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87TH LEGISLATIVE SESSION POA BILL ANALYSIS

Managers, Developers, Board Members and Friends:

The 87th Legislative Session has ended¹. Unlike the last two legislative sessions, the 2021 session will potentially have the greatest impact on POAs since the landmark 2011 legislative session.

Despite a great deal of lobbying from the CAI and other organizations, several pieces of legislation passed, and are slated to be signed or have already been signed by the Governor into law.

Remember, because Texas law still differentiates between Condominiums and Single-Family Homes / Townhouses, some bills exclusively apply one category, while others apply to all community associations. Additionally, many associations may have special characteristics such as declarant control, mixed used properties, commercial associations and low-member number associations, all of which may affect applicability of some or all of the statutory changes. Thus, we encourage you to conduct a specific, detailed review of your association documents with counsel.

Also included is a chart listing out the anticipated costs associated with the below-described legislative changes. As always, feel free to call the Firm with any questions you may have regarding the specific application of these laws to your specific association.

The new laws are organized below in charts, with detailed provisions flushed out after the summaries.

I. CONDENSED SUMMARY OF BILLS

Condominiums ONLY

<u>Statute</u>	<u>Summary</u>	<u>Effective Date</u>
SB 318	Essentially transplants the record production and copying requirements applicable to single family homes	September 1, 2021

¹ As of this writing, two special sessions have been scheduled, though it is unlikely they will contain many bills of note for POAs.

	and townhomes and makes them also applicable to condominiums.	
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Single Family Homes / Townhomes ONLY

<u>Statute</u>	<u>Summary</u>	<u>Effective Date</u>
HB 1281	Essentially eliminates POAs from restricting golf carts.	Immediately
HB 1659	Caveats the blanket "67% to amend" rule to potentially exclude amendments made in mixed-used associations.	Immediately
HB 3571	Prohibits POAs from preventing owners from building or installing security measures. Modifies 202 but expressly excludes condominiums from applicability.	Immediately

Applicable to BOTH Ch. 209 and Ch. 81-82 Properties

<u>Statute</u>	<u>Summary</u>	<u>Effective Date</u>
HB 1927	Allows the carrying of firearms without a license. Still allows for business entry restrictions via the Penal Code.	September 1, 2021
SB 1588	Omnibus bill, makes numerous, sweeping changes to POA laws including collections, religious displays, pool fences, security measures, resale certificates, management certificates, ACC membership, board meetings, contracts, deed enforcement, and leasing.	Variable
SB 30	Provides additional power to remove discriminatory language from dedicatory instruments.	September 1, 2021
SB 581	Widens the scope of the allowed religious displays originally included in 2011's amendment to Tex. Prop. Code 202.	Immediately
SB 6	Also an omnibus bill, essentially specifies liability for pandemic exposure.	September 1, 2021

II. DETAILED SUMMARY OF BILLS

BILLS AFFECTING CONDOMINIUMS

SB 318: Several years ago Tex. Prop. Code § 209.005 inserted record retention, copying and production requirements for single family and townhome associations. This bill lifts those requirements *virtually verbatim* and inserts them into Tex. Prop. Code § 82.1141:

- Records must be open and available for examination by an owner, a person **designated in writing** by an owner as the owner's agent, attorney, or certified public accountant

- Owner or agent must send written request for access by certified mail, with sufficient detail describing records requested, to address of association's agent as shown on the most recently filed management certificate
 - Condo Associations must **respond within 10 business days** and if it can't have the requested documents ready within the ten day window, it must inform owner (or agent) and advise when the records will be available
 - Inspection location to be agreed upon during normal business hours
- Attorneys records and files are not considered association records
- **Condo Associations must adopt a records production and copying policy**, and record it, outlining charges for compilation, production and reproduction of information
 - Charges cannot exceed costs applicable for an item under 1 TAC² Section 70.3
 - Condo Associations may not charge any fees absent a written recorded policy
 - Condo Associations may require advance payment of the estimated amount of the costs and then reconcile within 30 business days to actual amounts owed
- Condo Associations are not required to provide violation history of any individual, any owner's personal financial information or contact info (except address), or employee information. Information may be provided in a summary format.
- Condo Associations shall adopt a **records retention policy**
- Member denied access to Condo Association's records can file a petition in JP court
- All dedicatory instruments must be filed in county and have no effect until filed

Note: though the legislature did not amend § 82.002(c) (the applicability provision), § 82.1141(a) states that "this section applies to all associations governed by this chapter and controls over other law not specifically applicable to an association." In other words, while these new provisions will arguably apply to any condominium regime, even those whose declaration was recorded prior to January 1, 1994. In any event, even if that were not the case, the legislature has shown it has a vested interest in access to POA documents, so it was considered "best practices" for all Associations to adopt these rules as a policy, whether or not they are strictly applicable.

