

NIEMANN & HEYER, L.L.P.
ATTORNEYS AT LAW
WESTGATE BUILDING, SUITE 313
1122 COLORADO STREET
AUSTIN, TEXAS 78701-2101

CONNIE NIEMANN HEYER
WILLIAM M. HEYER

TELEPHONE (512) 474-6901
FAX (512) 474-0717
CONNIEHEYER@NIEMANNLAW.COM
WILLIAMHEYER@NIEMANNLAW.COM

MEMORANDUM

To: POA Boards of Directors

From: Connie Heyer

Date: June 17, 2011

Re: **Practical effects of 2011 POA legislation on POA Board activity**

The Texas legislature has completed its 2011 session. Numerous bills were passed which will affect property owner associations in Texas. Our firm's comprehensive legislative report details all legislation and its effect. If you do not have a copy already, we would be happy to provide one. **This material focuses on the practical effects the new legislation will have on day-to-day activities of POA boards.** Many legislative requirements will be handled by your POA's management professional. But there are many it is important for the board to either take action on, or be aware of.

This memorandum is organized as follows:

- **First**, a list of all recommended (or legally required) action items for POA boards; and
- **Second**, further detail related to the action items, plus additional important "FYIs" for boards. In this section, action items, or items of particular importance, are in blue font.

Our hope is that this memorandum will allow our POA clients to have a smooth transition to the new state of the law. As always, we are happy to provide further assistance to clients in legal compliance, POA collections, and general POA counseling.

As you will see from the attached, **POA collections efforts need immediate attention**, because a new, more expensive and time consuming, collection procedure, will be required on any amounts outstanding after January 1, 2012. Our firm is ready to assist you with your association's collection needs at any time.

Niemann & Heyer handles collections for its clients through a proprietary, state of the art, highly automated, web-based platform called Integrated Collections Enforcement ("ICE"). ICE permits managers and directors to access realtime information about collection account activity from anywhere the client or manager has high-speed internet access. ICE also permits these users to monitor and manage collections accounts, including the ability to print reports, authorize additional collection steps, obtain information about fees and costs incurred, view account-related documents, and the like.

ICE permits our team of dedicated collection account managers and attorneys to monitor accounts, create necessary notices and filings, and take other necessary steps in the collections process in a time efficient manner, thereby allowing N&H to keep its collection fees lower than other firms while providing superior services. Our automated calendaring system generates automatic ticklers to notify us of deadlines for mandatory waiting periods, payments, and other important deadlines, thus helping to ensure that nothing falls through the cracks. While recovery rates vary over time, historically Niemann & Heyer has been able to satisfactorily settle approximately 95 percent of the accounts it manages (i.e., owner pays all amounts owed, including legal fees and costs), whether by obtaining a payment in full or a board-approved payment plan. We welcome the opportunity to assist you with your POAs collection needs.

BOARD ACTION ITEMS

Board actions either required or recommended due to 2011 legislation

Applicable to HOAs and Condominium Associations

Transfer Fees. All boards should determine what transfer fees their POAs charge, and ensure that each is authorized under the governing documents or State law. If one or more transfer fee is not so authorized, the board should discontinue charging that fee or discuss with an attorney steps that can be taken to legally authorize the fee.

Action Deadline: September 1, 2011. (HB 8)

Solar Rules. All boards should adopt and record solar rules. Absent adoption of such rules, owners will have an absolute right to install solar devices.

Action Deadline: September 1, 2011. (HB 362)

Recording of Governing Documents. All boards should ensure that all governing documents (e.g., declarations, bylaws, articles, rules and amendments to same) are filed of record in the county(ies) in which the development is located. Any governing document not so recorded is unenforceable.

Action Deadline: January 1, 2012. (HB 1821)

Flag Rules. All boards should adopt and record rules related to the display of flags. Absent adoption of such rules, owners will have an absolute right to fly US, Texas or military flags.

Action Deadline: September 1, 2011. (HB 2779)

Rain Barrel Rules. All boards should adopt and record rules related to rain barrels. Absent adoption of such rules, a legitimate question arises as to whether associations can impose limits on the size, type, screening, and materials for rain barrels.

