

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
WWW.NIEMANNLAW.COM

REPRESENTING PROPERTY OWNERS ASSOCIATIONS FOR MORE THAN 25 YEARS

June 4, 2015
TEXAS POA LEGISLATIVE UPDATE
By: Connie N. Heyer

The Texas Legislature has adjourned for the 2015 session! Senate Bill 1168 (Sen. Royce West) was passed, creating many changes for property owners associations (POAs). **Unless otherwise noted, all new laws discussed below become effective September 1, 2015.**

This update will summarize some of the more important aspects of Senate Bill 1168 and other bills that passed this session that affect both HOAs and condominium associations.

Action items for POAs as a result of the new laws are noted in the boxes below.

Please feel free to call or email us with any questions at conniehey@niemannlaw.com.

HOA VOTING AND ELECTIONS:

Applicable to HOAs only (not condos).

The new law makes several changes to the procedures and requirements for voting and elections. Some of the more important changes are:

*HOAs only need to provide one method of voting to owners, but must in all cases make voting available by either absentee or proxy ballot.

*Secret voting (unsigned ballots) is now allowed if and only if the HOA adopts rules addressing secret ballots, including rules to help ensure owners only cast the number of votes they are entitled to cast. Further, if secret voting is used for a board member election, each candidate must be allowed to name one person to observe ballot counting but that person is not allowed see the names on the ballots.

Action item: If your HOA is interested in secret (unsigned) ballots for enhanced privacy, talk to us about drafting rules regarding secret ballots. (But keep in mind that "regular" ballots are private – by law no one is legally entitled to see the ballots except the vote tabulators.)

Make sure you understand the law regarding election observers so that you can comply with this requirement at future elections.

*Floor nominations in election meetings do not invalidate previously cast absentee or proxy ballots.

*Demands for recounts must follow a specific timeline. The new law provides very clear steps to follow.

*The tabulator of a vote or a recount cannot disclose how individual owners voted unless required to do so by Court order. (Ballots are secret – owners are not entitled to see them and the HOA is prohibited from allowing owners to see them).

*An association meeting is not necessary for a vote of owners but all owners must be given notice of a vote at least 20 days before the ballot is due.

*Written ballots (either signed or secret) are no longer required for every vote, but they are required for the following votes: votes not taken at a meeting, votes in an election to fill a board position, votes for a proposed amendment of dedicatory instruments, votes for an increase in assessments or adoption of special assessments, and votes for the proposed removal of a board member.

*The new law clarifies that declaration amendments can only be voted on by those entitled to vote on the amendment. This means that only owners who are members of a sub-association, and not other members of the master associations who don't live in that area, can vote on amendments to that sub association's declaration.

*If an HOA has more than 100 lots, a notice must be sent to owners soliciting candidates for members of the board. The notice must contain certain statutory language and must be sent at least 10 days before ballots are sent or otherwise provided to owners for voting. All names of eligible owners who request to be on the ballot must be put on the ballot.

Action item: If you have more than 100 lots, be sure that a solicitation for candidates is sent at least 10 days prior to your next board member election. Our attorneys can further explain the notice requirements including the required method of notice, and help prepare the notice to ensure compliance with the new law.

Talk to our attorneys to ensure the voting procedures in your governing documents comply with the new laws.

HOA BOARD MEETING TOPICS THAT REQUIRE 72-HOUR OWNER NOTICE:

Applicable to HOAs only (not condos).

SB 1168 makes several additions to the list of board discussions and votes that require a 72-hour noticed board meeting. Currently, votes on fines, initiation of enforcement action, and five other items that I call the “magic 7” items – all of these votes must be had at board meetings. The new law expands this magic 7 list into a “magic 14” list. The new law also gives greater freedom for votes to be taken outside of a 72-hour noticed meeting.

Board votes or discussions on the following topics may only be had at a 72-hour owner-noticed board meeting (these topics are in addition to the “magic 7”):

- *lending or borrowing money;
- *adoption or amendment of a dedicatory instrument, including adoption or amendment of rules;
- *approval of an annual budget or approval of an increase of greater than 10% of an annual budget;
- *sale or purchase of real property;
- *filling of a vacancy on the Board;
- *construction of capitol improvements (but not the repair, replacement, or enhancement of an *existing* capitol improvement); and
- *election of an officer.

Action item: Make sure that 72-hour prior notice of a board meeting is given to owners if the board will possibly discuss or vote on any of the “magic 14” topics in the statute.

HOA BOARD MEETINGS HELD ELECTRONICALLY OR TELEPHONICALLY:

Applicable to HOAs only (not condos).

