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88th Legislative Update

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Disclaimer

This legislative summary is not intended to be relied on as a final analysis in resolving legal questions related to all legislation affecting property owners' associations that was approved at the 88th Legislative Session. The information presented here is intended to summarize some of the newly approved community association legislation. There is no substitute for a thorough review of the new statutes in conjunction with an association's current governing documents by an experienced and competent attorney.



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Analysis of Changes to Property Owners' Association Law

During the 2023 Texas Legislative Session

I. Summary

The 2023 Texas Legislative Session brought about numerous changes to Texas Property Owners' Association Law. The changes to the law include both mandatory and permissive actions that residential subdivisions, condominium associations, and townhome communities must (or may) make to their daily operations. What follows is a summary and analysis of those changes made during the 2023 Legislative Session as well as a breakdown of both mandatory and recommended actions associations must (or may) make to be compliant with the new laws. Should you have any questions, please reach out to Manning & Meyers at Casey@HOALegal.com, and we will be happy to assist you in your compliance efforts.

II. Summary & Analysis of Changes

1) Assessment Lien Filing Timeline-

Substantial changes were made to Section 209.0094 of the Texas Property Code, which governs the filing of a lien by a Texas property owners' association. These changes are applicable to owners and residents within both residential subdivisions and townhomes. They are not applicable to condominium associations.

The amendments to Section 209.0094 require that a Texas property owners' association send several notices to an owner prior to filing notice of an assessment lien in the real property records. Here is the process, according to Section 209.0094:

The association must send a first notice of delinquency, either by first-class mail to the owner's last known mailing address or by email to an address provided by the owner.¹

A second notice of delinquency must be sent by certified mail, return receipt requested, to the owner's last known address, not earlier than 30 days after the first notice was sent.²

The association cannot file notice of an assessment lien until 90 days after the date the second notice of delinquency was sent.

This section does not apply to owners protected under the Servicemembers Civil Relief Act. The new regulations are only applicable to assessments that become delinquent on or after the effective date of the act, which is September 1, 2023.

¹ Tex. Prop. Code § 209.0094(d).

² Tex. Prop. Code § 209.0094(e).

For the property owners' associations I represent, my recommendations would include:

- a) Update your assessment collection process to align with the new requirements outlined in Section 209.0094. This includes using the appropriate methods for sending the first and second notices, and ensuring the timing aligns with the requirements of the statute (not filing a lien before 90 days after the second notice).
- b) Implement a system to keep accurate and up-to-date records of property owners' addresses and email addresses. This information is crucial to ensure the notices are sent to the correct locations.
- c) Review and update the association's dedicatory instruments, procedures, and policies to reflect these changes. This includes any forms, templates, or system processes related to the sending of notices and filing of assessment liens.

In practice, I do not believe that the newly amended Section 209.0094 will alter collection procedures for many clients. The first notice required to be sent is often already transmitted to delinquent owners as a courtesy reminder. The second notice, which must be sent via certified mail, is the collection notice required under Section 209.0064 of the Texas Property Code. The 209.0064 notice allows for 45 days to cure a delinquency prior to additional collection action being taken.³ Section 209.0094 allows for a Texas property owners' association to send an additional attorney demand letter 45 days after the Section 209.0064 notice and provide an additional 45 days to cure. Only then should an association file a notice of lien. This will allow for the filing of an assessment lien in compliance with both Sections 209.0064 and 209.0094.

If you need assistance in the updating of your assessment collection procedures or have questions related to Section 209.0094, please reach out to our office at Casey@HOALegal.com.

2) Covenant Enforcement & Fining Policies-

Section 209.0061 of the Texas Property Code was created by the 88th Texas Legislature and requires a Texas property owners' association to create and distribute a covenant enforcement and fining policy. This section is applicable to owners and residents within both residential subdivisions and townhomes. It is not applicable to condominium associations.

³ Tex. Prop. Code § 209.0064(b)(3).