Action Deadline: September 1, 2011. (HB 3391)

HOAs Only (N/A to Condominium Associations)

Rules Related to Records Retention and Production. Boards must adopt and record rules regarding production and copying of HOA records, including a fee schedule for copy charges. Boards in POAs having more than 14 lots must also adopt a records retention policy.

Action Deadline: January 1, 2012. (HB 2761)

Payment Plan Rules. Boards must adopt and record payment plan rules.

Action Deadline: January 1, 2012. (HB 1228 and HB 1821)

Resale Certificates. Boards (if a board member rather than a management professional prepares a resale certificate) must include on all resale certificates a statement of all fees associated with the transfer of ownership, including a description of each fee, to whom each fee is paid, and the amount of each fee.

Action Deadline: January 1, 2012. (HB 1821)

Copies of Governing Documents on Website. If an HOA or its management company maintains an HOA website, Boards must see that the website includes copies of all governing documents of the association (e.g. declaration, bylaws, rules, articles and all amendments to same).

Action Deadline: January 1, 2012. (HB 1821)

Voting Methods. For association-wide votes after 9-1-11, absentee balloting and e-voting are expressly allowed, in addition to in-person and proxy voting. Boards should determine which methods of voting will be used.

Action deadline: September 1, 2011. (SB 472).

**Further Detail Related to Action Items,
Plus Additional Important “FYIs” for Board Members)**

Legislation Affecting Both HOAs and Condominium Associations

HB 8. Transfer fees (effective 9-1-11).

The bill prohibits transfer fees unless they are authorized in the governing documents, or authorized by law. *All associations should determine what transfer fees they charge, ensure that each is authorized under the governing documents or State law. If one or more transfer fee is not so authorized, the association should discontinue charging that fee or discuss with an attorney steps that can be taken to legally authorize the fee, no later than 9-1-11.*

HB 362. Solar devices (effective 9-1-11). This bill gives owners the right to install solar panels and shingles with certain limitations. Limitations are only allowed if the association incorporates these limitations into their documents (e.g. adopts rules to this effect). *All associations should seek advice of association counsel on what rules are permissible, and adopt and record solar rules by 9-1-11. Absent adoption of such rules, owners will have an absolute right to install solar devices.*

HB 1278. Religious displays allowed on doors (effective immediately). The bill requires associations to permit certain religious displays on owners’ doors. *Boards should be aware that up to 25 square inches of religious displays are allowed on anyone’s front door, effective immediately.* Associations have the right to “self help” under this law – they may remove an item that violates deed restrictions, provided the deed restrictions don’t conflict with this statute.

HB 1821. Recording of documents (effective 1-1-12). *All boards should ensure that all governing documents (e.g., declarations, bylaws, articles, rules and amendments to same) are filed of record no later than 1-1-12 in the county(ies) in which the development is located. Any governing document not so recorded is unenforceable.*

HB 2779. Flags and flagpoles (effective 9-1-11). The bill prohibits any restrictions on an owner’s display of the US, Texas, or military branch flag, with some limitations. An association must adopt restrictions if the association desires to apply the permissible limitations; otherwise there are no limitations on displays of US, Texas, or military flags. *Boards should seek HOA counsel’s advice as to what rules are permissible, and adopt permissible flag rules by 9-1-11. Absent adoption of such rules, owners will have an absolute right to fly US, Texas or military flags.*

HB 3391. Rain barrels (effective 9-1-11). The bill amends current “rain barrel” law and requires associations to permit owners to install and use rain-harvesting devices if they meet certain architectural requirements. *All associations should seek legal counsel’s advice as to what rules are permissible, and adopt and record rules related to rain barrels by 9-1-11. Absent adoption of such rules, a legitimate question arises as to whether associations can impose limits on the size, type, screening, and materials for rain barrels.*

Legislation Affecting HOAs Only (N/A to Condominium Associations)

HB 1228. Collections; Payment plans; Foreclosures (effective 1-1-12).

Payment Plans.

