

**RESTRICTIVE COVENANTS:
MODIFYING AND UPDATING**

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State Bar of Texas

36TH ANNUAL

ADVANCED REAL ESTATE LAW COURSE

July 10-12, 2014

San Antonio

CHAPTER 21

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RESTRICTIVE COVENANTS: MODIFYING AND UPDATING

I. INTRODUCTION

A. Restrictive Covenants

Restrictive covenants are often referred to as “deed restrictions” (referred to as “Restrictions” in this Article) and are private, contractual covenants which limit land use. Restrictions are placed on real property by affirmative action of the owner of the real property (usually the initial developer), for the benefit of that property only, with a typical intent to enhance the value of that real property. Restrictions affect subsequent owners of the real property, usually for a stated term and for any extensions. There are no limitations on the subject matter of Restrictions, except for compliance with law and public policy. Deed restrictions are really a subset of Restrictions, being Restrictions included in deeds.

Restrictions are of two types: real and personal. Personal covenants are also known as “equitable servitudes.” Most Restrictions dealt with by real estate attorneys are real, but that should not be taken for granted. Real covenants run with the land, binding all future owners, while personal covenants are for the benefit of a specific named party, and any permitted assigned. *Tarrant Appraisal District v. Colonial Country Club*, 767 S.W.2d 230, 235 (Tex. App.—Fort Worth 1989, writ. denied). Generally, unless there is evidence in the dedicatory instrument that the Restriction is for the benefit of other land, the covenants will be personal to the grantor. *Davis v. Skipper*, 83 S.W.2d 318, 322 (Tex. Comm. App. Sec. A 1935—Opinion Adopted); *Baker v. Alford*, 482 S.W.2d 908 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ.). However, personal restrictions on their face could still be enforced by other lot owners if there is a general scheme or plan. *Brehmer v. City of Kerrville*, 320 S.W.2d 193 (Tex. Civ. App.—San Antonio 1959, no writ.) The presumption is in favor of personal covenants. *McCart v. Cain*, 416 S.W.2d 463, 465 (Tex. Civ. App.—Fort Worth 1967, writ ref’d n.r.e.). *Baker v. Henderson*, 153 S.W.2d 465 (Tex. Comm. App. Sec. A 1941, Opinion adopted) held that personal covenants are not assignable without an express assignment provision. However, a Federal Court opinion interpreting Colorado law held that since a personal covenant is a Restriction subject to contract law, and general contract law holds that contract rights are assignable unless specifically prohibited, a personal covenant is therefore assignable. This analysis could sway a Texas court since Restrictions are generally governed by contract law principles. *El Paso Refinery, LP v. TRMI*, 302 F.3d 343, 355-58 (5th Cir. 2002) contains a comprehensive overview of Texas law on personal and real covenants. The court cited the test

for whether a covenant “runs with the land” (which is the distinction between real and personal covenants) as follows:

- i) touches and concerns the land,
- ii) relates to a thing in existence, or specifically binds the parties and their assigns,
- iii) is intended by the original parties to run with the land, and
- iv) the successor to the burden has notice.

(citing *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987) and 16 Tex. Jur. 3d *Covenants, Conditions and Restrictions* Sec. 10 (2002)).

B. Modification and Extension

1. Residential Restrictions

As time passes, the needs of a residential neighborhood change. Restrictions drafted before 1970 rarely adequately address land use and redevelopment issues today. Modern Restrictions control all nature of use and development in a residential neighborhood. As suburban dwellers look to moving to close-in established neighborhoods, and as dwellers in those neighborhoods seek the protections provided by Restrictions in newer suburban neighborhoods, community associations are looking to modify their outdated Restrictions to provide the essential elements of protection sought by residential neighborhoods.

Often, older Restrictions do not have adequate provisions for renewal or modification, forcing use of the statutory provisions of the Texas Property Code which allow modification and extension without unanimous consent even if the Restrictions do not address modification or extension. For practical reasons of neighborhood consensus, the modification of existing Restrictions often requires a neighborhood to focus on the most significant issues only. Restrictions with the extensive detail and dramatic community association control typical in suburban neighborhoods often will not receive support in an established neighborhood.

A key element in modifying Restrictions in an established neighborhood is a well organized community association able to: (i) define neighborhood needs, (ii) limit proposed modifications to those addressing those needs, and (iii) pursue compliance with the statutory provisions for an enforceable modification.

2. Commercial Restrictions

Like residential Restrictions, commercial Restrictions may become outdated. However, since most commercial restrictions arose beginning in the 1970's, they are, generally, well drafted and not

requiring the comprehensive updating typical of an older residential neighborhood. More typically, modification of commercial restrictions is required to address changes in land use, correct errors, clarify uses due to changes in terminology or accommodate commercial transactions.

C. Creation

Some neighborhoods have no Restrictions (or the Restrictions have expired). Those neighborhoods confront a completely different task in adopting Restrictions from the neighborhood modifying or extending Restrictions. The neighborhood must reach a strong consensus for the need for Restrictions and the primary goals to be achieved by adopting Restrictions.

Often the first critical decision is the geographic definition of the "neighborhood." The focus in that decision is not historic boundaries (whether subdivision plat boundaries or streets). Instead, the focus must be upon an area with a shared vision and the desire to work together for a common good. However, if a Chapter 201 statutory creation process is contemplated, the "neighborhood" is that geographic area once subject to Restrictions.

The scope of Restrictions considered by such a neighborhood should be more restrictive than that of a neighborhood with existing Restrictions looking to update those Restrictions. These neighborhoods may utilize Chapter 201 of the Texas Property Code (which contains the infamous "opt out" provision) only if previously subject to Restrictions limiting a majority of area to residential use only. There is no mechanism to force a property owner to restrict their property. Any vigilant property owner can exercise their opt out rights by affirmatively rejecting the Restrictions when initially presented or by filing a statement in the Real Property Records within one year after the filing of the Restrictions.

Where no Restrictions ever existed which limited a majority in area to residential use only, unanimous consent is required of the property owners in the affected area, or the non-consenting owner is not bound.

The critical elements in the proposed Restrictions for an established residential neighborhood which has none currently are (i) residential use, and (ii) minimum performance standards for new construction and remodeling. For practical reasons of neighborhood consensus, insignificant provisions should be minimized. However, where Restrictions have lapsed, simply reinstating the expired Restriction is usually palatable to the neighborhood.

D. Other Valuable Resources

Roy Hailey of Houston and Sharon Reuler of Dallas prepared an excellent paper for the 2010 State Bar Advance Real Estate Law Course entitled "The

Texas POA Primer: Tips for Working with Condo & Homeowner Associations". It is highly recommended reading for any attorney amending Restrictions in that it provides a practical education to the dynamics of a restricted neighborhood. I also recommend Roy and Sharon's 2011 State Bar webcast on the 2011 POA Reform Legislation.

II. COMMON LAW MODIFICATION OF RESTRICTIONS

A. Introduction

Most modern Restrictions specifically contain a provision for the modification or extension of the duration of the term of the Restrictions. Typically, the provision requires an affirmative vote by a majority of owners within the affected area. Without a specific provision to the contrary, under common law, the consent of all of the affected property owners is required to modify or extend Restrictions.

B. Identification and Review of Applicable Restrictions

The first task for an attorney dealing with a request to modify, extend or add to Restrictions is to review the Restrictions. Simple as it seems, insuring that ALL currently effective Restrictions have been reviewed can be a problem and the attorney should order a title review to insure that they are reviewing recorded copies of all applicable Restrictions. Never accept a summary or "copy typed" version. Some older residential neighborhoods will prepare and rely upon "handed down" typed copies of older, hard to read Restrictions and these can have errors.

B. Counseling the Client

Once the Restrictions have been identified and reviewed, the attorney has 2 tasks: i) counsel the client about the proper interpretation, and ii) determine the process for modification. Generally, the attorney is approached only after the client has a specific modification in mind. The attorney must confirm the motivation for the change and insure that all relevant sections in the Restrictions are identified. Many clients will be too limited in their request to the attorney, and if the attorney gives the client what is requested, the client may not achieve their goal. Further, the attorney should counsel the client on other shortcomings or pitfalls in the Restrictions so that the client may take the opportunity to use the modification process to "clean up" other areas, even if not on the client's mind when they approached the attorney. Typically, the modification process takes significant effort and a client will appreciate the thoughtful attorney who goes beyond the specifics of the literal request to highlight other appropriate modifications.

C. Rules for Interpretation of Restrictions

1. General Rules

The Texas Supreme Court in *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998) outlined basic rules for interpretation of Restrictions:

- The rules of contract construction apply to Restrictions.
- Whether Restrictions are ambiguous is a question of law.
- Restrictions are construed in light of the circumstances in place when adopted.
- Restrictions are unambiguous as a matter of law if they can be given a definite legal meaning, but are ambiguous if susceptible to more than one reasonable meaning.

2. The Battle Between Strict and Liberal Construction

The issue of whether Restrictions should be strictly or liberally construed has been a sticky problem for Texas courts. The common law rule is cited and discussed in innumerable Texas cases that Restrictions are encumbrances on realty and therefore, under common law, are to be strictly construed in favor of the free use of land. *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981); *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987); *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Benard v. Humble*, 990 S.W.2d 929 (Tex. App.—Beaumont 1999, writ denied). However, Restrictions are enforced as written where the language and intent is clear. *WLR, Inc. v. Borders*, 690 S.W.2d 663, 667 (Tex. App.—Waco 1985, writ ref'd n.r.e.). Restrictions are strictly construed, favoring the grantee and disfavoring the grantor. *Davis*, 620 S.W.2d at 565. Any ambiguity is resolved in favor of the least restrictive reasonable interpretation. *Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, L.L.P.*, 848 S.W.2d 772 (Tex. App.—Texarkana 1993, writ denied); *Wilmoth*, 734 S.W.2d at 657.

In 1987, the Texas legislature required that: "A restrictive covenant shall be liberally construed to give effect of its purposes and intent." TEX. PROP. CODE § 202.003(a). As with the common law rule, many Texas cases have cited and discussed this new mandate. *Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474 (Tex. App.—Houston [14th District] 1988, writ denied); *Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d 524 (Tex. App.—San Antonio 2000, pet. denied); *SAMMS v. Autumn Run Cmty. Improvement Ass'n*, 23 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Village of Pheasant Run Homeowners Ass'n v. Kastor*, 47 S.W.3d 747, 750 (Tex. App.—Houston [14th Dist.] 2001, pet. denied);

VICC Homeowners' Ass'n v. Los Campeones, Inc., 143 S.W.3d 832, 835 (Tex. App.—Corpus Christi 2004, no pet.) ("To ensure that a covenant's provisions are given effect, we interpret the intent of the provisions by giving liberal interpretation to the covenant's language.").

Unfortunately, the case law has not uniformly applied strict versus liberal construction. In fact, the cases are in conflict, with some cases applying liberal construction based on Section 202.003(a) and others ignoring it all together and referencing the prior common law. See *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987); *Ashcreek Homeowner's Ass'n v. Smith*, 902 S.W.2d 586, 588-89 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.) (explaining that the statutory rule of liberal construction does not trump common law rules of construction and stating that a majority of courts of appeals agree, but noting the conflict); *City of Pasadena v. Gennedy*, 125 S.W.3d 687, 693-95 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (discussing the potential conflict between the common law and Section 202.003(a)).

A recent case, *Wiese v. Heathlake Cmty. Ass'n, Inc.*, 384 S.W.3d 395, 401 (Tex. App.—Houston [14th Dist.] 2012, no pet., discussed appellate courts' varying approaches to reconciling the common law requirement for strict construction with Section 202.003(a)'s requirement for liberal construction.

3. De Novo Interpretation.

An appellate court will review a trial court's interpretation of Restrictions de novo. *Air Park-Dallas Zoning Comm. v. Crow Billingsley AirPark, Ltd.*, 109 S.W.3d 900, 909 (Tex. App.—Dallas 2003, no pet.).

4. All Owners as Required Parties in Declaratory Judgment.

Several courts of appeal have held that ALL owners of a restricted area MUST be parties to a declaratory judgment action seeking a court interpretation of Restrictions. *Dahl v. Hartman*, 14 S.W.3d 434, 436 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Letsos v. Katz*, 489 S.W.2d 317, 319 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ); *Riddick v. Quail Harbour Condominium Ass'n*, 7 S.W.3d 663, 672 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). However, the Texas Supreme Court held in two separate Restrictions cases that if the objection to jurisdiction of the trial court for failure to join all necessary parties is first raised on appeal, it is waived and the case may proceed. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163 (Tex. 2004); *Simpson v. Afton Oaks Civic Club, Inc.*, 145 S.W.3d 169, 170

(Tex. 2004). The result of such a case will be binding only against the parties. *Brooks*, 141 S.W.3d at 163. The risk of inconsistent judgments was not considered a sufficient concern to prevent this result. *Id.* A common ploy in Restriction Litigation is a motion to dismiss for failure to include all necessary parties, forcing a party seeking a declaratory judgment for interpretation of Restrictions to consider if the dispute is worthy of the effort and cost to litigate with an entire neighborhood.

C. Rules for Modification of Restrictions

1. Original Declarant/Grantor.

The party creating Restrictions has the unilateral right to terminate or modify them so long as they continue to own all the property subject to the Restrictions. *Hill v. Trigg*, 286 S.W. 182, 183 (Tex. Comm. App. 1926, judgment adopted); *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 313 (Tex. App.—Fort Worth 2001, no pet.). Thereafter, a unilateral right to modify is enforceable only if it meets the 3 part test generally applicable to modification of Restrictions (discussed in the following section) AND the party retaining the right must possess a property interest in the benefited area. *Dyegard*, 39 S.W.3d at 314; *Baldwin v. Barbon Corp.*, 773 S.W.2d 681, 684-85 (Tex. App.—San Antonio 1989, writ denied).

Amendments made pursuant to retained right are also subject to the requirement that they be reasonable, not arbitrary or capricious. *Dyegard*, 39 S.W.3d at 315.

In *Dyegard*, the court addressed a challenge to the unilateral amendment of Restrictions by a developer. The developer amended the applicable Restrictions when a dispute arose about whether the Restrictions prohibit certain conduct, as interpreted by the developer and disputed by certain owners. To resolve the dispute, the developer simply amended the Restrictions to clearly prohibit the conduct. After an extensive review of the right to reserve amendment authority and the relevant law in Texas and other states, the court upheld the developer's amendment authority, but remanded for consideration of whether the developer retained any property rights in the neighborhood and that the amendment was reasonable. *See, Validity, Construction and Effect of Contractual Provisions Regarding Future Revocation or Modification of Covenant Restriction Use of Land*, 4. A.L.R. 3d 570 (1965) for a general discussion of the law and issues of a developer retaining unilateral power to modify Restrictions.

2. General Rules.

A 3 part test must be satisfied to modify Restrictions:

- (i) The instrument creating the restrictions must establish both the right to amend and the method of amendment.
- (ii) The right to amend implies only those changes contemplating a correction, improvement or reformation of the agreement rather than destruction of it, and
- (iii) Any amendment may not be illegal or against public policy.

Hanchett v. East Sunnyside Civic League, 696 S.W.2d 613, 615 (Tex. App. – Houston [14th Dist.] 1985, writ. ref'd. n.r.e.); *Dyegard*, 39 S.W.3d at 313; *VICC Homeowners' Ass'n*, 143 S.W.3d at 836. *But see Meyerland Cmty. Imp. Ass'n v. Temple*, 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Any amendment must be accomplished in the exact manner required in the Restriction. *Norwood v. Davis*, 345 S.W.2d 944, 948 (Tex. Civ. App.—Austin 1961, no writ); *Dyegard*, 39 S.W.3d at 313; *Youssefzadeh v. Brown*, 131 S.W.3d 641, 645 (Tex. App.—Fort Worth 2004, pet. denied); *Cedar Oak Mesa, Inc. v. Alternate Real Estate, LLC*, 03-10-00067-CV, 2010 WL 3431703 (Tex. App.—Austin Aug. 31, 2010, no pet.).

Effective September 1, 2011, the Texas Legislature pre-empted the amendment process in certain Restrictions by TEX. PROP. CODE Sec. 209.0041, which fully analyzed in Exhibit "A". In summary, for most modern residential neighborhoods, a new, statutory amendment process is the ONLY permitted procedure. The approval percentage is capped at 67% and the voting process is the same as any other property owners' association vote. No longer will the base be either i) the no. of lots or separately owned tracts in a neighborhood or ii) the no. of owners (being the 2 most common in Restrictions), but the "votes allocated to property owners in the property owners' association". See Exhibit "A"

3. All Property is Bound by a Modification.

A properly adopted modification binds all property encumbered by the Restrictions. *Dyegard*, 39 S.W.3d at 314. This is a logical result considering that all owners take their property subject to the recorded Restrictions. *Id.* (quoting *Baldwin v. Barbon Corp.*, 773 S.W.2d 681, 682 (Tex. App.—San Antonio 1989, writ denied)).

D. Limitations on Modifications

1. Discriminatory Amendments.

A majority of owners may not amend Restrictions to "single out" a limited area for special treatment, as to do so "...would invite foreseeable mischiefs not within the original intent of the subdivider. The most

obvious of such mischiefs to result are uncertainties and possible discriminations." *Zent v. Murrow*, 476 S.W.2d 875, 878 (Tex. Civ. App.—Austin 1972, no writ). This is an application of the public policy limitation on Restrictions. However, the amendment of Restrictions that “single out” a specific area may be permissible when there have been changed circumstances. One court found that the lots that were being singled out for modification were distinctively different from the remaining lots and thus the nonuniform modifications were valid. *Arthur M. Deck & Associates v. Crispin*, 888 S.W.2d 56, 61 (Tex. App.—Houston [1st Dist.] 1994, writ denied). The author believes that courts will listen to arguments of discrimination if there is no rational basis for the distinction in a modification, so the logic supporting a discriminatory amendment should be set forth in the modification. If a logical basis cannot be articulated clearly, then the amendment is at risk to be invalidated, but if there is a logic distinction, then the amendments are valid.

2. Amendments as Terminations.

An amendment which effectively destroys the Restriction was rejected in *Hanchett v. East Sunnyside Civic League*, 696 S.W.2d 613, 615 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.), holding that the right to amend implies only corrections, improvements or reformation. However, in *Meyerland Cmty. Imp. Ass’n*, the court allowed an amendment to eliminate critical components from the Restrictions so long as the proper procedure was followed, despite a challenge that the amendment was inconsistent with the common scheme of development for the overall development of which area modifying its Restrictions was a section. 700 S.W.2d at 267. The author believes that a properly adopted modification should be upheld without regard to the provisions deleted, as the authority to modify should include the authority to eliminate.

3. Amendments by the Developer.

Developer unilateral amendments, pursuant to specifically retained authority, are subject to limitations that (i) the Developer must retain a property interest in the benefited land, and (ii) the amendment must be reasonable and not arbitrary or capricious. *Dyegard Land P’ship v. Hoover*, 39 S.W.3d 300, 314 (Tex App.—Fort Worth 2001, no pet.). A recitation in the amendment addressing these points is recommended.

TEX. PROP. CODE CH. 209.0041 defines “Development Period” as “a period stated in a declaration during which a declarant reserves: (1) a right to facilitate the development, construction, and marketing of the subdivision; and (2) a right to direct the size, shape, and composition of the subdivision.”

During this period certain limitations apply. See the chart attached as Exhibit “I”.

4. Modification “Windows”.

Most Restrictions provide for an initial term, then automatic renewals, usually every 10 years. Many residential Restrictions from the 1950’s-1970’s contain modification provisions which limit modifications and extensions to a specified time period (usually 6 or 12 months) immediately prior to an automatic renewal date. The concept was that owners would have foreseeability as to the Restrictions for extended periods, without concern that they might change in random intervals. The period when modification and extension is prohibited is a “Freeze-out” period. The period when modification or extension is permitted is a modification/extension “Window.” These types of provisions have bedeviled neighborhoods for years, as they are forced to wait for the window to open, then act within the window. Some attorneys hoped that the statutory modification provision of TEX. PROP. CODE CH. 204 could be used to modify residential Restrictions within the freeze-out period under the argument that the Restrictions prohibited modifications (at least as to the freeze-out period), therefore Ch. 204 applies during that period. This argument was rejected in *Simpson v. Afton Oaks Civic Club*, 155 S.W.3d 674 (Tex. App.—Texarkana 2005, pet. denied), holding that the provision for modification in a window as sufficient to preclude applicability of Chapter 204, and no modification was permitted during the freeze-out period. However, TEX. PROP. CODE Sec. 209.0041 overrides *Simpson*, by establishing a mandatory statutory process to amend Restrictions by a 67% vote based on all votes allocated to owners in a POA.

5. Non-Competition Restrictions.

A modification to establish limits on use for the benefit of adjacent, non-owned property, such as to assist a neighboring property owner to a tenant which desires to have protection from the establishment of a competing store, may be a violation of the Texas Free Enterprise and Antitrust Act of 1983, TEX. BUS. & COM. CODE Sec. 15.04. In *Kroger Co. v. J. Weingarten, Inc.*, 380 S.W.2d 145, 150 (Tex. Civ. App. Houston 1964, writ ref’d n.r.e.), the court interpreted prior Texas antitrust law to prohibit the enforceability of a similar restriction as constituting an unlawful trust to prevent competition. Such limitation would be valid if established incident to a lease or property transfer in which the party establishing the Restriction has an interest. *Id.* The court refused a request to reform the Restriction or to otherwise “do equity”. *Id.* at 151-52.

III. TEXAS STATUTES AFFECTING RESTRICTIONS

A. Applicable Statutes

The Texas Legislature dramatically modified several basic concepts of Restriction law starting in 1985, in the TEX. PROP. CODE Chapter 200 series of statutes. The cumulative effect of these statutory provisions is to import various concepts from municipal land use law (based on the police power) into Restriction law (based on private contract). Many attorneys believe this series only apply to the Houston area, as the series was initiated by Houston legislators and contains several provisions bracketed to apply only to the Houston area or to other limited area. This is not true, as Chapters 202, 207 and 209 have statewide application. Also, through "bracket creep" (increase in population making a population bracketed bill apply to an area not originally intended), a Chapter may apply to your client. An attorney considering the modification of Restrictions should recognize these statutes and consider how they may affect the modification process. Many of the recent changes void certain Restrictions. Any attorney reviewing Restrictions must also review the then current TEX. PROP. CODE Chapter 200 series to determine what statutory powers apply to the particular neighborhood and which of the Restrictions are void or modified statutorily.

1. TEX. PROP. CODE CH. 201 (bracketed to Houston area) authorizes creation or modification of Restrictions by a property owner petition for certain neighborhoods.
2. TEX. PROP. CODE CH. 202 (statewide application) provides for:
 - a. *liberal construction of Restrictions*;
 - b. *a strong presumption of reasonableness* for actions of property owners' associations;
 - c. property owners' association ("POA") standing to enforce Restrictions;
 - d. \$200 per day "*civil damages*" for violation of Restrictions; and
 - e. limits on regulation of political signage, religious items, flag display, solar energy devices, certain roof shingles and drought resistant landscaping.
3. TEX. PROP. CODE CH. 203 authorizes counties over 200,000 population to enforce certain Restrictions.

