

# C.I.A. Services, Inc.

## “There’s No Place Like Home”

### New Laws Affecting Homeowners Associations

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#### USE RESTRICTIONS

**Religious Items.** Is a garage door considered an entry door within the new law?

*Probably not. The law refers to the entry door to the dwelling and the garage door is the entry to the garage and not the dwelling. Under the law, that may not be a distinction for an attached garage so you should consult your attorney if a problem arises. To avoid the issue, you may want to clarify the definition in advance and work it into your guidelines.*

**Religious Items.** Does the law dealing with Religious Items prohibit things like Christmas nativity scenes?

*No. The law requires that an Association allow certain religious items on an entry door or doorframe. The law does not cover any other parts of the property or land. In addition, at the entry, the law only indicates the minimum an Association must allow with guidelines - an Association can write their guidelines to include much more than the minimum. For example, a guideline could be written to allow religious items on other parts of the property and in sizes larger than the minimum.*

**Religious Items:** Aren't the symbols of Christianity during Christmas the most likely to create conflicts with an Association's regulatory standards?

This should not be a problem. First, the new law applies to the entry doors only. Second, most Associations do not have a problem with temporary seasonal decorations on the property whether they have a basis which is religious (Christmas, Diwali) or a secular (Fourth of July, Halloween).

**Religious Items.** Who defines offensive words or images on entry religious items?

*In practice, the Association will need to make the initial judgment as to whether an item is offensive. If the Association deems an item is offensive, it may take whatever actions are appropriate and lawful to have the item removed or modified. If the dispute progresses to legal action, the judge or the jury would evaluate the item from the perspective of an average person, applying contemporary community standards and viewing the material as a whole.*

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**Religious Items.** Do the guidelines need to name specifically name offensive items such as religions that use animal sacrifice?

*No. You’ll the “offensive” paragraph provides the generic regulation you’ll need. The problem with providing specific examples is that there will be unanticipated situations not covered by you examples. If you would like to use examples to help give guidance to owners, make sure you include a phrase similar to “...by way of example but not limited to ...”.*

**Rainwater Harvesting.** Can the association put a restriction in their Rain Harvesting guidelines that requires an owner to have their system be pre-fabricated and not “home-made”?

*Yes. The law allows an Association to create guidelines that regulate size, location, screening, color, appearance and other characteristics. However, since “home-made” doesn’t necessarily mean unacceptable, your guidelines should address the end results and not the method for achieving the final product. An owner may choose to purchase some components (tanks) and fabricate others (piping) and achieve a well-crafted product.*

**Solar Energy Devices.** What is meant by “cannot be unreasonably withheld”?

*Generally, this would mean that the Association cannot deny an application without good reason supported by the guidelines or other important factors. For example, an application could be reasonably disapproved if the solar energy devices are proposed for a prohibited location or if a proposal included an obvious safety issue. An application could not be disapproved because they would be unattractive even though in compliance with the guidelines. Ultimately, if litigation were involved, a judge or jury would determine if the Association acted reasonably.*

**Solar Energy Devices.** Are wind power devices covered under the new law?

*No. The law deals with devices designed primarily to provide heating or cooling or to produce electrical or mechanical power by collecting and transferring solar-generated energy. It could be technically argued that wind is created through atmospheric heating and cooling from solar energy and other factors. However, that clearly wasn’t the intent of the bill’s author or the word “wind” would have been included in the bill.*

**Roof Shingles.** Does the new law apply to standing seam metal roofs or roofs using metal materials that simulate tiles or shingles?

*The new law specifically applies to communities that allow shingled roofs. So if a community allows only tile roofs, the new law does not apply and the Association may determine whether simulated metal tiles are allowed. If shingles are allowed then an Association may not prohibit, for example, shingles that are wind and hail resistant. Metal simulated shingles may be wind and hail resistant but, with guidelines, an Association could allow or prohibit them based on the aesthetic appearance. If this is a concern, the sample guidelines could be revised to address this possibility.*

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#### **Flags.** Can the association restrict the display of a flag to the inside of a window?

*The new law requires that any guidelines created allow at least one free-standing flagpole up to 20 feet tall for the display of at least one of the 7 protected flags (US, Texas and 5 armed forces branches). Beyond that minimum requirement, an Association may establish guidelines that allow or prohibit any other flag display. The sample guidelines we provided do not address flags visible on the interior of a house but imply they are not allowed since all authorized locations are listed. If this is a concern or an acceptable option, you may want to address it in your guidelines.*

#### **Flags.** Can we prohibit 20’ front yard flagpoles? In other words, can we allow them in the back yard only?

*Yes. With guidelines, the new law allows an Association to regulate location. The minimum requirement of the guidelines is that one free-standing flagpole not to exceed 20 feet in height be allowed somewhere on the property.*

#### **Military Notice.** Is the new military notice required only in writing or also during any oral communications?

*Prior to taking enforcement action, in a letter sent by certified mail, an owner must be given notice that they may have special federal rights if they are serving on active duty in the military. This must be in letters to all owners and not just on letters where you know the owner is on active duty. There is no obligation to provide this information in oral communications. However, if you speak to an owner who is on active duty, you certainly should mention it. On a related note, the law does not require this notice on collection issues until the matter has been referred to an attorney. However, you may want to consider adding the notice to collection certified letters as a courtesy.*

#### **Military Notice.** Does the person have to prove he is in the military?

*The new law only deals with a mandatory notice that must be placed on letters prior to enforcement action. The notice must appear on all letters whether or not the recipient is on active military duty. The notice simply indicates that active duty military personnel may have certain rights under federal law that may affect these actions. It is that person’s obligation to explore those rights, if they apply, and raise the issues with the Association. If that occurs, it would be appropriate to ask the owner to provide evidence of the status of their military status.*

#### **New Law Guidelines.** If an owner has religious items in place, a rain barrel, solar panels, etc. before the association files guidelines, can the association enforce the new guidelines?