- HOAs with more than 14 lots must offer payment plans with a minimum term of 3 months. The provision regarding a maximum term is worded awkwardly, but it appears to prohibit plans longer than 18 months from the date the owner requests a plan.
- *HOAs must adopt and record reasonable payment plan guidelines/rules no later than 1-1-12.*

Priority of Payments Schedule. *Boards should be aware of this.*

- Associations must apply owners' 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; (6) other amounts.

Foreclosure.

**All POA liens must be prepared and filed by attorneys.*

**Non-judicial foreclosure is not allowed after January 1, 2012. So, after January 1, 2012, collection action will become more expensive. Boards should consider this in collection activity between now and December. It takes several months from "beginning to end" of the collection process. It is important and sensible to undertake as much collection activity to collect as much outstanding debt as possible BEFORE DECEMBER 31, 2011. After that time, the collection landscape changes and costs will be higher as a judicial hearing is required prior to foreclosure.*

- The bill clarifies that only licensed attorneys may draft and file a lien on behalf of an association. The bill makes clear that existing law requiring attorneys to draft and file any instrument that affects title to real property applies to an association's lien, notice of claim of lien, or similar document.
- Contingency fee arrangements between the association and its attorney or collection agent are prohibited. The association's collections contract with its attorney or other collection agent must require payment (the collection contract may not be contingent, and must hold the association responsible for paying costs incurred under the contract, so as to prevent de facto contingent arrangements in the form of "well, just don't pay us if we don't collect it"). Per legislative testimony, this is to prevent historical abuses where a minimal amount of an owner's unpaid assessments turns into hundreds of dollars in collection costs due to contingent billing arrangements.
- All associations pursuing foreclosure must go through an expedited judicial foreclosure process and receive a court order granting the association the right to foreclose. Any other foreclosure method allowed by the association's documents is prohibited unless an owner specifically agrees to it in writing.

HB 2761. Records and Meetings (effective 1-1-12).

Association records. *Board members should familiarize themselves with the new record request procedures (your management professional will presumably handle most record requests, meeting notices, etc.), plus boards MUST adopt rules regarding production and copying of records and MUST adopt rules regarding record retention.*

- Owners may have access to association records, but they must submit written requests to the association or its representative by certified mail to the mailing address of the association or authorized representative as listed in the current management certificate. The request must identify the records requested and indicate whether the requesting owner wants to inspect the records or have the association forward copies.
- The association then has 10 business days from receipt of the request to, as appropriate: (1) provide written notice of dates on which records may be inspected, or (2) provide the requested copies, or (3) provide the owner written notice that it is unable to produce the records within the 10-day period and provide a date, within an additional 15 days, by which the records will be sent or made available to the owner for inspection.
- Owners are responsible for the costs of producing and copying association records; costs are capped at approximately 10¢ per copy.
- *HOAs must by 1-1-12 adopt and record rules regarding production and copying of HOA records, including a fee schedule for copy charges.* These costs cannot exceed those listed under the Texas Administrative Code's charges for providing copies of public information (1 TAC Section 70.3) – approximately 10¢ per standard paper copy, \$1 per CD, \$3 per DVD, 50¢ per oversize paper copy, etc.
- HOAs may require the owner to pay in advance.
- HOAs may keep certain records confidential and decline to make them available (e.g., violation histories of owners, owners' personal financial information, owners' contact information other than address, and association personnel files) unless the owner gives written approval or a court orders the HOA to release the information.
- *Associations with more than 14 lots must by 1-1-12 adopt a records retention policy that includes, at minimum, the following categories and retention periods:*

- Account records of current owners (5 years)
- Contracts for terms of at least one year (4 years after expiration of contract)
- Minutes of owner meetings and board meetings (7 years)
- Tax returns and audits (7 years)
- Governing documents (permanently)

The following provisions regarding open board meetings are some of the more sweeping changes affecting board operations

Open board meetings and closed executive sessions.