4. TEX. PROP. CODE CH. 204 (bracketed to Houston area) provides:
 - a. for creation of a POA where none was created under Restrictions;
 - b. *statutory powers to POAs*;
 - c. for assumption of architectural control by POAs; and
 - d. for modification of Restrictions by a POA petition (likely pre-empted by Tex. Prop. Code Sec. 209.0041).
5. TEX. PROP. CODE CH. 205 (bracketed to counties with 65,000 or more population) provides:
 - a. a residential subdivision covered by a partial replat is subject to the Restrictions from the prior plat and that Chapter 204 provisions must be followed to modify the Restrictions; and
 - b. a POA may amend Restrictions to comply with HUD or VA requirements for insured/guaranteed loans.
6. TEX. PROP. CODE CH. 206 (Houston bracket) provides for extension of assessments for very large POAs by a procedure similar to Chapter 204. This chapter was requested by Clear Lake United Civic Association in Houston to address the pending lapse of its assessment rights under Restrictions which did not provide for modification or extension. Chapter 206 applies only to a subdivision with 4,600 or more houses located in part in a city with at least 1,600,000 population (Houston) located in a county with at least 2,800,000 population (Harris County).
7. TEX. PROP. CODE CH. 207 (statewide application) requires disclosure of information by a POA in the form of a "resale certificate", which is binding on the POA.
8. TEX. PROP. CODE CH. 208 (Houston bracket) provides for the modification of Restrictions in a Historic Neighborhood which are part of a Common Scheme for Preservation of Historic Property, as well as eliminates some technical defenses to the adoption of those Restrictions. This chapter was requested by the Houston Heights Association in Houston. Originally Chapter 207, it was renumbered in 2003. Chapter 208 applies only to a "historic neighborhood" located in part in a city with at least 1,600,000 population (Houston) located in a county with at least 2,800,000 population (Harris County). A historic

neighborhood is either (i) a former city incorporated before 1900, (ii) an area subdivided prior to 1900, or (iii) certain designated historic districts.

9. TEX. PROP. CODE CH. 209 (statewide application), the "Texas Residential Property Owners Protection Act", provides a significant list of protections to residential property owners. It applies only to residential Restrictions which provide for mandatory membership in a POA with assessment powers. It also invalidates and limits certain Restrictions. Protections include:

- Restrictions may be amended ONLY 67% vote (or lesser percentage in the Restrictions). The vote is based on the votes allocated to owners under the Restrictions. This provision permits modification where Restrictions were silent or otherwise limit modification, such as a freeze-out period. The method for voting in Restrictions is pre-empted, except that a lower voting percentage in Restrictions will apply. Bylaws may not be amended to conflict with a declaration's amendment percentage. See Exhibit "F" for a full analysis to this important change in Restriction law.
- Vote is authorized by the following methods: in person or proxy at a meeting, by absentee ballot, by electronic ballot, which includes e-mail, facsimile or posting on an internet website, or by any method provided in a Dedicatory Instrument.
- A "Management Certificate" must be recorded with information about the subdivision, and re-filed before January 2014 to be properly indexed
- POA records are now "open" excluding attorney's records, similar to local governments
- POA meetings are now "open", similar to local governments
- Right to POA hearing prior to an enforcement action (fine, charge or filing suit)
- Certain POAs may not bar members from voting because of pending enforcement actions or outstanding assessments, fines or fees
- Limitation on attorney's fees for enforcement/foreclosure

- No foreclosures if the debt is solely fines/attorneys fees
- Notice and right of redemption for foreclosures
- Limits regulations of improvements on adjacent property under common ownership used for residential purposes
- Limits Restriction amendments granting easements without owner consent.

Chapter 209 was adopted in response to public outcry when an elderly Houston woman lost her home due to her failure to pay an insignificant amount of fees and the home was purchased at the non-judicial foreclosure sale by a third party investor who refused to re-sell if for less than fair market value. It how houses a "Bill of Rights" for residential neighborhoods with POAs.

10. TEX. PROP. CODE CH. 210 (narrow bracket) provides a procedure for the extension or modification of restrictive covenants in certain small counties (between 170,000 and 175,000 population or adjacent counties between 45,000 and 75,000 population).
11. TEX. PROP. CODE CH. 211 (narrow bracket) provides a procedure for the modification of restrictions in subdivisions located in the unincorporated areas of counties of 65,000 or less where either there is no existing procedure to amend the restrictions or they may not be amended without the unanimous consent of all the property owners in the subdivision. Ch. 211 also provides that amendments of restrictions made in a real estate subdivision are effective when filed in the county real property records, notwithstanding a different effective date in the instrument.
12. TEX. PROP. CODE CH. 212 (bracketed to Houston) provides a procedure for the extension of restrictions through written consent of the majority of homeowners in a residential real estate subdivision located in a municipality with a population over 2 million and a county of over 3.3 million. Ch 212 applies to restrictions that will expire and provide that it can be extended by a majority vote. Ch. 212 does not require the creation or action of a POA or similar organization. The extension period is limited to the original term of the restriction. Property owners may not opt out of these extended restrictions.
13. TEX. PROP. CODE CH. 215 (narrow bracket) applies to "master mixed use" POAs and exempts them from Ch. 209. Ch. 215 allows amendments to declarations by a majority of

the eligible votes in master mixed use POAs. This provision was specifically created to target the Las Colinas community.

14. TEX. PROP. CODE §5.006 authorizes recovery of attorney's fees in actions based on breach of Restrictions.
15. TEX. LOC. GOV'T CODE §§ 212.151 and 212.153 authorize the City of Houston and other unzoned cities, like Pasadena, to enforce certain Restrictions (limited to use, set back, lot size, fences, or size, type, number and orientation of structures). See HOUSTON, TEX., CODE §§ 10-551 - 10-555.

A chart outlining the applicability of the various "bracketed" sections in TEX. PROP. CODE CH. 200, et. seq. is attached as Exhibit "E".

B. TEX. PROP. CODE CH. 202 - Construction and Enforcement of Restrictions

1. Purpose

Chapter 202 was adopted in 1987 to support the efforts of a "property owners' association" (as defined in Chapter 202.001(2), and referred to herein as a "POA") to enforce Restrictions. Chapter 202 provides for liberal construction of Restrictions, a presumption of validity of a POA's exercise of discretionary authority in enforcing Restrictions, statutory authority for a POA to enforce Restrictions, and civil penalties for violation of Restrictions.

2. Application

Chapter 202 applies to all "Restrictive Covenants." "Restrictive Covenants" are defined as any covenant, condition, or restriction contained in a "dedicatory instrument," whether mandatory, prohibitive, permissive, or administrative. A "dedicatory instrument" is broadly defined and includes a declaration or similar instrument subjecting real property to Restrictions, bylaws or similar instruments covering either the administration or operation of a POA, the properly adopted rules or regulations of a property owners' association, and all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

3. Liberal Construction

Section 202.003(a) states "a [Restriction] shall be liberally construed to give effect to its purposes and intent."

But what does this mean when long-standing Texas case law mandated the strict construction of Restrictions in favor of the free use of land? Some courts have accepted the direction as a clear legislative reversal of the common law. Many courts have adopted the statutory standard of liberal construction as stipulated by Section 202.003(a). See, e.g., *Lee v.*

Perez, 120 S.W.3d 463, 466 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Air Park-Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 909 (Tex. App.—Dallas 2003, no pet.); *Truong v. City of Houston*, 99 S.W.3d 204, 214 (Tex. App.—Houston [1st Dist.] 2002, no pet.). However, other courts continue to more strictly construe restrictive covenants, contending that Section 202.003(a) does not alter the traditional common law rule of contract interpretation. See *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.) (positing that Section 202.003(a) in no way trumps the common law rules of construction for interpreting restrictive covenants).

The 14th Court of Appeals recently outlined the conflict between the Texas courts:

Some courts, including our own, have held or suggested that the Property Code's liberal construction rule has superseded the common law's approach to strictly construing restrictive covenants. By contrast, others have held that there is no discernible conflict between the two rules. Among these courts, there persists a separate disagreement as to how the rules should be applied...Other courts, including ours, have continued to apply the common law rule without any reference to the Property Code...The Texas Supreme Court has noted, but has not addressed, the potential tension between these two methods of construction.

Wiese v. Heathlake Cmty. Ass'n, Inc., 384 S.W.3d 395, 401-02 (Tex. App.—Houston [14th Dist.] 2012, no pet.)

The confusion appears to stem from the Texas Supreme Court case of *Wilmoth v. Wilcox*, 734 S.W.2d 656 (Tex. 1987), which relied upon the prior common law rule of strict construction of restrictive covenants in favor of the free use of land. Unfortunately, that case was handed down shortly after the effective date of § 202.003(a), but does not reference it. Apparently, neither the Supreme Court nor the attorneys arguing the case were aware of the change, and it was not briefed. Nonetheless, several courts continue to rely upon *Wilcox* as support for the continuation of strict construction. This issue was addressed in dicta in *Herbert v. Polly Ranch Homeowners Ass'n*, in the following excerpt:

The Association argues that this standard of review [i.e. strict interpretation] was legislatively overruled by § 202.003, which requires us to give effect to their purposes and intent. Even though *Wilmoth* was decided after the effective date of § 202.003,

the Association argues that this issue was never raised in that case. Copies of the brief filed before the Supreme Court in *Wilmoth*, show that the effect of § 202.003 was not an issue. The Association is correct about the adoption of § 202.003 in the *Wilmoth* case.... Even after the enactment of § 202.003, this Court stated that covenants restricting the free use of land were not favored. It is not necessary for us to resolve such discrepancies today, because under either approach we would reach the same result in this case.

Herbert v. Polly Ranch Homeowners Ass'n, 943 S.W.2d 906, 908 (Tex. App.—Houston [1st Dist.] 1996, writ denied)(citation omitted).

Liberal construction is mandated by § 202.003(a). The author believes that the importance of liberal construction is that ambiguous provisions in Restrictions should be construed in a manner favorable to the overall intent of the Restrictions to regulate land use. However, liberal construction will not solve poor drafting. Where a provision in a Restriction is unambiguous, even if the unambiguous provision does not state the intent of the owner, the provisions will be enforced as written. Courts will construe a Restriction which is unambiguous based on its clear statement without admitting evidence as to the actual intent of the parties. Where a provision is ambiguous, such evidence will be admitted to help determine the true intent of the owner who executed Restrictions. *See, e.g., Reagan Nat. Advertising of Austin, Inc. v. Capital Outdoors, Inc.*, 96 S.W.3d 490 (Tex. App.—Austin 2002, pet. granted, judgment vacated w.r.m.). This liberal construction is important only where the traditional strict construction would “tip the scales” in favor of permissive use of land. Previously, if a provision were potentially ambiguous, it would not be enforced, due to strict construction doctrine. Now, that same provision might be enforced since the liberal construction mandate (requiring a “second review” of the Restriction as a whole) tips the scales a different way. Perhaps these cases show that the importance of the strict construction doctrine is overstated and in the granular interpretation by a court of specific Restrictions, the strict/liberal distinction is usually immaterial. The rule has never changed that unambiguous Restrictions will be enforced. The only impact of the strict/liberal distinction is those Restrictions which are borderline ambiguous.

However, no "dedicatory instrument" may be construed to prevent the use of property as a "family home," defined to include certain homes for persons with specified medical conditions. TEX. HUMAN RES. CODE, Chapter 123; *see also Deep East Texas Regional Mental Health & Mental Retardation v. Kinneer*, 877 S.W.2d 550 (Tex. App.—Beaumont

1994, no writ). (Note that *Kinneer* also espouses strict construction.)

4. Discretionary Authority

Section 202.004(a) provides a presumption of reasonableness when a POA (or other representative designated by a property owner) exercises "discretionary authority." The presumption is overcome only by a preponderance of the evidence demonstrating that the action was "arbitrary, capricious or discriminatory." This presumption is similar to that afforded a municipality in enforcing land use regulations.

5. Standing to Enforce Restrictions

Section 202.004(b) authorizes a "Property Owners' Association" or "other representative designated by an owner of real property" to enforce Restrictions, whether or not said representative was created under the Restrictions and whether or not she or he has contractual authority to enforce the Restrictions. At common law, a community association does not have contractual right to enforce Restrictions unless it was created under the Restrictions. "Property Owners' Association" is broadly defined in Section 202.001(2) as: (i) an incorporated or unincorporated association, (ii) owned by or where members consist primarily of the owners of property covered by the dedicatory instrument, (iii) through which the owners (or a board of managers or similar governing body) manage or regulate the neighborhood. A court may be troubled with the requirement for the association to "manage or regulate" in the instance where the association is a civic club without any legal authority to act on behalf of owners who are not members.

6. Civil Penalties

Section 202.004(c) authorizes "civil damages" not to exceed \$200 for each day of a Restrictions violation. This is similar to the penalty for violation of municipal land use regulations. (Two hundred dollars was the maximum penalty for a municipal zoning violation at the time Section 202.004(c) was enacted.) *See also Sanchez v. Southampton Civic Club, Inc.*, 367 S.W.3d 429, 436 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (“section 202.004 damages are punitive rather than compensatory”). These damages are discretionary, not mandatory. *Id.*

C. **TEX. PROP. CODE CH. 209**

1. Introduction

Chapter 209 is also known as the Texas Residential Property Owners Protection Act. There are a number of provisions in this Chapter which effect the modification of Restrictive Covenants, specifically in

regards to the procedural aspects of modification. The full text of Chapter 209 is attached as Exhibit “J”.

2. Definitions

- “Board” means the governing body of a property owners' association
- “Declaration” means an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision.
- “Dedictory instrument” means each governing instrument covering the establishment, maintenance, and operation of a residential subdivision. The term includes restrictions or similar instruments subjecting property to 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
- “Development period” means a period stated in a declaration during which a declarant reserves: (A) a right to facilitate the development, construction, and marketing of the subdivision; and (B) a right to direct the size, shape, and composition of the subdivision.
- “Lot” means any designated parcel of land located in a residential subdivision, including any improvements on the designated parcel.
- “Owner” means a person who holds record title to property in a residential subdivision and includes the personal representative of a person who holds record title to property in a residential subdivision.
- “Property owners' association” or “association” means an incorporated or unincorporated association that: (A) is designated as the representative of the owners of property in a residential subdivision; (B) has a membership primarily consisting of the owners of the property covered by the dedictory instrument for the residential subdivision; and (C) manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision.
- “Residential subdivision” or “subdivision” means a subdivision, planned unit development, townhouse regime, or similar planned development in which all land has been divided into two or more parts and is subject to restrictions that:

- (A) limit a majority of the land subject to the dedictory instruments, excluding streets, common areas, and public areas, to residential use for single-family homes, townhomes, or duplexes only;
- (B) are recorded in the real property records of the county in which the residential subdivision is located; and
- (C) require membership in a POA that has authority to impose regular or special assessments on the property in the subdivision.

- “Restrictions” means one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the real property records or map or plat records.
- “Restrictive covenant” means any covenant, condition, or restriction contained in a dedictory instrument, whether mandatory, prohibitive, permissive, or administrative.

3. Section 209.0041: Amendment of Dedictory Instruments

Section 209.0041 overrides common law and conflicting Declaratory Instrument provisions authorizing a Dedictory Instrument to be amended ONLY by a vote of 67% (or less if in the Declaratory Instruction) of owners with votes in a POA. Bylaws may not be amended to conflict with this provision. This section does not apply during the Development Period. The provision is clearly mandatory and pre-empts conflicting contractual provisions or other provisions of Ch. 209. The operative language is:

...a declaration may be amended *only* by a vote of 67 percent of the total votes allocated to property owners in the property owners' association in addition to any governmental approval required by law.

The author reads this as a statutory amendment process pre-empting Restriction amendment procedure and establishing a new, exclusive, and more liberal procedure. A restrictive reading is that only the contractual voting percentage for amendments has been limited. However, the use of “only” indicates that the legislature is dictating a new, mandatory amendment process. Therefore, the author believes that all Restrictions to which Ch. 209 is applicable (those with mandatory POAs with assessments) may now be modified, **at any time**, simply by an owner vote of 67% (or less). Restrictions which don't provide for amendment or which have freeze-out

period are now subject to amendment, at any time. Only the procedural process in Ch. 209 is legally required (or permitted).

See Exhibit "A" for a full analysis for TEX. PROP. CODE Sec. 209.0041, and recommended "best practices" for amendments.

4. Section 209.0051: Board Meetings

Section 209.0051 provides notice requirements for open board meetings which supersede the Restrictions. These provision imitate the open government mandates on Texas governmental bodies. POAs are not considered quasi-governmental entities. Requirements:

- owners may attend meetings
- Meetings must be held in a county in which all or part of the property is located, or an adjacent county
- notice must provide the date, hour, place and general subject of the meeting and must be mailed or through posting a notice on the associations common property or online along with sending the notice by email.
- apply during the Development Period, but only if the meeting is to adopt/amend governing documents.

5. Voting

The process for voting has been liberalized to insure all owners may be heard.

- Notice of vote/election (Sec. 209.0056)- 10th - 60th day before the vote/election, there must be written notice to each owner, which supersedes provisions in a Dedicatory Instrument.
- Ballot requirements (Sec. 209.0058)- Votes must be cast in writing and signed, unless an election is uncontested.
- Voting Methods (Sec. 209.00592)- Expanded to include:
 - in person(If a vote was submitted by absentee/electronic ballot, it is invalidated if the owner votes in person)
 - proxy
 - absentee ballot
 - electronic ballot(e-mail, facsimile or internet website, so long as the identity of the property owner can be confirmed and the owner can receive a receipt of the electronic transmission)
 - other method in a Dedicatory Instrument.

Tex. Prop. Code Sec. 209.0041 pre-empts many

Restrictions' amendment process, replacing it with a simple 67% (or lesser if the Restrictions provides for a lower percentage) vote. That vote can be any of the preceding methods, including electronic.

D. TEX. PROP. CODE CH. 204 - Modification of Restrictions by Property Owners' Association

1. Background and Purpose

Chapter 204 was added to the Property Code effective August 28, 1995, by the 74th Legislature. It codifies the powers of a property owners' association to act as a community association for the neighborhood referenced in the Restrictions, and provides a process to **create** a property owners' association. The goal of Chapter 204 is to eliminate many of the costs and administrative burdens created by the "opt out" provision of Chapter 201. Chapter 204 was a significant benefit to a neighborhood which qualifies for its use, but has been pre-empted by TEX. PROP. CODE Sec. 209.0041, and is no longer a modification procedure. A chart outlining the process required by Chapter 204 is attached as Exhibit "B".

2. Application (§§ 204.002 and 204.003)

Chapter 204 applies to:

- "Subdivision": same definition as Chapter 201 (§ 201.003(2)), where the subdivision (excluding a condominium development) is located (i) entirely or in part in a county with a population of 2,800,000 or more [Harris County]; in a county with a population of 250,000 or more that is adjacent both to the Gulf of Mexico and to a county having a population of 2.8 million or more [Galveston and Brazoria Counties]; or in a county with a population of 275,000 or more that is both adjacent to a county with a population of 3.3 million or more and contains part of a national forest [Montgomery County]. Analysis of the statutory definition of "subdivision" is attached as Exhibit "D." As a general rule, this is the area shown on the recorded subdivision plat for the neighborhood or the area burdened by the Restrictions on the neighborhood. The "subdivision" cannot be gerrymandered to achieve approval.
- Restrictions without regard to effective date (§ 204.002(b)).

Chapter 204 does not apply to:

- Portions of a Subdivision zoned or containing commercial/industrial structures,

an apartment complex, or a condominium. (§ 204.002(c)).

- An express Restrictions provision for the extension of, addition to, or modification of the Restrictions by a designated number of owners of real property in a subdivision that is not included in a County described by Section 204.002(a)(3). Tex. H.B. 3518, 80th Leg., R.S. (2007)(modifying Property Code Section 204.003).

In *Simpson v. Afton Oaks Civic Club*, 155 S.W.3d 674 (Tex. App.—Texarkana 2005, pet. denied), the court held that Sec. 204.003 prevents use of the modification procedures of Chapter 204 where the Restriction contains different, and specific, procedures for modifications, even if those procedures prohibit modification during specified long period of time. Afton Oaks Restrictions have a typical provision seen in many residential Restrictions of the 1950's, 1960's and 1970's, which provide for modification only within a 'window' immediately prior to the automatic renewal dates for the Restrictions, in this case a 6 month period prior to 10 year renewals. The civic club orchestrated an attempted modification outside that period utilizing Chapter 204 under the argument that Chapter 204 should apply during any period when Restrictions either don't provide for modification or don't permit it. The court rejected this argument based on a plain reading of Sec. 204.003(a) stating "...the restrictions provided an express method for amendment and ...Afton Oaks did not amend the restrictions according to that procedure." *Id.* at 4. **TEX. PROP. CODE Sec. 209.0041 now eliminates the Afton Oaks situation for Restrictions subject to Chapter 209.**

3. Property Owners' Association (§§ 204.004, 204.009 and 204.010)

Chapter 204 creates a statutory community association entity designated as a "POA." Chapter 204 codifies the position taken by community association attorneys in litigating the authority of community associations.

a. Statutory Definition - A designated representative of the owners in a Subdivision, whose members are those owners. It may be referred to as a homeowners' association, community association, civic association, civic club, association, committee, or similar term in Restrictions (§ 204.004(a)).

b. Form - The POA must be non-profit and may be incorporated or unincorporated (§ 204.004(b)).

c. Creation Pursuant to Restrictions - The POA's board of directors/trustees must be selected

under the Restrictions and any applicable articles of incorporation or bylaws (§ 204.004(c)).

d. Texas Non-Profit Corporation - Where a POA is referenced in Restrictions as a Texas non-profit corporation, the powers and purposes set out in its articles of incorporation and bylaws are incorporated into the Restrictions by implied reference (§ 204.009).

e. Implied Powers - Unless limited by the Restrictions, articles of incorporation, or bylaws, POAs may act through their board of directors/trustees and exercise 21 enumerated powers set forth in § 204.010. These powers are broad and incorporate all rights typical of a POA, including the following:

- (1) Adopt and amend bylaws;
- (2) Regulate the use, maintenance, repair, replacement, modification, and appearance of the Subdivision;
- (3) Grant easements, leases, licenses and concessions through or over the common area;
- (4) Adopt and amend rules relating to collection of delinquent assessments and the application of payments;
- (5) If the Restrictions allow for an annual increase in the maximum regular assessment without a vote of the membership, assess the increase annually or accumulate and assess the increase over a number of years;
- (6) If the Restrictions or Chapter 204 vests architectural control authority in the POA, implement, record, and modify written architectural control guidelines;
- (7) Exercise other powers typical to a POA;
- (8) Exercise other powers necessary and proper for the governance and operation of the POA (§ 204.010); and
- (9) Those powers set forth in the POA's Articles and Bylaws (§ 204.009).