The new law allows for all board meetings (including 72-hour owner-noticed board meetings) to be held telephonically or electronically. When a 72-hour owner-noticed board meeting will be held either electronically or telephonically, the new law requires that the notice to owners include instructions on how to listen to the meeting (using the same electronic or telephone method that any of the board members are using). Remember, the law does not require that owners be able to speak at these meetings, just that they can hear the board members.

*** Board members are now allowed to discuss and vote on any issue not on the “magic 14” list outlined above without providing 72 hour prior notice to owners**, so long as the action is summarized orally and put in the

minutes of the next 72-hour noticed board meeting. If the board takes action, including voting, without a 72-hour noticed board meeting, each board member must be given an opportunity to express his opinion to all other board members.

Action item: This is a great time-efficiency benefit to managers and board members – every board vote except for votes or discussions on the “magic 14” list can now be done via email or phone. You may wish to adjust the board’s meeting schedule accordingly, and may wish to consider changes to the bylaws if the bylaws require monthly board meetings for example. Talk to our attorneys for more details on the legal requirements for board voting by email or conference call.

HOA BOARD MEMBERS ELIGIBILITY:

Applicable to HOAs only (not condos).

The new law includes a new option for HOAs to limit eligibility for board membership.

*HOAs may adopt bylaws requiring some, *but not all*, of the board members to be residents of the subdivision.

Action item: If you want to require that board members be residents of the subdivision, talk to our attorneys about amending your bylaws.

HOA ENFORCEMENT ACTIONS:

Applicable to HOAs only (not condos).

The new law makes several amendments to HOA procedures for taking enforcement action for violations of the governing documents.

*The bill now defines two types of violations – those that are curable in nature and those that are not. Some examples of curable violations include parking violations, maintenance violations, failure to construct improvements in accordance with approved plans, and ongoing noise violations such as a barking dog. Uncurable violations include shooting fireworks, noise violations that are not ongoing (such as a loud party), property damage, removal or alteration of landscaping, holding a garage sale or other prohibited event, or anything posing a health or safety risk.

If a violation is uncurable, the “209” notice sent to the owner no longer has to give the owner an opportunity to cure the violation – a fine or damage assessment can issue immediately.

*Violation notification letters for curable violations must include a specific date by which the owner has to cure the violation (and not just a number of days).

*For repeat violations, if an owner has been given notice regarding the same violation in the previous six months

HOAs are no longer required to send additional notice to the owner before taking enforcement action.

*Violation letters (aka “209 letters”) must simply be sent certified mail rather than the former requirement of certified mail return receipt requested (but it is still fine to send letters with return receipt requested if desired.)

Action item: Contact our attorneys to ensure that your violation notices and violation procedures are compliant with the new law. Many HOA rules are now drafted to mirror the current (soon to be old) statutory requirements of notice and opportunity to cure in all cases. These rules will likely need to be amended in order to take advantage of the new law’s language regarding incurable violations.

HOA PAYMENT PLANS:

Applicable to HOAs only (not condos).

HOAs are now allowed, but not required, to offer payment plans longer than 18 months. HOAs are now specifically given the discretion to not offer payment plans after the 30-day period to cure under 209.0064 has expired.

Action item: We recommend a review and update of all payment plan rules.

HOA FORECLOSURES:

Applicable to HOAs only (not condos).

Current law requires that HOAs provide notice to junior lienholders of an opportunity to cure the owner’s delinquency at least 60 days before the HOA initiates a foreclosure action. Under the new law, HOAs may also, but are not required to, send the same notice to a senior lienholder. Also, anytime an HOA has the authority to use the expedited foreclosure process they are also given the discretion to file a lawsuit for foreclosure instead.

HOA OWNER NOTICES:

Applicable to HOAs only (not condos).

The new law allows, but does not require, HOAs to offer owners alternative methods of receiving notices from the association, such as by email. Owners must elect to receive notices via the new method and HOAs cannot force owners to make that election.

Action item: Talk to us about offering new methods of notice to owners if your HOA is interested in sending notices via email.

HOA LEASING:

Applicable to HOAs only (not condos).

This new law prohibits HOAs from requiring an owner to submit any specific tenant/tenant information for approval by the HOA (HOAs should not be in the tenant approval

business anyway in our opinion). HOAs can also no longer require an owner to share a tenant’s lease application or credit report (which typically contain sensitive personal information) with the HOA.