- Board meetings (regular and special) must be open to owners.
- The board has the right to adjourn a board meeting and reconvene in a closed executive session for certain issues (e.g., personnel matters, litigation, contract negotiations, enforcement actions, confidential attorney communications, matters involving the invasion of owners' privacy, or matters involving parties who have requested confidentiality and the board has agreed to honor that request).
- Decisions made in executive sessions must be summarized orally in general terms, including any expenditures approved, and recorded in the minutes.
- Boards must keep written minutes as record of each regular and special meeting and give owners access to approved minutes.
- Boards must give members notice of upcoming board meetings (regular and special), including the date, hour, place, and general subject of issues to be brought up in executive sessions.
- The Board's notice of meeting must be either:
 - (1) mailed to owners at least 10 days beforehand; or
 - (2) provided at least 72 hours before meeting by: (a) being posted notice in a conspicuous location (i.e., in a common area or on an association website); and (b) being emailed to all owners who have provided their email address to the HOA.
- An owner has a duty to keep his email address updated with the HOA.
- Board meeting notice is not required if:
 - (1) The board meets by telephone, email, or in any alternate manner whereby all directors speak their opinion and are heard (or the opinion can be read via email) by all other directors, (2) the board acts by unanimous written consent on routine or administrative matters, or (3) the meeting is necessary to address an urgent or emergency situation that requires immediate action.
 - The foregoing right of a board to meet and vote without prior notice to the members does not apply to the following matters: (1) fines; (2) damage assessments; (3) initiation of foreclosure actions or enforcement actions; (4) increases in assessments; (5) levying special assessments; (6) appeals from denials of architectural control approval; or (7) suspending rights of an owner before the owner has an opportunity to appear before the board.
 - ***Practice Point:*** *For routine decisions involving anything but fines, damage assessments, approval of foreclosures, assessment increases, ACC appeals, or suspending common area use rights, boards can still make decisions via phone meeting, email, or unanimous written consent, provided all board members are privy to the phone call or email communications.*
 - ***Actions taken without prior meeting notice must be summarized orally, including any actual or estimated expenditures approved, and documented in the minutes of the next noticed meeting.***

Elections and voting: notice and ballots. ***Boards should familiarize themselves with these new requirements.***

- HOAs must give owners notice of an association-wide election or vote at least 10 days before it occurs, regardless of any provision in the declaration or bylaws to the contrary.
- Ballots must be in writing and signed by the member.
- Electronic and absentee votes are valid if the ballots meet certain requirements, regardless of any provision in the declaration or bylaws to the contrary.
- Proxy and in-person voting is unaffected.
- Owners' right to vote. Property owners may not be disqualified (for any reason) from voting. For example, an owner's right to vote cannot be suspended because of past due assessments.

- Owners' right to run for board election. The association cannot adopt or enforce restrictions that prevent owners from running for a position on the association's board, excepting only when the board is presented with written, documented evidence that a potential candidate (or sitting director) has been convicted of a felony or crime involving "moral turpitude." Any such evidence against a sitting director results in that director becoming immediately removed from the board and prohibited from future service.

SB 472. Voting; Declaration amendments (effective 9-1-11). *Boards should familiarize themselves with these requirements.*

- Electronic voting and absentee ballots. Members may vote electronically or by means of absentee ballots; absentee ballots must include certain language; electronic and absentee ballots count toward the quorum only on matters listed on the ballot, and do not count at all if the ballot item is modified at the meeting prior to the vote. *Boards should determine what methods of voting will be used for votes held after 9-1-11.*
- Ballot requirements. A member's vote in an association-wide vote must be in writing and signed by the member, except for uncontested races (e.g., one candidate to fill one open director seat). An electronic ballot is deemed to be in writing and signed.
- Owners' right to vote. Property owners may not be disqualified for any reason from voting on board member elections or issues that affect the owner's rights and responsibilities. For example, an owner's right to vote cannot be suspended because of past due assessments.
- Owners' right to run for board election. The association cannot prevent owners from running for a position on the board, but if the board is presented with evidence that the director or candidate has been convicted of a felony or crime involving "moral turpitude", that person is ineligible to serve on the association board.
- Declaration amendment procedure. Regardless of language in the declaration to the contrary, all declaration amendments may and must be passed by 67% of the total votes allocated to owners, unless the declaration itself states a lower percentage.

HB 1821. Posting documents online (effective 1-1-12).

Online association information.

- *If an HOA or its management company maintains an HOA website, no later than 1-1-12 that website must include copies of all governing documents of the association (e.g. declaration, bylaws, rules, articles and all amendments to same).*