The limitation in the preamble to Sec. 204.010 "Unless otherwise provide by the restrictions or the association's articles of incorporation or bylaws, the property owners association...may..." was interpreted by the Texas Supreme Court in *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004). *Brooks* held:

- Sec. 204.010 is constitutional;
- Late fees may be adopted in addition to interest on late payments where the Restrictions are silent on late fees;
- Sec. 204.010(10) fees may not be the basis for non judicial foreclosure because there is not notice in the original Restrictions; and

- Any limitations in the Restrictions regarding assessments will be given effect.

4. Creation of POA (§ 204.006)

Chapter 204 provides a special procedure to allow a neighborhood with Restrictions, but without a POA designated in those Restrictions, to modify its Restrictions to designate a POA. Tex. Prop. Code Sec. 209.0041 does not pre-empt this process, since Restrictions without a POA are not subject to Chapter 209.

Prior to Tex. Prop. Codes Sec. 209.0041, neighborhoods would engage in a 2 step process to amend their Restrictions. First, the neighborhood would create a POA using the procedure set forth in Chapter 204.006. Second, the POA would modify the Restrictions under Chapter 204.005 (see Section III.B.5 of this article). Some practitioners had argued that the process in Sec. 204.006 to establish the POA and the process to amend the Restrictions could occur together. However, in *Gillebaard v. Bayview Acres Assoc., Inc.*, 263 S.W.3d 342 (Tex. App.—Houston [1st Dist.] 2007, pet. denied), this interpretation was rejected. In *Gillebaard*, several lots comprising approximately six acres in a residential subdivision were sold for the construction of a condominium project. In an effort to block this development, the surrounding neighbors attempted to amend their existing deed restrictions to create a POA and simultaneously amend the restrictions to single-family use only. *Id.* at 344-45. The court interpreted the plain language of Sec. 204.005 and 204.006 to reflect a “due order of action:” first, a petition to create a POA and establish how it will operate; second, the POA circulates a new petition for the purpose of amending the restrictions in other ways. A POA cannot have the power to act on the homeowners’ behalf unless the restrictions have first been amended to create a POA with such powers. As such the one-step process was invalid. In dicta, the *Gillebaard* court stated that where Restrictions contained no amendment process, that Ch. 204 is not applicable. *Id.* FN. 10 The author respectfully disagrees with the court, as the intent of Ch. 204 is liberalize the amendment process in response to the difficulties of using Ch. 201. Further, the court misconstrues the impact of having no amendment process, which results, as a matter of law in a 100% approval requirement for amendments. This 100% requirement satisfies the provision in Ch. 204 that it is applicable only if the required approval for amendments exceeds

The appropriate process to create a POA is as follows:

a. Application - In Subdivisions where Restrictions do not provide for a POA and require

more than **60% owner** approval to add to or modify the Restrictions, a POA may be added to the Restrictions through the petition process (§ 204.006(a)).

b. Petition Committee - A three (3) person petition committee is formed pursuant to TEX. PROP. CODE § 201.005 and a notice recorded (§ 204.006(a)(1)).

c. Petition Contents - The petition modifies the Restrictions for the **sole** purpose of creating and operating a POA with mandatory membership, mandatory assessments, and equivalent voting rights for each of the owners in the Subdivision (§ 204.006(a)). The author and Michael Gainer believe that this section does not require mandatory assessments to be implemented.

d. Petition Approval - The petition must be approved by the owners (excluding lienholders, contract purchasers, and mineral owners) of at least **60%** of the property (not owners) in the Subdivision (§ 204.006(a)(2)).

e. Petition Procedure - Same as under § 204.005, not Chapter 201 (§ 204.006(a)(3)).

f. Time for Approval - One (1) year from creation of the petition committee (§ 204.006(b)).

g. Effect of Petition Approval - Binding on all property in the Subdivision to which Chapter 204 is applicable [*i.e.* not to zoned or used for commercial or industrial property, apartments, or condominiums]. There is no opt out provision. (§ 204.006(c)).

5. Extension of, Addition to, or Modification of Restrictions (§204.005)

Chapter 204 provides a streamlined procedure whereby a neighborhood with a POA established in its Restrictions may extend, add to, or modify its Restrictions, but this process has been superseded by TEX. PROP. CODE § 209.0041. Once Chapter 204 has been utilized to create a POA, then the Restrictions may be modified only the TEX. PROP. CODE § 209.0041.

6. Lienholders (§ 204.007)

- Lienholders are bound, except for increases in assessments where Restrictions do not subordinate assessments to purchase money or home improvement liens.
- Lienholders are bound in all matters where the Restrictions subordinate purchase money or home improvements liens.

- c. Purchaser at a foreclosure sale or from a foreclosing lienholder is bound in all matters.

7. Architectural Control (§§ 204.010(a)(18) and 204.011)

Chapter 204 codifies POA rights to implement architectural guidelines and to assume the authority of an architectural control committee ("ACC").

a. Application - Where Restrictions provide for the creation and operation of an ACC with the power to approve or deny applications for proposed original construction or modification of a building, structure, or improvement (§ 204.011(a)).

b. Transfer to Association (§ 204.011(b)) - ACC authority automatically vests in the POA on the earlier to occur of:

- (1) The expiration of the term of the ACC;
- (2) The completion and sale of the residence on the last available building site;
- (3) The person/entity designated as the ACC in the Restrictions assigns his/its authority in writing to the POA;
- (4) The assignee of the original holder of the authority of the ACC abandons its authority for more than one year; **or**
- (5) The Restrictions vest architectural control in the POA.

Note: Chapter 204 resurrects a defunct ACC (where the foregoing events occurred prior to 8/28/95).

c. Vests Authority in a Civic Association (§204.011(d)) - if existing restrictions applicable to a subdivision do not provide for a property owners' association, and a property owners' association has not been formed, the architectural control committee authority over the entire subdivision vests in a civic association other than a property owner's if:

- (1) The architectural control committee exercised its authority over all the lots in the subdivision for at least 10 years and over a majority of the lots for at least 20 years;
- (2) The architectural control committee created by the restrictions assigned the civic association the architectural control committee's authority over a majority of the lots in the subdivision.
- (3) The architectural control committee assigned the civic association the architectural control committee's authority over a majority of the lots and has exercised that authority over all the lots in the subdivision for at least 10 years; and

- (4) The architectural control committee authority has lapsed in the lots in which the civic association lacks authority, and the lapse is solely the result of the automatic termination of the architectural control committee authority or the death of a member of the architectural control committee or another cause resulting from the inability to locate a member of the architectural control committee or the member's assigns.

8. POA Authority Continues Until (§ 204.011(c)) -

- a. The Restrictions provide otherwise;
- b. The Restrictions are terminated; **or**
- c. The POA ceases to exist.

9. POA Authority (§ 204.010(a)(18)) - The POA may:

- a. Implement written architectural control guidelines (which may be recorded); and
- b. Modify the guidelines as the needs of the Subdivision change.

E. TEX. PROP. CODE CH. 201 - Creation, Extension, and Modification of Restrictions

1. Purpose

At common law, every owner must approve any new Restrictions. Community associations in Houston discovered that many renewal campaigns failed if an owner could not be found or, worse, refused to sign for any reason. Perhaps this was based on an unfounded fear or ignorance of the legal consequences of Restrictions.

In 1985, after several unsuccessful attempts, neighborhood proponents succeeded in pushing TEX. PROP. CODE CH. 201 through the Legislature to allow extension, modification, and adoption of Restrictions without necessity of joining every affected owner.

Due to TEX. PROP. CODE § 209.0041, and Chapter 204, the remaining importance of Chapter 201 is to *reestablish* lapsed residential Restrictions. TEX. PROP. CODE § 209.0041 supersedes the modification provision of Chapter 201 where a property owners' association exists. Where no property owners' association exists, Chapter 201 remains an option for modifying Restriction. However, due to the "opt-out" provision of § 201.009-10, a better solution is to use Chapter 204 to create a property owners' association, then use § 209.0041 to modify the Restrictions. A chart showing the process required by Chapter 201 is attached as Exhibit "C".

2. Application (§ 201.001)

Chapter 201 applies only to a "residential real estate subdivision" (also defined as "subdivision")

within the city limits or extraterritorial jurisdiction of cities with population exceeding 100,000, the unincorporated portions of counties with a population exceeding 2,400,000 [i.e., Harris County and Dallas County] or the incorporated or unincorporated portions of adjacent counties with population of 30,000 or more [all counties adjacent to Harris County and Dallas County]. A "residential real estate subdivision" must have the following characteristics (§ 201.003(2)):

- It must be (i) referenced on a recorded plat or (ii) a subdivision area located within the limits or extraterritorial jurisdiction of a municipality [Note: All of Harris County is believed to be within the municipal limits or the extraterritorial jurisdiction of some city, primarily the City of Houston]; and
- A majority of the land area (excluding streets and public areas) "is or was" restricted to "residential use only."

Analysis of the statutory definition of "subdivision" is attached as Exhibit "D." As a general rule, this is the area shown on the recorded subdivision plat for the neighborhood or the area burdened by the Restrictions on the neighborhood. The "subdivision" cannot be gerrymandered to achieve approval.

Chapter 201 does not apply for purposes of extension or creation of Restrictions in neighborhoods where, per § 201.001(b):

- Restrictions are automatically extended for an indefinite number of successive periods of at least 10 years subject to a right of waiver or termination by a specified percentage of less than 50% plus one of the owners; or
- Restrictions provide for an indefinite number of successive extensions of at least 10 years of the term of the restrictions by written and filed agreement of a specified percentage of less than 50% plus one of the owners.

Chapter 201 does not apply for purposes of modification in neighborhoods where the existing Restrictions require a vote of less than 75% of the owners to modify said Restrictions (§ 201.001(c)).

Chapter 201 has been pre-empted for amendments to Restrictions subject to Chapter 209.

3. Procedure (§§ 201.004-008)

Chapter 201 mandates the following procedure to extend, adopt, or modify Restrictions:

a. Petition Committee - At least 3 owners form a petition committee. The petition committee files a notice in the real property records describing the

affected area and detailing the proposed action (§ 201.005(a)).

b. Petition Contents - A petition is then circulated to collect signature from the owners. The petition sets forth:

- (1) extension of existing Restrictions, or
- (2) modifications of the existing Restrictions, or
- (3) the proposed new Restrictions (§§ 201.005 and 201.007).

c. Petition Approval - The required percentage of signatures for approval is (i) to extend or create Restrictions - **50%**; and (ii) to modify Restrictions - **75%**. Signatures must be acknowledged. The required percentage may be obtained by counting approval from owners of the required percentage using any one of these criteria (§ 201.006(a) and (b)):

- (1) Lots;
- (2) Separately owned parcels; **or**
- (3) Square footage of lots (excluding roads and public areas).

Some neighborhoods have circulated a common law (i.e. non-statutory form) power of attorney without an acknowledgment for signature by owners to authorize an officer of the Petition Committee or Civic Club to sign for that owner in support of the Petition. The attorney-in-fact's signature is then acknowledged for the purpose of satisfying Chapter 201. Several title insurance companies contacted by the author questioned the procedure; however, it appears to comply with technical requirements of Chapter 201.

In addition to a common law power of attorney, Texas Probate Code § 490 contains a statutory durable power of attorney form, which allows a principal to give an agent a number of enumerated powers, but must be acknowledged. The statute's form powers are construed in a "broad and sweeping" manner. TEX. PROB. CODE ANN § 490(a) (Vernon 1993). It is noteworthy that durable power of attorney documents, statutory and non-statutory, do not lapse until revoked in writing. As such, it is recommended that the instrument creating the power of attorney specifically include a time limitation (i.e. six months).

In 1997, the Texas Legislature required the approval of the Petition (by acknowledged signature) of the developer or ACC representative (or their successors or assigns) if the Petition proposes to alter a right granted in the Restrictions to such party. This amounts to a veto power (§ 201.0051).

Some neighborhoods question whether a modification or extension would be valid if the approval is obtained from the record owner alone, even though the relevant property is community property.

Although there are no Texas cases in the restrictive covenant context which address this issue, the Texas Court of Appeals has held that persons who purchased an easement from a record owner of realty were bona fide purchasers though the realty was the community property of the record owner and his wife. *Heidelberg v. Harvey*, 391 S.W.2d 828 (Tex. Civ. App.—El Paso 1965, no writ). However, best practice is to obtain the approval of both the husband and wife.

d. Deadline for Filing Petition - The petition with acknowledged signatures must be filed with the County Clerk within 1 year from the date of recording the notice of creation of the petition committee (§ 201.006(b)) [but Note: Section 201.004(b) indicates a 2 year deadline].

e. Notice to Owner - Notice and a copy of the petition must be sent to all owners by certified mail within 60 days after the petition is filed. Additional notice is required by newspaper publication once a week for 2 consecutive weeks (§ 201.008). The Petition Committee should keep all Return Receipts indefinitely.

4. Opt Out Provisions (§§ 201.009-010)

An Owner may "opt out" of the Restrictions by:

a. Petition - Signing the petition and affirmatively electing to exclude his/its property. This may be done by checking the "opt out" blank the petition is required to include; or

b. Lawsuit - Filing suit to challenge the petition process within 6 months after the filing of the petition; **or**

c. Opt-out Statement - Filing a statement affirmatively electing to be excluded from the Restrictions in the real property records within 1 year after actual notice. Evidence of receipt by all owners of the certified mail notice to each owner is critical.

This dreaded opt-out is why no one will use Chap. 201 for an amendment, unless necessary (such as there is not a mandatory membership POA with assessment authority, and the neighborhood will not accept a POA with those powers).

5. Parties Bound (§ 201.009)

All property is bound by the recorded Restrictions **except** (§ 201.009):

a. Opt-out - those whose owners formally opt out;

b. No Notice - those whose owners had no actual notice of the petition process;

c. Public Property - property exclusively dedicated for use by the public or for uses by utilities [Note: this raises the possibility of inhibiting some types of utility operations];

d. Minors/Incompetents - property owned by minors or incompetents; and

e. Lienholder - property owned by lienholders which did not sign the petition.

Lienholders and third parties acquiring their property interest after the date the petition is filed (as to consenting property owners) and after the 1-year anniversary date (as to non-consenting but non-objecting property owners) are bound.

6. Statute of Limitation (§ 201.010)

a. Suit Alleging Procedural Defects - The completeness or regularity of the procedures adopting the Restrictions may not be challenged by an owner who failed to utilize the "opt out" provisions (or whose predecessors failed to do so) except by suit for declaratory judgment filed within one hundred and eighty (180) days after the date the certificate of compliance is filed. This creates a short six (6) month statute of limitations for an objecting owner to challenge procedural satisfaction of the requirements of Chapter 201.

b. Suit Asserting Incompatible Restrictions - The foregoing statute of limitations does not apply to an owner seeking to exclude their property from the Restrictions. However, that relief is limited to a circumstance where the owner bears the burden of establishing proof that conditions of land use within the neighborhood at the time the certificate of compliance was filed was incompatible with the Restrictions. This limitation sets a high standard for an objecting owner, as it is very unlikely that the procedural requirements for approval by the requisite number of owners could be achieved if, in fact, the Restrictions are inconsistent with actual land use conditions. Further, in the unlikely event that a court finds such incompatibility, the court is authorized to alter the portion of the Restrictions which are in conflict to conform to actual land use conditions.

7. Exclusive Remedies

These remedies are exclusive. Comparable limitations are not contained in Chapter 204.

IV. MODIFICATION TO STOP NEW DEVELOPMENT (HOUSTON ONLY)

A. Constitutionality of City Enforcement.

City enforcement of Restrictions through the platting process should be upheld against an attack that

it is an unconstitutional enforcement of private contract and thus not a public purpose, as the city can assert that enforcement of private restrictions has a public benefit of protecting property values and preserving neighborhood character. *Young v. City of Houston*, 756 S.W.2d 813, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (upholding direct City enforcement of residential restrictions). Further, Deed restriction enforcement is now statutorily designated as a *governmental* function. TEX. LOC. GOV'T CODE § 212.137.

B. City Prohibition of Replats if they "Violate" Restrictions.

A replat must not "attempt to **amend or remove** any covenants or restrictions." TEX. LOC. GOV'T CODE § 212.014(3) (*emphasis added*). In 2007, the Legislature added §212.0146 to the Local Government Code, which is bracketed to Houston and states that a replat must not "amend, remove, **or violate**, or have the effect of amending, removing, **or violating**, any covenants or restrictions." TEX. LOC. GOV'T CODE § 212.0146 (3) (*emphasis added*). No replat may amend or remove Restrictions on the face of the plat being replatted, and in Houston, no replat may violate any existing Restrictions affecting the area being replatted, even if not referenced on the underlying plat.

Houston has, for many years, taken the position that it does not have the authority to approve a replat if the replat, on its face, has the effect of violating existing Restrictions (even though not referenced on the face to the original plat, or the replat). Other cities may have taken the same position. The 2007 amendment provides a statutory basis for Houston's position (where there was none before). There are no comparable provisions for counties regarding amending, removing or violating Restrictions.

In some neighborhoods, Restrictions affecting lot size, set back, etc., may not have been enforced and, in the opinion of the developer's real estate lawyer, are no longer enforceable due to waiver or change in conditions, but nonetheless remain of record. Sometimes the restrictions are ambiguous as to whether they would prevent the subdivision in question, but the landowner wishes to proceed with the development based on their attorney's legal opinion that the Restrictions are unenforceable or inapplicable, figuring that area property owners will not have the stomach or resources for a legal fight. Such situation should not affect the ability to replat property, even if arguably in violation of recorded Restrictions, except in Houston. In Houston, if a proposed plat arguably violates Restrictions, the replat must be disapproved, as it violates § 212.0146. The City of Houston takes the further position that it is the applicant's burden of proof to show that the Restrictions are not being violated.

C. Modification to Prevent City Approval of a Pending Replat.

Replats in the City of Houston have been denied where Restrictions were modified or created in the period between the initial plat application and final consideration, with the express intent to prohibit the pending subdivision. The City of Houston rejects the argument that the application of the modified Restrictions violates the applicant's vested rights in the regulations applicable at the time of application under Local Government Code Chapter 245, taking the position that the regulatory scheme has not changed, only the underlying facts.

In Houston, a neighborhood may wish to modify its Restrictions for the sole purpose of stopping "lot splitting" by developers, including a *pending* replat. This is exactly the fact situation in *Winter v. Bean*, 2002 WL 188832 (Tex. App.—Houston [1st Dist.] 2002) (unpublished opinion), where the court upheld the revised Restrictions. The court held that the modification provision in the Restrictions placed the Winters on notice that the Restrictions could be changed by a majority vote and they are bound by the subdivision limitations in the amendment.

V. MODIFYING RESTRICTIONS TO RESOLVE DISPUTES

Often, owners dispute the interpretation of Restrictions among themselves, with the Developer or with an owners' association. Sometimes an assumed limitation does not exist, is ambiguous, or is otherwise legally suspect. A direct solution is to revise the Restrictions to clearly address the issue. This fact situation occurred in *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex App.—Fort Worth 2001, no pet.), where the Developer exercised its reserved unilateral right to amend the Restrictions in the face to dispute over whether the original Restrictions prohibited personal water wells. The amended Restrictions clearly prohibited them. The court upheld amending the Restrictions with the sole intent to specifically prevent the action which was the source of the initial dispute and to moot that dispute once the court determined that the authority existed (subject to a remand on 2 fact questions not determined by the trial court).

VI. SELECTED MODIFICATION / CREATION ISSUES FOR NEIGHBORHOODS UPDATING RESTRICTIONS

Particularly in Houston, where Restrictions are the primary protection for residential neighborhoods, those neighborhoods will periodically approach an attorney for assistance in a comprehensive review and modification of the Restrictions. The modification process may take several alternative formats:

- A listing of specific sections which are deleted, replaced, or modified.
- A restatement of the Restrictions in the same format as originally used, with the modifications incorporated in a single, easy to read instrument.
- A restatement in a completely new format, utilizing modern drafting techniques.

Which format to choose is a function of the desires and politics of the neighborhood. In some neighborhoods, the shortest possible instrument to accomplish the task is desired. In others, the demand for "modern" Restrictions will lead to a comprehensive restatement/replacement.

When considering modifications to outdated Restrictions or the creation of new Restrictions in an existing residential neighborhood, a number of fundamental issues routinely arise. The treatment of these major topics can make or break a modification effort.

A. Drafting

1. Protected Uses

In drafting new restrictive covenants or modifying existing restrictive covenants be aware of the specific uses the legislature has declared cannot be prohibit. These "protected uses" are listed in the attached Exhibit "F". These uses include drought resistant landscaping, political signage, flag display, display of certain religious items, solar energy devices and certain roof shingles. While a POA may be able to regulate some of these uses, it cannot prohibit them. The author expects the Texas Legislature to continue to add to this listing of protected uses.

2. Drafting in Contemplation of Legislative Changes

Traditionally, anything that was not illegal or not contrary to public policy within a restrictive covenant was enforceable. Recently however the legislature has intervened and created rights that cannot be limited and are essentially protected uses, described above. It is important to draft with this in mind for the potential of future legislative changes. There are two options to draft in contemplation of future legislative changes. The first is to make sure the restrictive covenants conform with the law at the time it was drafted. The second is to draft in a way that you want the restrictive covenant to be in forced but explicitly state that it is subject to the Texas Property Code. For an example of how to draft a restrictive covenant subject to the law see Exhibit "G".

The new reality of Restriction Law is that the Texas Legislature has demonstrated that it will legislative modify private contract law to void and pre-empt certain provisions in Restrictions and to impose

various "protections" of property owners. No Restriction may ever be reviewed in a vacuum, but must be considered with an eye to Chapters 202, 207 and 209 (with future modifications expected). Like other areas of highly regulated activity, it is possible that the current level of regulation may ebb in the future, thus permitted provisions in Restrictions which are currently void, pre-empted or limited to have renewed effect. Each drafter of Restrictions must determine if they will draft as they hope the law will allow the Restrictions to function (hoping for a future relaxation of regulation) or to conform Restrictions to current law (knowing that changes are likely, based on recent history).

B. Property Owners Association

Where a POA is not established in Restrictions, any modification should include the designation of a POA. A POA automatically has all of the powers set forth in Chapter 204; Chapter 204 powers are significant and should eliminate many legal challenges to a POA's authority. Further, the POA will have the power to utilize Chapter 204 for modification and extension of Restrictions. Some neighborhoods have been troubled by the breadth of Chapter 204 powers and specifically limited the powers of newly created POAs to specifically eliminate any inferred powers under Chapter 204. This is permissible under Chapter 204.010.

Chapter 204 provides a procedure to create a POA by a vote of 60% of owners in a neighborhood utilizing the Chapter 204 modification procedures after the initiation of the process by a 3 person petition committee. The documentation for creation of a POA is significantly abbreviated by the elimination of the need to elaborate on the powers of the POA since Chapter 204 provides codified powers.