*Effective June 17, 2011, the new laws say that an association may not prohibit the items described in the seminar. They each go on to say that an Association may create reasonable guidelines within the constraints of the law to regulate these items. However, until guidelines are prepared, adopted and filed, there can be no regulation. An Association would not be able to retroactively apply guidelines to an existing item legally installed under state law. Therefore, it is extremely important that guidelines be promptly filed to avoid the possibility of unacceptable installations with no recourse.*

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**New Law Guidelines.** If CC&Rs don’t restrict flag poles, can we still establish guidelines? Said another way, can guidelines be established and filed, if the Association’s documents do not address the issue?

*Yes. The new laws specifically give an Association the right to create guidelines within the constraints of the law. This right only applies to these specific items. As an example, if the CC&Rs do not deal with yards trees then the Association cannot create guidelines to require a certain number of yard trees because there is no overriding state law which gives the Association the right to regulate yard trees.*

**New Law Guidelines.** Do we have to publish this policy to the homeowners by mailing them a copy, describing in a newsletter or posting it on the website?

*One of the new laws indicates that dedicatory instruments, like these new guidelines are not effective until they are filed in the public records. Another new law requires that all dedicatory instruments be posted on an Association’s website, if one exists. There is no other requirement in the law for owner notifications. However, as with all changes in Association policies, procedures, guidelines and rules, it is good to notify all owners in as many ways as is appropriate for the change. A newsletter summary pointing to the actual guidelines on the website is a very good approach.*

**New Law Guidelines.** Do all guidelines have to be filed by January 1, 2012?

*The new laws do not require that guidelines be prepared and filed. However, without guidelines for the five areas covered by the new laws, an Association may not regulate those items. Since the laws all went into effect on June 17, 2011, it is very important that guidelines be filed as soon as possible to provide an degree of regulation.*

**New Law Guidelines.** Do guidelines have to be approved by the owners or can the Board adopt them? What if the governing documents give the ACC the authority to adopt guidelines?

*Each of the new laws simply indicates that an Association may adopt guidelines. The mechanism for adoption would be specified in other state laws or in the Association’s governing documents. We are not aware of any Associations where a member vote would be required (remember, these guidelines are not amendments to the CC&Rs – they are rules authorized under the overriding state law). Unless your CC&Rs indicate that only the ACC may create guidelines then the Board may adopt these new guidelines. Most CC&Rs indicate that the ACC may promulgate guidelines.*

**New Law Guidelines.** Can filing of new guidelines done by board member or does an attorney need to handle the filing?

*Anyone can file the documents with the County Clerk’s office. They should be reviewed by your attorney in advance and the signed and notarized by a Board member (typically President or Secretary) before filing.*

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**New Law Guidelines.** Why short time to comply on DR laws? Why did legislation do this as June rather than January?

*New laws typically go into effect immediately, September 1<sup>st</sup> or January 1<sup>st</sup>. Each of these laws were written using the language that they would go into effect on September 1<sup>st</sup> or immediately if they received a 2/3 vote from both chambers. Since each passed with overwhelming support, they went into effect on June 17<sup>th</sup> after it passed the governor’s approval. It is not clear why each was written this way since they weren’t emergency issues. The negative impact of the immediate effect may have been an unintended consequence.*

**New Law Guidelines.** Are Word versions of guidelines available?

*Absolutely. Just send an email to [seminars@ciaservices.com](mailto:seminars@ciaservices.com) and ask for the document package from the 2011 Legislation seminars. The presentation slides, guidelines, policies and samples will be returned within one business day.*

**Condos.** Do the new use restrictions apply to townhomes and condos?

*The new laws on religious items, rainwater harvesting, solar energy devices, roof shingles and flags apply to homeowners association, townhomes and condos. The military notice does not apply to condos.*

**Grandfathering.** If someone owned the property before you and there is a building on the land, who is responsible for the building?

*A typical purchase includes all improvements to the land such as structures. If there is a problem with a structure such as a setback encroachment or if the structure had been disapproved, you would assume those problems. However, there are ways to protect yourself in a purchase. A survey and title policy will catch encroachment issues. You can request a Resale Certificate from the Association to reveal violation issues. Using an attorney to represent you in a purchase should uncover all carry-over issues.*

**Realtor Signs.** What are the guidelines for realtors with regard to open houses or sales functions and posting or placing open house signs?

*None of the new laws address signage. In a prior session, a law was passed regarding political signage. We are not aware of any state laws dealing with realtor signs and associations. Therefore, the language in your CC&Rs would apply. That language typically allows realtor signs placed on a property advertising the property for sale or for lease. An Association can regulate or prohibit signage on its common areas and a municipality can regulate or prohibit signage on public rights-of-way.*

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#### **COLLECTIONS**

**Payment Plans.** Can an Association accept two payments from any owner without a payment plan?

*Yes. The new law indicates that an Association must offer a 3 to 18 month payment plan to a delinquent owner. The law does not allow an Association to agree to a 2 month payment plan. That doesn’t mean you can’t accept two payments from an owner - you just can’t put that in the form of a written payment plan.*

**Payment Plans.** What if an Association doesn’t want 18 months payment plans - can the board say the longest offer is 12 months?

