LAWS AFFECTING THE DRAFTING OF HOA DOCUMENTS

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State Bar of Texas
26th ANNUAL
ADVANCED REAL ESTATE DRAFTING COURSE
March 26-27, 2015
Houston

CHAPTER 8

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The scope of this paper is not to present a complete set of documents for the governance of community associations ("HOAs"), or to present a complete analysis of the law as it relates to the drafting of HOA documents. Rather, this paper (i) points out some of the key HOA documents that are required for or helpful in governing HOAs, and (ii) discusses some of the ways that federal and state statutes, and the courts' interpretation and application of these statutes, affect the drafting of key provisions of these documents.

Any discussion of HOAs should address the fact that HOAs are referred to by several different names. Homeowners associations, property owners associations, community associations, civic associations, etc.; these terms are often times used interchangeably. The Texas Property Code uses the term "property owners' association" as defined in §202.001 of the Texas Property Code, are associations (i) which are comprised primarily of owners of property covered by the dedicatory instruments, and (ii) through which the owners or board manage or regulate the property.[1]

However, Chapter 204 of the Texas Property Code adds another definition for the term as follows:

> (a) A property owners' association is 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.[2]

For the sake of simplicity, this paper will use "HOA" as the designation that applies to all forms of associations. The provisions to be discussed herein apply to all types of residential property unless distinguished as applying only to residential HOAs (single-family and townhomeHOAs) or only to condominium HOAs.

I. APPLICABLE LAW & DEFINITIONS

Statutes that apply to HOAs include <u>but are not limited to</u> the following:

Texas Condominium Act, Tex. Prop. Code §81 et seq.;
Texas Uniform Condominium Act, Tex. Prop. Code §82 et seq. (herein referred to as "TUCA");
Texas Business Organizations Code; Chapter 22 et seq.;
Telecommunications Act of 1996;
Texas Fair Housing Act, Tex. Prop. Code Ann. §301 et seq.;
Tex. Prop. Code §§ 202-209;
Fair Housing Amendments Act, 42 U.S.C.A. § 3601;
Federal Fair Debt Collection Practices Act, 15 U.S.C. 1692-16920;
Title 5 Finance Code, Chapter 392, Debt Collection. Tex. Fin. Code Ann. §392 et seq.

II. TYPES OF DEDICATORY INSTRUMENTS

As defined by the Property Code, dedicatory instruments can be found in many forms. However, most dedicatory instruments fall into one of two basic categories. The first category involves instruments that restrict the real property, i.e. the geographic dimensions of the subdivision, limitations of permissible use of the lots and improvements within the subdivision. The quintessential example of this type of instrument is the Declaration of Covenants, Conditions, and Restrictions or Condominium Declaration ("Declaration"). The second category involves instruments that govern the corporate operations of the HOA. One key document that falls into this category is the Bylaws of the HOA.

Additional dedicatory instruments in both categories may be promulgated by the HOA or its board of directors ("Board") in the form of resolutions, policies, guidelines, or rules and regulations (herein referred to as "Policies").[3]

[1] Tex. Prop. Code §202.001(1)(C)(2).

[2] Tex. Prop. Code §204.004(a). However, this definition applies only to certain Texas counties (currently Harris, Galveston, and Montgomery Counties), applies only to residential subdivisions, specifically excludes condominiums, and is retroactive to a restriction regardless of its effective date. Id.

[3] Tex. Prop. Code §202.001(1). It is important to note, however, that no dedicatory instrument is effective unless it is recorded in the real property records of the county in which the property is located. Tex. Prop. Code §202.006.

III. DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS

Typically, the Declaration is the primary document that subjects the real property within the geographic confines of a subdivision to restrictive covenants as to permitted uses, maintenance, prohibited uses, and the mechanism created to fund the administration of the subdivision. In the case of condominiums, the boundaries of the units are also identified.

Various state and federal laws must be considered when drafting the Declaration and related Policies including: the applicable provisions of the Texas Property Code, the Telecommunications Act of 1996, and the Fair Housing Act. The following are a few examples of how these laws affect the drafting of various provisions of the Declaration and related Policies.

A. Creation of the HOA

Occasionally, a HOA may lose its rights to regulate and govern the property simply because it loses the right to its name. The HOA is created by its Certificate of Formation, but its authority to regulate and govern the property is often established or referenced in the Declaration. Many Declarations provide for only one HOA to have this authority, and it is identified ***by name***. For example:

> "Association" means the XYZ Community Association, Inc., it successors or assigns.