² Texas Administrative Code

BILLS AFFECTING SINGLE FAMILY HOMES AND TOWNHOMES

HB 1281: In previous legislative sessions the legislature decided to do something about golf carts, and by "do something" I mean they worked to deregulate them. This bill goes further, essentially making it impossible for POAs to restrict the use of golf carts within Associations *or on commercial roads* with very few caveats.

HB 1659: For the last ten years or so, amending restrictive covenants in 209 properties has been simplified by allowing for a flat 67% of the ownership to amend, regardless of any higher percentage requirements found in the documents. This bill carves out an exception to that rule for some mixed-use Associations, but the bill is so poorly drafted it's unclear when it will apply, or what purpose the Texas legislature was trying to achieve.

HB 3571: This exceedingly short bill modifies Tex. Prop. Code § 202, though it specifically does not apply to condominiums. It provides that a POA may not adopt or enforce a restrictive covenant that prevents a property owner from building or installing security measures, including but not limited to a security camera, motion detector, or perimeter fence. However, it allows a POA to prohibit installation of a camera on property not owned by the owner, and it still allows the POA to regulate the type of fencing installed. All 209 Associations should strongly consider adopting a very specific policy to control and regulate what can be done by a homeowner and any aesthetic considerations.

BILLS AFFECTING ALL ASSOCIATIONS

HB 1927: Though this is not strictly a POA-related bill, it affects everyone in the state, as it provides that anyone 21 or older who is otherwise legally permitted to carry a firearm may carry a firearm without a handgun license. However, private businesses (such as management companies) can and should post carry restrictions as permitted by Tex. Pen. Code §§ 30.06 and 30.07. Note, the carry restrictions of the Penal Code are very detailed and strictly interpreted.

SB 30: In prior years, the Property Code was amended to automatically invalidate and exclude any provision of any dedicatory instrument which was "discriminatory" as defined by Tex. Prop. Code § 5.026(a). With this new bill, owners within an Association may file a petition with the clerk to have such provisions "removed" from the documents themselves. It would essentially be a meaningless piece of legislation—no details are provided about how the provisions are to be "removed," either by inference, redaction, or some other method—except that the process exists through this document (1) to seek to have specific provisions *deemed* "discriminatory"; and (2) the provisions are **automatically** deemed discriminatory if the court doesn't take action within a certain time period (15 days). So, conceivably, innocuous or even helpful provisions could be labeled "discriminatory" and invalidated, without ever even providing notice to the Association. This is an example of poor drafting potentially leading to unintended consequences.

SB 581: In 2011 the Section 202 of the Property Code was amended to allow for owners to place size-limited religious items in the door area of their residence. This bill takes those provisions and widens them (literally) to allow for display of religious items anywhere on an owner's property, without size limitation, and removing the express ability for the Association to remove items not in compliance. The bill, like the 2011 version, allows for the Association to create a policy which prohibits installation of items which meet certain criteria. However the criteria have themselves changed since 2011. The Association may now implement a policy which prohibits installation of an item which:

- (1) threatens the public health or safety;
- (2) violates a law other than a law prohibiting the display of religious speech;
- (3) contains language, graphics, or any display that is patently offensive to a passerby for reasons other than its religious content;
- (4) is installed on property:
 - (A) owned or maintained by the property owners' association; or
 - (B) owned in common by members of the property owners' association;
- (5) violates any applicable building line, right-of-way, setback, or easement; or
- (6) is attached to a traffic control device, street lamp, fire hydrant, or utility sign, pole, or fixture

SB 6: This bill is enormous and most of its heft does not affect POAs in the slightest. However, it also creates Section 148 of the CPRC, which is entitled "Liability for Causing Exposure to a Pandemic." The most relevant sections are subsections (1) (a) and 1(b), which focus on liability for individuals and businesses (incl. corporations). The bill states that one is not liable for injury or death caused by exposing an individual to a pandemic disease during a pandemic emergency unless the claimant can establish that the person who exposed the individual knowingly failed to warn the individual or remediate a condition the person knew was likely to expose the individual to the disease. But the person would have to have had control over the condition, know the individual would most likely come into contact with the condition and had a reasonable opportunity and ability to remediate the condition or warn the individual of the condition before that individual came into contact with the condition.