*Yes. The law says an Association must create a reasonable policy for payment plans that are no shorter than 3 months and no longer than 18 months. If it is the board’s position that 18 months is unreasonable, then 12 months could be the maximum in the policy. However, there may be circumstances where an 18 month payment plan is appropriate. Our sample policy provides guidelines as to what length of payment plan is reasonable for different balances owed.*

**Payment Plans.** Can payment plan policy require a larger down payment or must they be equal payments throughout?

*Yes. An Association’s reasonable policy may include down payments. If you would like a larger down payment, you could include that requirement in the policy with guidance for an owner as to how much (e.g. 20%) would be expected for various past due balances.*

**Payment Plans.** Do we have to offer payment plans for current or dues collected in advance?

*No. The law only covers delinquent amounts due from an owner. So for an Association with annual assessment overdue after January 31<sup>st</sup>, the Association would only need to offer payment plans beginning on February 1<sup>st</sup> for owners that had been current. That doesn’t mean you can’t accept payment plans at any time. So if an owner asks for a 3 month payment plan in mid-January, go ahead and get it in place.*

**Payment Plans.** Does the new law apply to currently delinquent accounts that are not already on payment plans?

*Yes. Effective January 1<sup>st</sup>, any delinquent owner is entitled to a payment plan.*

**Payment Plans.** Are payment plans put into effect before January 1<sup>st</sup> still valid even if they do not comply with the new policy (e.g. more than 18 months in duration)?

*Yes. The new law does not affect payment plans already in place.*

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**Payment Plans.** After the new policy is first filed, can an Association deny an owner a new payment plan based on a voided payment plan in the time before the policy was adopted?

*Yes. The new law says that an Association is not required to enter into a payment plan with an owner that has defaulted on the terms of a previous plan within the prior two years. However, since your new policy will be different than your prior policy, which may not have been in writing, it would be more fair to start all owners off with a clean slate. If they default under the new policy, they would not be entitled to a payment plan for the next two years.*

**Payment Plans.** How does a bankruptcy affect a delinquent owners account?

*Federal bankruptcy law supersedes state law which supersedes dedicatory instruments. A person under a chapter 13 repayment plan will most likely be making payment through the bankruptcy court for up to 60 months on the pre-petition debt (i.e. the amount due as of the time they filed their bankruptcy). Under their bankruptcy, they are required to keep their post-petition debts current. If they do not, the Association could be able to enter into a payment plan for the post-petition amounts.*

**Payment Plans.** Are title companies entitled to “alternative payment arrangements”?

*No. The new law applies to owners only. A mortgage company that had foreclosed on a property would be entitled to a payment plan as the record owner. We are not aware of any situation where a title company (who is simply handling money for others) or a mortgage company would need or desire a payment plan.*

**Payment Plans.** Do the new payment plan requirements apply to townhomes and condos?

*No. The new law applies to homeowners associations including townhomes. Most condominium laws fall under the Texas Uniform Condominium Act.*

**Application of Payments.** Can a payment plan with an owner override the order that partial payments be applied?

*No. The new law requires that payments be applied as specified. Any Association may not agree to apply payments otherwise in violation of the law. There is a curious exception in the law that might be difficult to implement uniformly in practice. That law says that if an owner is in default of a payment plan at the time of a payment, the Association can apply their partial payment in any way they choose. It is not clear what timeframe would apply - could this be done for the full two years in which they are no longer eligible for a payment plan?*

**Application of Payments.** Is there an exception to the law if an owner files bankruptcy?

*However, federal bankruptcy supersedes the new state law. When an owner files bankruptcy, you end up having two accounts for the owner: one for the pre-petition debt covered by the bankruptcy and one for the post-petition debt. Payments by the bankruptcy trustee for the pre-petition debt should be applied as specified by the trustee, if any, or in the order specified in this new law. A payment for a post-petition amount must skip over all the pre-petition amounts and be applied in the order specified in the new law.*

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#### **Application of Payments.** Can an Association refuse to accept a partial payment?

*Yes. The new law only requires that payment plans be offered to delinquent owners. If an owner does not enter into a payment plan and simply submits a partial payment, an Association has no obligation to accept it. With that said, unless the payment includes conditional endorsements (e.g. “this constitutes payment in full”), you probably should accept the payment and continue collection efforts.*

#### **Application of Payments.** If an Association charges for special letters sent for collections or rules enforcement, where do those fees fall relative to application of a partial payment?

*These would fall last in the “anything else” category. Here is the required order: (1) delinquent assessment, (2) current assessments, (3) collection legal fees, (4) other legal fees, (5) fines and (6) anything else. Within a category, you can use any order you like. Typically you would apply payments to the oldest first (2009 interest, followed by 2010 interest) but you can do it in any order you like (letter fees before forced maintenance fees before interest, etc.).*

#### **Application of Payments.** Since the new laws require that the homeowner pay the delinquent assessments first, how will the Association be able to collect the other fees on the account?

*The changes may not be a significant concern. There has always been an issue of an owner making partial payments and leaving a balance on their account. Previously a remaining balance would have included the most recent invoices and now it will contain the lowest priority invoices. That doesn’t change the owners’ obligation to pay. An Association may still pursue unpaid amounts through an attorney including filing a lawsuit. The only change in remedies is that an Association will not be able to foreclose if assessments are not involved. Associations will still be able to obtain a judgment and execute on the judgment. Foreclosures by Associations have been and will continue to be very rare.*

#### **Application of Payments.** Will late fees continue to accrue if an owner only pays the assessment portions of their account?