Section 209.0061 does not apply to a Texas property owners' association that is not authorized to levy a fine by the Association's dedicatory instruments.⁴

- a) Per the statute, all property owners' associations that are allowed to levy fines need to establish an enforcement policy detailing how they will levy fines. The policy should cover the following areas:
 - (i) General categories of restrictive covenants for which the association may impose fines;⁵
 - (ii) A schedule of fines for each category of violations;⁶ and
 - (iii) Information regarding an owners right to a hearing in front of the Board of Directors in accordance with Section 209.007 of the Texas Property Code.⁷
- b) Importantly, the enforcement policy may reserve the board's authority to levy a fine from a schedule that varies on a case-by-case basis.⁸
- c) Once this policy has been drafted and adopted, the association is required to provide a copy of the policy to each owner within the association. This can be achieved by posting it on an internet website maintained by the property owners' association or an agent acting on its behalf. Alternatively, the association may annually hand-deliver, mail, or email a copy of the policy to each owner. Additionally, an association must make the policy available on any publicly accessible website maintained by the property owners' association or an agent acting on its behalf.⁹
- d) This new law only applies to fines that become due after its effective date of January 1, 2024. Any fines imposed before this date are governed by the previous laws.

For residential subdivision or townhome associations, I recommend taking the following actions:

- a) If your association currently has the authority to levy fines, and you have a covenant enforcement and fining policy, ensure that your policy conforms with the requirements set forth under Section 209.0061.
- b) If your association has the authority to levy fines, and you do not have a covenant enforcement and fining policy, Section 209.0061 requires the adoption of such a policy. You may contact our office for assistance in drafting such a policy.

⁴ Tex. Prop. Code § 209.0061(a).

⁵ Tex. Prop. Code § 209.0061(b)(1).

⁶ Tex. Prop. Code § 209.0061(b)(2).

⁷ Tex. Prop. Code § 209.0061(b)(3).

⁸ Tex. Prop. Code § 209.0061(c).

⁹ Tex. Prop. Code § 209.0061(d).

- c) If your association does not have the authority to levy fines, then this section will not require you to take any action.
- d) Once your enforcement policy is adopted and compliant with Section 209.0061, ensure that the policy is distributed to owners on an annual basis and made accessible to the public on an internet website maintained either by the association or its management.

These changes could have significant impacts on property owners' associations that fail to comply. Manning & Meyers stands ready to help you navigate these changes and ensure your interests are protected. Please reach out to us at Casey@HOALegal.com if you have any questions regarding this section or need assistance in drafting a covenant enforcement and fining policy.

3) Section 8 & Housing Voucher Restrictions-

Section 202.024 of the Texas Property Code now restricts the ability of a Texas property owners' association from prohibiting an owner from leasing a dwelling based on the tenant's method of payment. These changes are applicable to owners within both residential subdivisions and condominium associations. The changes related to method of payment take effect on September 1, 2023.

First, the law defines a "Method of Payment" as payment made, in whole or in part, by (1) a housing choice voucher under Section 8; or (2) any other federal or state or local housing assistance provided to a person or property owner on behalf of a tenant, including rental vouchers, rental assistance, or rental subsidies from a non-governmental organization.¹⁰

In effect, Texas property owners' associations with rental restrictions that prohibit Section 8 tenants or tenants that receive government assistance will no longer be able to enforce those provisions of the rental restrictions.¹¹

For residential subdivision or townhome associations that have rental restrictions in place, I recommend that you update those restrictions to align with the new requirements outlined in Section 202.024. This includes removal of prohibitions on Section 8 and housing voucher tenants. At the very least, I recommend you no longer enforce any "Method of Payment" restriction that would violate section 202.024 of the Texas Property Code.

4) Construction Defects- Timeline to File a Claim-

Section 16.009 of the Texas Civil Practice and Remedies Code establishes a statute of limitations for bringing a suit for damages against a person who constructs or repairs an improvement to real property. This section was amended by the 88th Texas Legislature.