The rights and powers of the members of a POA and the board of directors of a POA as set forth in the POA's Articles of Incorporation and Bylaws are now incorporated by reference within the Restrictions pursuant to Chapter 204. Together with the liberal construction and presumption of validity provisions of Chapter 202, attacks on procedural matters set forth in Bylaws will be virtually eliminated.

C. Assessments

A POA without funding will be ineffective. Although mandatory assessments are not required by law, voluntary assessments have no legal effect and are not recommended. However, more than a few newly created POAs have forgone mandatory assessments in recognition of the political realities of their neighborhoods, realizing that mandatory assessments will not be approved.

Every neighborhood should establish enforceable assessments in order to provide funding for their community association. In many established neighborhoods, a lien for enforcement of the assessment is not politically palatable (particularly a non-judicially enforced lien). Further, such a lien will not be effective against the homestead of existing property owners, but only against the homestead of subsequently purchasing owners. Particularly where Chapter 201 is the method of adoption or modification of Restrictions, a lien is an issue which could defeat a petition process because it may encourage widespread opposition and opt out. Conversely, where Chapter 204 procedure is used, a lien (particularly if only judicially enforceable and with safeguards for elderly owners) may be viable. Where concerns are raised on this issue, the better course is to eliminate any lien but retain a legally enforceable assessment. Where a community association is currently voluntarily funded, adopting other modifications to the Restrictions may be more important than obtaining an enforceable assessment and lien. Chapter 209 will become applicable where the POA is mandatory and has authority for assessments, therefore an attorney must understand the benefits and limits of Chapter 209 before advising on adoption of assessment authority. The protections of Chapter 209 may be sufficient to convince owners which would formerly have opposed a POA with assessment rights and foreclosure ability to accept these ideas.

Concerns typically voiced by opponents to mandatory assessments include the following:

- (1) Philosophical/Political opposition to the mandatory requirement—often from a "property rights" view.
- (2) The current funding is adequate.
- (3) Concern with controls over use of funding—sometimes this is addressed with limitation on the powers of the POA.
- (4) Ability to increase annual assessments and create special assessments without limit—often, this is addressed by limits on annual increases without a supermajority vote of the owners.
- (5) An underlying concern with the "power" of the POA and its ability to control the neighborhood if it has funding.

Mandatory funding is best supported by the argument that it is the only fair method to allocate the cost of neighborhood-wide benefits (which should be enumerated). Without mandatory funding, some neighbors benefit without paying.

D. Development Controls

With continued urban sprawl, many citizens are choosing close-in neighborhoods to reduce commuting time. The desire for new, larger houses typically available in the suburbs is brought into close-in neighborhoods by those citizens. Sometimes these needs are satisfied by extensive remodeling of existing structures and, at other times, by demolition and construction of new housing on existing lots. This redevelopment was not contemplated by the original developers of close-in neighborhoods. The unwritten expectations of longtime owners in the neighborhoods may be shattered by the development of large residential projects (whether single-family detached, townhouse, or condominium). These conflicts between neighbors should be addressed in modified Restrictions. Restrictions can address the issue in two ways: first, by definitive performance standards; and second, by requiring the approval of an architectural control committee with significant discretion.

1. Performance Standards

Performance standards are typically non-discretionary limitations on development. Examples include setbacks, height limit, pervious area, open space, construction materials, orientation of structure, view corridors, and lighting standards. Typically, these provisions can be mapped out on paper. Some Restrictions' performance standards are subject to a variance in the event of hardship due to unusual site conditions. Other performance standards relate to the size and ability to subdivide existing tracts in the neighborhood.

2. Architectural Control Committee

An Architectural Control Committee ("ACC") is an appointed/elected panel which exercises discretionary authority to insure compliance of new construction and remodeling of existing structures with the Restrictions and to insure consistency of architectural design. Typically, the ACC has broad discretion based on the desire of a neighborhood to have a consistent architectural approach, typically based upon a certain architectural style. The discretion of an ACC can be limited to the extent set forth in the Restrictions and could include only insuring that stated performance standards have been satisfied.

Modifying Restrictions to add an ACC where none has existed before will be a difficult and politically divisive task, unless the ACC has significantly limited discretion. In a city such as Houston, where zoning is unknown and has been defeated in the past, the philosophical objections to the ACC as a version of the "taste police" may be significant. Neighborhoods which originally had an ACC controlled by a developer—but where the ACC's term subsequently expired—have a good opportunity

to reinstate an ACC, with appropriate limitations on discretion.

Unless maintenance of a neighborhood-wide architectural style is mandated, an ACC is unnecessary except as a procedure to insure enforcement of performance standards. Performance standards can provide most non-architectural control necessary for a residential neighborhood.

E. Residential Use/Home Occupation/Garage Apartments

1. Residential Use

Virtually all neighborhoods with Restrictions limit use to "residential" only. Several unfortunate recent decisions indicate that language to the effect that the neighborhood may be used for single-family residential houses only creates an architectural restriction, not a use restriction. Restrictions can be modified to clearly state that the use of the neighborhood shall be single-family residential use only and that the construction of improvements in the neighborhood shall include only single-family residential structures. "Single-family" can be appropriately defined for each neighborhood.

2. Home Occupation

With the downsizing of corporate America and the advent of the "Information Superhighway," more people have become entrepreneurs operating out of their homes in an effort to maintain low business overhead. Most Restrictions do not allow any business operations in the neighborhood. Violation is rampant.

Restrictions should be modified to allow "home occupations" restricted by reasonable performance standards. These standards should address:

- a. Number of outside employees, if any;
- b. Signage, if any;
- c. Outside storage, if any;
- d. No external activities;
- e. Traffic/parking;
- f. Light, sound, and smell;
- g. Compliance with applicable laws; and
- h. Permit from POA [optional].

3. Garage Apartments

Garage apartments are showing up in all manner of neighborhoods to provide housing for nannies, teenage/adult children, parents, and temporary guests. In intercity redevelopment areas, most new houses have a garage apartment. Garage apartments are usually on a second floor over the garage, with a separate bathroom and entrance and, often, a kitchen. These garage apartments range from 300 to 600 square feet. A neighborhood considering allowing garage apartments should address the following performance standards:

- a. No reduction in existing garage space;
- b. Height limit;
- c. Square footage limit;
- d. Whether or not allowed to be connected to principal dwelling structure;
- e. Prohibition of windows and doors immediately adjacent to neighbor's yard;
- f. Architectural integrity with existing garage and house;
- g. Renting;
- h. Cooking facilities; and
- i. Parking for occupants.

F. Signage

Neighborhoods may wish to reduce the size and number of political signs allowed. In 2005, the Legislature added § 202.009 to the Property Code. This provision sets forth precise guidelines for the regulation of political signage by a property owners' association. A restriction cannot prohibit a political sign during the 90 days before an election or the 10 days following an election. This does not, however, prevent the property owners' association from adopting certain aesthetic restrictions on signage as provided under the statute.

Neighborhoods may also wish to reduce displays of religious symbols or items. In 2011, the Legislature restricted a property owners' association right to do that with the passage of § 202.018 to the Property Code. § 202.018 only applies to dwelling entries and if those religious items being displayed are done so because of "sincere religious belief." The statute provides for a list of exceptions wherein the property owners' association can remove the religious items.

G. Flags

In 2011, the Legislature passed § 202.011 to the Property Code, which limits the restrictions prohibiting flag display. Specifically, it does not permit property owners' associations to prohibit the display of a United States, Texas or armed forces flag. The provision was again amended in 2013 to permit flagpoles that are attached to a residential structure or are located in the front yard of a residence and do not exceed 20 feet in height.

H. Aesthetics - landscaping, gardens, drives/parking, maintenance

Restrictions may legally restrict all types of aesthetic issues such as landscaping, gardens, driveways, parking, maintenance, building materials, architectural style, and the like. Aesthetics should be incorporated in Restrictions in a manner similar to development controls, either (i) by clear performance standards, or (ii) under the discretion of the ACC or board of directors, with appropriate guidance and limitations. Modifying Restrictions to deal with this

issue requires a clear mandate from the neighborhood, or the petition will fail. Typically, modifications to Restrictions in aesthetic areas are designed to prohibit an objectionable action which occurred in a neighborhood. To be prohibited, such action should be objectionable to an overwhelming percentage of the owners in a neighborhood. The practical aspects of enforcement of aesthetic Restrictions must be considered. Once aesthetic Restrictions are adopted, a failure to enforce such Restrictions can result in waiver. *See Foxwood Homeowner's Assoc. v. Ricles*, 673 S.W.2d 376 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (court denied an injunction to enforce a deed restriction that prohibited garage conversions because the neighborhood knowingly allowed violations).

The Legislature in 2011 began limiting property owners' associations' ability to restrict specific energy efficient attributes on property. § 202.010 was added to prevent the restrictions of solar devices and prohibits property owners' associations and architectural control committees from withholding approval of solar devices unless the device is determined to substantially interfere with the use and enjoyment of the land. § 202.011 additionally prohibits the restrictions of certain roof shingles that are more efficient, provide solar generation capabilities and are more wind and hail resistant so long as the shingles resemble those already in the property division and are of better quality. In 2013, the Legislature limited POAs further by prohibiting restrictions against drought-resistant landscaping and water-conserving natural turf, which was in addition to the already protected vegetative composts, rain barrels, rain harvesting systems and efficient irrigation systems in § 202.007. Under this provision, POAs may require landscaping plans to be submitted for approval but approval may not be unreasonably withheld.

I. Vehicles

Many families now have 1 car for every licensed driver and, sometimes, an additional hobby car. Older Restrictions did not contemplate the number of automobiles now accommodated in a neighborhood. Safety and aesthetic reasons cause neighborhoods to consider how to modify Restrictions to deal with the increased number of vehicles parked in a residential neighborhood.

1. Garage/Carport

Minimum 2 car garage/carports can be mandated for a neighborhood. This will preclude conversion of vehicle storage space to living area. Some neighborhoods may not wish to allow carports. Often, certain types of vehicles (boats, RVs, trailer, campers, etc.) must be parked inside a garage or carport (or behind a fence).

2. Driveways/Parking Areas

Restrictions can mandate requirements for driveways (width, location, and manner of construction). Circular drives provide a place for vehicles to be parked off residential streets but are sometimes found to be aesthetically objectionable. "Parking pads" are sometimes prohibited in front yards, but are often allowed behind the front building setback line and in rear yards. Parking of vehicles on landscaped areas is often prohibited.

3. Non-Functioning Vehicles

Non-functioning vehicles are often required to be stored only in an enclosed garage. Sometimes they are allowed within a fenced rear yard.

4. Parking on Street

Some cities prohibit parking on residential streets between the hours of 1:00 a.m. and 6:00 a.m. This also encourages owners' cars to be parked in driveways at all times. This policy (i) reduces the opportunity for children to jump out from behind parked cars and be hit, (ii) allows police to patrol the neighborhood at night, and (iii) restricts access of burglars, since they have no place to park. Conceptually, Restrictions could regulate the use of public rights-of-way by the owners of property in the neighborhood, but would be invalid against non-owners. However, streets are public easements controlled by the local government. The general public has full right to access and use public street rights of way limited only by the local government regulation. Nonetheless, each owner adjacent to a public street owns the fee under the street to the center thereof under the "strips and gores" doctrine. Assuming the description of land subject to Restrictions includes the public street, then, conceptually, the Restrictions could be modified to restrict owner conduct in the public street right of way. The author suggests caution in this area, as the enforcement of such Restrictions could be problematic. A third party would not be restricted, since there is no privity to bind them to the Restrictions. Only owners and renters would be restricted.

If the street is private, such as with most gated communities, then regulation of the private street right of way are clearly valid.

In 1997, the Texas Legislature created a petition process for 25% of the owners or tenants in a neighborhood to request the City/County (as applicable) to post signs prohibiting overnight parking by commercial motor vehicles from 10:00 p.m. to 6:00 a.m. (unless performing work in the neighborhood). This provision applies only in counties with a population of 220,000 or more and in neighborhoods with recorded subdivision plats, where a majority of area is restricted to residential use only. TEX. TRANSP. CODE § 545.307.

J. Fences

Neighborhoods may wish to restrict the type, location, and height of fencing. Typically, fencing will be prohibited in the front yards. The height of fencing is typically restricted to 6-8 feet maximum. Some neighborhoods allow only certain types of fencing.

K. Modification, Extension and Termination

Typically, Restrictions which allow for modification, extension, or termination of Restrictions provide they can (i) be modified by a majority vote, (ii) automatically renewed for 10-20 year periods, and (iii) be terminated by a super majority vote (75-90%). These actions bind all owners subject to the Restrictions. Many of the procedural provisions of Chapter 204 should be considered for incorporation into the modification/renewal/termination provisions of Restrictions.

L. Transition Features

When significant new Restrictions are added, it is appropriate to provide transition features to deal with (i) existing uses and structures, and (ii) financial hardships. Existing uses/structures should be allowed to continue in existence as pre-existing, non-conforming uses/structures, but should not be allowed to intensify their use. Destruction or discontinuance of the use/structure should terminate the pre-existing, non-conforming rights. Financial hardship provisions should deal with the unusual needs of the elderly and poor related to cost of compliance with new Restrictions and payment of assessments.

M. Variance Procedures

Variances allow limited nonconformance with limitations in Restrictions in unusual circumstances. Variances are necessary to deal with unusual circumstances of specific property where unusual hardship would occur from strict compliance with the Restrictions, but where the variance will not undermine the policy objectives of the Restriction(s) in question. Sometimes the Restrictions do not appropriately contemplate particular situations which exist in a neighborhood or may come to pass due to changing uses, construction techniques, and technological change. No drafter can foresee the future. Variances should be strictly limited to prevent them from being used to evade the essential directives of the Restrictions. Variances are "safety valves" to deal with unusual circumstances only.

N. Rentals by Owner

Vacation rental by owners has recently become a popular option for property owners who are not occupying their residences and want to make some cash without long-term leases. This may be particularly popular in water-front communities or areas where

there are persons looking to rent a home for a short time period for school or business. The issue arises whether this rental can be considered a business and not a residential purpose.

Additionally, some POAs may wish to limit/prevent vacation rentals. *See Cedar Oak Mesa, Inc. v. Altemate Real Estate, LLC*, 03-10-00067-CV, 2010 WL 3431703 (Tex. App.—Austin Aug. 31, 2010, no pet.). A POA may wish to adopt policies for short term vacation rentals. An example of Rules for rentals is attached as Exhibit "H".

EXHIBIT "A"**TPC 209.0041****“Adoption or Amendment of Certain Declaratory Instruments”**
(SB 472, 82nd Leg. eff. 9/1/11)

Applies to: Any “declaration” for a “residential subdivision” subject to a mandatory membership in a “property owner’s association” (POA), but not i) where the POA is subject to Tex. Gov’t Code Sec. 552.0036, or ii) during a “development period”, without regard to the date of the declaration.

Pre-empts: Any contrary provision in a declaration or Tex. Prop. Code (TPC) Title 11 (Ch. 201, et. seq.).

NOTE: TPC 209.012 (prohibiting the amendment of a declaration to grant a POA an easement without owner consent) appears to be pre-empted, which is likely not the legislative intent.

Substantive Provisions - TPC 209.0041(h & i):

“...a declaration may be amended *only* by

a vote of 67 percent[*] of

the total votes allocated to property owners in the property owner’s association,

in addition to any governmental approval required by law.

*”If the declaration contains a lower percentage, the percentage in the declaration controls.”

“A bylaw may not be amended to conflict with the declaration.”

Legislative History: TPC 209.0041 was a 5/25/11 House floor amendment by Rep. Giddings to Sen. West’s SB 472. Rep. Giddings explained the amendment: “...the amendment provides that an association’s declaration—its dedicatory instrument—can be amended by a 2/3rds or 67% vote rather than a 90% vote, as some organizations have a conflict between bylaws and constitution. This brings those two into compliance and requires a 67% vote.” <http://www.journals.house.state.tx.us/hjrn/82r/pdf/82RDAY85FINAL.PDF#page=45>. Despite Senator West’s objection, the Conference Committee for the bill unanimously approved the amendment on 5/29/11. The Conference Committee Report states:

“...209.0041 authorizes a declaration to be amended only by a vote of 67% of the total votes allocated to property owners in the property owners’ association, in addition to any governmental approval required by law, establishes that the percentage in the declaration controls if the declaration contains a lower percentage, and prohibits a bylaw from being amended to conflict with the declaration.”

SB 472 was passed 5/30/11 and was effective 9/1/11.

NOTE: The substantive provisions of TPC 209.0041(h) are clearly derived from TPC. 82.067(a) (commonly known as the Texas Uniform Condominium Act or “TUCA”), but TUCA establishes a *minimum* vote while TPC 209.0041(h) establishes a *maximum* vote. The new TPC 209.0041(h) voting procedure is now similar to the declaration amendment voting procedure in TUCA. New TPC 209.0093 has similar language, but includes “at least” 67% for removal of a foreclosure right from a declaration.

Voting Procedure: Previously, most amendment provisions in declarations focused on approval based on a percentage of either i) lots, or ii) owners (usually “record owners). If lots, then the usual process was to review the recorded plat and count the number of platted lots to determine the base for the approval percentage. If owners, then the real property records were reviewed to generate a list of all owners, the total number of which became the base. Now, the base is “total votes allocated to property owners in the property owners’ association”, which is different. This focus is on the voting process in the POA, which is usually determined in the Bylaws, but may have some core determinations in a declaration. The vote for an amendment is now not different than any other matter before the POA. The 2011 amendments to TPC Ch. 209 revolutionized POA voting, which may be electronic, by ballot, by proxy or in person. Therefore, the required vote for an amendment may follow any of those formats.

NOTE: Except for electronic voting, all votes must be *signed* by the POA member.

If the declaration requires less than 67% to amend, then that percentage controls, and applies to the TPC 209.0041 process, even if the base for the declaration's amendment vote (lots or owners) and the procedure is different than TPC 209.0041. The legislative history makes it clear that this change to the law is intended to make it easier to amend a declaration. It is also clear that any provision in a bylaw purporting to require approval by more than a 67% vote is not effective. Finally, bylaws may not be amended to conflict with the declaration (presumably as to amendment procedures, but TPC 209.0041(i) is not limited, so it *may* preclude ANY conflicting amendment). Although TPC 209.0041 specifies a precise 67%, it seems obvious from the legislative history that the intent is to facilitate amendments, so a greater % should be acceptable.

Additional requirements in a declaration are pre-empted, except a requirement for approval by a governmental body (City, MUD, County, etc.). Since TPC 209.0041 does not apply within a development period (ie, the period of developer control), developers will continue to be able to exercise "declarant control".

Recording: A duly adopted amendment must be recorded per TPC 202.006, as it is a "declaration", and this should occur *promptly*. TPC 209.0041 does not itself require recording, nor does it require any form for the amendment or any acknowledgement or jurat. See **Best Practices** section below.

Effective Date: TPC 209.0041 does not address effectiveness, but implicitly indicates that the amendment is valid upon the requisite vote. A buyer without notice is not likely to be bound by unrecorded amendments, even if statutorily authorized, so prompt recording is important. Further, it is unlikely that TPC 209.0041 validates invalid amendments prior to 9/1/11 that would be valid under TPC 209.0041.

Important Definitions (emphasis added):

"*Declaration* means an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision."

"*Property owners' association or association*" means an incorporated or unincorporated association that:

- (A) is designated as the representative of the owners of property in the residential subdivision;
- (B) has a membership *primarily* consisting of the owners of property in the residential subdivision; and
- (C) *manages or regulates* the residential subdivision for the benefit of the owners of property in the residential subdivision."

"*Regular assessment* means an assessment, a charge, a fee or dues that each owner of property in the residential subdivision is *required* to pay to the property owners' association on a regular basis and that is designated for use by the property owners' association for the benefit of the residential subdivision as provided in the restrictions."

"*Residential subdivision or subdivision*" means a subdivision, planned unit development, townhouse regime, or similar planned development in which all the land has been divided into two or more parts and is subject to restrictions that:

- (A) limit a *majority* of the land subject to the dedicatory instruments, excluding streets, common areas, and public areas, to *residential use for single-family homes, townhomes, or duplexes only*;
- (B) are *recorded* in the real property records of the county in which the residential subdivision is located; and
- (C) *require* membership in a property owners' association that has *authority* to impose regular or special assessments on the property in the subdivision."

"*Restrictions* means any one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the real property records or map or plat records. The term includes any amendment or extension of the restrictions."

"*Restrictive covenant* means any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative."

Layman's Rewrite of TPC 209.0041:

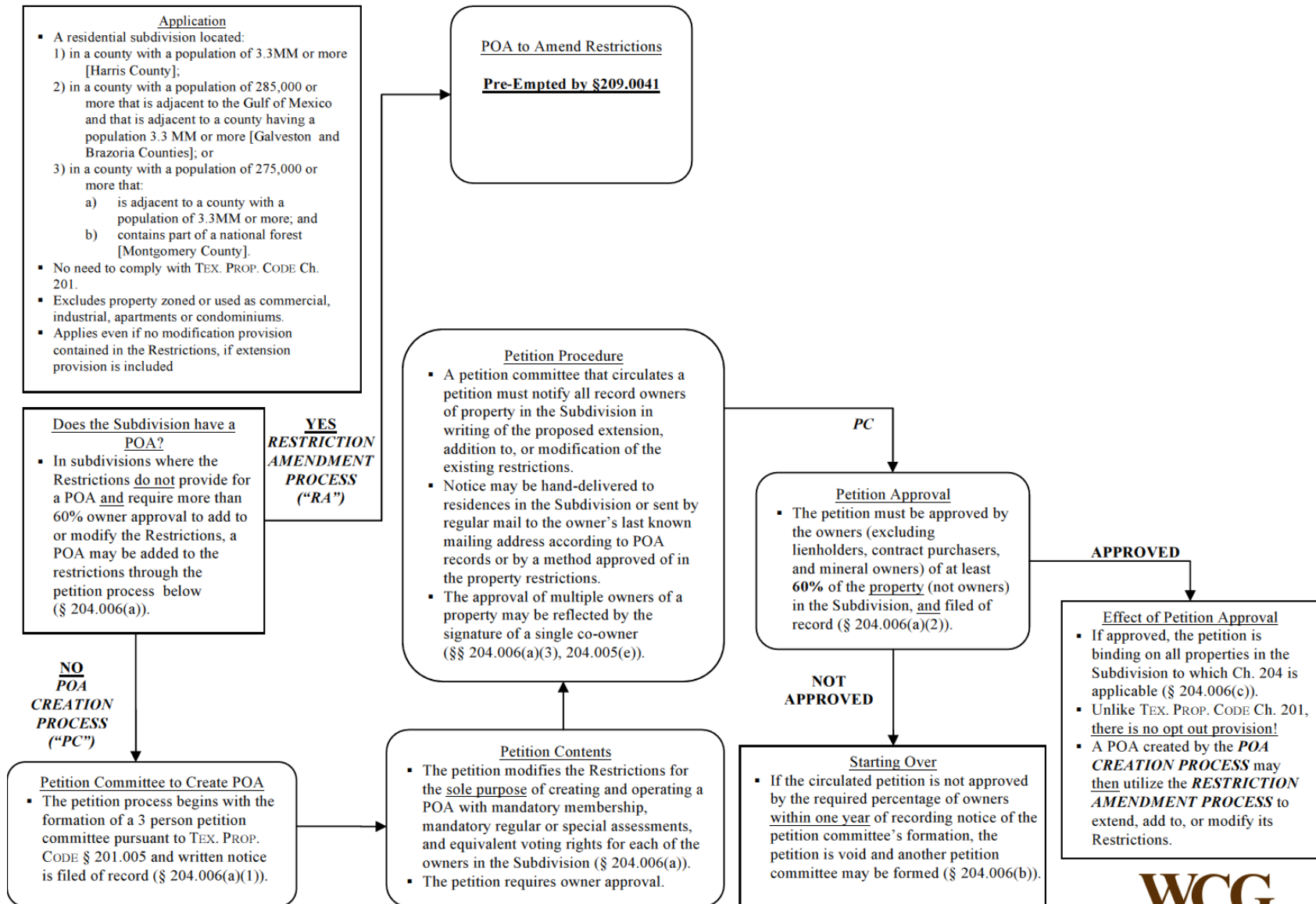
In a residential subdivision (except one subject to Tex. Gov't Code Ch. 552), past the end of the development period, and notwithstanding the declaration predates 9/1/11, the only procedure to amend any restrictive covenant/declaration is a vote of at least 67% of all votes allocated to property owners in the POA (or lesser % in the recorded instruments). The bylaws may not be modified to conflict with the declaration's amendment provisions. The total possible votes, and the voting process, are the same any other POA vote (consider the declaration, articles of incorporation and bylaws, as well as the Ch. 209[which permits electronic voting]). Contrary provisions in Tex. Prop. Code Ch. 201 et. seq. are pre-empted.