*The language in the CC&Rs will determine whether interest can be charged on invoices other than assessments. Some documents allow interest on assessments only, some on all amounts owed and some on a combination. If late fees are also applied as part of the collections process, they would typically be subject to similar criteria. TPC chapter 204, for example, allows late fees to be applied if there are unpaid assessments.*

#### **Third Party Collections.** Is a management company a third party relative to collections?

*Not if the management company is the managing agent for the Association. The 1<sup>st</sup> and 2<sup>nd</sup> parties are the owner and the Association as represented by their managing agent. Any other entity collecting on behalf of the Association is a 3<sup>rd</sup> party.*

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**Liens.** Is a lien filed by someone other than an attorney before January 1<sup>st</sup> still valid?

*Yes. As clarification, the lien encumbering the land in a community was put in place with the original CC&Rs by the developer. Documents filed subsequently on behalf of the Association are notices pointing to the original lien and stating assessments are currently underpaid. With the clarification in the law, any document filed in the public records “evidencing the nonpayment of assessments” must be prepared by an attorney. There was never an indication that the documents previously filed were not valid - the issue is whether the person filing them is practicing law without a license.*

**Liens.** Can someone other than an attorney file a release of lien?

*No. Although the law only references “nonpayment”, the clear intent of the law is that only an attorney should be prepare liens and releases.*

**Liens.** Does an attorney have to send a letter to the owner prior to filing a lien or can the Association send the letter and then have the attorney prepare and file the lien?

*Under existing law, an owner must be given notice by certified mail that reasonable attorney fees will be applied to their account if their account is not paid. In a new law, that same notice must also offer a payment plan. Thirty days after that notice is sent, the Association may turn the account over to an attorney for collections. The attorney may elect to file the lien first or send a demand letter first.*

**Foreclosure.** What does an Association do when a Judge will not sign a judgment with foreclosure language? We have won several cases but judge will not sign unless we remove foreclosure language. How do we get owner to pay?

*In their sole discretion, judges may exclude the foreclosure remedy in a judgment. As a holder of a judgment, an Association has other remedies. An Association will certainly want to file an Abstract of Judgment in each county where the owner has property or does business. An Association may execute on the judgment to seize and sell non-exempt assets. Your attorney can provide the range of options still available.*

**New Law Policies.** How hard will it be to change our any of our new policies once they are adopted and filed?

*Amending these policies is very easy. Draft the change and adopt the change, run it by your attorney if the change is significant, file it with the county and post it on your website. Done!*

**New Law Policies.** Do we have to publish this policy to the homeowners by mailing them a copy, describing in a newsletter or posting it on the website?

*The new laws require that all Associations with more than 14 lots prepare, adopt and file policies for payments plans, record retention and records production by January 1<sup>st</sup>. Another new law requires that all dedicatory instruments be posted on an Association’s website, if one exists. There is no other requirement in the law for owner notifications. However, as with all changes in Association policies, procedures, guidelines and rules, it is good to notify all owners in as many*

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*ways as is appropriate for the change. A newsletter summary pointing to the actual policies on the website is a very good approach.*

**New Law Policies.** Can filing of new policies done by board member or does an attorney need to handle the filing?

*Anyone can file the documents with the County Clerk’s office. They should be reviewed by your attorney in advance and the signed and notarized by a Board member (typically President or Secretary) before filing.*

**General Collections.** How many years can an Association go back to collect assessments?

*CC&Rs fall under contract law relative to the statute of limitations. Therefore, to protect the Association’s position, a lawsuit needs to be filed within four years from the date the assessment became due. This limitation is an affirmative defense that would be raised by the owner at trial.*

**General Collections.** We are broke. What if several homeowners don’t pay? We have a lien on their property. What do we do next as we have not been able to raise the fee because we need 2/3 of the votes and cannot get the votes?

*In a typical Association, a program can be developed to address the financial situation and get the Association back to an appropriate collection rate. Attorney deferred fee programs are perfect for these situations where an Association cannot afford the legal fees up front. However, the situation is compounded when an Association has a capped assessment. In that case, improving the collection rate does not solve the systemic problem that revenues, even if fully collected, are not adequate to sustain the business of the Association. Long term, the owners will need to consent to amending the CC&Rs to allow reasonable assessment increases. Short term, the Association can cut services, transfer responsibilities to another entity and enact a voluntary supplemental assessment.*

**General Collections.** Do the new laws prohibit the association from withholding access to the facilities if the owner is delinquent in their fees or monies are owed the association?

*No. One of the new laws eliminates an Association’s ability to withhold voting rights for unpaid assessments or any other reason. That law is specific to voting so an Association may withhold any other rights as allowed under its C&Rs or Bylaws. So if you have been able to withhold pool passes, tennis keys, etc. until all fees have been paid, you can continue to do that.*

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#### **ASSOCIATION RECORDS**

**Document Retention.** Does new law include documents prior to 1/1/12? What if documents do not exist?

*Effective January 1<sup>st</sup>, you need to begin keeping records for the durations specified in your Document Retention Policy. If your policy says you must keep financials for 7 years but you have only kept them historically for 5 years, you will initially have a gap of 2 years of documents that don’t exist. The law applies to new and existing documents so if a document doesn’t exist, because it was discarded under a different policy, that not a problem under the law.*

**Records Production.** Is there a limit of time permitted in office for viewing records?

*No. The law is silent on this topic. This can be problematic if an Association feels the person should be monitored during the document review or if the person needs significant assistance during their review. That type of labor would not be chargeable. It is also silent on the related topic of reasonable limitations on document to be reproduced for an owner. An owner could request a copy of every record of the Association and only be limited by the cost of production which must be paid in advance if the policy requires that.*

**Records Production.** What if you do not produce financial records within 10 business days from receipt of the certified mail request? What are the ramifications?