However, there are several ways which a HOA may forfeit its corporate charter. If it does, it may not be able to take the name back. For example, any disgruntled homeowner could incorporate an entity in the HOAs name. Then, the HOA cannot take its name back without the permission of the homeowner. And, since only an HOA by ***that name*** has the authority to regulate the property, the now defunct HOA may have lost its right to do so.

The following is a sample definition in the Declaration which addresses this issue:

> "Association" means one or more non-profit corporations, including its successors, assigns, or replacements, created under the laws of the State of Texas, with the first being the XYZ Community Association, Inc. Declarant is hereby authorized to incorporate one or more entities to provide the functions of the Association. No more than one such non-profit corporation shall be in existence at any one time, provided however, the formation of a sub-association is permitted. The Association has jurisdiction over all properties located within the Subdivision, as same may be amended from time to time as additional property is annexed into the Subdivision as allowed under this Declaration. For purposes of clarity, when "Association" is used herein, that term includes the authority, rights, remedies and obligations of the nonprofit corporation, and the authority of the Board, as defined herein, to carry out the authority, rights, remedies and obligations of the Association.

HOAs are traditionally established and initially controlled by the developer of the property, but over time, the HOA is typically "turned over" to the owners at or near the end of the Developer Control Period.[4] These owners are generally volunteers and are often times not as sophisticated or fluent in corporate matters as their developer predecessors. As a result, issues like this arise most often after turnover has occurred. The corporate existence is one of many items that should always be verified or addressed before turnover of developer control.

B. The Board's Ability to Promulgate Policies

Many restrictions with extensive detail are better handled in Policies rather than the Declaration, because they may need to be amended more easily or more often to adapt to unforeseen or changing needs of the HOA. The Declaration often has stringent amendment requirements that require a vote of the members.[5] Policies, on the other hand, may be promulgated and amended by the Board alone.[6]

In order to vest the HOA with the authority to adopt such Policies, the following is a sample provision often found in the Declaration:

A. Authority to Promulgate Rules, Regulations and Policies

The Board has the authority, without the obligation, to promulgate, amend, cancel, limit, create exceptions to, and enforce reasonable rules, regulations and policies, including but not limited to rules, regulations and policies concerning the administration

[4] See, Tex. Prop. Code §209.00591 for residential HOAs, and Tex. Prop. Code §82.103 for condominium HOAs.

[5] See, Tex. Prop. Code §209.0041 for residential HOAs, and Tex. Prop. Code §82.067 for condominium HOAs.

[6] While these Policies may be created or amended by the Board, the law requires that the Board do so at an open Board meeting subject to notice to the owners as required by the applicable statute. See Tex. Prop. Code §209.00591 for residential HOAs and Tex. Prop. Code §82.070 for condominium HOAs.

of the Property, the enforcement of the Dedicatory Instruments, the use and enjoyment of the Property, limitations on the use of the Common Area, establishing and setting the amount of fines for violations of the Dedicatory Instruments and all fees and costs generated in the enforcement of the Dedicatory Instruments. Such rules, regulations and policies shall be binding upon all Owners and Occupants, if any. The rights and remedies contained in this Article are cumulative and supplement all other rights of enforcement under applicable law.

The Declaration may also vest the Board of Directors and/or the Architectural Review Committee ("ARC") with the authority to promulgate reasonable guidelines to address the minutiae of landscaping, paint color, brick/siding issues, etc. To that end definitions should be added to the Declaration such as the following:

> "Guidelines" means general, architectural, and/or builder guidelines, and application and review procedures, if any, that may set forth various standards relating to exterior harmony of any and all improvements placed upon or constructed on any Lot and/or construction types and aesthetics, which Guidelines may be promulgated and amended by the Board, with the approval of the Declarant during the Development Period. There shall be no limitation on the scope of amendments to the Guidelines, and such amendments may remove requirements previously imposed or otherwise make the Guidelines less restrictive. Guidelines are enforceable by the Association.

C. Specific Restrictions and Related Policies

The Texas Property Code contains several statutes which apply directly to specific restrictions involving residential ownership and use of property. Whether these restrictions are addressed in the Declaration, or in Policies as described above, they must be carefully drafted to be in compliance with these laws. The following is a selection of ***some*** of these statutes, and contains examples of suggested language for (1) a standard Policy allowing for the minimum use under the statute, (2) a Policy that accounts for different application during the developer control period, and (3) a Policy that allows for uses beyond the minimum allowed under the statute.

1. Rain Barrels

Section 202.007 of the Texas Property Code speaks to an owners right to have rain barrels and other rainwater harvesting devices. This provision allows the association to prohibit an owner from installing a rain barrel on property that is: (i) owned by association; (ii) owned in common by members of the association; or (iii) located between the front of the home and adjoining or adjacent street.