¹⁰ Tex. Prop. Code § 202.024(a).

¹¹ Tex. Prop. Code § 209.024(b).

Generally, in cases arising out of a defective or unsafe condition or a deficiency in the construction or repair of an improvement, a claimant must bring a suit within 10 years of the substantial completion of the improvement.¹²

For claims related to the design, construction, or repair of a new residence or an alteration, repair, or addition to an existing residence, the same 10-year limit applies. However, if the person being sued is a contractor who has provided a written warranty for the residence that complies with Section 16.009(a-3), the claimant must bring the suit within 6 years after substantial completion of the improvement.¹³

Subsection (a-3) defines the minimum warranty periods as one year for workmanship and materials, two years for plumbing, electrical, heating, and air-conditioning delivery systems, and six years for major structural components.¹⁴

If a claimant presents a written claim for damages, contribution, or indemnity during the applicable limitations period, the period is extended for two years from the date the claim is presented (for claims to which Subsection (a) applies), or one year from the date the claim is presented (for claims to which Subsection (a-1) or (a-2) applies).¹⁵

This section only applies to causes of action that commence on or after the effective date of Section 16.09, which takes effect immediately. It does not apply to causes of action arising out of a contract entered into before that date.

For Texas property owners' associations with concerns related to possible construction defects, I recommend that you:

- a) Ensure all construction or repair contracts clearly define when "substantial completion" of an improvement occurs, as this starts the clock for the statute of limitations.
- b) Carefully review any warranties provided by contractors. Ensure that they comply with the minimum periods stated in Section 16.09(a-3).
- c) Keep comprehensive records of all construction, repair, and improvement work performed on association properties. This should include completion dates, any warranties provided, and any written claims made.
- d) Educate homeowners on the time limits for filing suits related to construction or repair defects. Encourage them to promptly report any issues they notice.

¹² Tex. Civ. Prac. & Rem. Code § 16.09(a).

¹³ Tex. Civ. Prac. & Rem. Code § 16.09(a-2).

¹⁴ Tex. Civ. Prac. & Rem. Code § 16.09(a-3).

¹⁵ Tex. Civ. Prac. & Rem. Code § 16.09(c).

If you would like our firm's assistance in construction defect matters, you may reach out to us at Casey@HOALegal.com.

5) **Construction Defects- Changes to the Residential Construction Liability Act-**

Section 27 of the Texas Property Code is the Residential Construction Liability Act ("RCLA"). The 88th Texas Legislature made substantial changes to the RCLA. A list of these changes and recommendations are as follows:

- a) Substantial changes were made to the applicable definitions, thereby expanding the scope of the RCLA:
 - (i) The definition of "Appurtenance" has been expanded and clarified to include any garage, outbuilding, retaining wall, or other structure or recreational facility that is constructed by a contractor in connection with the construction or alteration of a residence.¹⁶
 - (ii) The term "Construction defect" has been redefined and substantially narrowed to encompass any deficiency in the design, construction, or repair of a new residence or alteration of, or repair or addition to an existing residence.¹⁷
 - (iii) The definition of "Contractor" has been expanded to include not only builders but also any person contracting for the sale or construction of a new residence. It also now includes those contracting with an owner or the developer of a condominium or other housing project for various types of construction or repair.¹⁸
 - (iv) "Economic damages" now explicitly excludes damages for bodily or personal injury, physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.¹⁹
 - (v) The definition of "Residence" has been expanded to include real property and improvements for a variety of dwelling types.²⁰
 - (vi) The term "Structural failure" is now defined to mean actual physical damage to the load-bearing portion of a residence caused by a failure of the load-bearing portion.²¹
 - (vii) The term "Townhouse" has been added to the RCLA and is defined as a single-family dwelling unit constructed in a group of three or more attached units.²² This is convenient as the term had been used, but never defined under the Texas Property Code.

¹⁶ Tex. Prop. Code § 27.001(2).

¹⁷ Tex. Prop. Code § 27.001(3).