*Within 10 business days of receipt of a request, and association must either produce the requested records or provide a reply indicating when they will be available within 15 additional business days from the date of the reply letter. If an owner is denied the requested information within the timeframe allowed, that owner may file a lawsuit against the Association in Justice of the Peace Court. If the owner prevails in the lawsuit, the judge may order the records be produced and award attorney’s fees and costs to the owner.*

**Records Production.** Can we charge a fee to cover cost of labor in addition to copying to produce records?

*In most cases, yes. First, after January 1<sup>st</sup>, an Association must file its “Records Production and Copying Policy” or it cannot charge for any costs. With a policy in place, the law allows costs to be charged to owners in compliance with the Texas Administrative Code regarding Open Records Requests to public entities. That code allows a labor cost to be charged if the request involves more than 50 copies or if the records had to be retrieved from an offsite location. The allowed labor rate is currently \$15 per hour. In addition, a 20% overhead rate can be applied to the labor. Labor may be charged for the actual time “to locate, compile, manipulate data and reproduce the requested information”.*

**Records Production.** Is redaction of records permitted?

*This is not covered in the new law, however, the law is clear on intent. All Association records except for those specifically listed (attorney files, privileged information and private owner records) are available for owner review. Redaction cannot be used to hide any information that*

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*an owner is entitled to see. If a document contains both public and private information then the private information could be redacted if the public information was responsive to the request. Associations should alter their internal procedures to keep privileged information out of public documents like meeting minutes so redaction is never necessary.*

**Records Production.** Does the new law address private information about individual owners?

*Yes. An Association is not required to release any information regarding an individual’s violation history, financial information or contact information (other than address). An exception is if that owner provides written consent for the person requesting access to see their records.*

**Records Production.** Are architectural changes considered confidential or are they open for inspection?

*This exposes a gap in the law. The law specifically protects contact information, financial details and violation history. Approved new home plans, for example, are not protected. Before this law, we didn’t have a legal basis for withholding private information from others but we did so to protect owner’s privacy. We would suggest Associations continue that common sense approach and keep details of anything that applies to an individual owner confidential.*

**Records Production.** How do you handle a call from an owner related to a deed restriction issue on a neighboring property?

*Although the new law only deals with records production, the approach should be taken to verbal communications. A neighbor is not entitled to know any details about a violation at another property. In practice, this may be a situation where a neighbor makes a complaint about another property and calls to learn the status. The best approach is to confirm that the violation is being pursued without providing any details.*

**Website Posting.** If you do not want to comply with website posting, could you get rid of website?

*Yes. However, this is not a good solution since you will be denying your current and future owners easy access to community documents. One you load all your current documents, adding new ones is easy. In addition, a website provides a good option for posting board meeting notices required under another of the new laws.*

**Website Posting.** Is “Facebook” or other social media considered a publicly accessible website?

Probably not - the world of social media is evolving so this answer may change. A publically accessible website is one where any person may access the information without a user ID or password.

**Website Posting.** Can an Association charge for providing documents posted on the website?

*The law required that an Association post its dedicatory instruments on a publically accessible website if one exists. Although the law doesn’t directly address this, the implication is that they*

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*should be freely available and not conditional upon a payment. This doesn’t mean an Association can’t charge for providing documents. Under records production, an owner may request you mail copies of governing documents to them and they can be required to pay for them under your Records Production and Copying Policy. In addition, an Association may charge for a Resale Certificate which may contain copies of governing documents.*

**Website Posting.** Are there any requirements for an Association to file documents in any other languages other than English?

*No. Although you may want to consider translations for things like newsletters based on your community demographics, you definitely should not post any translations of your dedicatory instruments. Those are legal documents that are binding in their original form only. A translation could contain errors or altered meanings.*

**New Law Policies.** Do we have to publish this policy to the homeowners by mailing them a copy, describing in a newsletter or posting it on the website?

*The new laws require that all Associations with more than 14 lots prepare, adopt and file policies for payments plans, record retention and records production by January 1<sup>st</sup>. Another new law requires that all dedicatory instruments be posted on an Association’s website, if one exists. There is no other requirement in the law for owner notifications. However, as with all changes in Association policies, procedures, guidelines and rules, it is good to notify all owners in as many ways as is appropriate for the change. A newsletter summary pointing to the actual policies on the website is a very good approach.*

**New Law Policies.** Can all three policies be filed as one document in the public records to reduce the filing fee?

*The new law requires that the policies be filed in the public records but does not mandate a particular format. The samples have been prepared as separate documents with different headings and individual signatures so a County Clerk would probably not accept them as one document from the standpoint of recording and filing fees. It will be easier for someone to look up the documents if they are filed individually. The filing fee costs savings are small. In Harris County, these three policies would cost \$76 individually and \$52 together.*

**General Records.** Can you go to the county and get an Association’s Bylaws and amendments?

*Yes. Since 1999, the law has required that all dedicatory instruments be filed in the public records. Dedicatory instruments are any document which covers the establishment, operation or maintenance of an Association - that includes Bylaws. However, until the new law takes effect on January 1<sup>st</sup>, there was no penalty for non-compliance so it is possible that an Association did not comply with the law. In addition, the Bylaws may have been included in a consolidated filing of many documents so may be difficult to track down in the public records.*

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#### **MEMBER MEETINGS**

**Meeting Notice.** Can a written notice be a notice in a publication or does it have to be in an individual letter?

*The law requires written notice to each owner 10 to 60 days in advance of member meetings. The law does not prescribe the format of that notice so any method you been allowed to do under your governing documents can still be used as long as it gets to each owner. So if you have placed a notice in a newsletter delivered to each owner, then that will continue to be acceptable. Hand delivered newsletters would not be acceptable unless you also mailed copies to non-resident owners. Publication in a regional newspaper would not work because it would not guarantee notice to every owner. Email notice or website posting does not fall under the definition of written notice.*

**Director Qualifications.** Can a policy be adopted to prevent both a husband and wife from being on the board together?