Best Practices for Amendments of residential POA Declarations after 9/1/11:

- Process:
 - Conduct a POA vote using the same procedure (notice and meeting) as any other important vote-fully compliant with the declaration, articles, bylaws and TCP Ch. 209.
 - Carefully document the voting and preserve evidence of the % voting in favor by *signed* ballots (unless electronic).
 - Seek a 67% affirmative vote.
- Notice:
 - Provide any notice required by the declaration and bylaws for amendments, stating that a declaration amendment will be considered.
 - Provide notice to any party which is given an approval right in the declaration or bylaws, so they have an opportunity to participate in the deliberation process, even though their approval is pre-empted.
 - Provide the proposed amendment in the notice or on the POA website.
- Information:
 - Provide website substantiation for the amendment, and describe the process for Board consideration, owner input and recommendation of the amendment.
 - Consider conducting informational meetings for owners if the amendment is controversial.
 - Carefully lay out the amendment, the purpose and the process of its consideration by the Board at the POA meeting where the vote is taken or solicited.
- After Approval:
 - Have a POA officer certify to the notice, process and vote, and attach a correct, legible copy of the approved amendment. State compliance with TCP 209.0041.
 - Record the certification, and copies of signed ballots (and electronic ballots) for the required % within 30 days of approval.
 - Record updated Management Certificate within 30 days of approval.
 - Update the POA website asap.

EXHIBIT "B"
TEXAS PROPERTY CODE CHAPTER 204:

Creating a Property Owners' Association and Extending, Adding to, or Modifying Existing Restrictions



CHAPTER 204 DEFINITIONS

Restrictions: 1 or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the county real property records, map records, or deed records.

Residential real estate subdivision or subdivision: all land within 1 or more maps or plats of land that is divided into 2 or more parts if the maps or plats cover land within a city, town, or village, or within the ETJ of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; **or** all land located within a city, town, or village, or within the ETJ of a city, town, or village that has been divided into 2 or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Owner: an individual, fiduciary, partnership, joint venture, corporation, association, or other entity that owns record title to real property in a subdivision, **or** the personal rep. of an individual who owns record title to subdivision property.

Petition: 1 or more instruments, however designated or entitled, by which 1 or more actions relating to restrictive covenants are sought to be accomplished.

Property Owners' Association ("POA"): a designated representative of the owners of property in a subdivision and may be referred to as a "homeowners association," "community association," "civic association," "civic club," "association," "committee," or similar term contained in the restrictions. The membership of the association consists of the owners of property within the subdivision. The association must be nonprofit and may be incorporated as a Texas nonprofit corporation. An unincorporated association may incorporate under the Texas Non-Profit Corporation Act (Sec. 22.001 et seq., Business Organization Code). The association's board of directors or trustees must be elected or appointed in accordance with the applicable provisions of the restrictions and the association's articles of incorporation or bylaws.

Real property records: the applicable records of a county clerk in which conveyances of real property are recorded.

Lienholder: an individual, corporation, financial institution, or other entity that holds a vendor's or deed of trust lien secured by land within the subdivision.

Dedictory instrument: each governing instrument covering the establishment, maintenance, and operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association, to properly adopted rules and regulations of the POA, or to all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

Restrictive covenant: any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative.

Regular assessment: an assessment, charge, fee, or dues that each owner of property within a subdivision is required to pay to the POA on a regular basis and that are to be used by the association for the benefit of the subdivision in accordance with the original, extended, added, or modified restrictions.

Special assessment: an assessment, charge, fee, or dues that each owner of property within a subdivision is required to pay to the POA, after a vote of the membership, for the purpose of paying for the costs of capital improvements to the common areas that are incurred or will be incurred by the association during the fiscal year. A special assessment may be assessed before or after the association incurs the capital improvement costs.

CHAPTER 204: STATUTORY POWERS OF A PROPERTY OWNERS' ASSOCIATION

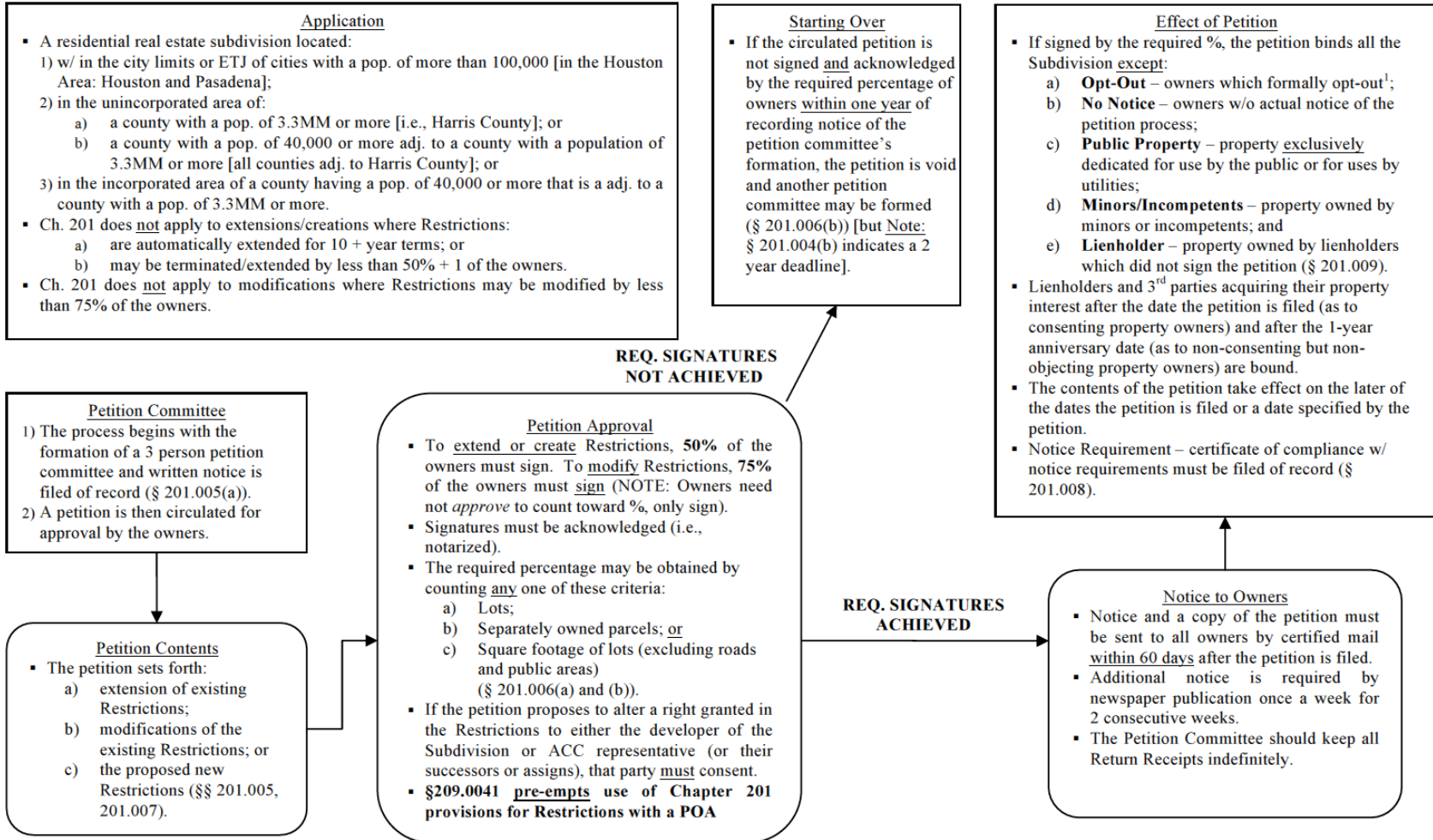
Unless otherwise provided by the restrictions or the association's articles of incorporation or bylaws, the POA, acting through its board of directors or trustees, may:

- (1) adopt and amend bylaws;
- (2) adopt and amend budgets for revenues, expenditures, and reserves and collect regular assessments or special assessments for common expenses from property owners;
- (3) hire and terminate managing agents and other employees, agents, and independent contractors;
- (4) institute, defend, intervene in, settle, or compromise litigation or administrative proceedings on matters affecting the subdivision;
- (5) make contracts and incur liabilities relating to the operation of the subdivision and the POA;
- (6) regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision;
- (7) make additional improvements to be included as a part of the common area;
- (8) grant easements, leases, licenses, and concessions through or over the common area;
- (9) impose and receive payments, fees, or charges for the use, rental, or operation of the common area and for services provided to property owners;
- (10) impose interest, late charges, and, if applicable, returned check charges for late payments of regular assessments or special assessments;
- (11) if notice and an opportunity to be heard are given, collect reimbursement of actual attorney's fees and other reasonable costs incurred by the POA relating to violations of the subdivision's restrictions or the POA's bylaws and rules;
- (12) charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments;
- (13) adopt and amend rules regulating the collection of delinquent assessments and the application of payments;
- (14) impose reasonable charges for preparing, recording, or copying amendments to the restrictions, resale certificates, or statements of unpaid assessments;
- (15) purchase insurance and fidelity bonds, including directors' and officers' liability insurance, that the board considers appropriate or necessary;
- (16) if the restrictions allow for an annual increase in the maximum regular assessment without a vote of the membership, assess the increase annually or accumulate and assess the increase after a number of years;
- (17) subject to the requirements of the Texas Non-Profit Corporation Act (Sec. 22.001 et seq., Business Organization Code) and by majority vote of its board of directors, indemnify a director or officer of the POA who was, is, or may be made a named defendant or respondent in a proceeding because the person is or was a director;
- (18) if the restrictions vest the architectural control authority in the POA or if the authority is vested in the POA under Section 204.011:
 - (A) implement written architectural control guidelines for its own use or record the guidelines in the real property records of the applicable county; and
 - (B) modify the guidelines as the needs of the subdivision change;
- (19) exercise other powers conferred by the restrictions, its articles of incorporation, or its bylaws;
- (20) exercise other powers that may be exercised in this state by a corporation of the same type as the POA; and
- (21) exercise other powers necessary and proper for the governance and operation of the POA.

EXHIBIT "C"

TEXAS PROPERTY CODE CHAPTER 201:

Creating, Extending, Renewing, Adding to, or Modifying Restrictions



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Attorneys at Law

¹ An owner may "opt-out" of the Restrictions by:
a) **Petition** – Signing the petition and affirmatively electing to exclude their property. The petition is required to include an "opt-out" blank to check; or
b) **Lawsuit** – Suit challenging the petition process filed w/ in 6 months after the filing of the petition; or
c) **Opt-Out Statement** – Filing a statement affirmatively electing to be excluded from the Restrictions in the real property records within 1 year after actual notice. Evidence of receipt by all owners of the certified mail notice to each owner is critical (§§ 201.009-010).

CHAPTER 201 DEFINITIONS

Restrictions: 1 or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the county real property records, map records, or deed records.

Residential real estate subdivision or subdivision: all land within 1 or more maps or plats of land that is divided into 2 or more parts if the maps or plats cover land within a city, town, or village, or within the ETJ of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; **or** all land located within a city, town, or village, or within the ETJ of a city, town, or village that has been divided into 2 or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Owner: an individual, fiduciary, partnership, joint venture, corporation, association, or other entity that owns record title to real property in a subdivision, **or** the personal rep. of an individual who owns record title to subdivision property.

Petition: 1 or more instruments, however designated or entitled, by which 1 or more of the purposes authorized by Ch. 201 are sought to be accomplished.

Real property records: the applicable records of a county clerk in which conveyances of real property are recorded.

Lienholder: an individual, corporation, financial institution, or other entity that holds a vendor's or deed of trust lien secured by land within the subdivision.

Petition committee or committee: a group of 3 or more owners who file with the county clerk a notice as required by Section 201.005(a) and who prepare and circulate a petition as allowed under Ch. 201.

Exhibit "D"**Definition of "subdivision" applicable to
Texas Property Code Chapters 201 & 204**

CHAPTER 201. Restrictive Covenants Applicable to Certain Subdivisions

§201.003. Definitions

(2) "Residential real estate subdivision" or "subdivision" means:

(A) **all land** *[All, not part]*

encompassed within one or more

maps or

plats of land *[platted prop.]*

that is **divided** into two or more parts *[ie. a 'subdivision of land']*

if the maps or plats cover land **within**

a **city,**

town, or

village, or

within the **extraterritorial jurisdiction of a**

city,

town, or

village *[excludes county outside ETJ]*

and are **recorded** in the

deed,

map, or

real property records of a county, *[public notice: recorded plats only]*

and the land encompassed within the maps or plats **is or was burdened by restrictions** limiting all or at least a **majority of the land** area covered by the map or plat, excluding streets and public areas, **to residential use only**; *[50%+ is res. Use restricted]*

[Summary: Land in a city(or ETJ of a city) if (i) more than 50% is now or previously subject to res. only restrictions **and** (ii) w/in a recorded map/plat. The land is the area shown in the map/plat.]

Or

(B) **all land** *[All, not part]*

located within

a **city,**

town, or

village, or

within the **extraterritorial jurisdiction of a**

city,

town, or

village *[excludes county outside ETJ]*

that has been **divided** into two or more parts *[ie. a 'subdivision of land']*

and that is or was **burdened by restrictions limiting** at least a **majority of the land** area burdened by restrictions, excluding streets and public areas, **to residential use only**, *[50%+ is res. Use restricted]*

if the instrument or instruments creating the restrictions are **recorded** in the

deed or
real property records of a county. [*public notice: recorded instrument*]

[Summary: Land in a city(or ETJ of a city) if (i) more than 50% is now or previously subject to res. only restrictions, **and** (ii) **both** (a) there is an recorded instrument creating the restrictions, and (b) the land has been divided. The land would the land covered by the recorded instrument.]

This definition also applies to Chap. 204 per Tex. Prop. Code Sec. 204.001(1).

Exhibit "E"

Chapter and Title	Limitation	Applicability *
201. Restrictive Covenants Applicable to Certain Subdivisions	<p>This chapter applies to a residential real estate subdivision that is located in whole or in part:</p> <p>(1) within a city that has a population of more than 100,000, or within the extraterritorial jurisdiction of such a city;</p> <p>(2) in the unincorporated area of: (A) a county having a population of 3.3 million or more; or (B) a county having a population of 40,000 or more that is adjacent to a county having a population of 3.3 million or more; or</p> <p>(3) in the incorporated area of a county having a population of 40,000 or more that is adjacent to a county having a population of 3.3 million or more.</p>	<p>→ Harris County</p> <p>→ Montgomery, Waller, Ft. Bend, Brazoria, Galveston,, Liberty</p> <p>→ Montgomery, Waller, Ft. Bend, Brazoria, Galveston, Chambers, Liberty</p>
202. Construction and Enforcement of Restrictions		→State wide
203. Enforcement of Land Use Restrictions in Certain Counties	This chapter applies only to a county with a population of more than 200,000.	→ Harris, Dallas, Tarrant, Bexar, Travis, Collin, El Paso, Hidalgo, Denton, Ft. Bend, Montgomery, Williamson, Cameron, Nueces, Brazoria, Galveston, Bell, Lubbock, Jefferson, Webb, McLennan & Smith County
204. Powers of Property Owners' Association Relating to Restrictive Covenants in Certain Subdivisions	<p>This chapter applies only to a residential real estate subdivision, excluding a condominium development governed by Title 7, Property Code, that is located in whole or in part:</p> <p>(1) in a county with a population of 3.3 million or more;</p> <p>(2) in a county with a population between 285,000 and 300,000 that is adjacent to the Gulf of Mexico and that is adjacent to a county having a population of 3.3 million or more; or</p> <p>(3) in a county with a population of 275,000 or more that: (A) is adjacent to a county with a population of 3.3 million or more; and (B) contains part of a national forest.</p>	<p>→ Harris County</p> <p>→ Galveston County</p> <p>→ Montgomery County</p>
205. Restrictive Covenants Applicable to Revised Subdivisions in Certain Counties	This chapter applies only to a county with a population of 65,000 or more.	→ Harris, Dallas, Tarrant, Bexar, Travis, Collin, El Paso, Hidalgo, Denton, Ft. Bend, Montgomery, Williamson, Cameron, Nueces, Brazoria, Galveston, Bell, Lubbock, Jefferson, Webb, McLennan, Smith, Brazos, Johnson, Hays, Ellis, Ector, Midland, Wichita, Taylor, Potter, Grayson, Gregg, Guadalupe, Randall, Parker, Comal, Tom Green, Kaufman, Bowie, Victoria, Angelina, Orange, Hunt, Henderson, Rockwall, Liberty, Bastrop, Coryell, , Walker
206. Extension of Restrictions	This chapter applies only to:	

<p>Imposing Regular Assessments in Certain Subdivisions</p>	<p>(1) a residential real estate subdivision that: (A) consists of at least 4,600 homes; (B) is located in whole or in part in a municipality with a population of more than 1.6 million located in a county with a population of 2.8 million or more; and (C) has restrictions the terms of which are automatically extended but has a regular assessment that is established by a separate document that permits the assessment to expire and does not provide for extension of the term of the assessment; or</p> <p>(2) a residential real estate subdivision that: (A) consists of at least 750 homes; (B) is located in two adjacent municipalities in a county with a population of 2.8 million or more; and (C) has use restrictions the terms of which are automatically extended but has a regular assessment that is established by two separate documents that permit the assessment to expire and do not provide for extension of the term of the assessment.</p>	<p>→ Certain subdivisions in Houston (Clear Lake City)</p> <p>→ Certain cities in Harris County</p>
<p>207. Disclosure of Information by Property Owners' Associations</p>	<p>This chapter applies to a subdivision with a property owners' association (POA) that is entitled to levy regular or special assessments.</p>	<p>→ State wide, but applicability depends on a Restriction with a POA for a primarily residential subdivision.</p>
<p>208. Amendment and Termination of Restrictive Covenants in Historic Neighborhoods</p>	<p>This chapter applies only to a historic neighborhood that is located in whole or in part in a municipality with a population of 1.6 million or more located in a county with a population of 2.8 million or more.</p>	<p>→ Historic neighborhoods in Houston (Houston Heights)</p>
<p>209. Texas Residential Property Owners Protection Act</p>	<p>(a) This chapter applies only to a residential subdivision that is subject to restrictions or provisions in a declaration that authorize the POA to collect regular or special assessments on all or a majority of the property in the subdivision.</p> <p>(b) Except as otherwise provided by this chapter, this chapter applies only to a POA that requires mandatory membership in the association for all or a majority of the owners of residential property within the subdivision subject to the POA's dedicatory instruments.</p> <p>(c) This chapter applies to a residential POA regardless of whether the entity is designated as a "homeowners' association," "community association," or similar designation in the restrictions or dedicatory instrument.</p> <p>(d) This chapter does not apply to a</p>	<p>→ State wide, but applicability depends on a Restriction with a POA for a primarily residential subdivision.</p>

	<p>condominium development governed by Chapter 82.</p> <p>(e) The following provisions of this chapter do not apply to a POA that is a mixed-use master association that existed before January 1, 1974, and that does not have the authority under a dedicatory instrument or other governing document to impose fines:</p> <p>(1) <u>Section 209.005(c)</u>; (2) <u>Section 209.0056</u>; (3) <u>Section 209.0057</u>; (4) <u>Section 209.0058</u>; (5) <u>Section 209.00592</u>; and (6) <u>Section 209.0062</u>.</p>	
<p>210. Extensions or Modification of Residential</p>	<p>This chapter applies to a residential real estate subdivision that is located in a county with a population of:</p> <p>(1) more than 200,000 and less than 220,000; or (2) more than 45,000 and less than 80,000 that is adjacent to a county with a population of more than 200,000 and less than 220,000.</p>	<p>→ Residential real estate subdivisions in select counties falling within these population ranges.</p>
<p>211. Amendment and Enforcement of Restrictions in Certain Subdivisions</p>	<p>This chapter applies only to a residential real estate subdivision or any unit or parcel of a subdivision</p> <p>(1) located in whole or in part within an unincorporated area of a county if the county has a population of less than 65,000. (2) located within the extraterritorial jurisdiction of a municipality located in a county that has a population between 65,000 and 135,000 (3) located within the extraterritorial jurisdiction of a municipality located in a county that borders Lake Buchanan and has a population between 18,500 and 19,500.</p>	<p>→ Residential real estate subdivisions located in the Unincorporated areas of San Patricio, Harrison, Nacogdoches, Starr, Wise, Anderson, Maverick, Van Zandt, Hardin, Hood, Navarro, Lamar, Rusk, Cherokee, Kerr, Val Verde, Polk, Burnet, Medina, Atascosa, Wood, Jim Wells, Wharton, Wilson, Cooke, Brown, Upshur, Matagorda, Caldwell, Waller, Erath, Hill, Hale, Jasper, Hopkins, Fannin, Kendall, Bee, Howard, Washington, Kleberg, Titus, Chambers, Cass, Palo Pinto, Austin, Shelby, Uvalde, Grimes, Aransas, Milam, San Jacinto, Gillespie, Panola, Fayette, Houston, Gray, Hockley, Limestone, Hutchinson, Lampasas, Colorado, Willacy, Tyler, Calhoun, Moore, Bandera, Montague, DeWitt, Jones, Gonzales, Freestone, Lavaca, Deaf Smith, Llano, Eastland, Bosque, Young, Falls, Leon, Burleson, Lee, Pecos, Frio, Scurry, Robertson, Gaines, Karnes, Nolan, Trinity, Jackson, Zapata, Wilbarger, Newton, Dawson, Andrews, Lamb, Callahan, Comanche, Madison, Red River, Morris, Camp, Terry, Duval, Zavala, Live Oak, Rains, Reeves, Franklin, Clay, Ward, Marion, Runnels, Sabine, Dimmit, Ochiltree, Stephens, Brewster, Mitchell, Parmer, Archer, Blanco, Jack, Coleman, San Augustine, Hamilton, McCulloch, Somervell, Swisher, Yoakum, Brooks, Childress, Presidio, Refugio, Goliad, Castro, Winkler, Floyd, Bailey, Dallam, Carson, Crosby, San Saba, La Salle, Lynn, Delta, Hansford, Haskell, Hartley, Jim Hogg, Mills, Wheeler, Garza, Martin, Kimble, Sutton, Crane, Hardeman, Fisher, Mason, Donley, Crockett, Baylor, Concho, Coke, Hemphill, Hall, Knox, Kinney, Upton, Hudspeth, Shackelford, Regan, Collingsworth, Lipscomb, Cochran, Sherman, Real, Schleicher, Dickens, Culberson, Jeff Davis, Menard, Armstrong, Oldham, Edwards, Irion, Throckmorton, Cottle, Briscoe, Stonewall, Foard, Motley, Sterling, Glasscock,</p>

		Terrell, McMullen, Roberts, Kent, Borden, Kenedy, King and Loving County
212. Extension of Restrictions by Majority vote in Certain Subdivisions	This chapter applies only to a residential real estate subdivision that is located wholly or partly in a municipality with a population of more than two million located in a county with a population of 3.3 million or more	→ Harris County

<p>215. Master Mixed Use Property Owners' Associations</p>	<p>This chapter applies to property owners associations that:</p> <p>(1) include:</p> <ul style="list-style-type: none"> a. commercial properties that constitutes at least 35% of total appraised value of mixed use development b. single family attached and detached properties that constitute at least 25% of total appraised value c. multifamily properties that constitute at least 10% of total appraised value <p>(2) governs at least 6,000 acres of deed restricted property</p> <p>(3) has at least 10 incorporated residential or commercial property owners' associations that are members of master mixed-use property owners' association</p> <p>(4) at least 3,4000 platted and developed single family residential properties, 400 platted commercial properties which constitute together at least 30 million sq. ft. of building area</p>	<p>→ Las Colinas</p>
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*Population data obtained from the Texas Association of Counties (<https://www.county.org/about-texas-counties/county-data/Documents/Pop-2010.html>), 2010 data.