¹⁸ Tex. Prop. Code § 27.001(4).

¹⁹ Tex. Prop. Code § 27.001(5).

²⁰ Tex. Prop. Code § 27.001(6).

²¹ Tex. Prop. Code § 27.001(7).

²² Tex. Prop. Code § 27.001(9).

Substantial changes to the rest of the RCLA were also made:

- (i) The RCLA now prevails over any other law, including the Deceptive Trade Practices-Consumer Protection Act, or a common law cause of action, to the extent of conflict between this chapter and any other law.²³
- (ii) The conditions under which a contractor is held liable for a construction defect have been clarified and narrowed. A contractor is now only liable to the extent a defective condition directly causes actual physical damage to the residence, an actual failure of a building component to perform its intended function, or poses a verifiable danger to the occupants of the residence.²⁴
- (iii) The conditions under which a contractor is not liable for damages have been expanded. A contractor is not liable for damages caused by the negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor, failure of a person to mitigate the damages, maintain the residence, or timely notify a contractor of a construction defect. They are also not liable for damages caused by normal wear and tear, normal cracking due to drying or settlement, or reliance on inaccurate written information obtained from official government records.²⁵
- (iv) The statute clarifies that if an assignee or a person subrogated to the rights of a claimant fails to provide the contractor with the written notice and opportunity to inspect and offer to repair required by Section 27.004 before performing repairs, the contractor is not liable for the cost of any repairs or any percentage of damages caused by repairs.²⁶
- (v) A new subsection has been added which states that to maintain a claim of breach of a warranty of habitability, a claimant must establish that a construction defect was latent at the time the residence was completed or title was conveyed to the original purchaser and has rendered the residence unsuitable for its intended use as a home.²⁷
- (vi) The 60-day notice period prior to initiating an action has been specified for all construction defect claims, regardless of whether they are subject to Subtitle D, Title 16 or not. The claimant must provide written notice to the contractor specifying the defects and also provide any evidence that depicts the nature and cause of the defect.²⁸

²³ Tex. Prop. Code § 27.002(b).

²⁴ Tex. Prop. Code § 27.003.

²⁵ Tex. Prop. Code § 27.003.

²⁶ Tex. Prop. Code § 27.003.

²⁷ Tex. Prop. Code § 27.003(c).

²⁸ Tex. Prop. Code § 27.004.

- (vii) The contractor now has the opportunity to conduct up to three inspections within a 35-day period after receiving the notice. They may take reasonable steps to document the defect.²⁹
- (viii) The contractor may make a written offer of settlement to the claimant within 60 days after receiving the notice. If the claimant finds the offer unreasonable, they should advise the contractor in writing within 25 days after receiving the offer. The contractor then has 10 days to make a supplemental offer of settlement.³⁰
- (ix) The statute of limitations has been addressed; if an action is initiated to prevent expiration of the statute of limitations, the complaint must specify in reasonable detail each construction defect. Also, if the provisions of Subsection 27.004(a) were not properly followed, the action shall be abated to allow compliance.³¹
- (x) Abatement rules have been refined: the court or tribunal shall abate an action if the claimant failed to provide the notice or failed to give the contractor a reasonable opportunity to inspect the property.³²
- (xi) The law clarifies that claimants can recover only specific types of economic damages caused by a construction defect. This list now includes the reasonable and necessary arbitration filing fees and the claimant's share of arbitrator compensation.
- (xii) A new subsection allows the court or tribunal to consider a late offer from the contractor to be timely if the claimant failed to provide all available evidence at the time of the original notice or if they amended a claim to add a new defect, or due to events beyond the contractor's control.³³
- (xiii) The RCLA now requires that the claimant prove that the construction defect existed at the time of the completion of the construction, alteration, or repair.³⁴
- (xiv) Lastly, the any attempted waiver of the RCLA by contract is now void.³⁵

²⁹ Tex. Prop. Code § 27.004(a).