*No. The law gives every owner the right to run for and serve on the board. So if both husband and wife are on the deed, both can serve simultaneously.*

**Director Qualifications.** If a house is in the husband’s name alone, can the wife run for the board?

*Yes, unless the Bylaws specifically prohibit non-owners from serving. The new law indicates that an Association may not prohibit an owner from running and serving. It says nothing about non-owners. So it is lawful for Bylaws to allow or prohibit non-owners from the Board. Most Bylaws are initially written to allow both owners and non-owners on the Board. Note that ownership is determined by the names on the latest filed deed to the property in the county public records. From an Association’s standpoint, the community property laws of Texas have no bearing for a married couple where only one spouse’s name is on the deed.*

**Director Qualifications.** Can we require that board members live in the community?

*Yes and no. The new law only applies to owners. So, no, you cannot require an owner live in the community in order to serve. However, you could prohibit the very rare situation where a person who is not an owner and doesn’t live in the community wants to serve.*

**Director Qualifications.** If an owner has a contract for doing work in community, can he/she run for board? Is this a conflict of interest?

*Yes and maybe. Every owner has a right to run for and serve on the board. A conflict of interest does not prevent an owner from fully participating in decisions and discussions that are unrelated to the conflict. Where there is a conflict, it must be disclosed and that board member should excuse himself from the discussions and abstain from any decisions. However, there is no law which requires this and in some cases, a board member with a conflict may have difficulty staying out of the process. So it is better for everyone involved if an owner makes a choice between serving on the board or having a contract with the Association.*

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**Director Qualifications.** Why not just do a background check of everyone that runs for getting on the board?

*An Association could adopt a procedure requiring backgrounds checks for all candidates. However, under the law, if a third party is used to provide the report, the candidate must be notified of the check and provide written consent. Refusal to provide consent is not a basis for disqualifying a candidate.*

**Director Qualifications.** Should board candidates be asked to release their A/R history and deed restriction violation history?

*No. Under the new law, any owner may run for and serve on the Board regardless of their past or current status relative to assessments and deed restrictions. An owner also has no obligation to expose their private information – in fact, the new law on records production indicates private records may only be released with written permission from the owner. Finally, their status is not a good indicator or their value as a board member. A person who has had prior difficulties may actually provide good perspective to the board.*

**Director Qualifications.** How does the new law affect committee members?

*The new law only applies to board members. An Association may use any appropriate criteria in appointing volunteers to serve on various committees. If an Association has unusual CC&Rs where the owners elect the Architectural Control Committee, the law does not apply to this election - an Association may use any qualifications in the governing documents.*

**Voting Rights.** Does the change in voting rights (every owner may vote) have any effect on the quorum requirements?

*Possibly - it depends on the wording in your governing documents. If they indicate that quorum is, for example, 10% of all eligible votes and your documents declare a person who has not paid assessments as ineligible, then your quorum is now higher since all votes are now eligible. Here is an example of that situation for 500 homes with 100 unpaid. Previously, your 10% quorum would have been 40 (10% of paid up votes) - now it will always be 50 (10% of all votes).*

**Voting Rights.** Now that all owners may vote, does that mean both spouse owners of a property can each vote? In other words, it is still one vote per lot?

*The law ensures that voting rights cannot be withheld from any owner. It does not change their quantity of votes. So with multiple owners, either of the owners may cast the vote as they among themselves determine. If they happen to both cast conflicting votes, the ballots can be declared invalid. In a community under developer control, it is not unusual for the Declarant to hold multiple votes for each of their lots. They will continue to have the same number of votes.*

**Voting Rights.** If an Association uses a representative voting system, does the new law mean each owner will now vote?

*No. Some large master-planned communities use a representative voting system where neighborhood reps are elected by the owners and then the neighborhood reps vote on various*

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*community issues including board member elections. The new law specifically exempts those systems.*

**Voting Methods.** Do absentee votes need to be notarized? How can an association validate the legitimacy of a vote?

*Absentee ballots do not need to be notarized. The legislature has now provided Associations with four voting methods: in person, by proxy, absentee ballot and electronic voting. Under the law, the only method that requires validation of the owner submitting the ballot is electronic voting. As indicated in our seminar, we recommend that Associations also validate ownership on proxies and absentee ballots using the PIN method we described.*

**Voting Methods.** Can we re-write the ballot so it is easier for owners to understand and vote?

*Yes. With four methods of voting, each method could use a different format as long as the election or proposal language is identical. The law does require a specific paragraph be printed on each absentee ballot as shown on our samples. Other than that, the clearer you can make the ballot, the better.*

**Voting Methods.** Can you vote by phone using a PIN?

*No. The new law requires that all ballots be in writing and signed by the owner.*

**Ballots.** In an open Board position, does 1 vote for a nominee guarantee their win?

*Yes if there is an uncontested election (not more candidates than open positions). An interesting related question: if there is one candidate for one open position and nobody votes for that candidate, including himself, is he elected? No.*

**Ballots.** If a quorum is barely established at a meeting and several votes are not counted because a proposition was amended from the floor, is quorum lost?

*No. If votes on ballots cannot be counted because the proposition was changed by a floor amendment, they are still counted toward quorum. In addition, if the ballot contains 2 propositions, one amended and one as written, that ballot can be counted toward the unamended proposition.*

**Ballots.** Do you have to take nominations from the floor?

*Not unless your governing documents require this by indicating you shall take nominations from the floor. Most documents do not mandate this.*

**Ballots.** What is the liability to a vote counter for revealing a vote?

*The law does not specify a penalty. If votes are revealed then an aggrieved party could pursue legal action through the civil justice system using the law as their basis for the lawsuit.*

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#### **Recounts.** Would a Board member have to pay for a recount?