**Exhibit “F”
Texas Property Code Protected Uses Chart**

Section	Protected Use	Substantive limitations
202.007	<p>Measures that promote solid-waste composting of vegetation, including grass clippings, leaves, or brush, or leaving grass clippings uncollected on grass; installing rain barrels or a rainwater harvesting system; implementing efficient irrigation systems, including underground drip or other drip systems; or using drought-resistant landscaping or water-conserving natural turf.</p> <p><u>Environmentally-conscious landscaping:</u></p>	<p>POA may restrict the type of turf used by a property owner in the planting of new turf to encourage or require water-conserving turf</p> <p>POA may regulate the requirements, including size, type, shielding, and materials, for or the location of a composting device if the restriction does not prohibit the economic installation of the device on the property owner's property where there is reasonably sufficient area to install the device; regulate the installation of efficient irrigation systems, including establishing visibility limitations for aesthetic purposes; regulate the installation or use of gravel, rocks, or cacti; regulate yard and landscape maintenance if the restrictions or requirements do not restrict or prohibit turf or landscaping design that promotes water conservation</p> <p>POA can prohibit a rain barrel or system if it is of a color other than a color consistent with the color scheme of the property owner's home; or displays any language or other content that is not typically displayed by such a barrel or system as it is manufactured</p> <p>POA can require an owner to submit a detailed description or a plan for the installation of drought-resistant landscaping or water-conserving natural turf for review and approval by the property owners' association to ensure, to the extent practicable, maximum aesthetic compatibility with other landscaping in the subdivision.</p>
202.009	<p>Displaying on the owner's property one or more signs advertising a political candidate or ballot item for an election: (1) on or after the 90th day before the date of the election to which the sign relates; or (2) before the 10th day after that election date.</p> <p><u>Political Signs:</u></p>	<p>POA may require a sign to be ground-mounted; or limit a property owner to displaying only one sign for each candidate or ballot item.</p> <p>POA may have covenants that restrict signs which: contain roofing material, siding, paving materials, flora, one or more balloons or lights, or any other similar building, landscaping, or nonstandard decorative component; is attached in any way to plant material, a traffic</p>

		<p>control device, a light, a trailer, a vehicle, or any other existing structure or object; includes the painting of architectural surfaces; threatens the public health or safety; is larger than four feet by six feet; violates a law; contains language, graphics, or any display that would be offensive to the ordinary person; or is accompanied by music or other sounds or by streamers or is otherwise distracting to motorists.</p>
<p>202.010</p>	<p>POA may not prohibit or restrict a property owner from installing a solar energy device</p> <p><u>Solar Energy devices:</u></p>	<p>Solar energy device may be prohibited if it is: adjudicated by a court to threaten the public health or safety or violates a law; is located on property not owned by the property owner installing the device; is located in an area on the property owner's property other than: on the roof of the home or of another structure allowed under a dedicatory instrument; or in a fenced yard or patio owned and maintained by the property owner;</p> <p>If mounted on the roof of the home a device can be prohibited if it extends higher than or beyond the roofline; is located in an area other than an area designated by the property owners' association, unless the alternate location increases the estimated annual energy production of the device, as determined by using a publicly available modeling tool provided by the National Renewable Energy Laboratory, by more than 10 percent above the energy production of the device if located in an area designated by the property owners' association; does not conform to the slope of the roof and has a top edge that is not parallel to the roofline; or has a frame, a support bracket, or visible piping or wiring that is not in a silver, bronze, or black tone commonly available in the marketplace;</p> <p>If located in a fenced yard or patio, it can be prohibited if it is taller than the fence line;</p> <p>POA may prohibit it if as installed, voids material warranties; or was installed without prior approval by the property owners' association or</p>

		<p>by a committee created in a dedicatory instrument for such purposes that provides decisions within a reasonable period or within a period specified in the dedicatory instrument.</p>
<p>202.011</p>	<p><u>Roofing Materials</u></p> <p>Installing shingles that are for the purpose of being wind and hail resistant; providing heating and cooling efficiencies greater than those provided by customary composite shingles; or providing solar generation capabilities;</p>	<p>POA may require that when installed the shingles resemble the shingles used or otherwise authorized for use on property in the subdivision; are more durable than and are of equal or superior quality to the shingles used or otherwise authorized for use on property; and match the aesthetics of the property surrounding the owner's property.</p>
<p>202.012</p>	<p><u>Flags:</u></p> <p>Display of the flag of the United States of America; the flag of the State of Texas; or an official or replica flag of any branch of the United States armed forces.</p>	<p>POA may restrict that the flag of the United States be displayed in accordance with 4 U.S.C. Sections 5-10; the flag of the State of Texas be displayed in accordance with Chapter 3100, Government Code; a flagpole attached to a dwelling or a freestanding flagpole be constructed of permanent, long-lasting materials, with a finish appropriate to the materials used in the construction of the flagpole and harmonious with the dwelling; the display of a flag, or the location and construction of the supporting flagpole, to comply with applicable zoning ordinances, easements, and setbacks of record; and a displayed flag and the flagpole on which it is flown be maintained in good condition.</p> <p>POA must permit at least one flagpole that is at least 20 ft. in height in a property owners front yard, so long as they meet applicable setback, zoning, and easement requirements, or one flagpole that is attached to their dwelling. Otherwise POA's can regulate the size, number, and location of flagpoles on which flags are displayed.</p> <p>POA may regulate the size, location, and intensity of any lights used to illuminate a displayed flag. POA may impose reasonable restrictions to abate noise caused by an external halyard of a flagpole. POA may prohibit a property owner from locating a displayed flag or flagpole on property that is not</p>

		<p>owned by the property owner but rather in common with other property owners or owned by the association.</p>
<p>202.018</p>	<p><u>Religious Items:</u> Display or affix on the entry to the owner's or resident's dwelling one or more religious items the display of which is motivated by the owner's or resident's sincere religious belief.</p>	<p>POA may prohibit religious items if they threaten the public health or safety; violate a law; contain language, graphics, or any display that is patently offensive to a passerby; is in a location other than the entry door or door frame or extends past the outer edge of the door frame of the owner's or resident's dwelling; or individually or in combination with each other religious item displayed or affixed on the entry door or door frame has a total size of greater than 25 square inches.</p> <p>This section does not authorize an owner or resident to use a material or color for an entry door or door frame of the owner's or resident's dwelling or make an alteration to the entry door or door frame that is not authorized by the restrictive covenants governing the dwelling.</p>
<p>209.015</p>	<p><u>Adjacent Residential Purpose:</u> The owner of a lot on which a residence is located can use for residential purposes an adjacent lot owned by the property owner.</p>	<p>An owner must obtain the approval of the property owners' association or, if applicable, an architectural committee established by the association or the association's dedicatory instruments, based on criteria prescribed by the dedicatory instruments specific to the use of a lot for residential purposes, including reasonable restrictions regarding size, location, shielding, and aesthetics of the residential purpose, before the owner begins the construction, placement, or erection of a building, structure, or other improvement for the residential purpose on an adjacent lot.</p>
<p>209.012</p>	<p><u>Easements:</u> Prohibits easements without the property owners consent.</p>	<p>Section does not prohibit POA from entering property to remedy violation.</p>

Exhibit "G"

PROPOSED INSERT CONTEMPLATES FUTURE CHANGES IN RESTRICTIVE COVENANT LAWS

At top of First Page:

NOTE: THESE RESTRICTIONS MAY BE AFFECTED BY STATE LAW, INCLUDING BUT NOT LIMITED TO TEX. PROP. CODE CH. 201 ET. SEQ. AS IN EFFECT FROM TIME TO TIME. REVIEW CURRENT LAW BEFORE APPLYING THESE RESTRICTIONS.

In Recitals:

The Declaration is intended to provide a long term structure for the organization and operation of the common area shared by the owners of units in the Project and for governance of the Project as a shared interest community. Shared interest communities and restrictive covenants such as the Declaration have been, and are anticipated to be in the future, subject to regulation, such as, but not limited to Tex. Prop. Code Ch. 201 et. seq. Tex. Prop. Code Ch. 209 ("The Texas Residential Property Owners Protection Act"), and Tex. Prop. Code Ch. 207 ("Disclosure of Information by Property Owners' Associations"). Chapters 207 and 209 materially affect the rights of owners of units and the powers of the Association. Each has been revised repeatedly and are anticipated to be the subject to future revisions and possible revocation. Other chapters of the Texas Property Code materially affect modification of restrictive covenants, and may affect the Declaration, the owners and the Association. It is not anticipated that the Declaration will be modified to be consistent with POA Laws as they change, but it will be subject to their limitations, as they apply from time to time. Anyone applying the provisions of this Declaration should retain knowledgeable counsel to advise them regarding the then current state of applicable law and to what extent, if any, the provisions of this Declaration may be limited.

In the Definition Section:

"Applicable Laws"- be sure it includes common law (reported decisions)

"POA Laws"- any statutes, laws or regulations affecting shared interest communities like the Project, restrictive covenants (including, but not limited to the covenants, conditions, restrictions and easements incorporated herein) such as the Declaration, and/or property owners associations like the Association, in effect from time to time,

At beginning of the Remedies Section:

Effect of POA Laws Limiting Remedies. Certain provisions of this Declaration may be circumscribed by POA Laws, including but not limited to Tex. Prop. Code Ch. 209 (The "Texas Residential Property Owner Protection Act"), which currently restrictions foreclosure, and requires certain notices. The POA Laws supersede the provisions hereof, unless either the POA Laws or applicable law permits the provisions hereof to control. To the extent permitted by law, it is intended that the provisions hereof shall control in the event of conflict with the POA Laws.

At end of the Misc. Section:

EFFECT OF POA LAWS: THE DECLARATION IS INTENDED TO PROVIDE A LONG TERM STRUCTURE FOR THE ORGANIZATION AND OPERATION OF THE COMMON AREA SHARED BY THE OWNERS OF UNITS IN THE PROJECT AND FOR GOVERNANCE OF THE PROJECT AS A SHARED INTEREST COMMUNITY. SHARED INTEREST COMMUNITIES AND RESTRICTIVE COVENANTS SUCH AS THE DECLARATION HAVE BEEN, AND ARE

ANTICIPATED TO BE IN THE FUTURE, SUBJECT TO REGULATION, SUCH AS, BUT NOT LIMITED TO TX. PROP. CODE CH. 201 ET. SEQ. TX. PROP. CODE CH. 209 (“THE TEXAS RESIDENTIAL PROPERTY OWNERS PROTECTION ACT”), AND TX. PROP. CODE CH. 207 (“DISCLOSURE OF INFORMATION BY PROPERTY OWNERS’ ASSOCIATIONS”). CHAPTERS 207 AND 209 MATERIALLY AFFECT THE RIGHTS OF OWNERS OF UNITS AND THE POWERS OF THE ASSOCIATION. EACH HAS BEEN REVISED REPEATEDLY AND ARE ANTICIPATED TO BE THE SUBJECT TO FUTURE REVISIONS AND POSSIBLE REVOCATION. OTHER CHAPTERS OF THE TEXAS PROPERTY CODE MATERIALLY AFFECT MODIFICATION OF RESTRICTIVE COVENANTS, AND MAY AFFECT THE DECLARATION, THE OWNERS AND THE ASSOCIATION. IT IS NOT ANTICIPATED THAT THE DECLARATION WILL BE MODIFIED TO BE CONSISTENT WITH POA LAWS AS THEY CHANGE, BUT IT WILL BE SUBJECT TO THEIR LIMITATIONS, AS THEY APPLY FROM TIME TO TIME. ANYONE APPLYING THE PROVISIONS OF THIS DECLARATION SHOULD RETAIN KNOWLEDGEABLE COUNSEL TO ADVISE THEM REGARDING THE THEN CURRENT STATE OF APPLICABLE LAW AND TO WHAT EXTENT, IF ANY, THE PROVISIONS OF THIS DECLARATION MAY BE LIMITED.

**Exhibit “H”
PROPOSED AMENDMENT TO PREVENT RENTAL BY OWNER**

RENTAL PROPERTY POLICIES

REGISTRATION:

All rental properties must be registered with the [insert POA’s name] Board of Directors using the board’s approved registration form.

NOTIFICATION:

The owner or rental agent must give in writing at least two contact names, phone numbers and email addresses to the board.

CLIENT NOTIFICATION:

All renters should be given a copy of the [insert POA's name] Code of Conduct prior to using the property.

RESIDENTIAL USE:

All rental homes are designated for residential use. Large groups such as after-prom parties, reunions, receptions or like events are not allowed.

PARKING:

All vehicles and boat trailers should be parked in approved areas.

OCCUPANCY LIMITS:

Overnight guests must not exceed the property’s posted occupancy. Only registered guests shall occupy the rental property.

NOISE AND QUIET TIME:

Guests should be made aware that noises carry more readily over the water so loud voices, music, etc., will disturb neighbors several houses away.

Quiet time starts at 10 p.m. Sunday through Thursday and 11 p.m. Friday, Saturday and official holidays. Quiet time means there should be no loud music or other disturbances.

RECREATIONAL VEHICLES: Recreational vehicles to be used as spare bedrooms.

FIREWORKS: Fireworks are banned.

TRASH:

Trash must not be left outside in trash bags. It must be bagged and placed in a secure trash container. Guests should be careful to keep trash and litter from blowing into the canal.

SIGNS:

Signs advertising properties for short-term vacation use are not allowed.

**[Insert POA] BOARD OF DIRECTORS
CODE OF CONDUCT**

We appreciate that you have chosen to stay in [name of neighborhood] and we hope you enjoy your time in our neighborhood. However, because of past problems, the board of directors has approved the following code of conduct for all guests.

RESIDENTIAL USE:

All rental homes are designated for residential use. Large groups such as after-prom parties, reunions, receptions or like events are not allowed.

QUIET TIME:

Please respect the neighborhood and our neighbors' right to quietly enjoy their homes. Remember that noises carry more readily over the water so your conversations could be overheard and your music may annoy neighbors several houses away.

Quiet time starts at 10 p.m. Sunday through Thursday and 11 p.m. Friday, Saturday and official holidays. Please be a considerate guest!

PARKING:

All vehicles and boat trailers should be parked in approved areas.

SPEEDING:

Posted street signage (speed limits, parking, etc.) must be obeyed. Our speed limit is 20 mph.

RECREATIONAL VEHICLES:

Recreational vehicles may not be used as spare bedrooms.

WAKE IN CANAL:

Please obey the NO WAKE sign. Before entering [the neighborhood] from the Intracoastal Waterway, please reduce your boat speed to the lowest possible forward speed.

EXTERIOR LIGHTS:

When retiring for the night, be sure to turn off all waterfront flood lights. These lights often reflect off the water and can be a nuisance.

FIREWORKS:

[The POA] does not allow fireworks because our homes are close together and many of them have boats docked in the canals. Fireworks are dangerous!

TRASH:

Trash and garbage must be bagged and placed in a secure trash container. Trash bags may not be left outside overnight because they attract stray pets and other animals.

PETS:

All pets are subject to _____ County leash laws. Please clean up after your pets.

Exhibit "I"
APPLICABLE PROVISIONS TO THE DEVELOPMENT PERIOD

Texas Property Code Section	Specially Permitted during Development Period	Limitations during Development Period
202.010	Allows the prohibition of solar energy devices during the development period	
209.0041	Allows a declaration to be amended by more or less than a vote of 67 percent of the total votes allocated to property owners in the property owners' association	
209.0051		<p>If the purpose of the meeting is to: adopt or amend the governing documents, including declarations, bylaws, rules, and regulations of the association; increase the amount of regular assessments of the association or adopt or increase a special assessment; elect non-developer board members of the association or establish a process by which those members are elected; or change the voting rights of members of the association then:</p> <p>the POA must make the meeting open to owners, it must be held in the same county or an adjacent county, written minutes must be kept of the meeting, and members must be given proper notice of the meeting.</p>
209.0052	The restrictions regarding contracts entered into by an association with an association board member does not apply.	
209.00593	If a board members term has expired he or she does not need to be elected by owners who are members of the POA.	

Exhibit “J”
Texas Property Code Chapter 209:

§ 209.001. Short Title

This chapter may be cited as the Texas Residential Property Owners Protection Act.

§ 209.002. Definitions

In this chapter:

- (1) “Assessment” means a regular assessment, special assessment, or other amount a property owner is required to pay a property owners’ association under the dedicatory instrument or by law.
- (2) “Board” means the governing body of a property owners’ association.
- (3) “Declaration” means an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision.
- (4) “Dedicatory instrument” means each governing instrument covering the establishment, maintenance, and operation of a residential subdivision. The term includes restrictions or similar instruments subjecting property to 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.
- (4-a) “Development period” means a period stated in a declaration during which a declarant reserves:
 - (A) a right to facilitate the development, construction, and marketing of the subdivision; and
 - (B) a right to direct the size, shape, and composition of the subdivision.
- (5) “Lot” means any designated parcel of land located in a residential subdivision, including any improvements on the designated parcel.
- (6) “Owner” means a person who holds record title to property in a residential subdivision and includes the personal representative of a person who holds record title to property in a residential subdivision.
- (7) “Property owners’ association” or “association” means an incorporated or unincorporated association that:
 - (A) is designated as the representative of the owners of property in a residential subdivision;
 - (B) has a membership primarily consisting of the owners of the property covered by the dedicatory instrument for the residential subdivision; and
 - (C) manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision.
- (8) “Regular assessment” means an assessment, a charge, a fee, or dues that each owner of property within a residential subdivision is required to pay to the property owners’ association on a regular basis and that is designated for use by the property owners’ association for the benefit of the residential subdivision as provided by the restrictions.
- (9) “Residential subdivision” or “subdivision” means a subdivision, planned unit development, townhouse regime, or similar planned development in which all land has been divided into two or more parts and is subject to restrictions that:
 - (A) limit a majority of the land subject to the dedicatory instruments, excluding streets, common areas, and public areas, to residential use for single-family homes, townhomes, or duplexes only;
 - (B) are recorded in the real property records of the county in which the residential subdivision is located; and
 - (C) require membership in a property owners’ association that has authority to impose regular or special assessments on the property in the subdivision.
- (10) “Restrictions” means one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the real property records or map or plat records. The term includes any amendment or extension of the restrictions.
- (11) “Restrictive covenant” means any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative.
- (12) “Special assessment” means an assessment, a charge, a fee, or dues, other than a regular assessment, that each owner of property located in a residential subdivision is required to pay to the property owners’ association, according to procedures required by the dedicatory instruments, for:
 - (A) defraying, in whole or in part, the cost, whether incurred before or after the assessment, of any construction or reconstruction, unexpected repair, or replacement of a capital improvement in common areas owned by the property owners’ association, including the necessary fixtures and personal property related to the common areas;
 - (B) maintenance and improvement of common areas owned by the property owners’ association; or
 - (C) other purposes of the property owners’ association as stated in its articles of incorporation or the dedicatory instrument for the residential subdivision.

§ 209.003. Applicability of Chapter

(a) This chapter applies only to a residential subdivision that is subject to restrictions or provisions in a declaration that authorize the property owners’ association to collect regular or special assessments on all or a majority of the property in the subdivision.

- (b) Except as otherwise provided by this chapter, this chapter applies only to a property owners' association that requires mandatory membership in the association for all or a majority of the owners of residential property within the subdivision subject to the association's dedicatory instruments.
- (c) This chapter applies to a residential property owners' association regardless of whether the entity is designated as a "homeowners' association," "community association," or similar designation in the restrictions or dedicatory instrument
- (d) This chapter does not apply to a condominium development governed by Chapter 82
- (e) The following provisions of this chapter do not apply to a property owners' association that is a mixed-use master association that existed before January 1, 1974, and that does not have the authority under a dedicatory instrument or other governing document to impose fines:
- (1) Section 209.005(c);
 - (2) Section 209.0056;
 - (3) Section 209.0057;
 - (4) Section 209.0058;
 - (5) Section 209.00592; and
 - (6) Section 209.0062.