With certain limitations, the statute authorizes associations to regulate the size, color, graphics, type, and shielding of, and the materials used in the construction of a rain barrel, rainwater harvesting device, or other appurtenance. The statute also permits regulation in a side yard so long as the regulation does not have the effect of prohibiting the system.

When drafting a Policy such as this, it is helpful to track the language of the statute. The following is an example of language that establishes such a Policy, allowing for the minimum use under the law:

> NOW THEREFORE, pursuant to the authority granted in Section 202.007(d) of the Texas Property Code, the Board of Directors (the "Board"), hereby adopts this Rain Barrel Policy ("Policy"), which shall run with the land and be binding on all owners and lots within the subdivision. This Policy replaces any previously recorded or implemented policy that addresses the subjects contained herein.

An application must be submitted for review by the ARC, and formal written approval from the ARC shall be required before installation may begin.

I. RAIN BARRELS

A. Prohibited Rainwater Harvesting Systems/Rain Barrels

Rainwater harvesting systems or rain barrels (collectively referred to herein as "Rain Barrels") are prohibited in the following circumstances:

1. Rain Barrels that are located on property owned by the Association;
2. Rain Barrels that are located on property that is owned in common by the members of the Association;
3. Rain Barrels that are located between the front of the owner's home and an adjoining or adjacent street;
4. Rain Barrels that are of a color not consistent with the color scheme of the home; and
5. Rain Barrels that display language or content other than the manufacturer's typical display.

B. Rain Barrels Located in Area Visible from a Street, Lot, or Common Area:

Rain Barrels that are located on the side of a house or at any other location that is visible from a street, another lot, or a common area must comply with the following:

1. Rain Barrels must have adequate screening, as determined by the ARC;
2. Only commercial and professional grade Rain Barrels are permitted;
3. All Rain Barrels must be fully enclosed and have a proper screen or filter to prevent mosquito breeding and harboring; and
4. Rain Barrels may not create unsanitary conditions or be of nuisance to any neighboring properties.

2. Solar Panels

The legislature also recognizes in various ways that the needs of a development, whether subdivision or condominium, can be quite different while it is initially being developed. As such, the Texas Property Code defines the "Development Period" in various statutes, and applies different statutory standards during this Development Period than it does after such period ends.

For instance, Section 202.007 of the Texas Property Code, which discusses an owner's right to install solar energy devices on residential property, defines the Development Period as follows:

(1) "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.

This statute contains different standards for the restrictions related to solar energy panels during and after the Development Period. During the Development Period, the declarant is not required to allow solar panels to be installed on homes.[7]

The following is a sample of language that can be added to such a Policy, to address the different standards allowed during and after the Development Period:

> NOW THEREFORE, pursuant to the authority granted in Sections 202.010 of the Texas Property Code, the Board of Directors (the "Board"), hereby adopts this Solar Energy Devices Policy ("Policy"), which shall run with the land and be binding on all owners and lots within the subdivision. This Policy replaces any previously recorded or implemented policy that addresses the subjects contained herein.
>
> I. SOLAR ENERGY DEVICES DURING DEVELOPMENT PERIOD
>
> Pursuant to Texas Property Code §202.010, solar energy devices, including solar panels, are prohibited on any lot within the ABC subdivision during the development period.
>
> II. SOLAR ENERGY DEVICES AFTER DEVELOPMENT PERIOD COMPLETE
>
> Pursuant to Texas Property Code §202.010, after completion of the development period, solar energy devices, including solar panels, shall be restricted in the following manner.

3. Flag Display Policy

Section 202.012 to the Texas Property Code discusses an owner's right to install a flag. This provision allows the HOA to prohibit an owner from installing a flag on property that is owned in common by the members (essentially any part of a common element or any association reserve). An HOA may not adopt or enforce a dedicatory instrument that prohibits or restricts an owner from the display of: (i) US flag; (ii) Texas flag; or (iii) any branch of the US armed forces.

Intuitively, it would seem that the Flag Display Policy would be one of the easiest to draft, and if the only flags permitted are those listed above, it can be quite simple. However, the wording of the statute is not easy to decipher. Thus, drafting a provision that complies with the statute can be difficult under certain circumstances in which the HOA wants to allow more flags than those listed above.