³⁰ Tex. Prop. Code § 27.004(b).

³¹ Tex. Prop. Code § 27.004(c).

³² Tex. Prop. Code § 27.004(d).

³³ Tex. Prop. Code § 27.004(g-1).

³⁴ Tex. Prop. Code § 27.006.

³⁵ Tex. Prop. Code § 27.009.

As a result of these amendments, my advice to Texas property owners' associations with concerns related to possible construction defects would include:

- a) If you are planning any construction or alteration work, you need to understand the new definitions of "Contractor" and "Appurtenance." Make sure your contracts clearly define the roles and responsibilities of all parties involved.
- b) With the new definition of "Construction defect," ensure your contracts have clear and comprehensive warranties and procedures for addressing any potential construction defects. It's more crucial than ever to have a thorough pre-construction and post-construction inspection process to detect and rectify any defects early.
- c) If a construction defect leads to a claim, be aware that "Economic damages" do not include certain types of personal injury damages. Consult with your insurance company to ensure you have adequate coverage for all types of potential claims.
- d) Lastly, keep in mind that this Act now has dominance over any other conflicting laws, including common law causes of action.
- e) When contracting for construction or repairs, ensure your contracts include clear language about the contractor's liability as per the new changes. Also, outline clear procedures for the timely notification of defects and the opportunity for the contractor to inspect and offer to repair.
- f) Continue to regularly maintain your properties and document these maintenance efforts, as a contractor can now avoid liability if a person fails to maintain the residence.
- g) Review your procedures for handling construction defects, and ensure all stakeholders are aware that they need to notify contractors of defects before making any repairs. Failure to do so can now negate the contractor's liability for the cost of repairs.
- h) In the event of a claim of breach of a warranty of habitability, prepare to establish that the defect was latent at the time of completion and that it has rendered the residence unsuitable for its intended use.
- i) When identifying construction defects, make sure to specify them in detail and gather all available evidence such as expert reports, photographs, and video or audio recordings. Develop a system for documenting every correspondence with contractors, especially the sending and receiving of notices, and offers of settlement.

These changes could have significant impacts on homeowners, builders, and developers. Manning & Meyers stands ready to help you navigate these changes and ensure your interests are protected. Please reach out to us at Casey@HOALegal.com if you have any questions regarding this section or if you wish to make a construction defect claim.

6) Insurance- Expansion of Insurance Coverage for Underserved Areas-

Section 2211.001 of the Texas Insurance Code sets forth requirements for insurance commonly known as the Fair Access to Insurance Requirements (“FAIR”) Plan. The 88th Texas Legislature makes changes to the FAIR Plan to expand the ability of Texas property owners’ associations to obtain insurance coverage. Those changes include:

The FAIR Plan now expressly includes “Property owners’ association insurance” which is defined as insurance coverage covering common areas and facilities of a homeowners’ association or condominium owners’ association.³⁶

Allows for the Texas Insurance Commissioner to provide insurance to underserved areas, as defined below, if the commissioner determines, after notice and a hearing, that the property owners’ association insurance is not reasonably available in the voluntary market.³⁷ A property owners’ association must first make a diligent effort to obtain insurance through the voluntary market, but be declined twice.³⁸

The FAIR Plan is only applicable to property owners’ associations within 10 miles of the Texas Windstorm Insurance Association catastrophe area.³⁹ That solely includes counties along the Gulf of Mexico. For a map of those areas, please see: <https://www.tdi.texas.gov/wind/maps/index.html>.

If you are a Texas property owners’ association along the Gulf Coast and unable to obtain insurance on the voluntary market, please contact your management company or Texas Insurance Commissioner so that you may go about obtaining insurance through the Fair Access to Insurance Requirements Plan.

³⁶ Tex. Ins. Code § 2211.001(6-a).

³⁷ Tex. Ins. Code § 2211.051(b).

³⁸ Tex. Ins. Code § 2211.1515(b).

³⁹ Tex. Ins. Code § 2211.1515(a).