The person is not liable unless the person knowingly failed to implement or comply with government standards, guidance, or protocols intended to lower the likelihood of exposure that were applicable to the person or the person's business provided that:

- The person had reasonable opportunity and ability to implement protocols.
- The person refused to implement or comply with or acted with flagrant disregard to the protocols.
- The government protocols (on the date the person failed to implement or comply with) did not (on the date the individual was exposed to the disease) conflict with the protocols the person implemented or complied with.

This is, essentially, a blueprint for the bare minimum that individuals and Associations must follow to avoid courting liability during a pandemic.

SB 1588: This bill has more going on than all of the other bills put together. In fact, many of the provisions of the above-described bills are also included in one form or another in SB 1588. Since it touches on so many different areas, I've tried to break it down by section for easy digestion:

Section 1 – Collection of Assessments:

This section clarifies that you can't collect assessments based on documents which aren't filed with the County. Oddly because this section amends Section 202.006 of the Property Code, it should affect Condos, but by using the definition of "assessments" contained in Section 209.002, they may be limiting its applicability to single family homes and townhomes. In any event, all Condominiums, Townhomes and single family Associations should have a detailed collection policy on file with their respective county(ies).

Section 2 – Religious Displays:

This section of the bill is essentially identical to SB 581 (the religious items bill), described *supra*.

Section 3 – Swimming Pool Fences

This is a new section which theoretically affects both 209 Associations and condos, though practically it should never affect condos. This bill prohibit POAs from adopting or enforcing a provision in a governing document that prohibits or restricts an owner from installing a swimming pool enclosure that conforms to applicable state or local safety requirements. A POA may enforce a provision in a dedicatory instrument related to the appearance of the enclosure, including regulation of colors, provided such regulation does not prohibit a black swimming pool enclosure that consists of transparent mesh set in metal frames. Here to the extent an Association wishes to have some say and/or control of what is installed, a detailed policy should be drafted to define acceptable standards.

Section 4 – Security Measures

This section only applies to 209 properties. It add Section 202.023 to the Texas Property Code which prohibits a POA from adopting or enforcing a restrictive covenant that prevents an owner from building or installing security measures (e.g. security cameras, motion detectors and perimeter fencing). A POA is not prohibited from banning the installation of a security camera in a place other than an owner's private property or regulating the type of fencing that an owner may install. As discussed above, all 209 Associations should adopt a policy to regulate these new installations.

Section 5 – Definition Update

The next several sections (Sec. 5 through 8) all deal with Section 207 of the Texas Property Code, which is entitled "Disclosure of Information by Property Owners' Associations." Section 5 clarifies that the definition of "Management Company" in 207 is identical to the definition used in 209. Note: the definition itself is amended in Section 9. Note: Sections 5-9 only apply to 209 properties, not Condos.

Section 6 – Resale Certificates

This section amends Section 207.003(c) of the Texas Property Code to cap resale certificate fees at \$375.00 and updated resale certificate fees at \$75.00.

Section 7 – Penalties

This section amends the deadline to deliver a resale certificate after the second request is delivered by an owner under Section 207.004(b) from seven days to five days. Also, now an owner may seek a judgment against the POA for not more than \$5,000 for failure to deliver such information in a timely manner. The previous judgment cap was \$500. In addition to monetary penalties, the owner may also seek costs, fees, *a credit towards future assessments*, and what is essentially injunctive relief ordering the Association to produce documents.

Section 8 – Online Subdivision Information

This section amends Section 207.006 of the Texas Property Code to **require** POAs to make current versions of the POA's dedicatory instruments available on an internet website maintained by the POA or management company on behalf of a POA and available to POA members. this section only applies to POAs with at least 60 lots **OR** a POA that has contracted with a management company. Note: there do not appear to be any provisions explaining what happens of the POA does not comply.

Section 9 – Management Company Definition

This section amends the definition of "Management Company" under Section 209.002 of the Texas Property as follows: "Management company" means **a person or entity** established or contracted to provide management **or administrative services** on behalf of a property owners' association." (emphasis added). Note: "administrative services" is not defined, but Associations and "management companies" should be prepared for the term to be broadly interpreted.

Section 10 – TREC Filings

This section is what the TREC lobbying efforts created. It amends Section 209.004 of the Texas Property Code and requires management certificates to include declaration amendments, the phone number and email address for the managing agent or representative, website information

and amount and description of transfer fees. Not later than the seventh day after the date a POA files a management certificate or amended management certificate, the POA must electronically file the management certificate with the Texas Real Estate Commission ("TREC"). **Owners will not be liable for attorney's fees incurred by a POA relating to collection of assessments or interest if such fees accrue during the period a management certificate is not recorded with a county clerk or electronically filed with TREC.** Essentially, if the management certificate isn't kept perfectly accurate and updated, any owner can avoid attorney's fees and interest in any collection efforts.

Section 11 – ACC Membership

This section amends 209 to prohibit a person from serving on an architectural review committee ("ACC") if the person is: (1) a current board member; (2) a current board member's spouse; or (3) a person residing in a current board member's household.

Let that sink in for a moment.

Also, now an owner is permitted to appeal a decision by the ACC to the board, since the board can no longer be the ACC / on the ACC. Notice of denial must be provided to the owner meeting the requirements provided elsewhere in the code and the board **must** hold the hearing within 30 days after the date the board receives the owner's request for a hearing. A notice **must** be sent to the owner providing the date, time and place of the hearing not later than 10 days before the date of the hearing (only one hearing is required). During the hearing, the board (or designated representative) and the owner are provided an opportunity to discuss, verify facts and resolve the denial by the ACC. Both the board and owner are permitted to postpone for a period of not more than 10 days. Audio recording is permitted by both parties.

Section 12 – Board Meeting Notices, Open Meeting Requirements

This section amends Section 209.0051 of the Texas Property Code to provide a board meeting notice requirement of at least 144 hours before the start of a regular board meeting (an increase from the current 72 hour requirement) and at least 72 hours before the start of a special board meeting. It also amends which topics may and may not be discussed in an open board meeting. Of particular interest, budget approvals or amendments must now be voted on in an open meeting (this used to be limited only to budget increases greater than 10%).

Section 13 – Required Bids for High Dollar Contracts

This language amends Section 209.0052 of the Texas Property Code to require a POA to solicit bids or proposals using a bid process established by the POA if it chooses to contract for services that will cost more than \$50,000. This doesn't take effect until December 1, 2021, per Section 24. A formal bidding policy is recommended to be adopted and filed with the real property records.

Section 14 – 209 Enforcement Action Notice

This section amends Section 209.006(a) of the Texas Property Code to require POAs to send the requisite enforcement action "209" notice under Section 209.006(a) of the Texas Property Code to an owner prior to reporting a delinquency to a credit reporting service.

Section 15 – Application of Payments

This section amends Section 209.0063(a) of the Texas Property Code regarding the proper application of payment funds. Specifically, it adds the word "reasonable" in front of every instance of "attorney's fees," "collection costs," "fines," and "other amounts." Note: this creates wiggle room which will certainly lead to litigation. Accordingly every attempt should be made to ensure that all amounts charged are objectively reasonable.

Section 16 – 209 Minimum Period to Cure Delinquency

This language requires a POA to provide an owner with at least 45 days to cure a delinquency before further collection action is taken, including turning an account over to a collection agent or attorney. This is an increase from the prior period of 30 days.

Section 17 – Credit Reporting Services

This section prohibits a POA or collection agent from reporting fines, fees, or assessments to a credit reporting service if the charges are disputed. The fees, fines, or assessments may be reported only if: (1) 30 days prior to reporting the POA sends a notice of all delinquent charges to the owner; and (2) the owner has had an offer of a payment plan. A POA may not charge a fee to an owner for the reporting of the delinquent payment history of assessments, fines, and fees to a credit reporting service. Per Section 25, this section doesn't apply to any amount that **becomes due** prior to September 1, 2021.