*Yes. The law provides for a recount by any owner and requires that the person requesting a recount pay for the cost of the recount. The cost does not necessarily need to be high. The law requires that an independent tabulator be hired. That tabulator must be a judge, voter registrar, elections administrator or anyone else who is mutually acceptable. Therefore a recount could even be done with an independent volunteer.*

#### **Board Appointments.** How do you replace a board member who has been removed because of a felony or crime of moral turpitude?

*In an election of the members. The law only allows board member to fill board positions by appointment after resignation, death or disability. The law requires all other vacancies to be filled by a member election (at the next annual meeting or at a special election). This applies to four situations: removal by law, removal by board for non-participation if allowed under Bylaws, removal by members in an impeachment and vacancy due to an expired term not filled at the annual meeting.*

#### **Board Appointments.** How do the new laws impact an Association where all board members are appointed?

*There are several types of Associations that are in this situation such communities under developer control, master associations and collaborative associations such as trails or boulevard maintenance organizations. For developer controlled communities, the new law provides some limited guidance on transitioning to owner control. For all other types of Associations where all board members are appointed instead of elected, there is no impact.*

#### **Failure to Hold Annual Meetings.** If a developer is in control do you still have to have an annual meeting?

*Yes. The new law requires that every Association call an annual meeting each year. An annual meeting is required even if no election will occur because board positions are appointed.*

#### **Failure to Hold Annual Meeting.** What if no quorum is met at the annual meeting?

*It is more important now than ever to achieve a quorum and hold an annual meeting and election. By providing four voting methods, achieving quorum will be a little easier. Associations that regularly have difficulties should consider a variety of incentives for voting such as “door prizes” for absentee ballots. An Association should also consider lowering quorum requirements - 10% is typical and generally achievable but it could be lowered if necessary. Depending on your governing documents, you may be able to do this with a board vote only - consult your attorney since there are overriding state laws which may help.*

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#### **BOARD MEETINGS**

**Notice to Members.** Are you required to notify owners they have a right to email meeting notices?

*No. However, you’ll probably want to communicate this, and other changes under the law, to all of your owners. In addition, if you don’t have a way to differentiate email addresses for notices from all other email addresses, an owner might wonder why they have started receiving these emails.*

**Notice to Members.** If we have regular board meeting, can we post and email the meeting schedule for the year each January to satisfy the notice requirements?

*Theoretically, yes, since the law indicates the notices must be sent at least 72 hours in advance of the meeting. However, in addition to the date, time and place, the notice must describe the general subjects and topics of anything to be handled in executive session. Because of that detail, it would be impossible to foresee the agendas and executive sessions in all future months.*

**Notice to Members.** What if the communication will not recognize your email address?

*In addition to a public posting, the new law requires that a meeting notice be emailed to any owner that requests it. It is that owner’s responsibility under the law to maintain an updated email address with the Association. The Association has no obligation to try to resolve a problem where the email notice is rejected by the owner’s ISP, mail system or spam filter.*

**Notice to Members.** Do email notices need to contain an “opt-out” option?

*No. Even though an owner must request email notices be sent to them, many Associations will not be able to differentiate between email addresses for notices and email addresses obtained for other purposes. Therefore, you may get requests to remove them from your emailing list. Each Association will need to develop an internal procedure to comply with owner opt-out requests.*

**Notice to Members.** Is the Association required to give notice that the board has cancelled a meeting?

*No. However, it would be a courtesy to post the cancellation and send an email. If the meeting is being rescheduled, the normal notice requirements apply.*

**Open Meetings:** If the board will only be taking action by approving meeting minutes and the financial report, do we need to provide notice to the members?

*No. However, at the next announced meeting, the board will need to disclose that meeting and summarize the actions taken. In practice, the Association should try to provide notice of every non-emergency meeting to avoid concerns over what can be discussed and how to document actions.*

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**Open Meetings:** Are you required to hold announced meetings a certain number of times per year?

*Any board meeting frequency requirements would be stated in your governing documents. You should understand that the intent of the new laws is to give owners the ability to monitor board meetings - unannounced meeting should be reserved for emergency meetings or meetings where no significant actions will be taken.*

**Executive Sessions.** Can we hold an executive session on a different date than the board meeting?

*It is important to recognize that an executive session occurs within a board meeting. So this question is really asking “can we hold a board meeting with the only business being in an executive session”. Yes. Procedurally you will need to provide notice to owners of the meeting, call the meeting to order, immediately move to executive session, reconvene to open session, summarize the discussion, make any motions and adjourn the board meeting. You can also do an executive session as part of an unannounced board meeting as long it doesn’t include any of the topics prohibited in unannounced meetings.*

**Executive Sessions.** Where does the executive session need to be in a board meeting? Can we hold an executive session first before the open meeting?