For instance, many HOAs wish to allow (1) seasonal temporary flags, (2) school spirit or holiday flags, or (3) flags that existed prior to the institution of the Policy. The following is suggested language which allows the HOA to permit such flags:

> Option One:
> In addition to the one flagpole allowed above, owners may display one temporary freestanding flagpole with a U.S. flag ("Temporary Flag") on their front yard for up to two days before and two days after the following dates: Independence Day, Memorial Day, Veterans Day, and September 11th. Temporary Flags must meet all of the applicable requirements set forth above.
>
> Option Two:
> Furthermore, this Flag Display Policy does not apply to flags displayed as "School Spirit" flags, or flags displayed during

[7] See, Tex. Prop. Code §202.010.

various holidays ("Holiday Flags") pursuant to the association's agreement with a group or entity that uses such displays as a means of fundraising or support (including by way of illustration and not limitation: scouting groups or local school groups). The board has sole discretion in determining which School Spirit and Holiday Flags may be displayed, and the length of time of such display.

Option Three:
It is not the intent of this Flag Display Policy to create a deed restriction violation for a permanently installed flagpole that was installed prior to the date this Flag Display Policy is recorded in the Official Public Records of Real Property of XXXXX County, Texas.

D. Federal Pre-Emption

In addition to complying with all state and local requirements, there are several federal statutes that should be kept in mind when drafting the Declaration. Generally, all of the applicable statutes and the dedicatory instruments contain definitions of important terms. When considering definitions in deed restrictions, careful attention should be given to all of the applicable definitions found in statutes to avoid ambiguity and/or contradictions. The following are some suggestions for dealing with federal statutes.

1. Fair Housing Amendments Act

The Fair Housing Amendments Act of 1988 (the "FHA"), Section 1, 42 U.S.C.A. Section 3601 et seq. greatly affects the drafting of certain restrictions. The FHA has been broadly applied to reach all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws. These laws prevent discrimination based on handicap, or familial status. The familial status protection specifically prohibits discrimination against individuals in the sale, rental or financing of housing because there are children under 18 in the family. In addition to the FHA, many states have adopted similar state laws. For example, the Texas legislature adopted a fair housing law which is substantially similar to the federal Fair Housing Act. This act is codified at Tex. Prop Code Ann. Sec. 301.023 (Vernon 1995, Supp. 2001).

A common challenge to drafting restrictions for single-family residences which remain compliant with FHA protections is based on the question of what constitutes a "single family." Currently, there is no precise definition under the law. However, this issue must be addressed in a Declaration for a residential subdivision or condominium in order to prohibit multi-family living arrangements, certain leasing arrangements with large numbers of unrelated tenants, or the construction of dwellings with multiple or split residences built in.

Additionally, challenges often hinge upon whether or not the designation as "single-family residential" refers to the type of use of a dwelling, the number of inhabitants of a dwelling, or solely to the architectural design of the dwelling. In an effort to address this issue in a way that remains compliant with the FHA, the following provision is a sample of language that may be used:

> Homesites within the Subdivision shall be used exclusively for single-family residential purposes. The term "single-family" as used herein shall refer not only to the architectural design of the Dwelling but also to the permitted number of inhabitants, which shall be limited to a single family, as defined below. Single-family shall mean the use of and improvement to a Lot with no more than one building designed for and containing facilities for living, sleeping, cooking, and eating therein. In no case may a Lot contain more than one Dwelling. No multi-family Dwellings may be constructed on any Lot. No building, Outbuilding or portion thereof shall be constructed for income property, such that Occupants would occupy less than the entire Lot and/or Homesite.

A chart or examples may be inserted after the language above in order to illustrate approved "single family" residents.

However, after this illustration, you may wish to insert the following:

> It is not the intent of this provision to exclude from a Lot any individual who is authorized to so remain by any state or federal law. If it is found that this provision is in violation of any law, then this provision shall be interpreted to be as restrictive as possible to preserve as much of the original provision as allowed by law.

It should be noted that the language shown above is a "savings clause" that can be found in many provisions in the Declaration. The following provision may also be inserted at the end of the Declaration:

> Compliance with Laws
> At all times, each Owner shall comply with all applicable federal, state, county, and municipal laws, ordinances, rules, and regulations with respect to the use, occupancy, and condition of the Property and

> any improvements thereon. If any provision contained in this Declaration or any Supplemental Declaration or amendment is found to violate any law, then the provision shall be interpreted to be as restrictive as possible to preserve as much of the original provision as allowed by law.

2. Telecommunications Act of 1996

Many HOAs desire restrictive covenants that address an owner's right to install satellite dishes and antennas of various types. However, these restrictions, if not drafted carefully, will be pre-empted by federal law, and therefore of no force and effect. The Telecommunications Act of 1996, passed to promote competition and reduce regulation of telecommunications, was a broad overhaul of existing telecommunications laws. Title II - Broadcast Services, Section 207 if this act addressed restrictions on over-the-air reception devices. Section 207 reads as follows:

> "Within 180 days after the date of enactment of this Act, the commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to ***prohibit restrictions*** that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."