Section 18 – Deed Enforcement Hearings

This section amends Section 209.007 of the Texas Property Code related to 209 hearings requested by owners. Specifically, it provides that, not later than 10 days prior to the hearing, the POA **must** deliver a packet to the owner **containing its evidence it will introduce** at the hearing (photos, documents, communications, etc.). If the evidence is not provided, an owner is automatically entitled to a 15-day postponement. During the hearing, the board must present its case first, and then the owner is entitled to present his/her case. It's probably a good idea to create flow chart for the board and then a written procedure / policy for filing which will explain the process, require homeowners to produce their evidence, and set out how the hearings will be conducted.

Section 20 – Required Leasing Information³

The prior iteration of 209 limited the amount of information a POA could request from prospective tenants and/or their landlords, but excludes "sensitive personal information." this section (and Section 22, *infra*) amends Section 209.016 of the Texas Property Code to provide that a POA may request the following information regarding a lease or rental applicant: (1) contact information, including the name, mailing address, phone number, and e-mail address of each person who will reside at a property in the subdivision under a lease; and (2) the commencement date and term of the lease. However, as worded, it can be argued that this list is *exclusive*. This may require amendment to any existing Association leasing policies to the extent they conflict with this new legislation. Likewise, Associations without leasing policies in place may wish to adopt one.

Section 21 – JP Court Jurisdiction

This section adds Section 209.017 to the Texas Property Code to permit owners to bring an action for a violation of Chapter 209 of the Texas Property Code against a POA in the justice court of a precinct in which all or part of the subdivision is located. Note: this appears to apply only to 209, and not to 207, and according to Section 26 only applies to actions brought on or after September 1, 2021. Further, it does not specify the specific cause(s) of action or remedy(ies) available to owners who bring such an action.

Section 22 – Repeal of Current Laws⁴

This section repeals certain sections of 202 and 209 which would otherwise make the new laws inconsistent. Specifically it omits size and placement restrictions on religious items; now irrelevant language regarding deed restriction hearings; and the "sensitive personal information" sections regarding 209 leases.

Sections 23, 27 – Deadlines

New management certificates must be updated (including filing data for new and amended policies and newly required information) and filed by December 1, 2021. The TREC filing requirements described in Section 10 must be completed by June 1, 2022.

III. CONCLUSION

As in 2011, it will be necessary for most POAs, whether single family, townhomes or condominiums, to create and/or update and file several policies to protect their rights, and to comply with the newly enacted laws. Specifically, the Firm recommends the following policies be drafted or amended:

³ Note: Section 19 clarifies the distinction between ACC and Board.

⁴ Note: Sections 24-26 are supplements to prior sections and described therein.

Those recommendations below which are statutorily required are **specifically indicated**.

All POAs

<u>Action Item</u>	<u>Est. Hours</u>	<u>Est. Cost</u>
Adopt / Amend a Collection Policy	1.5	\$337.50
Draft New 209 Compliant Collection Letter	1.0	\$225.00
Adopt / Amend a Pandemic Policy	1.0	\$225.00
Adopt / Amend a Pool Enclosures Policy	1.0	\$225.00
Adopt / Amend a Religious Items Display Policy	1.0	\$225.00

209 POAs

<u>Action Item</u>	<u>Est. Hours</u>	<u>Est. Cost</u>
Adopt / Amend a Deed Enforcement Policy	1.5	\$337.50
Draft / Amend a New Management Certificate	1.0	\$225.00
Draft New 209 Compliant Deed Letter	1.0	\$225.00
Adopt / Amend a Bidding Policy	1.0	\$225.00
Adopt / Amend a Security Measures Policy	1.0	\$225.00
Adopt / Amend a Security Measures Policy	1.0	\$225.00
Adopt / Amend an ACC Hearings Policy	1.5	\$337.50
Adopt / Amended a Residential Leasing Policy	2.0	\$450.00

Condo POAs

<u>Action Item</u>	<u>Est. Hours</u>	<u>Est. Cost</u>
Adopt a Records Retention, Production and Copying Policy	1.0	\$225.00

As always, Casey and I are happy to meet with any of you, either in open session, executive session or informally, to discuss these changes or the changes from prior legislative sessions.

If you have any questions or concerns, please do not hesitate to contact us.

Regards,



Shawn R. McKee
 Partner

