2021 Texas Legislative Update

Holt & Young, P.C.

On May 31, 2021, the Texas House and Senate passed Senate Bill 1588, which makes significant changes to the Texas Property Code. While these changes are not as significant as the Legislature's 2011 and 2015 amendments, they will have ramifications for most property owners' associations in Texas. Holt & Young, P.C., has prepared a brief review of the Property Code's new and modified provisions.

The Property Code's amendments regarding religious displays (the amendments to Section 202.018) go into effect immediately.

All other provisions go into effect on September 1, 2021, except that property owners' associations will not be required to file with the Texas Real Estate Commission until December 1, 2021.

PROPERTY OWNERS' ASSOCIATIONS MUST UPDATE THEIR MANAGEMENT CERTIFICATES MORE REGULARLY, MUST PROVIDE ADDITIONAL INFORMATION – AND MUST FILE THEM WITH THE TEXAS REAL ESTATE COMMISSION.

Property owners' associations are required to update their management certificates whenever they adopt new amendments to the declaration. Further, property owners' associations will now be required to file their management certificates with the Texas Real Estate Commission, in addition to their county Real Property Records.

What must be included in a management certificate has been modified as well. Section 209.004 now includes some additional content requirements. In addition to the previous management certificate requirements, which remain in effect, property owners' associations must now include:

- the recording data for the declaration *and any amendments to the declaration*;
- the name, mailing address, *telephone number, and e-mail address* of the person managing the association or the association's designated representative;
- the website address of any Internet website on which the association's dedicatory instruments are available (more on this issue below); and
- the amount and description of a fee or fees charged by the association relating to a property transfer in the subdivision.

Finally, associations will need to update their certificates more often. Previously, many property owners' associations updated their management certificates only when changing management companies. This will no longer be sufficient. Now, a property owners' association must amend its management certificate whenever there is "a change in any information in the recorded certificate."

The Legislature imposes (potentially) steep penalties on property owners' associations that fail to follow these new management certificate requirements. If a property owners' association has not filed an up-to-date management certificate with the Texas Real Estate Commission and in the real

property records, that property owners' association cannot collect attorneys' fees and costs, or interest, from delinquent homeowners.

Recommendations: Property owners' associations should prepare to update their management certificates to include the newly-required information. Property owners' associations should anticipate being informed by their management company and attorneys when the Texas Real Estate Commission is ready to accept these filings.

BOARD MEETINGS NOW REQUIRE MORE ADVANCED NOTICE.

The Legislature amended Section 209.0051, so that property owners' associations must now provide 144 hours' notice before a regular board meeting, and 72 hours' notice before any special board meeting.

Recommendations: Property owners' associations should update any applicable forms or procedures necessary to comply with the new requirements.

PROPERTY OWNERS' ASSOCIATIONS MUST NOW AFFORD FORTY-FIVE (45) DAYS' NOTICE BEFORE SENDING A HOMEOWNER TO A THIRD-PARTY DEBT COLLECTOR.

The Legislature amended Section 209.0064 of the Texas Property Code. Previously, associations were required to afford homeowners thirty (30) days to cure their delinquency before the property owners' association could charge the homeowner for collection agency/attorneys' fees and costs. Now, property owners' associations must afford forty-five (45) days' notice.

Recommendations: Property owners' associations should update any applicable forms or procedures necessary to comply with the new requirements. Where associations have adopted collection policies that conflict with the new legislation, we recommend amending those collection policies.

DEED RESTRICTION VIOLATION HEARINGS ARE NOW STRUCTURED, AND NOW REQUIRE ASSOCIATIONS TO PRESENT EVIDENCE.

Since 2001, homeowners who receive a deed restriction violation notice have been entitled to request a hearing before their property owners' association's board of directors. In many associations, these hearings are relatively informal and unstructured. Such informal hearings under Section 209 of the Texas Property Code will no longer be possible.

The Legislature amended Section 209.007, and made significant changes to the hearing process. If a homeowner who is entitled to cure their violation requests a hearing, within thirty (30) days after the date of the certified notice regarding their deed restriction violation, their property owners' association must grant a hearing. This, of course, is not new. However, the Legislature imposed many new requirements as to what these hearings entail.

The board can no longer delegate this authority to a committee; the board must hold these hearings itself. Further, no later than ten (10) days before such a deed restriction violation hearing, the property owners' association must provide the homeowner "a packet containing all documents, photographs, and communications relating to the matter the association intends to introduce at the hearing." Essentially, property owners' associations will now be required to marshal their evidence, and present it to the homeowner in advance of the hearing. (It is unclear how courts will interpret this provision as to how much evidence property owners' associations will be required to present.)

Additionally, the hearing must now follow a set procedure: the property owners' association will present its case, and the homeowner or their representative will have the opportunity to rebut. Specifically, "during a hearing, a member of the board or the association's designated representative shall first present the association's case against the owner. An owner or the owner's designated representative is entitled to present the owner's information and issues relevant to the appeal or dispute."

Recommendations: We advise that, within the parameters of these new requirements, property owners' associations approach each hearing based upon the particular circumstances of the deed restriction violation at issue and the applicable restrictive covenant violated. A case-by-case review will enable the property owners' association to respond to the unique issues presented by each specific matter. The amendments do not require a property owners' association board to make a determination as to the violation during the hearing.

IF A PROPERTY OWNERS' ASSOCIATION DENIES AN ACC APPLICATION, IT MUST NOW PROVIDE THE HOMEOWNER SPECIFIC INFORMATION AS TO THE DENIAL, AND AN OPPORTUNITY TO APPEAL.

Under the newly-added Section 209.00505 (which applies only to those property owners' associations larger than forty (40) lots and applies only after the development period ends), in the event an ACC denies an ACC application, the property owners' association must now provide the homeowner with a written notice that "describes the basis for the denial in reasonable detail and changes, if any, to the application or improvements required as a condition to approval." Additionally, the written notice must inform the owner that the owner may request a hearing to appeal the ACC's decision.

If the owner appeals the ACC's denial, the Board must hold a hearing on the appeal within thirty (30) days. Owners are permitted to record these hearings, and are permitted to bring counsel to advocate for them. During the hearing, "the board or the designated representative of the property owners' association and the owner or the owner's designated representative will each be provided the opportunity to discuss, verify facts, and resolve the denial of the owner's application or request for the construction of improvements, and the changes, if any, requested by the architectural review authority in the notice provided to the owner." After such a hearing, the Board may "affirm, modify, or reverse" the ACC's decision.

Recommendations: Property owners' associations must ensure their denial letters include both the detailed basis for the denial and a clear explanation of how the application could be modified

to be approved. Additionally, we advise that property owners' associations approach each appeal based upon the particular circumstances of the denial within the parameters of these new requirements. A case-by-case review will enable the property owners' association to respond to the unique issues presented by each appeal. The amendments do not require a property owners' association board to make a determination as to the violation during the appeal hearing.

ASSOCIATIONS MUST NOW AFFORD HOMEOWNERS FORTY-FIVE (45) DAYS TO CURE THEIR DELINQUENCIES.

The Legislature amended Section 209.0064 to afford homeowners forty-five (45) days to cure their delinquencies after receiving certified notice. Previously, that period was thirty (30) days.

Recommendations: Property owners' associations should update any applicable forms or procedures necessary to comply with the new requirements. Where associations have adopted collection policies that conflict with the new legislation, we recommend amending those collection policies.

DIRECTORS CAN NO LONGER SERVE ON THE ACC IN MANY COMMUNITIES.

In many subdivisions, directors also serve on their architectural control committees. From this point forward, no director may be appointed or elected to the ACC.

The newly-added Section 209.00505, discussed above, also prohibits directors, their spouses, and close relatives, from being "appointed or elected to serve on an architectural control committee." Please note that this does not apply during the development period, and does not apply to subdivisions of fewer than forty (40) lots. The new law does not require that directors currently serving on an ACC resign from the ACC. Therefore, directors currently serving a term on the ACC may continue to do so until their ACC terms expire.

This raises an important question: how should property owners' associations navigate this new law if their ACC members do not serve fixed terms? Unfortunately, the new legislation does not provide direction for such associations. The new legislation prohibit directors (or their spouses or close relatives) from being "appointed or elected" to the ACC. In a situation in which a director's ACC term has no set expiration or end date, the statute's language does not technically prohibit a director from continuing to serve on the ACC indefinitely. However, courts may frown on associations that try to circumvent the new legislation in this fashion.

Recommendations: For property owners' associations where the board has historically constituted the ACC, these associations should adopt policies to provide for a non-director ACC.

PROPERTY OWNERS' ASSOCIATIONS ARE REQUIRED TO MAINTAIN A WEBSITE AND PUBLISH THEIR GOVERNING DOCUMENTS ON THAT WEBSITE.

Many property owners' associations maintain websites which allow their members to access governing documents. Moving forward, all property owners' associations will be required to maintain such an online presence.

The Legislature amended Section 207.006 of the Texas Property Code to require that property owners' associations larger than sixty (60) lots, and all property owners' associations managed by a professional management company, "make the current version of the association's dedicatory instruments relating to the association or subdivision and filed in the county deed records available on an Internet website […] maintained by the association or a management company on behalf of the association."

It is important to note that "dedicatory instruments" does not just mean an association's declaration. Section 209.002(4) of the Texas Property Code defines "dedicatory instrument" as "each governing instrument covering the establishment, maintenance, and operation of a residential subdivision [including] restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association, to properly adopted rules and regulations of the property owners' association, and to all lawful amendments to the covenants, bylaws, rules, or regulations."

Recommendations: Property owners' associations should review their current online presence. Where associations are not already in compliance with the new Property Code provisions, those associations should communicate with their management companies or IT professionals to address these new requirements and to ensure that they will be in compliance by September 1, 2021.

THERE ARE NEW CAPS ON RESALE CERTIFICATE FEES.

The Legislature amended Section 207.003(c) of the Property Code to place a $375.00 cap on the amount a property owners' association may charge for resale certificates.

Further, the law now states that property owners' associations may charge a "reasonable *and necessary*" fee for these certificates. Previously, the Property Code allowed property owners' associations to charge "a reasonable fee" for providing resale certificates and amendments. It is unclear how courts will interpret the new "and necessary" language. One interpretation would be that associations should be able to demonstrate that the resale certificate fees the association charges are tied to the actual cost of preparing those certificates. For example, under this interpretation, if an association chooses to charge the maximum allowable $375.00 for a resale certificate, it must be able to demonstrate that the $375.00 the association charged was necessary for providing the certificate. Another reasonable interpretation would be that the "and necessary" component is satisfied whenever a homeowner requests a certificate, because at that time, the homeowner's association is required by law to provide the requested certificate – therefore, the work becomes "necessary" at that time. However, until courts rule on this new language, no attorney can definitively answer the question of how the new language will be interpreted.

Additionally, the Property Code now requires that property owners' associations deliver these certificates within *five business days* (instead of the previous seven days). The new legislation also raises the maximum amount of damages a homeowner can recover against their association if the association fails to deliver these certificates. Previously, homeowners could only recover $500.00, plus their attorneys' fees. Now, homeowners can recover up to $5,000.00, plus their attorneys' fees.

Recommendations: If a property owners' association's fees are in excess of the new caps, they must reduce them. Property owners' associations should update any forms and applicable procedures necessary to comply with the new requirements.

BOARDS MUST NOW APPROVE *ALL BUDGETS* IN OPEN MEETINGS.

Property Owners' Associations must now adopt any budget in an open board meeting. Previously, associations could approve annual budgets outside of meetings, so long as those budgets did not increase assessments by more than ten percent. That is no longer the case. Now, property owners' associations are prohibited from adopting – or amending – their budgets outside an open meeting. This is the only change to the list of fifteen items that boards can only consider in open board meetings.

Recommendations: Property owners' associations should update any applicable procedures to comply with the new requirements, if necessary.

PROPERTY OWNERS' ASSOCIATIONS MUST FOLLOW NEW PREREQUISITES BEFORE REPORTING HOMEOWNERS TO CREDIT BUREAUS – AND PROPERTY OWNERS' ASSOCIATIONS CANNOT CHARGE HOMEOWNERS FOR THE REPORTING.

The Legislature created a new Section, 209.0065, which addresses how property owners' associations may report delinquencies to credit bureaus.

Property owners' associations must now provide a homeowner notice, in a manner similar to the notice associations must provide before sending homeowners to a debt collection agency or law firm, and must afford the homeowner the opportunity to enter into a payment plan. Included with that letter must be "a detailed report of all delinquent charges owed." This notice and report must be provided to the homeowner at least thirty (30) *business days* (not calendar days) before the Association notifies a credit bureau of their delinquency. Further, if a homeowner has disputed the debt, the property owners' association may not report it to a credit bureau at all.

There is no guidance as to what constitutes "a detailed report of all delinquent charges." However, at the very least, Texas and federal debt collection law suggest that property owners' associations must provide some type of itemized breakdown of the various categories of charges, so that the homeowner can understand (for example) how much they owe in delinquent assessments, how much they owe in interest, how much they owe in collection costs, etc. Property owners' associations will be best served erring on the side of providing too much detail rather than too little.

An additional important change concerns charging homeowners for these reports. The new amendment prohibits property owners' associations from charging homeowners a fee for submitting these reports.

Recommendations: Due to the numerous regulations property owners' associations must follow prior to reporting a debt to a credit bureau, and due to the potential liability for failing to comply with these regulations, property owners' associations should consult their attorneys regarding compliance with the new statute.

PROPERTY OWNERS' ASSOCIATIONS HAVE LESS AUTHORITY TO REGULATE RELIGIOUS DISPLAYS.

The Legislature adopted significant amendments to Section 202.018 of the Texas Property Code. Previously, the Property Code permitted homeowners to affix religious items of a certain size to their doorframes. Moving forward, property owners' associations may not prohibit homeowners from placing "one or more religious items" on their "property or dwelling." Critically, the amendments remove all size requirements, and all limitations as to duration. There are no apparent limitations as to size or duration, and only slender limitations as to location. This represents a significant change, and results in associations having much less authority to regulate religious displays.

Associations may still prohibit a religious displays that "threatens the public health or safety; violates a law other than a law prohibiting the display of religious speech; contains language, graphics, or any display that is patently offensive to a passerby for reasons other than its religious content; is installed on property owned or maintained by the property owners' association or owned in common by members of the property owners' association; violates any applicable building line, right-of-way, setback, or easement; or is attached to a traffic control device, street lamp, fire hydrant, or utility sign, pole, or fixture." However, that is the extent of a property owners' association's authority to regulate religious items.

As noted above, these provisions go into effect <u>immediately</u>, pursuant to separate legislation.

Recommendation: Associations should amend their architectural guidelines and religious items policies to reflect the new requirements. Further, associations should review their active enforcement files and carefully consider whether any active enforcement actions are now improper under this statute. In the future, in the event an association believes a religious display may violate this policy, such association should consult its attorneys prior to undertaking any enforcement efforts.

PROPERTY OWNERS' ASSOCIATIONS CAN NO LONGER PROHIBIT CERTAIN SWIMMING POOL FENCES.

The Legislature created a new section of the Texas Property Code, Section 202.002. This section is designed to allow homeowners to build screening fences (fences designed primarily to prevent unsupervised children from falling into the pool) around their swimming pools.

Under this new section, property owners' associations may not prohibit homeowners from installing a "swimming pool enclosure that conforms to applicable state or local safety requirements." Property owners' associations can still regulate some aesthetic aspects of these fences. For example, property owners' associations may adopt "limitations establishing permissible colors for a swimming pool enclosure, provided that the provision does not prohibit a

swimming pool enclosure that is black in color and consists of transparent mesh set in metal frames."

Please note that statute defines "swimming pool enclosure" as "a fence that surrounds a water feature, including a swimming pool or spa; consists of transparent mesh or clear panels set in metal frames; is not more than six feet in height; and is designed to not be climbable."

Recommendation: Associations should review their architectural guidelines and policies to ensure compliance with the new legislation, and amend as necessary.

PROPERTY OWNERS' ASSOCIATIONS MUST ALLOW CERTAIN "SECURITY MEASURES," INCLUDING PERIMETER FENCING.

The Legislature added a new section, Section 202.023, which addresses homeowner-installed "security measures." The new legislation prohibits homeowners' associations from prohibiting "a property owner from building or installing security measures, including but not limited to a security camera, motion detector, or perimeter fence." Associations may still regulate "the type of fencing," and may prohibit homeowners from installing security cameras anywhere except on their own property.

"Security measures" is not defined. It is unclear what constitutes a security measure; the statute expressly states the definition includes, but is not limited to, "a security camera, motion detector, or perimeter fence." Therefore, we cannot advise what specific items a homeowner could claim as a "security measure." For example, is a two-story guard tower in the front lawn a security measure? Based on the statute's wording, yes, these would be permissible. However, we expect there will be a great deal of litigation regarding what constitutes a security measure and what does not. Unfortunately, until such litigation occurs, we cannot comment on what courts will permit associations to prohibit and what courts will determine property owners' associations must allow.

Recommendations: In matters arising related to these provisions, property owners' associations should consult their attorneys regarding the most recent interpretation of this statute. Associations should review their architectural guidelines and policies to ensure compliance with the new legislation, and amend as necessary.

PROPERTY OWNERS' ASSOCIATIONS MUST ESTABLISH A FORMAL PROCESS FOR LARGE CONTRACTS.

The Legislature also amended Section 209.0052, to add a Section 209.0052(c). This Section provides that an association that proposes to contract for services that will cost more than $50,000 shall solicit bids or proposals using a bid process established by the association.

It is important to note that this new requirement applies only to contracts for services that will cost more than $50,000.00. Some association contracts are structured so that the total amounts the association will incur are not strictly defined, but are instead based on potential services rendered upon request and/or rendered in certain circumstances. Associations should consult their attorneys to determine whether this new Property Code provision applies to such contracts.

Recommendations: Associations should communicate with their attorneys, and their management companies, to review their current practices regarding large contracts. Further, associations should begin the processing of adopting the newly-required "bid process" they must now "establish."

PROPERTY OWNERS' ASSOCIATIONS MAY REQUEST CERTAIN INFORMATION FROM TENANTS.

The Legislature amended Section 209.016 of the Texas Property Code to specify that property owners' associations may collect certain information from tenants. It provides that a property owners' association may request the "contact information, including the name, mailing address, phone number, and e-mail address of each person who will reside at a property in the subdivision under a lease; and the commencement date and term of the lease."

This statute does not specifically prohibit associations from seeking additional information beyond these items. Rather, this statute works to clarify Section 209.016, which allowed (and still allows) tenants to redact certain personal information, such as social security numbers, credit card numbers, and driver's license numbers, when submitting information to associations, and which prohibits associations from requiring tenants submit credit reports.

Recommendations: Subdivisions should review their current practices and policies regarding leasing. Associations should consider adopting guidelines that require tenants provide this information.

HOMEOWNERS MAY NOW SUE PROPERTY OWNERS' ASSOCIATIONS IN JUSTICE COURT.

The Legislature added a new section, Section 209.017, to the Texas Property Code. This section provides that "an owner of property in a subdivision may bring an action for a violation of this chapter against the property owners' association of the subdivision in the justice court of a precinct in which all or part of the subdivision is located."

It is important to note that homeowners already had this right. Homeowners were not previously barred from suing their associations in Justice Court. We will not know how this new statute actually modifies the law in a practical sense until we see how courts interpret the new provisions.

Recommendation: Property owners' associations should consult their attorneys regarding the viability of any threatened legal action that is based on this provision.

THE LEGISLATURE ADDED ADDITIONAL LANGUAGE AS TO PAYMENT APPLICATION.

The Legislature amended Section 209.0063, regarding payment applications. However, it is important to note that the new Section 209.0063 will not require any changes to how property owners' associations apply payments.

Section 209.0063 requires property owners' associations apply payments in a specific order. Previously, Section 209.0063 required that property owners' associations apply homeowner payments first to "any delinquent assessment," then to "any current assessment," then to "any attorney's fees or third party collection costs," then to "any attorney's fees incurred by the association that are not [collection costs]," then to "any fines assessed by the association," and then, lastly, to "any other amount owed to the association."

This order has not changed. Now, however, the word "reasonable" appears in front of every category after delinquent and current assessments. Therefore, the Property Code now mandates that associations apply payments to delinquent assessments, then to current assessments, and then to "*reasonable* attorney's fees or *reasonable* third party collection costs," and then to "any *reasonable* attorney's fees incurred by the association that are not [collection costs]," then to any "*reasonable* fines assessed by the association," and finally to "any other *reasonable* amount owed to the association."

Again, this <u>does not change</u> the order in which property owners' associations apply payments.

Recommendations: Associations should consult their attorneys before making any changes to how they apply payments.

We know you will have many questions about these changes. Holt & Young, P.C., is available to assist you in navigating this new legal landscape. We look forward to serving you as your community adopts and adjusts to these new requirements.