

A Reprint from *Tierra Grande*, the Real Estate Center Journal

Legislature Limits POA Power

By Judon Fambrough



It's no longer business as usual for Texas property owner associations (POAs). New statutes passed by the 78th and 79th Texas Legislatures affect how associations conduct business and regulate the display of political signs. Legislators hope the new laws eliminate much of the criticism and charges leveled against POAs regarding rule enforcement, collecting attorney fees and foreclosure procedures.

Changes Effective Jan. 1, 2002

The seeds for the 2002 changes came from the highly publicized foreclosure sale in Houston for nonpayment of assessment fees. A \$180,000 home was sold for \$5,000 to satisfy delinquent assessments. The 78th Texas Legislature frowned on the practice and implemented sweeping reforms. The new statute, found in Chapter 209 of the Texas Property Code, affects all residential POAs regardless of what they are called as long as they:

- represent, manage or regulate the subdivision on behalf of the owners,
- require mandatory membership for all or a majority of the property owners and
- collect regular or special assessments from all or a majority of the owners.

Required Notices

POAs may no longer take quick, unilateral action to resolve problems

involving homeowners without first sending notices and, in some cases, giving the homeowners an opportunity for a hearing. Notices must be sent before a POA may:

- suspend an owner's right to use a common area,
- file a suit against the owners for other than failing to pay a regular or special assessment,
- foreclose on an association's lien against the homeowner,
- charge an owner for property damage or
- levy a fine for violating a restriction, the bylaws or a rule of the association.

The notice must be sent by certified mail, return receipt requested, detailing the violation or the property damage and stating the amount of damages due the association. The owner must be given a reasonable time to cure the violation and be informed of the right to a hearing if requested within 30 days after receiving the notice.

The Hearing

If the owner opts for a hearing, the board must convene one within 30 days after receiving the request. The board must give the owner at least ten days prior notice of the scheduled date, time and place. The owner's presence is not required. Either party may ask for a postponement of not more than ten days. Either party may make an audio recording. The statute does not address the use of videotapes.

In lieu of a hearing, either party may use alternative dispute resolution services.

The statute describes three situations in which the owner does **not** have a right to receive notice to cure or the right to a hearing. These occur when:

- the owner received a notice and opportunity to cure a similar violation within the previous six months,
- the association files a lawsuit for a temporary restraining order, a temporary injunction or a foreclosure or
- the owner's right to use common areas have been suspended because of a significant and immediate risk of harm to others.

When a lawsuit has been filed for a temporary restraining order, a temporary injunction or a foreclosure, the owner has the right to file a motion to compel mediation.

Attorney Fees

One of the greatest criticisms of POAs related to the way attorney fees were imposed on homeowners. If a homeowner was delinquent in payment of an assessment or fine, no matter how short the period or how small the amount, some POAs hired an attorney to send a collection letter. The attorney fees for drafting and sending the letter (generally a form letter) at times far exceeded the amount in default. If the homeowner protested, attorney fees increased drastically.

The new law still allows associations to collect reimbursements for reasonable attorney fees and other reasonable costs for enforcing restrictions, rules or bylaws or for collecting amounts due the association. However, the POA must send the owner prior written notice that attorney fees and costs will be charged if the delinquency or violation continues beyond a certain date.

A homeowner is **never** liable for attorney fees in two circumstances. Both are tied to the required notice and right to cure discussed earlier. First, if a notice is required and the owner requests a hearing, the owner is not liable for any attorney fees incurred by the association before the conclusion of the hearing. Second, if a hearing is not requested, the owner is not liable for any attorney fees incurred during the 30 days following the receipt of the notice.

The statute absolutely forbids foreclosure to collect attorney fees associated with fines assessed by the association. The statute limits attorney fees when the POA pursues nonjudicial foreclosure for nonpayment of assessments. If the documents or restrictions governing the establishment, maintenance or operation of the subdivision permit nonjudicial foreclosure, then the association may include, as part of the POA's proceeds from the foreclosure sale, the greater of \$2,500 or one-third of the actual costs and assessments, excluding attorney fees. Actual costs may include court costs and interest if the law or restrictive covenants permit. Excess proceeds from a foreclosure sale are refunded to the owner.

If the association pursues the collection of attorney fees, it must provide a copy of all invoices and other costs related to the matter when requested by the owner. If attorney fees, costs and other amounts are collected, they must be deposited into an account maintained at a financial institution in the name of the association or its managing agent. Only members of the board or its managing agent may be signatories on the account.

Right of Redemption

POAs may foreclose for unpaid assessments, but owners now have the right to repurchase their homes. Formerly, this right of redemption, as it

is sometimes called, was limited to tax foreclosure sales in Texas.

The association must send written notice informing the owners of their redemption rights within 30 days following the sale. The notice must be sent by certified mail, return receipt requested, to the last known address in the POA's records.

The POA must file an affidavit in the public deed records stating the date the notice was mailed along with a legal description of the property. The affidavit must be filed within 30 days after the notice is sent to the homeowner.