The new law does NOT prohibit association rules from requiring a copy of a lease or placing any other restrictions on leasing. ***This law is already effective.***

Action items: Talk to our attorneys about any current leasing rules you may have – we recommend adopting new rules that comply with this law rather than relying on your current rules being voided to the extent they conflict with the new laws.

HOA SOLAR-POWERED STOP SIGNS:

Applicable to HOAs only (not condos).

This law allows an HOA to install a "solar powered light-emitting diode (LED) stop sign." The street must be within the HOA's jurisdiction, the sign must be approved by the municipality, and the HOA is responsible for the sign’s maintenance. ***This law is already effective.***

HOA BOARD ELIGIBILITY:

Applicable to HOAs only (not condos).

Under current law any person who has been convicted of a crime of “moral turpitude” is prohibited from serving on an HOA board if this crime is brought to the association’s attention. The new law alters this prohibition to allow anyone convicted of a crime of this type more than 20 years in the past to serve on the board.

HOA AND CONDO SOLAR PANELS:

Applicable to HOAs and condos.

Current law allows developers, during the development period, to prohibit solar panels entirely. After the development period, an HOA can only impose limited restrictions (via adopted rules) on solar installations. The new law eliminates the special rights of developers regarding solar. For any development with 51 or more residential units, developers must follow the same solar laws that apply to HOAs after the development period.

Action item: Even during the development period, all condo associations and HOAs will need solar device rules to ensure that the association may maintain control over placement, color and other permissible regulations on solar installations (state statute outlines the only restrictions an association may place on solar panels).

If your POA is out of the development period, it is important for the POA (condo or HOA) to adopt solar rules to ensure that the POA can maintain control over installations – e.g. prohibit installations on the common area, etc.

HOA AND CONDO GENERATORS:

Applicable to HOAs and condos.

This new law allows owners to install emergency generators. The association may impose limits and restrictions on generators but may not prohibit them outright. The new law allows HOAs to impose location requirements, screening requirements, and other similar requirements. For example, HOAs and condo associations can (and should!) adopt rules to prohibit generators from being installed on common areas. Without rules in place, arguably owners can place generators of any size at any location – even in the common areas. ***This law is already effective.***

Talk to our attorneys about adopting rules regarding generators – We recommend ALL HOAs and condo associations adopt rules as soon as possible to address this issue. Without adopted rules, a POA arguably cannot maintain control over emergency generators (e.g. cannot prevent a generator of any size, color, etc. from being installed on an owner's front lawn or in the common area).

CONDO RESALE CERTIFICATES:

Applicable to condos only (not HOAs).

The new law requires new information be provided on a condo resale certificate, namely: the association's current operating budget and balance sheet and a statement of all transfer fees (including the amount, a description of the fee, and to whom the fee is paid). The condo resale certificate law now essentially mirrors the HOA resale certificate law.

Action item: Condos must ensure that all certificates requested after Sept. 1, 2015 include this information.

House Bill 971, which would have imposed significant personal liability on board members and increased liability for all HOAs, did NOT pass! If passed this bill as filed would have required all board members to read all deed restrictions applicable to the HOA (in some cases hundreds of pages), read all statutes applicable to the HOA, and then sign an affidavit that they had done this reading assignment. Furthermore, the bill would have imposed potential personal liability on a board member if the HOA made an error in not following the deed restrictions or law. Thanks to all of you who assisted with calls and letters to legislators to defeat this harmful bill!

NEED HELP WITH YOUR NEW POA RULES? NEED MORE INFORMATION? WANT TO GET ON OUR EMAIL DISTRIBUTION LIST?

Contact our firm, connieheyer@niemannlaw.com, if you need help with or have questions about these new laws.

NIEMANN & HEYER LLP. Our firm was founded over 40 years ago and has since its inception focused on real estate law, representing numerous real estate trade organizations and focusing on property owners' association (POA) representation. Our lawyers have lobbied the Texas Legislature for more than 20 years on behalf of POAs. Our lawyers have been instrumental in drafting all major POA statutes in the last 20 years, including the Texas Uniform Condominium Act and the Texas Real Property Owners Protection Act. Currently, our firm represents over 350 POAs in Bexar, Comal, Hays, Llano, Travis and Williamson counties, ranging in size from an eight-unit condominium development to a subdivision with over 6,000 residences.

Services include deed restriction enforcement, deed restriction drafting, litigation, and full-service collections. Our state-of-the-art web-based collection software enables all board members and managers remote access to a secure system showing real-time status of all collection activity on their association's accounts.

File Server:CAI:2015 Session:N&H Newsletter Legislations 6-4-15HD.docx

IMPORTANT BILL NOT PASSING: