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Legislature Limits POA Power

By Judon Fambrough

It's no longer business as usual for Texas property owner associations (POAs). New statutes passed by the Texas Legislature in 2002, 2005 and 2012 affect how associations conduct business and regulate the display of political signs among other things. Legislators hope the new laws eliminate much of the criticism and charges leveled against POAs regarding rule enforcement, collecting attorney fees and foreclosure procedures. This article discusses the Legislative changes in each of the three years.

Changes Effective Jan. 1, 2002

The seeds for the 2002 changes came from the highly publicized foreclosure sale in Houston for nonpayment of assessment fees. A \$180,000 home was sold for \$5,000 to satisfy delinquent assessments. The 78th Texas Legislature frowned on the practice and implemented sweeping reforms. The new statute, found in Chapter 209 of the Texas Property Code (TPC), affects all residential POAs regardless of what they are called as long as they:

- represent, manage or regulate the subdivision on behalf of the owners,
- require mandatory membership for all or a majority of the property owners and
- collect regular or special assessments from all or a majority of the owners.



Required Notices

POAs may no longer take quick, unilateral action to resolve problems involving homeowners without first sending notices and, in some cases, giving the homeowners an opportunity for a hearing. Notices must be sent before a POA may:

- suspend an owner's right to use a common area,
- file a suit against the owners for other than failing to pay a regular or special assessment,
- foreclose on an association's lien against the homeowner,
- charge an owner for property damage or
- levy a fine for violating a restriction, the bylaws or a rule of the association.

The notice must be sent by certified mail, return receipt requested, detailing the violation or the property damage and stating the amount of damages due the association. The owner must be given a reasonable time to cure the violation and be informed of the right to a hearing if requested within 30 days after receiving the notice.

The Hearing

If the owner opts for a hearing, the board must convene one within 30 days after receiving the request. The board must give the owner at least ten days prior notice of the scheduled date, time and place. The owner's presence is not required. Either party may ask for

a postponement of not more than ten days. Either party may make an audio recording. The statute does not address the use of videotapes.

In lieu of a hearing, either party may use alternative dispute resolution services.

The statute describes three situations in which the owner does **not** have a right to receive notice to cure or the right to a hearing. These occur when:

- the owner received a notice and opportunity to cure a similar violation within the previous six months,
- the association files a lawsuit for a temporary restraining order, a temporary injunction or a foreclosure or
- the owner's right to use common areas have been suspended because of a significant and immediate risk of harm to others.

When a lawsuit has been filed for a temporary restraining order, a temporary injunction or a foreclosure, the owner has the right to file a motion to compel mediation.

Attorney Fees

One of the greatest criticisms of POAs related to the way attorney fees were imposed on homeowners. If a homeowner was delinquent in payment of an assessment or fine, no matter how short the period or how small the amount, some POAs hired an attorney to send a collection

letter. The attorney fees for drafting and sending the letter (generally a form letter) at times far exceeded the amount in default. If the homeowner protested, attorney fees increased drastically.

The new law still allows associations to collect reimbursements for reasonable attorney fees and other reasonable costs for enforcing restrictions, rules or bylaws or for collecting amounts due the association. However, the POA must send the owner prior written notice that attorney fees and costs will be charged if the delinquency or violation continues beyond a certain date.

A homeowner is **never** liable for attorney fees in two circumstances. Both are tied to the required notice and right to cure discussed earlier. First, if a notice is required and the owner requests a hearing, the owner is not liable for any attorney fees incurred by the association before the conclusion of the hearing. Second, if a hearing is not requested, the owner is not liable for any attorney fees incurred during the 30 days following the receipt of the notice.

The statute absolutely forbids foreclosure to collect attorney fees associated with fines assessed by the association. The statute limits attorney fees when the POA pursues nonjudicial foreclosure for nonpayment of assessments. If the documents or restrictions governing the establishment, maintenance or operation of the subdivision permit nonjudicial foreclosure, then the association may include, as part of the POA's proceeds from the foreclosure sale, the greater of \$2,500 or one-third of the actual costs and assessments, excluding attorney fees. Actual costs may include court costs and interest if the law or restrictive covenants permit. Excess proceeds from a foreclosure sale are refunded to the owner.

If the association pursues the collection of attorney fees, it must provide a copy of all invoices and other costs related to the matter when requested by the owner. If attorney fees, costs and other amounts are collected, they must be deposited into an account maintained at a financial institution in the name of the association or its managing

agent. Only members of the board or its managing agent may be signatories on the account.

Right of Redemption

(After Sept 1, 2009, lienholders possess the same right to redeem the property as the owner as discussed in this section. However, if the lienholder redeems the property, title is transferred back to the owner, not the lienholder.)

POAs may foreclose for unpaid assessments, but owners and lienholders have the right to repurchase the property for a limited time after the sale. Formerly, this right of redemption, as it is sometimes called, was limited to tax foreclosure sales in Texas.

Owners must be given reasonable time to cure violations and must be informed of their right to a hearing if requested within 30 days of being notified of violations.

To facilitate the redemption, the association must send written notices informing the owners and lienholders of their redemption rights within 30 days following the sale. The notice must be sent by certified mail, return receipt requested, to the last known owner's address in the POA's records.

For lienholders, the notice must be sent to the address contained on the most recently filed deed of trust. If the lien has been assigned, the notice must also be sent to the lienholder who has given written notice to the POA of the assignment and the assignee's mailing address. If the deed of trust contains no address or no notice of assignment is given, the POA has no duty to send notices to the lienholders or its assigns.

The POA must file an affidavit in the public deed records stating the date the notices were mailed along with a legal description of the property. The affidavit must be filed within 30 days after the notices are sent to the homeowner and lienholder.

The owner has 180 days after the association mails the notices to redeem the property. However, if the owner does not redeem the property within the first 90 days, then the lienholder may redeem it if the owner has not done so. The statute prohibits the buyer at the foreclosure sale from transferring title during the redemption period.

The redemption price, according to the statute, varies depending on whether the property was purchased by a third party or by the POA.

If the purchaser rents the property during the redemption period, all rent collected is credited toward the redemption price. Leases entered by the purchaser are subject to the owner's or lienholder's right of redemption. This means the renter must surrender possession immediately to the owner (not lienholder) in the event the property is redeemed.

If redeemed, the purchaser at the foreclosure sale must immediately execute and deliver a deed transferring title to the owner, not the redeeming lienholder. If the purchaser does not comply, the redeeming party may sue the purchaser to recover the property and any reasonable attorney fees.

The parties with the right of redemption may do one of two things during or at the end of the 180-day redemptive period to prevent the purchaser from selling the property to a bona fide purchaser. The redeeming party may record either the deed from the purchaser or an affidavit stating the redemption has occurred along with the legal description of the property and the name and mailing address of the person who redeemed it. If neither document is filed during the redemption period, the purchaser is free to sell to a third party at the end of the 180 days unless an extension occurs.

The redeeming parties may extend the redemption period by sending the purchaser at the foreclosure sale a written request to redeem the property. If the request is sent by certified mail, return receipt requested, on or before the end of the redemption period, the period is automatically extended until the tenth day after the purchaser at the foreclosure sale responds in writing

with the amount needed to redeem the property.

The redeemed property remains subject to all liens and encumbrances on the property before the foreclosure. Installment payments on mortgages or other liens must be paid on time to prevent their foreclosures.

The statute allows the owner, not the lienholder, the right to redeem the property from the POA by making partial payments. But all payments must be tendered on or before the redemption period ends. If not, the association must mail the amounts received, within 30 days after the redemption period expires, to the owner's last known address according to the association's records.

If the property is not redeemed and the redemption period is not extended, the purchaser at the foreclosure sale may file an affidavit in the real property deed records stating this fact. The property is then no longer bound by the right of redemption, and the purchaser is free to sell.

Changes Effective Sept. 1, 2005

Regulating Display of Political Signs

As might be expected, the changes regulating the display of political signs within subdivisions were implemented by the 79th Texas Legislature the year after an election.

The new law, found in Section 202.009 of the Property Code, divides the regulations into two categories: things that cannot be prohibited by POAs and things that are discretionary.

In the first category, POAs cannot adopt or enforce restrictive covenants that prohibit owners from displaying signs on their property that advertise a political candidate or ballot item for an election. The signs may appear on the property anytime 90 days before the election and ten days thereafter.

In the second category, the POAs may require the signs to be ground-mounted and no more than one sign per candidate or per ballot item. The POAs may prohibit signs that:

- contain roofing material, siding, paving material, flora, balloons or lights or any other similar building, landscaping or nonstandard decorative component;
- attach to plant material, traffic control devices, lights, trailers,

vehicles or other existing structures or objects;

- include the painting of architectural surfaces;
- threaten the public health and safety;
- exceed four feet by six feet;
- violate the law;
- incorporate language, graphics or any display that offends an ordinary person; or
- distract motorists with music, sounds, streamers or by other means.

The statute does not provide any penalties for the POAs violating the prohibitions, but it does allow POAs to remove signs that violate their discretionary requirements.

The Interaction of Property Tax Liens and POA Liens

The 79th Texas Legislature addressed a question that vexed POAs for years. If the POA holds a lien against property for unpaid assessments, dues, fines, and so forth, is the POA's lien superior or inferior to a property tax lien? Does it make any difference that the POA's lien arose prior to the property tax lien?

Effective Sept. 1, 2005, Section 32.05 of the Texas Tax Code answers the question. A tax lien takes priority over the claim of any holder of a lien held by a property owner's association, homeowner's association, condominium unit owner's association or council of owners of a condominium regime under a restrictive covenant, condominium declaration, a master deed or other similar instrument that secures regular or special maintenance assessments, fees, dues, fines, costs, attorney's fees or other monetary charges against the property.

Furthermore, the statute provides that the priority given a tax lien prevails, regardless of whether the debt, lien or other encumbrance existed before the attachment of the tax lien. Some distinction appears between liens placed of record and those that have not.

In an action to collect (foreclose) on the tax lien, the taxing authorities must join the POA as a necessary party in the process if the POA has recorded notice of its lien with the clerk of the county in which the property is located. To do so, the POA must record the liquidated amount of the lien evidenced by a sworn instrument duly executed by an

authorized person on behalf of the POA. A recorded restrictive covenant that provides, in general, for a lien for unpaid assessments, dues, fines, and so forth, does not suffice.

Placing the lien of record may impact whether the lien is extinguished by the tax sale. If the POA records its lien before the taxing authorities foreclose on the property, the POA must be joined in the lawsuit, and the sale extinguishes the POA's lien. If the POA fails to record its lien before the tax sale, the taxing authorities need not join the POA in the lawsuit, and the subsequent sale extinguishes the POA's lien. However, if the POA records its lien and the POA is not joined in the lawsuit, then the POA's lien appears to survive the tax sale.

POAs may wish to examine their policies regarding the filing of their liens in the county records in light of this statute.

Summary of Changes Effective Jan. 1, 2012

The 82nd Texas Legislature changed the way POAs conduct business in several ways. A quick summary of the changes follows. This is a supplemental update to an article that will appear in *Tierra Grande* and also to publication 1872 that deals with resale certificates.

Foreclosures

Once again the foreclosure process received legislative scrutiny. Prior to Jan. 1, 2012, POAs could not foreclose on liens when they consisted solely of fines and assessments or they involved attorney fees associated solely with the fines and assessments.

After Jan. 1, 2012, a third item was added. Now, a lien cannot be foreclosed if it contains costs for compiling, producing and reproducing requested information when added to an owner's account as an assessment under Section 209.005(j) of the TPC.

Likewise, after Jan. 1, 2012, POAs must foreclose judicially on all its liens when permitted unless the property owner waived the requirement in writing.

However, before judicial foreclosure is initiated, POAs must give all subordinate or inferior lienholders of record written notice of the total amount of the lien due on the property. The notice must be sent by certified mail, return receipt requested, to the address shown in the deed records. The inferior or subordi-

nate lienholders have 61 days from the receipt of the notice to cure the amount in default.

Alternative Payment Plans

All POAs comprised of more than 14 lots must now adopt reasonable guidelines for the collection of delinquent regular or special assessments or other amounts owed the association. The guidelines, better known as the Alternative Payment Schedule or simply the Plan, require the POAs to give delinquent property owners the option to make partial payments over a three- to 18-month period starting from the time the property owner requests the plan. Details of the plan are discussed in the *Tierra Grande* article.

In addition, the statute addresses the association's use of "collection agents" as defined in the Federal Fair Debt Collection Practices Act found in 15 U.S.C., Section 1692a. The statute discusses what POAs must do before the property

owners will be liable for the collection agents' fees. This includes certain notices and a 30-day right to cure.

Regulating Political Signs, Flags, Etc.

Effective Sept. 1, 2005, Texas legislators placed limitations on how POAs regulated the display of signs advertising political candidates or proposed items on a ballot. The momentum carried over to 2011. The 82nd Texas Legislature added several more measures regarding the ability of POAs to regulate other items. Here is a quick summary of the changes:

- Section 202.010 of the TPC was added regarding the regulation of the installation of solar panels.
- Section 202.011 added the regulating of certain types of roofing material.
- Section 209.0058 – 209.0594 was added addressing voting rights,

tabulations and other voting procedures by POAs.

- Section 202.011 was added regarding the displaying of flags. Subsection 5 of this statute was again amended in 2013 regarding the definition of a "front yard."
- Section 202.018 was added regarding the display of certain religious items.
- Sections 5.102 and 207.003 were amended expanding the POA's requirements to produce resale certificates and subdivision information.

Note. Evidently the left hand did not know what the right hand was doing. Section 202.011 was added twice, once regarding roofing material and the other regarding flags. 🚧

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