As a result, the FCC ruled that any local land-use, building, or similar regulation that materially limits reception of satellite earth station antennas; or imposes more than minimal costs on the users of such antennas, shall be presumed unreasonable and will be preempted.

The Over-the-Air-Reception Devices (OTARD) OTARD Rules implement this ruling. The first OTARD rule invalidated restrictions on various satellite dishes and antennas one meter or less in diameter, and standard television broadcast antennas regardless of size. Various other OTARD Rules have since followed.

These OTARD Rules have a direct impact on the drafting of restrictive covenants that prohibit or limit the installation and use of Home Satellite Dish antennas, Broadcast Antennas and MDDS Systems. In order to avoid preemption, any restrictive covenants will have to comply strictly with the FCC requirements. The following is a sample of an Antenna provision (with a similar "savings clause") in a Declaration that attempts to comply with the FCC position:

> Antennas
> No exterior antennas, aerials, satellite dishes, or other apparatus for the reception of television, radio, satellite or other signals of any kind shall be placed, allowed, or maintained upon any portion of the Subdivision, including any Homesite, which is visible from any street, Common Area or other Lot unless it is impossible to receive signals from said location. In that event the receiving device may be placed in a visible location as approved by the ARC. The ARC may require as much screening as possible while not substantially interfering with reception. No satellite dishes shall be permitted which are larger than one (1) meter in diameter. No exterior antennas, aerials, satellite dishes, or other apparatus shall be permitted which transmit television, radio, satellite or other signals of any kind shall be placed, allowed, or maintained upon any portion of the Property.
>
> The Declarant, by promulgating this Section, is not attempting to violate the Telecommunications Act of 1996 (the "1996 Act"), as same may be amended from time to time. This Section shall be interpreted to be as restrictive as possible while not violating the 1996 Act.
>
> In the event that it is impossible to receive an adequate signal from a non-visible location, the installation of antennas shall be subject to rules and regulations which may be promulgated by the Board setting out preferred alternate locations for antennas.

IV. BYLAWS

The second category of HOA documents involves the documents that govern the corporate operations of the HOA itself. One of the primary examples of this type of document is the Bylaws of the association. In the hierarchy of dedicatory instruments, it used to fall near the bottom among the least important documents. However, in light of the amendments to the Texas Property Code that now require that Bylaws be recorded,[8] the presumption of reasonableness attached to an exercise of discretionary authority,[9] and recent case law that requires all provisions to be read together

[8] Tex. Prop. Code §202.006.
[9] Tex. Prop. Code §202.004(a).

to determine the meaning of a restriction,[10] the Bylaws have become a much more important instrument for a HOA.[11]

Various statutes must be considered when drafting the Bylaws and the Policies related to corporate governance issues, including: various provisions of the Texas Property Code specific to HOA governance, and the Texas Business Organizations Code. As with the first category of documents, these laws sometimes provide for different standards for HOAs depending on their type and circumstance, and sometimes allow for choices and discretion by the drafter. The following are a few select examples of how these laws affect the drafting of various provisions of the Bylaws and related Policies.

A. The Standard of Care of Officers and Directors

The Texas Business and Organizations Code ("TBOC") and Texas Property Code have provided the standards of care for the directors and officers of community association. If directors and officers conduct themselves within the following standards of care, they cannot be held liable in a lawsuit based upon their acts or omissions as directors or officers for their community association. The applicable standard, however, depends upon the type of community association.

For residential subdivision HOAs, and pre -TUCA condominiums the TBOC provides that, in general, directors and officers must act:

(1) in good faith;
(2) with ordinary care; and
(3) in a manner they believe to be in the best interest of the community association.[12]

Directors and officers, who discharge their duties within the standard of care provided in the TBOC, are not personally liable for their actions. Further, the TBOC encourages all directors and officers to rely on the opinions, information, reports, and statements of their attorneys and other specified professionals in performing their duties.

The above mentioned standards of care appear easy enough to follow. In reality however, regardless of how a community association director or officer acts, there is always the possibility of a lawsuit.

