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THE NEW HOA LAWS IN A NUTSHELL

By Luke P. Tollett, Holt & Young, P.C.

The 2011 Texas legislature made substantial changes to the law governing property owner associations. The changes focus on expanding the rights of property owners with regard to collections, records, meetings and elections. This article is not legal advice; it covers key changes to the law but does not discuss all areas of importance. Unless otherwise indicated, the changes do not apply to condominiums.

COLLECTIONS

The new law impacts the ability of an association to collect delinquent assessments. Associations are required to adopt and record a Payment Plan Policy outlining terms for owners to pay their delinquent balance in installments. Payment plans lasting less than 3 months or more than 18 months are prohibited and the association may only charge interest and administrative costs during the plan. Before an association can refer a delinquent owner to its attorney for collections, the association must send a letter to the owner by certified mail advising that a payment plan is available, specifying each delinquent amount, and giving the owner 30 days to cure the delinquency.

In addition, the new laws mandate that owner payments be applied first to older secured debts, with unsecured debts being paid last. The new laws further affect collections by prohibiting contingency fee arrangements between an association and its collection agent and by clarifying that lien notices must be prepared by an attorney.

The most dramatic change regarding collections is the prohibition of nonjudicial foreclosure. Associations that previously foreclosed their lien nonjudicially, now have to apply to a court to proceed with foreclosure. This “expedited” process is the same process used to foreclose home equity liens.

RECORDS

Association records have always been available to owners under corporation law. Nevertheless, the new laws provide detailed procedures for retention and production of association records, including a requirement that all dedicatory instruments be available online if the Association maintains a website that is publically assessable. Associations must adopt and

record a Record Retention Policy and a Record Production Policy. The law provides the content of these policies, resulting in largely uniform provisions among associations.

The record retention requirements are brief. An association has to retain its Declaration, Bylaws and Certificate of Incorporation permanently. Association tax returns, tax audits, financial books, and meeting minutes must be retained for seven years. Account records of current owners have to be retained for five years and contracts with a term of more than one year must be retained for four years. While associations are not required to retain other records, it is prudent to do so if the records may be helpful to confirm prior association actions.

The record production requirements are best understood in steps. The first step is to evaluate whether an owners request for records is proper; a proper request is sent certified mail to the address contained in the association's management certificate.

The second step is to respond to the owner within 10 business days. If the request is to inspect and copy the books and records, the response should state the days, hours and location where the owner may inspect and copy. If the request is for copies of specific records which can be easily produced with no cost, then the response should provide the records. Otherwise, the association should respond that the records cannot be provided within 10 business days but will be available within 15 business days and state the cost to provide them.

The third step is to arrange for owner inspection or make the requested copies available. The Association may charge the owner for producing the records, including the cost of copies and materials. If the request is greater than 50 pages, the Association may also charge for labor and overhead costs. However, the charges cannot exceed those for production of public records under the Texas Administrative Code.

Lastly, an association's "dedicatory instruments" are not effective unless they are recorded with the county in which the subdivision is located. Dedicatory Instruments are restrictions, bylaws, rules, regulations, policies, guidelines and similar instruments. This change applies to condominiums.

MEETINGS AND ELECTIONS

Association meetings and elections are a major focus of the new laws. Important changes include expiration of director terms even if a replacement cannot be elected for lack of quorum and limitations on the Board's ability to fill vacancies by appointment. Associations cannot prohibit an owner from voting or running for election to the Board for any reason, except conviction of a felony or crime involving moral turpitude. Owners may now utilize absentee ballots and electronic ballots in elections, but secret ballots are prohibited. Recount procedures were also created so that owners may contest election results.

Associations must now provide owners with notice and the general subject of board meetings when certain items will be considered. Owners are entitled to attend such board meetings but may be excluded from executive session where the Board may discuss confidential items. However, after executive session, the Board must orally summarize decisions made in executive session and place them in the regular meeting minutes without breaching confidentiality. A Board may take action without providing notice and by unanimous written

consent for routine and administrative matters or for reasonably unforeseen emergencies that require immediate Board action.

MISCELLANEOUS

The new laws also entitle owners to solar panels, certain roof singles, flag poles, rain barrels and certain religious items. Owners may only place such items on their property and not on any property owned by the association. The statutes allow Associations to regulate certain characteristics of such items. This change applies to condominiums.

Resale Certificates are also affected as they must now include, among other things, information regarding association lawsuits, special assessments and fees associated with transfer of ownership. Information in the resale certificate cannot be more than 60 days old. This change applies to condominiums.

Declarants are affected as well; they cannot enforce a restriction that pays them a fee every time a lot is sold. In addition, Declarant control periods are limited to 10 years unless the Declaration states the maximum lots to be created. Further, after 75% of the lots in the Association are sold by the Declarant, at least one-third of the Board must be elected by non-developer owners.

To learn more about the new laws impacting property owner associations, please go to www.holtyoung.com.