§ 209.004. Management Certificates

- (a) A property owners' association shall record in each county in which any portion of the residential subdivision is located a management certificate, signed and acknowledged by an officer or the managing agent of the association, stating:
- (1) the name of the subdivision;
 - (2) the name of the association;
 - (3) the recording data for the subdivision;
 - (4) the recording data for the declaration;
 - (5) the name and mailing address of the association;
 - (6) the name and mailing address of the person managing the association or the association's designated representative; and
 - (7) other information the association considers appropriate.
- (a-1) The county clerk of each county in which a management certificate is filed as required by this section shall record the management certificate in the real property records of the county and index the document as a "Property Owners' Association Management Certificate."
- (b) The property owners' association shall record an amended management certificate not later than the 30th day after the date the association has notice of a change in any information in the recorded certificate required by Subsection (a).
- (c) Except as provided under Subsections (d) and (e), the property owners' association and its officers, directors, employees, and agents are not subject to liability to any person for a delay in recording or failure to record a management certificate, unless the delay or failure is willful or caused by gross negligence.
- (d) If a property owners' association fails to record a management certificate or an amended management certificate under this section, the purchaser, lender, or title insurance company or its agent in a transaction involving property in the property owners' association is not liable to the property owners' association for:
- (1) any amount due to the association on the date of a transfer to a bona fide purchaser; and
 - (2) any debt to or claim of the association that accrued before the date of a transfer to a bona fide purchaser.
- (e) A lien of a property owners' association that fails to file a management certificate or an amended management certificate under this section to secure an amount due on the effective date of a transfer to a bona fide purchaser is enforceable only for an amount incurred after the effective date of sale.
- (f) For purposes of this section, "bona fide purchaser" means:
- (1) a person who pays valuable consideration without notice of outstanding rights of others and acts in good faith; or
 - (2) a third-party lender who acquires a security interest in the property under a deed of trust

§ 209.0041. Adoption or Amendment of Certain Dedicatory Instruments

- (a) In this section, “development period” means a period stated in a declaration during which a declarant reserves:
- (1) a right to facilitate the development, construction, and marketing of the subdivision; and
 - (2) a right to direct the size, shape, and composition of the subdivision.
- (b) This section applies to a residential subdivision in which property owners are subject to mandatory membership in a property owners’ association.
- (c) This section does not apply to a property owners’ association that is subject to Chapter 552, Government Code, by application of [Section 552.0036, Government Code](#).
- (d) This section does not apply to the amendment of a declaration during a development period.
- (e) This section applies to a dedicatory instrument regardless of the date on which the dedicatory instrument was created.
- (f) This section supersedes any contrary requirement in a dedicatory instrument.
- (g) To the extent of any conflict with another provision of this title, this section prevails.
- (h) Except as provided by this subsection, a declaration may be amended only by a vote of 67 percent of the total votes allocated to property owners in the property owners’ association, in addition to any governmental approval required by law. If the declaration contains a lower percentage, the percentage in the declaration controls.
- (i) A bylaw may not be amended to conflict with the declaration.

§ 209.005. Association Records

- (a) Except as provided by Subsection (b), this section applies to all property owners’ associations and controls over other law not specifically applicable to a property owners’ association.
- (b) This section does not apply to a property owners’ association that is subject to Chapter 552, Government Code, by application of [Section 552.0036, Government Code](#).
- (c) Notwithstanding a provision in a dedicatory instrument, a property owners’ association shall make the books and records of the association, including financial records, open to and reasonably available for examination by an owner, or a person designated in a writing signed by the owner as the owner’s agent, attorney, or certified public accountant, in accordance with this section. An owner is entitled to obtain from the association copies of information contained in the books and records.
- (d) Except as provided by this subsection, an attorney’s files and records relating to the property owners’ association, excluding invoices requested by an owner under [Section 209.008\(d\)](#), are not records of the association and are not subject to inspection by the owner or production in a legal proceeding. If a document in an attorney’s files and records relating to the association would be responsive to a legally authorized request to inspect or copy association documents, the document shall be produced by using the copy from the attorney’s files and records if the association has not maintained a separate copy of the document. This subsection does not require production of a document that constitutes attorney work product or that is privileged as an attorney-client communication.
- (e) An owner or the owner’s authorized representative described by Subsection (c) must submit a written request for access or information under Subsection (c) by certified mail, with sufficient detail describing the property owners’ association’s books and records requested, to the mailing address of the association or authorized representative as reflected on the most current management certificate filed under [Section 209.004](#). The request must contain an election either to inspect the books and records before obtaining copies or to have the property owners’ association forward copies of the requested books and records and:
- (1) if an inspection is requested, the association, on or before the 10th business day after the date the association receives the request, shall send written notice of dates during normal business hours that the owner may inspect the requested books and records to the extent those books and records are in the possession, custody, or control of the association; or
 - (2) if copies of identified books and records are requested, the association shall, to the extent those books and records are in the possession, custody, or control of the association, produce the requested books and records for the requesting party on or before the 10th business day after the date the association receives the request, except as otherwise provided by this section.
- (f) If the property owners’ association is unable to produce the books or records requested under Subsection (e) on or before the 10th business day after the date the association receives the request, the association must provide to the requestor written notice that:
- (1) informs the requestor that the association is unable to produce the information on or before the 10th business day after the date the association received the request; and
 - (2) states a date by which the information will be sent or made available for inspection to the requesting party that is not later than the 15th business day after the date notice under this subsection is given.
- (g) If an inspection is requested or required, the inspection shall take place at a mutually agreed on time during normal business hours, and the requesting party shall identify the books and records for the property owners’ association to copy and forward to the requesting party.
- (h) A property owners’ association may produce books and records requested under this section in hard copy, electronic, or other format reasonably available to the association.

(i) A property owners' association board must adopt a records production and copying policy that prescribes the costs the association will charge for the compilation, production, and reproduction of information requested under this section. The prescribed charges may include all reasonable costs of materials, labor, and overhead but may not exceed costs that would be applicable for an item under [1 T.A.C. Section 70.3](#). The policy required by this subsection must be recorded as a dedicatory instrument in accordance with [Section 202.006](#). An association may not charge an owner for the compilation, production, or reproduction of information requested under this section unless the policy prescribing those costs has been recorded as required by this subsection. An owner is responsible for costs related to the compilation, production, and reproduction of the requested information in the amounts prescribed by the policy adopted under this subsection. The association may require advance payment of the estimated costs of compilation, production, and reproduction of the requested information. If the estimated costs are lesser or greater than the actual costs, the association shall submit a final invoice to the owner on or before the 30th business day after the date the information is delivered. If the final invoice includes additional amounts due from the owner, the additional amounts, if not reimbursed to the association before the 30th business day after the date the invoice is sent to the owner, may be added to the owner's account as an assessment. If the estimated costs exceeded the final invoice amount, the owner is entitled to a refund, and the refund shall be issued to the owner not later than the 30th business day after the date the invoice is sent to the owner.

(j) A property owners' association must estimate costs under this section using amounts prescribed by the policy adopted under Subsection (i).

(k) Except as provided by Subsection (l) and to the extent the information is provided in the meeting minutes, the property owners' association is not required to release or allow inspection of any books or records that identify the dedicatory instrument violation history of an individual owner of an association, an owner's personal financial information, including records of payment or nonpayment of amounts due the association, an owner's contact information, other than the owner's address, or information related to an employee of the association, including personnel files. Information may be released in an aggregate or summary manner that would not identify an individual property owner.

(l) The books and records described by Subsection (k) shall be released or made available for inspection if:

- (1) the express written approval of the owner whose records are the subject of the request for inspection is provided to the property owners' association; or
- (2) a court orders the release of the books and records or orders that the books and records be made available for inspection.

(m) A property owners' association composed of more than 14 lots shall adopt and comply with a document retention policy that includes, at a minimum, the following requirements:

- (1) certificates of formation, bylaws, restrictive covenants, and all amendments to the certificates of formation, bylaws, and covenants shall be retained permanently;
- (2) financial books and records shall be retained for seven years;
- (3) account records of current owners shall be retained for five years;
- (4) contracts with a term of one year or more shall be retained for four years after the expiration of the contract term;
- (5) minutes of meetings of the owners and the board shall be retained for seven years; and
- (6) tax returns and audit records shall be retained for seven years.

(n) A member of a property owners' association who is denied access to or copies of association books or records to which the member is entitled under this section may file a petition with the justice of the peace of a justice precinct in which all or part of the property that is governed by the association is located requesting relief in accordance with this subsection. If the justice of the peace finds that the member is entitled to access to or copies of the records, the justice of the peace may grant one or more of the following remedies:

- (1) a judgment ordering the property owners' association to release or allow access to the books or records;
- (2) a judgment against the property owners' association for court costs and attorney's fees incurred in connection with seeking a remedy under this section; or
- (3) a judgment authorizing the owner or the owner's assignee to deduct the amounts awarded under Subdivision (2) from any future regular or special assessments payable to the property owners' association.

(o) If the property owners' association prevails in an action under Subsection (n), the association is entitled to a judgment for court costs and attorney's fees incurred by the association in connection with the action.

(p) On or before the 10th business day before the date a person brings an action against a property owners' association under this section, the person must send written notice to the association of the person's intent to bring the action. The notice must:

- (1) be sent certified mail, return receipt requested, or delivered by the United States Postal Service with signature confirmation service to the mailing address of the association or authorized representative as reflected on the most current management certificate filed under [Section 209.004](#); and
- (2) describe with sufficient detail the books and records being requested.

(q) For the purposes of this section, "business day" means a day other than Saturday, Sunday, or a state or federal holiday.

§ 209.0051. Open Board Meetings

(a) This section does not apply to a property owners' association that is subject to Chapter 551, Government Code, by application of [Section 551.0015, Government Code](#).

(b) In this section:

- (1) "Board meeting":
- (A) means a deliberation between a quorum of the voting board of the property owners' association, or between a quorum of the voting board and another person, during which property owners' association business is considered and the board takes formal action; and
 - (B) does not include the gathering of a quorum of the board at a social function unrelated to the business of the association or the attendance by a quorum of the board at a regional, state, or national convention, ceremonial event, or press conference, if formal action is not taken and any discussion of association business is incidental to the social function, convention, ceremonial event, or press conference.
- (2) "Development period" means a period stated in a declaration during which a declarant reserves:
- (A) a right to facilitate the development, construction, and marketing of the subdivision; and
 - (B) a right to direct the size, shape, and composition of the subdivision.
- (c) Regular and special board meetings must be open to owners, subject to the right of the board to adjourn a board meeting and reconvene in closed executive session to consider actions involving personnel, pending or threatened litigation, contract negotiations, enforcement actions, confidential communications with the property owners' association's attorney, matters involving the invasion of privacy of individual owners, or matters that are to remain confidential by request of the affected parties and agreement of the board. Following an executive session, any decision made in the executive session must be summarized orally and placed in the minutes, in general terms, without breaching the privacy of individual owners, violating any privilege, or disclosing information that was to remain confidential at the request of the affected parties. The oral summary must include a general explanation of expenditures approved in executive session.
- (c-1) Except for a meeting held by electronic or telephonic means under Subsection (h), a board meeting must be held in a county in which all or part of the property in the subdivision is located or in a county adjacent to that county.
- (d) The board shall keep a record of each regular or special board meeting in the form of written minutes of the meeting. The board shall make meeting records, including approved minutes, available to a member for inspection and copying on the member's written request to the property owners' association's managing agent at the address appearing on the most recently filed management certificate or, if there is not a managing agent, to the board.
- (e) Members shall be given notice of the date, hour, place, and general subject of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session. The notice shall be:
- (1) mailed to each property owner not later than the 10th day or earlier than the 60th day before the date of the meeting; or
 - (2) provided at least 72 hours before the start of the meeting by:
 - (A) posting the notice in a conspicuous manner reasonably designed to provide notice to property owners' association members:
 - (i) in a place located on the association's common property or, with the property owner's consent, on other conspicuously located privately owned property within the subdivision; or
 - (ii) on any Internet website maintained by the association or other Internet media; and
 - (B) sending the notice by e-mail to each owner who has registered an e-mail address with the association.
- (f) It is an owner's duty to keep an updated e-mail address registered with the property owners' association under Subsection (e)(2)(B).
- (g) If the board recesses a regular or special board meeting to continue the following regular business day, the board is not required to post notice of the continued meeting if the recess is taken in good faith and not to circumvent this section. If a regular or special board meeting is continued to the following regular business day, and on that following day the board continues the meeting to another day, the board shall give notice of the continuation in at least one manner prescribed by Subsection (e)(2)(A) within two hours after adjourning the meeting being continued.
- (h) A board may meet by any method of communication, including electronic and telephonic, without prior notice to owners under Subsection (e), if each director may hear and be heard by every other director, or the board may take action by unanimous written consent to consider routine and administrative matters or a reasonably unforeseen emergency or urgent necessity that requires immediate board action. Any action taken without notice to owners under Subsection (e) must be summarized orally, including an explanation of any known actual or estimated expenditures approved at the meeting, and documented in the minutes of the next regular or special board meeting. The board may not, without prior notice to owners under Subsection (e), consider or vote on:
- (1) fines;
 - (2) damage assessments
 - (3) initiation of foreclosure actions;
 - (4) initiation of enforcement actions, excluding temporary restraining orders or violations involving a threat to health or safety;
 - (5) increases in assessments;
 - (6) levying of special assessments;
 - (7) appeals from a denial of architectural control approval; or
 - (8) a suspension of a right of a particular owner before the owner has an opportunity to attend a board meeting to present the owner's position, including any defense, on the issue.
- (i) This section applies to a meeting of a property owners' association board during the development period only if the meeting is conducted for the purpose of:
- (1) adopting or amending the governing documents, including declarations, bylaws, rules, and regulations of the

association;

- (2) increasing the amount of regular assessments of the association or adopting or increasing a special assessment;
 - (3) electing non-developer board members of the association or establishing a process by which those members are elected;
- or
- (4) changing the voting rights of members of the association.

§ 209.0052. Association Contracts

- (a) This section does not apply to a contract entered into by an association during the development period.
- (b) An association may enter into an enforceable contract with a current association board member, a person related to a current association board member within the third degree by consanguinity or affinity, as determined under Chapter 573, Government Code, a company in which a current association board member has a financial interest in at least 51 percent of profits, or a company in which a person related to a current association board member within the third degree by consanguinity or affinity, as determined under Chapter 573, Government Code, has a financial interest in at least 51 percent of profits only if the following conditions are satisfied:
 - (1) the board member, relative, or company bids on the proposed contract and the association has received at least two other bids for the contract from persons not associated with the board member, relative, or company, if reasonably available in the community;
 - (2) the board member:
 - (A) is not given access to the other bids;
 - (B) does not participate in any board discussion regarding the contract; and
 - (C) does not vote on the award of the contract;
 - (3) the material facts regarding the relationship or interest with respect to the proposed contract are disclosed to or known by the association board and the board, in good faith and with ordinary care, authorizes the contract by an affirmative vote of the majority of the board members who do not have an interest governed by this subsection; and
 - (4) the association board certifies that the other requirements of this subsection have been satisfied by a resolution approved by an affirmative vote of the majority of the board members who do not have an interest governed by this subsection.

§ 209.0055. Voting

- (a) This section applies only to a property owners' association that:
 - (1) provides maintenance, preservation, and architectural control of residential and commercial property within a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more; and
 - (2) is a corporation that:
 - (A) is governed by a board of trustees who may employ a general manager to execute the association's bylaws and administer the business of the corporation;
 - (B) does not require membership in the corporation by the owners of the property within the defined area; and
 - (C) was incorporated before January 1, 2006.
- (b) A property owners' association described by Subsection (a) may not bar a property owner from voting in an association election solely based on the fact that:
 - (1) there is a pending enforcement action against the property owner; or
 - (2) the property owner owes the association any delinquent assessments, fees, or fines.

§ 209.0056. Notice of Election or Association Vote

- (a) Not later than the 10th day or earlier than the 60th day before the date of an election or vote, a property owners' association shall give written notice of the election or vote to:
 - (1) each owner of property in the property owners' association, for purposes of an association-wide election or vote; or
 - (2) each owner of property in the property owners' association entitled under the dedicatory instruments to vote in a particular representative election, for purposes of a vote that involves election of representatives of the association who are vested under the dedicatory instruments of the property owners' association with the authority to elect or appoint board members of the property owners' association.
- (b) This section supersedes any contrary requirement in a dedicatory instrument.
- (c) This section does not apply to a property owners' association that is subject to Chapter 552, Government Code, by application of [Section 552.0036, Government Code](#).

§ 209.0057. Recount of Votes

- (a) This section does not apply to a property owners' association that is subject to Chapter 552, Government Code, by application of [Section 552.0036, Government Code](#).
- (b) Any owner may, not later than the 15th day after the date of the meeting at which the election was held, require a recount

of the votes. A demand for a recount must be submitted in writing either:

- (1) by certified mail, return receipt requested, or by delivery by the United States Postal Service with signature confirmation service to the property owners' association's mailing address as reflected on the latest management certificate filed under [Section 209.004](#); or
 - (2) in person to the property owners' association's managing agent as reflected on the latest management certificate filed under [Section 209.004](#) or to the address to which absentee and proxy ballots are mailed.
- (c) The property owners' association shall, at the expense of the owner requesting the recount, retain for the purpose of performing the recount, the services of a person qualified to tabulate votes under this subsection. The association shall enter into a contract for the services of a person who:
- (1) is not a member of the association or related to a member of the association board within the third degree by consanguinity or affinity, as determined under Chapter 573, Government Code; and
 - (2) is:
 - (A) a current or former:
 - (i) county judge;
 - (ii) county elections administrator;
 - (iii) justice of the peace; or
 - (iv) county voter registrar; or
 - (B) a person agreed on by the association and the persons requesting the recount.
- (d) Any recount under Subsection (b) must be performed on or before the 30th day after the date of receipt of a request and payment for a recount in accordance with Subsections (b) and (c). If the recount changes the results of the election, the property owners' association shall reimburse the requesting owner for the cost of the recount. The property owners' association shall provide the results of the recount to each owner who requested the recount. Any action taken by the board in the period between the initial election vote tally and the completion of the recount is not affected by any recount.

§ 209.0058. Ballots

- (a) Any vote cast in an election or vote by a member of a property owners' association must be in writing and signed by the member.
- (b) Electronic votes cast under [Section 209.00592](#) constitute written and signed ballots.
- (c) In an association-wide election, written and signed ballots are not required for uncontested races.

§ 209.0059. Right to Vote

- (a) A provision in a dedicatory instrument that would disqualify a property owner from voting in a property owners' association election of board members or on any matter concerning the rights or responsibilities of the owner is void.
- (b) This section does not apply to a property owners' association that is subject to Chapter 552, Government Code, by application of [Section 552.0036, Government Code](#).

§ 209.00591. Board Membership

- (a) Except as provided by this section, a provision in a dedicatory instrument that restricts a property owner's right to run for a position on the board of the property owners' association is void.
- (b) If a board is presented with written, documented evidence from a database or other record maintained by a governmental law enforcement authority that a board member has been convicted of a felony or crime involving moral turpitude, the board member is immediately ineligible to serve on the board of the property owners' association, automatically considered removed from the board, and prohibited from future service on the board.
- (c) The declaration may provide for a period of declarant control of the association during which a declarant, or persons designated by the declarant, may appoint and remove board members and the officers of the association, other than board members or officers elected by members of the property owners' association. Regardless of the period of declarant control provided by the declaration, on or before the 120th day after the date 75 percent of the lots that may be created and made subject to the declaration are conveyed to owners other than a declarant, at least one-third of the board members must be elected by owners other than the declarant. If the declaration does not include the number of lots that may be created and made subject to the declaration, at least one-third of the board members must be elected by owners other than the declarant not later than the 10th anniversary of the date the declaration was recorded.

§ 209.00592. Voting; Quorum

- (a) The voting rights of an owner may be cast or given:
 - (1) in person or by proxy at a meeting of the property owners' association;
 - (2) by absentee ballot in accordance with this section;
 - (3) by electronic ballot in accordance with this section; or
 - (4) by any method of representative or delegated voting provided by a dedicatory instrument.
- (b) An absentee or electronic ballot:
 - (1) may be counted as an owner present and voting for the purpose of establishing a quorum only for items appearing on

- the ballot;
- (2) may not be counted, even if properly delivered, if the owner attends any meeting to vote in person, so that any vote cast at a meeting by a property owner supersedes any vote submitted by absentee or electronic ballot previously submitted for that proposal; and
- (3) may not be counted on the final vote of a proposal if the motion was amended at the meeting to be different from the exact language on the absentee or electronic ballot.
- (c) A solicitation for votes by absentee ballot must include:
- (1) an absentee ballot that contains each proposed action and provides an opportunity to vote for or against each proposed action;
 - (2) instructions for delivery of the completed absentee ballot, including the delivery location; and
 - (3) the following language: “By casting your vote via absentee ballot you will forgo the opportunity to consider and vote on any action from the floor on these proposals, if a meeting is held. This means that if there are amendments to these proposals your votes will not be counted on the final vote on these measures. If you desire to retain this ability, please attend any meeting in person. You may submit an absentee ballot and later choose to attend any meeting in person, in which case any in-person vote will prevail.”
- (d) For the purposes of this section, “electronic ballot” means a ballot:
- (1) given by:
 - (A) e-mail;
 - (B) facsimile; or
 - (C) posting on an Internet website;
 - (2) for which the identity of the property owner submitting the ballot can be confirmed; and
 - (3) for which the property owner may receive a receipt of the electronic transmission and receipt of the owner’s ballot.
- (e) If an electronic ballot is posted on an Internet website, a notice of the posting shall be sent to each owner that contains instructions on obtaining access to the posting on the website.
- (f) This section supersedes any contrary provision in a dedicatory instrument.
- (g) This section does not apply to a property owners’ association that is subject to Chapter 552, Government Code, by application of [Section 552.0036, Government Code](#).

§ 209.00593. Election of Board Members

- (a) Notwithstanding any provision in a dedicatory instrument, any board member whose term has expired must be elected by owners who are members of the property owners’ association. A board member may be appointed by the board to fill a vacancy on the board . A board member appointed to fill a vacant position shall serve for the remainder of the unexpired term of the position .
- (b) The board of a property owners’ association may amend the bylaws of the property owners’ association to provide for elections to be held as required by Subsection (a).
- (c) The appointment of a board member in violation of this section is void.
- (d) This section does not apply to the appointment of a board member during a development period. In this subsection, “development period” means a period stated in a declaration during which a declarant reserves:
- (1) a right to facilitate the development, construction, and marketing of the subdivision; and
 - (2) a right to direct the size, shape, and composition of the subdivision.
- (e) This section does not apply to a representative board whose members or delegates are elected or appointed by representatives of a property owners’ association who are elected by owner members of a property owners’ association.

§ 209.00594. Tabulation of and Access to Ballots

- (a) Notwithstanding any other provision of this chapter or any other law, a person who is a candidate in a property owners’ association election or who is otherwise the subject of an association vote, or a person related to that person within the third degree by consanguinity or affinity, as determined under Chapter 573, Government Code, may not tabulate or otherwise be given access to the ballots cast in that election or vote except as provided by this section.
- (b) A person other than a person described by Subsection (a) may tabulate votes in an association election or vote but may not disclose to any other person how an individual voted.
- (c) Notwithstanding any other provision of this chapter or any other law, a person other than a person who tabulates votes under Subsection (b), including a person described by Subsection (a), may be given access to the ballots cast in the election or vote only as part of a recount process authorized by law.