For post-TUCA condominium HOAs, it is important to note that TUCA imposes on an officer or a member of the board a fiduciary duty to the unit owners for such officers' or board members' acts or omissions.[13] An officer or director of an association is liable to the association or any unit owner for monetary damages for an act or omission occurring in the person's capacity as an officer or director if the officer or director ***breached a fiduciary duty***, receive an improper benefit, or the act or omission was in bad faith, involved intentional misconduct, or was one for which liability is expressly provided by statute.[14]

While post-TUCA condominium officers and directors are held to a higher standard under the law, a dedicatory instrument for a condominium association may include a provision regarding limitation of liability when such person is acting in his/her capacity as an officer or director of the association and may further contain a provision pursuant to which an officer or director is indemnified by the association for his/her acts in his/her capacity as an officer or director. Nothing contained in TUCA, diminishes a limitation on liability of officers or directors that may be contained in the declaration, bylaws, certificate of formation or other law.[15]

The following represents an example of such a provision:

> Any act or thing done by any director, officer, or committee member taken in furtherance of the purposes of the corporation, and accomplished in conformity with the procedures set forth in the Declaration, Articles of Incorporation, the laws of the State of Texas, and/or these Bylaws, shall be reviewed under the standard of the Business Judgment Rule as established by the common law of Texas, and such act or thing done shall not be a breach of duty on the part of the director, officer, or committee member if they have been done within the exercise of their discretion and judgment.
>
> The Business Judgment Rule means that a court shall not substitute its judgment for that of the director, officer, or committee member. A court shall not re-examine the quality of the decisions made by the director,

[10] Goddard, III v Northhampton Homeowners Association, 229 SW3d 353, 358 (Tex.App.—Amarillo 2007, n.p.h.).
[11] However, for condominium HOAs under TUCA, the Declaration controls over the Bylaws (See, Tex. Prop. Code §82.053) and for residential HOAs, the Bylaws may not conflict with the Declaration (See, Tex. Prop. Code §209.0041).
[12] Tex. Bus. Org. Code §22.221.
[13] Tex. Prop. Code §82.103.
[14] Tex. Prop. Code §82.103(f).
[15] Tex. Prop. Code § 82.103(g)

> officer, or committee member by determining the reasonableness of the decision as long as the decision is made in good faith in what the director, officer, or committee member believes to be the best interest of the corporation.

B. Member in Good Standing

Many HOA Bylaws contain provisions that limit a member's right to run for the Board of Directors; for example, by providing that the member must be "in good standing."

For residential subdivisions, Chapter 209 dictates that such limitations are no longer permitted, and that all such provisions of governing documents that restrict an owner's right to run, including lack of being in good standing with the HOA, are no longer enforceable.[16] One exception exists, however, if written documented evidence is presented of a director's conviction for a felony or crime involving moral turpitude.[17] Below is sample language of a provision addressing this issue:

> The affairs of the Association shall be governed by a Board of Directors, each of whom shall have one (1) vote. With the exception of the Declarant, not more than one (1) representative of a corporation or other entity may serve on the Board at any given time. Notwithstanding anything contained herein to the contrary, if the Board is presented with written documented evidence that a director has been convicted of a felony or crime of moral turpitude, that director is immediately ineligible to serve on the Board of Directors and is automatically considered removed from the Board, and prohibited from future service on the Board.

In a condominium however, this type of qualification is still permitted on an owner's right to run for the board. Also, in residential HOAs, the concept of good standing may still be used as a qualification for other benefits, such as committee membership. Thus, it is still beneficial to define what it means to be a member in good standing. Often times this term is actually defined in the Declaration, and then referenced for use in the Bylaws or related Policies. The following language represents a sample of such a definition:

> "Member in Good Standing" shall mean Declarant, and a Member that:
>
> (a) is not delinquent in the payment of any Assessment against the Member's Lot or any interest, late charges, costs or reasonable attorney's fees added to such Assessment under the provisions of the Dedicatory Instruments or as provided by law,
> (b) is not delinquent on payments made pursuant to a payment plan for Assessments,
> (c) does not have any condition on his Lot which violates any Dedicatory Instrument which has progressed to the stage of a written notice of a hearing to be held by the Association or its designated committee, or beyond, and which remains unresolved as of the date of determination of the Member's standing,
> (d) has not failed to pay any fine levied against the Member and/or the Member's Lot pursuant to the Dedicatory Instruments, and
> (e) has not failed to comply with all terms of a judgment obtained against the Member by the Association, including the payment of all sums due the Association by virtue of such judgment.

If one Occupant of a particular Dwelling does not qualify as a Member in Good Standing, then all Occupants of such Dwelling shall not be considered as Members in Good Standing. Additionally, if an Owner of multiple Lots does not qualify as a Member in Good Standing as to one Lot, then such Owner shall not qualify as a Member in Good Standing as to all Lots owned by the Owner.