*The executive session can be held anywhere between the board meeting call to order and adjourn. Make sure your meeting announcement to members shows the start time as the board meeting start time and not the time when the executive session will be over. You can hold multiple executive sessions within a board meeting, for example, one at the beginning for a DR hearing for the convenience of that owner and one at the end to authorize enforcement actions.*

**Executive Sessions.** Do ACC issues fall into executive sessions?

*It depends on the topic. Normal status reports and consideration of guidelines are both open meeting agenda items. Enforcement actions and appeals of decisions could be held in executive session.*

**Executive Sessions.** Can the Board hold a closed meeting to review these new laws?

*The law defining allowed content for executive sessions goes into effect on January 1<sup>st</sup>. So you could handle this in executive session before then. After that, unless you are discussing the laws in context with attorney-client privileged advice, it is not something allowed in executive session.*

**Unannounced Meetings.** Can we have email “meetings” between regular board meetings?

*The new laws don’t cover email meetings - they allow electronic meetings but require that all board members can hear and be heard (e.g. a conference call or video conference). If your governing documents allow email decisions, they continue to be allowed. If your governing documents allow decisions to be made by unanimous written consent, you can accomplish that by email. As an alternative, you can use the ratification approach shown in the seminar handbook (decision made by email and then ratified and placed in the minutes of the next board meeting).*

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*However, you make a decision, it must make it into the minutes of the next announced board meeting.*

**Unannounced Meetings.** Do votes at unannounced meetings need to be unanimous?

*No. At a board meeting, binding action requires a duly called meeting at which a quorum is present where a majority of those present vote for the proposal. The only time a decision must be unanimous among all board members is with written consent outside of a board meeting.*

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## RESALES

**Resale Certificates.** What lawsuits need to be listed?

*All active, filed lawsuits must be listed. Lawsuits approved but not yet filed are not listed. Lawsuits that have been adjudicated or dismissed are not listed. The law requires that the style and cause be listed e.g. “Overlook Community Association, Inc. vs John and Mary Smith, Fort Bend County 400<sup>th</sup> District Court, Case 11-DCV-166457”.*

**Resale Certificates.** What about privacy issues regarding lawsuits showing owners names?

*The law requires the list of lawsuits include the defendant’s name. The list will not include the basis of the lawsuit or any other details. Once the lawsuit is filed, the information becomes a public record.*

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## MISCELLANEOUS

**Property Sales.** Is there any law or regulation that requires that the new homeowner be made aware that they are purchasing within a deed restricted community?

*Several laws are in place relating to notice. All dedicatory instruments must be filed in the public records. Dedicatory instruments must be filed on a publically assessable website if available. The contact information for each Association must be filed in a Management Certificate. Buyers may request a resale certificate to receive information about the property they are buying and the association. And finally, as part of a typical sale, buyers must sign Texas Real Estate Commission form 36-6: “Addendum for Property Subject to Mandatory Membership in a Property Owners Association”.*

**Property Sales.** Is there a legal requirement for deed restrictions to be given to new property owners at the time of closing?

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*No. However, they can get the governing documents in advance on their own, in advance through a resale certificate or at closing. On the TREC form referenced above, a buyer would specifically indicate that they have already received or do not want the “Subdivision Information”.*

**Compliance.** As a management company, are you responsible for insuring that your clients are in compliance with the requirements?

*Each Association, through its board of directors, is ultimately responsible for complying with the laws. That is true whether or not a management company is involved. The board should seek advice from its attorney and/or management company on procedures or requirements under the law. Seminars like ours provide an opportunity to understand the laws.*

**Compliance.** Any idea of cost impacts of compliance on management companies and Associations?

*There are definitely cost impacts which will become clearer as we move through the first year of the laws. The impacts will vary among management companies based on the structure of the contracts with their clients.*

**Increasing Assessments.** Are there any laws on the books by this session or previous sessions regarding assessment increases?

*None that directly address setting assessments. Laws dealing with amendments to CC&Rs, open board meeting and voting may have indirect bearing on the topic.*

**Current Legislation.** Did the legislature allow time for public comments prior to voting on and passing the new laws?

*Yes. Each introduced bill is assigned to a committee. Most of the laws affecting associations were handled by the Senate Intergovernmental Relations Committee chaired by Senator Royce West and the House Business & Industry Committee chaired by Representative Joe Deshotel. Each committee holds public hearings. However, the final laws can look significantly different from the original bill after revisions, substitutes, committee work and Senate/House reconciliations.*

**Future Legislation.** Any expectation that they will standardize HOA deed restrictions and bylaws?

*For almost two decades, there has been a back-burner effort to develop the equivalent of the Texas Uniform Condominium Act for property owners associations. There is not great interest in pursuing this. Even if passed, it would simply be a cleaned up version of what is in the Texas Property Code and would sit on top of existing governing document for each Association.*

**Seminar Information.** Would it be possible to acquire electronic copies of the guidelines presented?

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*Absolutely. Just send an email to [seminars@ciaservices.com](mailto:seminars@ciaservices.com) and ask for the document package from the 2011 Legislation seminars. The presentation slides, guidelines, policies and samples will be returned within one business day.*

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#### **NOTE ON CONDOS**

The laws relating to condominiums are to a great extent consolidated into the Texas Uniform Condominium Act (TUCA). Some of the topics in laws passed in this session for property owners associations are already covered in TUCA. And some of the laws passed in this session do apply to condominiums. Specifically:

- Laws relating to religious items, rainwater harvesting, solar energy devices, roof shingles and flags
- All dedicatory instruments must be filed or they are not effective
- Traditional transfer related fees are legal

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#### **NOTE ON DEVELOPER CONTROL**

There are a few exceptions in the new laws related to the period of developer control. The “development period” is defined as the “period stated in the 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 the development period:

- A developer may prohibit installation of solar energy devices
- A developer may continue to be able to amend CC&Rs as specified in the CC&Rs (beyond the development period, 67% of votes are required for an amendment)
- Board meetings must be only open with notice to members if the meeting includes: (1) adopting or amending dedicatory instruments, (2) increasing a regular assessment or imposing a special assessment, (3) electing a non-developer board member or (4) changing voting rights of members
- A developer can continue to make appointments as specified in their governing documents

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