The owner has 180 days after the association mails the notice to redeem the property. The statute prohibits

Owners must be given reasonable time to cure violations and must be informed of their right to a hearing if requested within 30 days of being notified of violations.

the buyer at the foreclosure sale from transferring title during this period. The price the original owner must pay to redeem the property depends on whether the POA or a third party purchases the property at the foreclosure sale.

If the purchaser rents the property during the redemption period, all rent collected is credited toward the redemption price. Leases entered by the purchaser are subject to the owner's right of redemption. This means the renter must surrender possession immediately if the owner redeems.

If the redemption price is paid, the purchaser at the foreclosure sale must immediately execute and deliver a deed transferring the property to the original property owner. Failure to do so means the original owner may sue the purchaser and recover reasonable attorney fees.

The redeeming property owner must do one of two things during or at the end of the 180-day redemption period to keep the purchaser from selling the property to a third party. The owner

must either record the deed from the purchaser or an affidavit stating the redemption has occurred along with the legal description of the property. If the original owner does not file either document during the redemption period, the owner's right to redeem expires at the end of the 180 days unless an extension occurs.

The original owner may extend the redemption period by sending the purchaser at the foreclosure sale a written request to redeem the property. If the request is sent by certified mail, return receipt requested, on or before the end of the redemption period, the period is automatically extended until the tenth day after the purchaser at the foreclosure sale responds in writing with the amount needed to redeem the property.

Foreclosure by the POA and redemption by the owner does not affect existing liens or encumbrances on the property. Installment payments on mortgages or other liens must be paid on time to prevent their foreclosures.

The statute allows the owner to redeem the property from the POA by making partial payments. But all payments must be tendered on or before the redemption period ends. If not, the association must mail the amounts received, within 30 days after the redemption period expires, to the owner's last known address according to the association's records.

If the property is not redeemed and the redemption period is not extended, the purchaser at the foreclosure sale may file an affidavit in the real property deed records stating this fact. The property is then no longer bound by the right of redemption, and the purchaser is free to sell.

Changes Effective Sept. 1, 2005

As might be expected, the changes regulating the display of political signs within subdivisions were implemented by the 79th Texas Legislature the year after an election.

The new law, found in Section 202.009 of the Property Code, divides the regulations into two categories: things that cannot be prohibited by POAs and things that are discretionary.

In the first category, POAs cannot adopt or enforce restrictive covenants that prohibit owners from displaying signs on their property that advertise a political candidate or ballot item for an election. The signs may appear on the property anytime 90 days before the election and ten days thereafter.

In the second category, the POAs may require the signs to be ground-mounted and no more than one sign per candidate or per ballot item. The POAs may prohibit signs that:

- contain roofing material, siding, paving material, flora, balloons or lights or any other similar building, landscaping or nonstandard decorative component;
- attach to plant material, traffic control devices, lights, trailers, vehicles or other existing structures or objects;
- include the painting of architectural surfaces;
- threaten the public health and safety;
- exceed four feet by six feet;
- violate the law;
- incorporate language, graphics or any display that offends an ordinary person; or
- distract motorists with music, sounds, streamers or by other means.

The statute does not provide any penalties for the POAs violating the

prohibitions, but it does allow POAs to remove signs that violate their discretionary requirements.

The Interaction of Property Tax Liens and POA Liens

The 79th Texas Legislature addressed a question that vexed POAs for years. If the POA holds a lien against property for unpaid assessments, dues, fines, and so forth, is the POA's lien superior or inferior to a property tax lien? Does it make any difference that the POA's lien arose prior to the property tax lien?

Effective Sept. 1, 2005, Section 32.05 of the Texas Tax Code answers the question. A tax lien takes priority over the claim of any holder of a lien held by a property owner's association, homeowner's association, condominium unit owner's association or council of owners of a condominium regime under a restrictive covenant, condominium declaration, a master deed or other similar instrument that secures regular or special maintenance assessments, fees, dues, fines, costs, attorney's fees or other monetary charges against the property.

Furthermore, the statute provides that the priority given a tax lien prevails, regardless of whether the debt, lien or other encumbrance existed before the attachment of the tax lien. Some distinction appears between liens placed of record and those that have not.

In an action to collect (foreclose) on the tax lien, the taxing authorities must join the POA as a necessary party in the process if the POA has recorded notice of its lien with the clerk of the county in which the property is located. To do so, the POA must record the liquidated amount of the lien evidenced by a sworn instrument duly executed by an authorized person on behalf of the POA. A recorded restrictive covenant that provides, in general, for a lien for unpaid assessments, dues, fines, and so forth, does not suffice.

Placing the lien of record may impact whether the lien is extinguished by the tax sale. If the POA records its lien before the taxing authorities foreclose on the property, the POA must be joined in the lawsuit, and the sale extinguishes the POA's lien. If the POA fails to record its lien before the tax sale, the taxing authorities need not join the POA in the lawsuit, and the subsequent sale extinguishes the POA's lien. However, if the POA records its lien and the POA is not joined in the lawsuit, then the POA's lien appears to survive the tax sale.

POAs may wish to examine their policies regarding the filing of their liens in the county records in light of this statute. ■

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