C. Other Related Policies

The Texas Property Code contains several statutes which apply directly to specific corporate functions of HOAs. Whether these requirements are addressed in the Bylaws or in Policies, they must be carefully drafted to be in compliance with these laws. The following are examples of suggested language for some of these Policies.

1. Open Board Meetings, Executive Session, and Notices

The desire for transparency is evident in recent legislation regarding board meetings.[18] However, the desire for transparency has not completely overtaken the need for proper board discretion and operation. First, boards may still discuss some matters in closed

[16] Tex. Prop. Code § 209.00591.
[17] Id.
[18] See, Tex. Prop. Code §209.0051 for residential subdivision HOAs, and Tex. Prop. Code §82.108 for condominium HOAs.

"executive sessions."[19] Also, it is not a requirement for open meetings means that members must be allowed to *participate* in board meetings. This would often drastically inhibit the board's ability to properly hold any meeting. Thankfully, the law only requires that the members be allowed to *observe* the board meetings.

The law also spells out the various requirements for the timing, procedure, and contents of a notice of the board meeting.[20] These issues are often addressed in general concept in the Bylaws, and a separate Policy addressing these issues is not required by the statutes. However, it may be helpful for the board to adopt such a Policy, so that the issues can be described (i) separately from the larger Bylaws document, (ii) in greater detail, and (iii) in language that is more easily understood by the members, directors, and community managers.

The following is sample language that may be helpful in drafting such a Policy in a residential subdivision:[21]

> NOW, THEREFORE, IT IS RESOLVED, that the following Board Meeting Notification Policy is hereby adopted by the board:
>
> I. NOTICE OF BOARD MEETINGS
>
> Owners shall be notified of regular or special board meetings in the following manner:
>
> 1. The notice shall contain the date, hour, place and general subject matter of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session.
> 2. The notice shall be provided by mailing the notice to each property owners not later than the 10th day or earlier than the 60th day before the date of the meeting; or
> 3. At least 72 hours before the start of the meeting, the notice shall be e-mailed to each owner who has registered their e-mail address with the association; and
>   a. Posted on the association's website; or
>   b. Posted at a conspicuous location within the subdivision.
>
> 4. Owners are responsible for keeping an updated e-mail address registered with the association.
>
> II. MEMBERS' TIME AT BOARD MEETING
>
> The notice of regular or special board meetings may include the time set aside by the board for input from members as follows:
>
> 1. Purpose.
>
> To set aside a special time prior to a regular board meeting for members to address the board in person and in a public forum, expressing their views and opinions on the affairs of the association and other matters of interest.
>
> 2. Policy.
>
> Members' Time will be set at XX:00 p.m. (unless otherwise determined by the board president) which is xx minutes prior to each regular board meeting, and will last no more than 30 minutes. At the end of Members' Time, the board meeting will begin and will be conducted pursuant to the agenda items.
>
> 3. Procedure.
>   a. Any member (or other party at the president's discretion) may address the board during Members' Time. Members wishing to speak should complete the form provided for that purpose before the start of the meeting, or request permission to speak before Members' Time ends.
>   b. The member must include their name, address, phone number, email and topic of discussion.
>   c. Each member will be allowed approximately 3 minutes to speak. Depending on the number of members wishing to speak, the president may adjust the time allotted for each member. A member may not yield his/her allotted time to any other person.
>   d. No member shall otherwise speak at any meeting unless recognized by the president.
>   e. Members shall refrain from obscenity, vulgarity, or any breach of respect. Improper or disrespectful conduct shall result in the immediate expiration of the member's allotted time and may result in the member's expulsion from the meeting.

[19] Id.
[20] Id.
[21] This Policy would not be appropriate for a condominium due to the various specific requirements under TUCA. See, Tex. Prop. Code §82.108

4. Board's Role.

   a. The president may address a member's comments, or allow another board member to address the comments as appropriate.
   b. While some discussion between the member and the board may take place, a lengthy dialogue will be avoided.
   c. The board may refer comments made during Members' Time for review or action, or to be placed on a future board agenda for discussion and/or action.
   d. Unless comments relate to matters already on the agenda, or the board adds the matter to the agenda, the board will not address the topic at the board meeting.

2. Document Retention

The Property Code sets out a relatively short list of documents that are *required* to be retained by the HOA.[22] Attached in the Appendix as Document No. 5 is the list of documents set forth in the statute, which are also those included in the State Bar form. However, the statutory list is a minimum, and clearly does not address *all* documents that an HOA has or should retain. Careful consideration should be given to additional documents that should be retained and for what period of time.

