau of Labor Statistics reported that in August the Greater Austin area's unemployment rate was at 5.9 percent, a considerable leap from the national rate of 8.1 percent. And, in September, Austin saw its 16th straight month of home sales volume increases with 1,806 single-family homes sold.

Overall, the decline in vacancy rates is a necessary part of the housing recovery. But these rates are dropping sharply in many cities that started with few vacancies. This is good news for sellers and homeowners who want prices to rise but it is bad news for buyers or renters struggling to find someplace to live.

While there may be no silver bullet, Wheeler shared her thoughts on the best way to navigate Austin's current housing shortage. "Find your perfect home first then put your house on the market," she said. "The interest rates have stayed low, and the public finally feels confident about buying."



Autumn Rhea Carpenter is a freelance writer and editor who writes about real estate trends and home design for several local publications, including Austin Monthly, Realty Line Austin and the Austin REALTOR®. She's also an SEO-friendly ghostblogger, web content writer and copywriter.