§ 209.006. Notice Required Before Enforcement Action

- (a) Before a property owners’ association may suspend an owner’s right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association’s lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail, return receipt requested.
- (b) The notice must:

- (1) describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner; and
- (2) inform the owner that the owner:
 - (A) is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months;
 - (B) may request a hearing under [Section 209.007](#) on or before the 30th day after the date the owner receives the notice; and
 - (C) may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act ([50 U.S.C. app. Section 501 et seq.](#)), if the owner is serving on active military duty.

§ 209.0062. Alternative Payment Schedule for Certain Assessments

- (a) A property owners' association composed of more than 14 lots shall adopt reasonable guidelines to establish an alternative payment schedule by which an owner may make partial payments to the property owners' association for delinquent regular or special assessments or any other amount owed to the association without accruing additional monetary penalties. For purposes of this section, monetary penalties do not include reasonable costs associated with administering the payment plan or interest.
- (b) The minimum term for a payment plan offered by a property owners' association is three months.
- (c) A property owners' association may not allow a payment plan for any amount that extends more than 18 months from the date of the owner's request for a payment plan. The association is not required to enter into a payment plan with an owner who failed to honor the terms of a previous payment plan during the two years following the owner's default under the previous payment plan
- (d) A property owners' association shall file the association's guidelines under this section in the real property records of each county in which the subdivision is located.
- (e) A property owners' association's failure to file as required by this section the association's guidelines in the real property records of each county in which the subdivision is located does not prohibit a property owner from receiving an alternative payment schedule by which the owner may make partial payments to the property owners' association for delinquent regular or special assessments or any other amount owed to the association without accruing additional monetary penalties, as defined by Subsection (a).

§ 209.0063. Priority of Payments

- (a) Except as provided by Subsection (b), a payment received by a property owners' association from the owner shall be applied to the owner's debt in the following order of priority:
 - (1) any delinquent assessment;
 - (2) any current assessment;
 - (3) any attorney's fees or third party collection costs incurred by the association associated solely with assessments or any other charge that could provide the basis for foreclosure;
 - (4) any attorney's fees incurred by the association that are not subject to Subdivision (3);
 - (5) any fines assessed by the association; and
 - (6) any other amount owed to the association.
- (b) If, at the time the property owners' association receives a payment from a property owner, the owner is in default under a payment plan entered into with the association:
 - (1) the association is not required to apply the payment in the order of priority specified by Subsection (a); and
 - (2) in applying the payment, a fine assessed by the association may not be given priority over any other amount owed to the association.

§ 209.0064. Third Party Collections

- (a) In this section, "collection agent" means a debt collector, as defined by Section 803 of the federal Fair Debt Collection Practices Act ([15 U.S.C. Section 1692a](#)).
- (b) A property owners' association may not hold an owner liable for fees of a collection agent retained by the property owners' association unless the association first provides written notice to the owner by certified mail, return receipt requested, that:
 - (1) specifies each delinquent amount and the total amount of the payment required to make the account current;
 - (2) describes the options the owner has to avoid having the account turned over to a collection agent, including information regarding availability of a payment plan through the association; and
 - (3) provides a period of at least 30 days for the owner to cure the delinquency before further collection action is taken.
- (c) An owner is not liable for fees of a collection agent retained by the property owners' association if:
 - (1) the obligation for payment by the association to the association's collection agent for fees or costs associated with a collection action is in any way dependent or contingent on amounts recovered; or
 - (2) the payment agreement between the association and the association's collection agent does not require payment by the

association of all fees to a collection agent for the action undertaken by the collection agent.

- (d) The agreement between the property owners' association and the association's collection agent may not prohibit the owner from contacting the association board or the association's managing agent regarding the owner's delinquency.
- (e) A property owners' association may not sell or otherwise transfer any interest in the association's accounts receivables for a purpose other than as collateral for a loan.

§ 209.007. Hearing Before Board; Alternative Dispute Resolution

- (a) If the owner is entitled to an opportunity to cure the violation, the owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the board of the property owners' association or before the board if the board does not appoint a committee.
- (b) If a hearing is to be held before a committee, the notice prescribed by [Section 209.006](#) must state that the owner has the right to appeal the committee's decision to the board by written notice to the board.
- (c) The association shall hold a hearing under this section not later than the 30th day after the date the board receives the owner's request for a hearing and shall notify the owner of the date, time, and place of the hearing not later than the 10th day before the date of the hearing. The board or the owner may request a postponement, and, if requested, a postponement shall be granted for a period of not more than 10 days. Additional postponements may be granted by agreement of the parties. The owner or the association may make an audio recording of the meeting.
- (d) The notice and hearing provisions of [Section 209.006](#) and this section do not apply if the association files a suit seeking a temporary restraining order or temporary injunctive relief or files a suit that includes foreclosure as a cause of action. If a suit is filed relating to a matter to which those sections apply, a party to the suit may file a motion to compel mediation. The notice and hearing provisions of [Section 209.006](#) and this section do not apply to a temporary suspension of a person's right to use common areas if the temporary suspension is the result of a violation that occurred in a common area and involved a significant and immediate risk of harm to others in the subdivision. The temporary suspension is effective until the board makes a final determination on the suspension action after following the procedures prescribed by this section.
- (e) An owner or property owners' association may use alternative dispute resolution services.

§ 209.008. Attorney's Fees

- (a) A property owners' association may collect reimbursement of reasonable attorney's fees and other reasonable costs incurred by the association relating to collecting amounts, including damages, due the association for enforcing restrictions or the bylaws or rules of the association only if the owner is provided a written notice that attorney's fees and costs will be charged to the owner if the delinquency or violation continues after a date certain.
- (b) An owner is not liable for attorney's fees incurred by the association relating to a matter described by the notice under [Section 209.006](#) if the attorney's fees are incurred before the conclusion of the hearing under [Section 209.007](#) or, if the owner does not request a hearing under that section, before the date by which the owner must request a hearing. The owner's presence is not required to hold a hearing under [Section 209.007](#).
- (c) All attorney's fees, costs, and other amounts collected from an owner shall be deposited into an account maintained at a financial institution in the name of the association or its managing agent. Only members of the association's board or its managing agent or employees of its managing agent may be signatories on the account.
- (d) On written request from the owner, the association shall provide copies of invoices for attorney's fees and other costs relating only to the matter for which the association seeks reimbursement of fees and costs.
- (e) The notice provisions of Subsection (a) do not apply to a counterclaim of an association in a lawsuit brought against the association by a property owner.
- (f) If the dedicatory instrument or restrictions of an association allow for nonjudicial foreclosure, the amount of attorney's fees that a property owners' association may include in a nonjudicial foreclosure sale for an indebtedness covered by a property owners' association's assessment lien is limited to the greater of:
- (1) one-third of the amount of all actual costs and assessments, excluding attorney's fees, plus interest and court costs, if those amounts are permitted to be included by law or by the restrictive covenants governing the property; or
 - (2) \$2,500.
- (g) Subsection (f) does not prevent a property owners' association from recovering or collecting attorney's fees in excess of the amounts prescribed by Subsection (f) by other means provided by law.

§ 209.009. Foreclosure Sale Prohibited in Certain Circumstances

A property owners' association may not foreclose a property owners' association's assessment lien if the debt securing the lien consists solely of:

- (1) fines assessed by the association;
- (2) attorney's fees incurred by the association solely associated with fines assessed by the association; or
- (3) amounts added to the owner's account as an assessment under [Section 209.005\(i\)](#).

§ 209.0091. Prerequisites to Foreclosure: Notice and Opportunity to Cure for Certain Other Lienholders

(a) A property owners' association may not foreclose a property owners' association assessment lien on real property by giving notice of sale under [Section 51.002](#) or commencing a judicial foreclosure action unless the association has:

(1) provided written notice of the total amount of the delinquency giving rise to the foreclosure to any other holder of a lien of record on the property whose lien is inferior or subordinate to the association's lien and is evidenced by a deed of trust; and

(2) provided the recipient of the notice an opportunity to cure the delinquency before the 61st day after the date the recipient receives the notice.

(b) Notice under this section must be sent by certified mail, return receipt requested, to the address for the lienholder shown in the deed records relating to the property that is subject to the property owners' association assessment lien.

§ 209.0092. Judicial Foreclosure Required

(a) Except as provided by Subsection (c) and subject to [Section 209.009](#), a property owners' association may not foreclose a property owners' association assessment lien unless the association first obtains a court order in an application for expedited foreclosure under the rules adopted by the supreme court under Subsection (b). A property owners' association may use the procedure described by this subsection to foreclose any lien described by the association's dedicatory instruments.

(b) The supreme court, as an exercise of the court's authority under [Section 74.024, Government Code](#), shall adopt rules establishing expedited foreclosure proceedings for use by a property owners' association in foreclosing an assessment lien of the association. The rules adopted under this subsection must be substantially similar to the rules adopted by the supreme court under [Section 50\(r\), Article XVI, Texas Constitution](#).

(c) Expedited foreclosure is not required under this section if the owner of the property that is subject to foreclosure agrees in writing at the time the foreclosure is sought to waive expedited foreclosure under this section. A waiver under this subsection may not be required as a condition of the transfer of title to real property.

§ 209.0093. Removal or Adoption of Foreclosure Authority

A provision granting a right to foreclose a lien on real property for unpaid amounts due to a property owners' association may be removed from a dedicatory instrument or adopted in a dedicatory instrument by a vote of at least 67 percent of the total votes allocated to property owners in the property owners' association. Owners holding at least 10 percent of all voting interests in the property owners' association may petition the association and require a special meeting to be called for the purposes of taking a vote for the purposes of this section.

§ 209.0094. Assessment Lien Filing

A lien, lien affidavit, or other instrument evidencing the nonpayment of assessments or other charges owed to a property owners' association and filed in the official public records of a county is a legal instrument affecting title to real property.

§ 209.010. Notice After Foreclosure Sale

(a) A property owners' association that conducts a foreclosure sale of an owner's lot must send to the lot owner and to each lienholder of record, not later than the 30th day after the date of the foreclosure sale, a written notice stating the date and time the sale occurred and informing the lot owner and each lienholder of record of the right of the lot owner and lienholder to redeem the property under [Section 209.011](#).

(b) The notice must be sent by certified mail, return receipt requested, to:

(1) the lot owner's last known mailing address, as reflected in the records of the property owners' association;

(2) the address of each holder of a lien on the property subject to foreclosure evidenced by the most recent deed of trust filed of record in the real property records of the county in which the property is located; and

(3) the address of each transferee or assignee of a deed of trust described by Subdivision (2) who has provided notice to a property owners' association of such assignment or transfer. Notice provided by a transferee or assignee to a property owners' association shall be in writing, shall contain the mailing address of the transferee or assignee, and shall be mailed by certified mail, return receipt requested, or United States mail with signature confirmation to the property owners' association according to the mailing address of the property owners' association pursuant to the most recent management certificate filed of record pursuant to [Section 209.004](#).

(b-1) If a recorded instrument does not include an address for the lienholder, the association does not have a duty to notify the lienholder as provided by this section.

(b-2) For purposes of this section, the lot owner is deemed to have given approval for the association to notify the lienholder.

(c) Not later than the 30th day after the date the association sends the notice required by Subsection (a), the association must record an affidavit in the real property records of the county in which the lot is located, stating the date on which the notice was sent and containing a legal description of the lot. Any person is entitled to rely conclusively on the information contained in the recorded affidavit.

(d) The notice requirements of this section also apply to the sale of an owner's lot by a sheriff or constable conducted as provided by a judgment obtained by the property owners' association.

§ 209.011. Right of Redemption After Foreclosure

(a) A property owners' association or other person who purchases occupied property at a sale foreclosing a property owners' association's assessment lien must commence and prosecute a forcible entry and detainer action under Chapter 24 to recover possession of the property.

(b) The owner of property in a residential subdivision or a lienholder of record may redeem the property from any purchaser at a sale foreclosing a property owners' association's assessment lien not later than the 180th day after the date the association mails written notice of the sale to the owner and the lienholder under [Section 209.010](#). A lienholder of record may not redeem the property as provided herein before 90 days after the date the association mails written notice of the sale to the lot owner and the lienholder under [Section 209.010](#), and only if the lot owner has not previously redeemed.

(c) A person who purchases property at a sale foreclosing a property owners' association's assessment lien may not transfer ownership of the property to a person other than a redeeming lot owner during the redemption period.

(d) To redeem property purchased by the property owners' association at the foreclosure sale, the lot owner or lienholder must pay to the association:

(1) all amounts due the association at the time of the foreclosure sale;

(2) interest from the date of the foreclosure sale to the date of redemption on all amounts owed the association at the rate stated in the dedicatory instruments for delinquent assessments or, if no rate is stated, at an annual interest rate of 10 percent;

(3) costs incurred by the association in foreclosing the lien and conveying the property to the lot owner, including reasonable attorney's fees;

(4) any assessment levied against the property by the association after the date of the foreclosure sale;

(5) any reasonable cost incurred by the association, including mortgage payments and costs of repair, maintenance, and leasing of the property; and

(6) the purchase price paid by the association at the foreclosure sale less any amounts due the association under Subdivision (1) that were satisfied out of foreclosure sale proceeds.

(e) To redeem property purchased at the foreclosure sale by a person other than the property owners' association, the lot owner or lienholder:

(1) must pay to the association:

(A) all amounts due the association at the time of the foreclosure sale less the foreclosure sales price received by the association from the purchaser;

(B) interest from the date of the foreclosure sale through the date of redemption on all amounts owed the association at the rate stated in the dedicatory instruments for delinquent assessments or, if no rate is stated, at an annual interest rate of 10 percent;

(C) costs incurred by the association in foreclosing the lien and conveying the property to the redeeming lot owner, including reasonable attorney's fees;

(D) any unpaid assessments levied against the property by the association after the date of the foreclosure sale; and

(E) taxable costs incurred in a proceeding brought under Subsection (a); and

(2) must pay to the person who purchased the property at the foreclosure sale:

(A) any assessments levied against the property by the association after the date of the foreclosure sale and paid by the purchaser;

(B) the purchase price paid by the purchaser at the foreclosure sale;

(C) the amount of the deed recording fee;

(D) the amount paid by the purchaser as ad valorem taxes, penalties, and interest on the property after the date of the foreclosure sale; and

(E) taxable costs incurred in a proceeding brought under Subsection (a).

(f) If a lot owner or lienholder redeems the property under this section, the purchaser of the property at foreclosure shall immediately execute and deliver to the redeeming party a deed transferring the property to the lot owner. If a purchaser fails to comply with this section, the lot owner or lienholder may file an action against the purchaser and may recover reasonable attorney's fees from the purchaser if the lot owner or the lienholder is the prevailing party in the action.

(g) If, before the expiration of the redemption period, the redeeming lot owner or lienholder fails to record the deed from the foreclosing purchaser or fails to record an affidavit stating that the lot owner or lienholder has redeemed the property, the lot owner's or lienholder's right of redemption as against a bona fide purchaser or lender for value expires after the redemption period.

(h) The purchaser of the property at the foreclosure sale or a person to whom the person who purchased the property at the foreclosure sale transferred the property may presume conclusively that the lot owner or a lienholder did not redeem the property unless the lot owner or a lienholder files in the real property records of the county in which the property is located:

(1) a deed from the purchaser of the property at the foreclosure sale; or

(2) an affidavit that:

(A) states that the property has been redeemed;

(B) contains a legal description of the property; and

(C) includes the name and mailing address of the person who redeemed the property.

(i) If the property owners' association purchases the property at foreclosure, all rent and other income collected by the association from the date of the foreclosure sale to the date of redemption shall be credited toward the amount owed the association under Subsection (d), and if there are excess proceeds, they shall be refunded to the lot owner. If a person other than the association purchases the property at foreclosure, all rent and other income collected by the purchaser from the date of the foreclosure sale to the date of redemption shall be credited toward the amount owed the purchaser under Subsection (e), and if there are excess proceeds, those proceeds shall be refunded to the lot owner.

(j) If a person other than the property owners' association is the purchaser at the foreclosure sale, before executing a deed transferring the property to the lot owner, the purchaser shall obtain an affidavit from the association or its authorized agent stating that all amounts owed the association under Subsection (e) have been paid. The association shall provide the purchaser with the affidavit not later than the 10th day after the date the association receives all amounts owed to the association under Subsection (e). Failure of a purchaser to comply with this subsection does not affect the validity of a redemption.

(k) Property that is redeemed remains subject to all liens and encumbrances on the property before foreclosure. Any lease entered into by the purchaser of property at a sale foreclosing an assessment lien of a property owners' association is subject to the right of redemption provided by this section and the lot owner's right to reoccupy the property immediately after redemption.

(l) If a lot owner makes partial payment of amounts due the association at any time before the redemption period expires but fails to pay all amounts necessary to redeem the property before the redemption period expires, the association shall refund any partial payments to the lot owner by mailing payment to the owner's last known address as shown in the association's records not later than the 30th day after the expiration date of the redemption period.

(m) If a lot owner or lienholder sends by certified mail, return receipt requested, a written request to redeem the property on or before the last day of the redemption period, the lot owner's or lienholder's right of redemption is extended until the 10th day after the date the association and any third party foreclosure purchaser provides written notice to the redeeming party of the amounts that must be paid to redeem the property.

(n) After the redemption period and any extended redemption period provided by Subsection (m) expires without a redemption of the property, the association or third party foreclosure purchaser shall record an affidavit in the real property records of the county in which the property is located stating that the lot owner or a lienholder did not redeem the property during the redemption period or any extended redemption period.

(o) The association or the person who purchased the property at the foreclosure sale may file an affidavit in the real property records of the county in which the property is located that states the date the citation was served in a suit under Subsection (a) and contains a legal description of the property. Any person may rely conclusively on the information contained in the affidavit.

(p) The rights of a lot owner and a lienholder under this section also apply if the sale of the lot owner's property is conducted by a constable or sheriff as provided by a judgment obtained by the property owners' association.

§ 209.012. Restrictive Covenants Granting Easements to Certain Property Owners' Associations

(a) A property owners' association may not amend a dedicatory instrument to grant the property owners' association an easement through or over an owner's lot without the consent of the owner.

(b) This section does not prohibit a property owners' association from adopting or enforcing a restriction in a dedicatory instrument that allows the property owners' association to access an owner's lot to remedy a violation of the dedicatory instrument.

§ 209.013. Authority of Association to Amend Dedicatory Instrument

(a) A dedicatory instrument created by a developer of a residential subdivision or by a property owners' association in which the developer has a majority of the voting rights or that the developer otherwise controls under the terms of the dedicatory instrument may not be amended during the period between the time the developer loses the majority of the voting rights or other form of control of the property owners' association and the time a new board of directors of the association assumes office following the loss of the majority of the voting rights or other form of control.

(b) A provision in a dedicatory instrument that violates this section is void and unenforceable.

§ 209.014. Mandatory Election Required After Failure to Call Regular Meeting

(a) Notwithstanding any provision in a dedicatory instrument, a board of a property owners' association shall call an annual meeting of the members of the association.

(b) If a board of a property owners' association does not call an annual meeting of the association members, an owner may demand that a meeting of the association members be called not later than the 30th day after the date of the owner's demand. The owner's demand must be made in writing and sent by certified mail, return receipt requested, to the registered agent of the property owners' association and to the association at the address for the association according to the most recently filed

management certificate. A copy of the notice must be sent to each property owner who is a member of the association.

(c) If the board does not call a meeting of the members of the property owners' association on or before the 30th day after the date of a demand under Subsection (b), three or more owners may form an election committee. The election committee shall file written notice of the committee's formation with the county clerk of each county in which the subdivision is located.

(d) A notice filed by an election committee must contain:

- (1) a statement that an election committee has been formed to call a meeting of owners who are members of the property owners' association for the sole purpose of electing board members;
- (2) the name and residential address of each committee member; and
- (3) the name of the subdivision over which the property owners' association has jurisdiction under a dedicatory instrument.

(e) Each committee member must sign and acknowledge the notice before a notary or other official authorized to take acknowledgments.

(f) The county clerk shall enter on the notice the date the notice is filed and record the notice in the county's real property records.

(g) Only one committee in a subdivision may operate under this section at one time. If more than one committee in a subdivision files a notice, the first committee that files a notice, after having complied with all other requirements of this section, is the committee with the power to act under this section. A committee that does not hold or conduct a successful election within four months after the date the notice is filed with the county clerk is dissolved by operation of law. An election held or conducted by a dissolved committee is ineffective for any purpose under this section.

(h) The election committee may call meetings of the owners who are members of the property owners' association for the sole purpose of electing board members. Notice, quorum, and voting provisions contained in the bylaws of the property owners' association apply to any meeting called by the election committee.

§ 209.015. Regulation of Land Use: Residential Purpose

(a) In this section:

(1) "Adjacent lot" means:

- (A) a lot that is contiguous to another lot that fronts on the same street;
- (B) with respect to a corner lot, a lot that is contiguous to the corner lot by either a side property line or a back property line; or
- (C) if permitted by the dedicatory instrument, any lot that is contiguous to another lot at the back property line.

(2) "Residential purpose" with respect to the use of a lot:

- (A) means the location on the lot of any building, structure, or other improvement customarily appurtenant to a residence, as opposed to use for a business or commercial purpose; and
- (B) includes the location on the lot of a garage, sidewalk, driveway, parking area, children's swing or playscape, fence, septic system, swimming pool, utility line, or water well and, if otherwise specifically permitted by the dedicatory instrument, the parking or storage of a recreational vehicle.

(b) Except as provided by this section, a property owners' association may not adopt or enforce a provision in a dedicatory instrument that prohibits or restricts the owner of a lot on which a residence is located from using for residential purposes an adjacent lot owned by the property owner.

(c) An owner must obtain the approval of the property owners' association or, if applicable, an architectural committee established by the association or the association's dedicatory instruments, based on criteria prescribed by the dedicatory instruments specific to the use of a lot for residential purposes, including reasonable restrictions regarding size, location, shielding, and aesthetics of the residential purpose, before the owner begins the construction, placement, or erection of a building, structure, or other improvement for the residential purpose on an adjacent lot.

(d) An owner who elects to use an adjacent lot for residential purposes under this section shall, on the sale or transfer of the lot containing the residence:

- (1) include the adjacent lot in the sales agreement and transfer the lot to the new owner under the same dedicatory conditions; or
- (2) restore the adjacent lot to the original condition before the addition of the improvements allowed under this section to the extent that the lot would again be suitable for the construction of a separate residence as originally platted and provided for in the conveyance to the owner.

(e) An owner may sell the adjacent lot separately only for the purpose of the construction of a new residence that complies with existing requirements in the dedicatory instrument unless the lot has been restored as described by Subsection (d)(2).

(f) A provision in a dedicatory instrument that violates this section is void.