Additionally, the composition of the typical HOA board of directors will change from year to year, and management companies may change over time. With these changes, some historic documents may no longer be retained or may be stored away in the attic of an unknown director from long ago. Thus, when drafting this Policy, it is possible to draft the HOA *into* a violation of it. The following is suggested language that can be added to the Document Retention Policy, as "savings language" so that the HOA is not in violation of the statute as to historic documents:

> This Policy provides for the future systematic review, retention, and destruction of documents received or created by the Association in connection with the transaction of the Association's business. This Policy covers all records and documents, regardless of physical form, and contains guidelines for how long certain documents should be kept and how records should be destroyed.

The retention chart can be attached to the policy as an exhibit. The following is suggested additional language that can be added to guide the HOA and/or its community manager as to (1) documents that are not addressed in the chart, (2) electronic records, and (3) destroying the records after the statutory period.

> The Association retains specific documents for the time periods outlined in the attached Exhibit "A." Documents that may not be specifically listed will be retained for the time period of the documents most closely related to those listed in the schedule. Electronic documents will be retained as if they were paper documents. Therefore, any electronic files that fall into one of the document types on the attached Exhibit "A" will be maintained for the identified time period.
>
> The Custodian of Records of the Association is responsible for the ongoing process of identifying the Association's records which have met the required retention period and overseeing their destruction. Destruction of any physical documents will be accomplished by shredding. Destruction of any electronic records of the Association shall be made via a reasonable attempt to remove the electronic records from all known electronic locations and/or repositories.

3. Document Production

In addition to retaining documents, boards are also responsible under Texas law to produce documents when properly requested. For Condominium HOAs, TUCA addresses this obligation in pertinent part as follows:

> §82.114 Association Records
> (b) All financial and other records of the association shall be reasonably available at its registered office or its principal office in this state for examination by a unit owner and the owner's agents. An attorney's files and records relating to the association are not records of the association and are not subject to inspection by unit owners or production in a legal proceeding. Tex. Prop. Code Ann. §82.114(b)

Section 207.006 of the Texas Property Code, which applies to both residential and condominium associations, requires associations with a public access website, to make available on the website all recorded governing documents.

[22] See, Tex. Prop. Code §209.005 for residential subdivision HOAs, and Tex. Prop. Code §82.114 for condominium HOAs.

Finally, Texas Property Code §209.005 relates to a residential HOAs obligation to make its books and records available to owners for inspection and or copying.[23] It dictates how an owner must request for access or information, and if such a request is made, how the association must accommodate the owner, and what fees the association is entitled to as a result.[24]

It is key to remember that not every piece of paper qualifies as an association record, and not every association record is subject to production by any owner. For example, attorney's files are not considered to be association records. Additionally, the 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, an owner's personal financial information, including payment or nonpayment of amounts due the association, the owner's contact information – other than the owner's address, or information related to an employee of the association, including personnel files. An association may release information as to an individual owner, if that owner has given the association express written approval to release the requested information.

The following language is an example of how these limitations can be outlined in a residential subdivision:

> An attorney's files and records relating to the Association, excluding invoices requested by an owner under Section 209.008(d) of the Texas Property Code 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. Any document that constitutes attorney work product or that is privileged as an attorney-client privileged communication is not required to be produced.
>
> The Association is not required to release or allow inspection of any books or records that identify the dedicatory instrument violation history of an owner, an owner's personal financial information, including records of payment/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 owner. These records may be made available only with (i) the express written approval of the owner whose records are the subject of the request, or (ii) if a court of competent jurisdiction orders the release of the records.

V. CONCLUSION

There are many state and federal laws which directly or indirectly impact how HOA documents should be drafted. Only a select few have been discussed in this paper. These statutes sometimes allow for different treatment or standards depending on the circumstances of the HOA such as whether the HOA is for a condominium or residential subdivision development, whether it is still in the "development period." It is crucial that these statutes be carefully examined and considered from the outset of development. Some of the statutes allow for great discretion or various options in the drafting of related provisions.

Knowledge and careful analysis of these statutes is necessary to draft governing documents that (1) are in compliance with these laws, (2) take advantage of the various choices and options available, and (3) are tailored to the specific needs, desires and circumstances of the development. With carefully drafted and unambiguous dedicatory instruments, which take these statutory provisions into account, the tasks of development of the condominium or subdivision, and administration of the HOA become much easier.

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[23] The statute also describes the remedy of the requesting owner who is denied access to or copies of the association records. See, Tex. Prop. Code §209.005(n).

[24] Additionally, the statute dictates that a residential association must adopt and record a policy regarding the production and copying of records in order to charge any fees to the requesting owner for the costs of such production and copying. See, Tex. Prop. Code §209.005(i).